

Strangers at Home: Deportation, Criminal Aliens,
and Concepts of Justice in the United States

By

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BA, University of Texas at Austin, 1993
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I acknowledge and respect the ɫəkʷəŋən peoples on whose traditional territory
the university stands, and the Songhees, Esquimalt and WSÁNEĆ peoples
whose historical relationships with the land continue to this day.

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Abstract

The passage of the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), in 1996 marked an abrupt and devastating turning point in the long history of US deportation regime, turning deportation into a massive machine that has shattered the lives of thousands of deportees and their families, and wreaked havoc on immigrant communities. My thesis argues that contemporary deportation policy in the United States is the result of a centuries' old conflict between the country's self-presented image as a land of immigrants and its history of nativist, anti-immigrant state policies and practices, a tension that continues today. I situate this conflict in the history of US deportation law since the colonial period. I then analyze the discourse surrounding the passage of the 1996 laws and find that although the harsh laws were purported to be needed for protecting the internal security of the United States, in reality, lawmakers capitalized on Americans' fear of crime and long-simmering anxiety over immigration in order to win political points at the expense of immigrants. Through a case study of Cambodian refugees, I show how the US deportation regime has become another step in the cycle of displacement that many Cambodian refugees have suffered since the involvement of the US in Southeast Asia in the 1970s. I conclude that US deportation policy of criminal aliens causes more harm than good and is ripe for reform under a new, more sympathetic political climate. Empirical data for the thesis come from secondary literature, documentary analysis, data analysis and legal research.

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Introduction

Philya Thach, who goes by the name “Philly,” was born in a refugee camp in Thailand in the late 1970s, shortly after his parents fled the brutal Khmer Rouge regime in Cambodia.¹ The family immigrated to the United States in search of safety and a new life, but they struggled with poverty. When Philly was eighteen—with a baby on the way and unable to support his growing family—he was arrested for petty theft and breaking and entering cars. He served about a year in prison and checked in regularly with immigration officers for twenty years with no problem. But in October of 2019, Philly was caught up in raids carried out by US Immigration and Customs Enforcement on the Cambodian community in California where he lives. Because of his decades-old conviction, he was detained and put into processing for deportation to Cambodia, his country of citizenship but a place to which he had never been.²

Stories like Philly’s abounded after the 1996 passage of a pair of laws that vastly expanded the power of the state to deport noncitizens convicted of crimes. As soon as the laws were implemented, the number of deportations of criminal aliens exploded. Huge numbers of immigrants who had served their sentences and successfully reintegrated into their communities were suddenly banished from their homes with little chance to ever return. “Banish” is arguably the wrong word to use, because banishment suggests an exile of a person from his proper place to a foreign land, and immigrants, by definition, are people who live in a land that is foreign from their own. However, many of the immigrants caught up in the American deportation regime are

¹ Kimmy Yam, “Former Vietnam War refugee faces deportation to country he's never visited,” NBC News, October 29, 2019, www.nbcnews.com/news/asian-america/former-vietnam-war-refugee-faces-deportation-country-he-s-never-n1073346.

² As of March 26, 2020, Thach is no longer listed as detainee in the ICE database. ICE does not publicly report whether a detainee has been deported.

permanent residents (green card holders) who have lived in the US for most of their adult lives. Despite their *de facto* membership within the US community, their immigrant status as permanent residents leaves them vulnerable to one of the few rights that citizens enjoy over noncitizens—the right not to be deported.

Because many of the terms I use have both general and legal definitions, I set forth the following definitions and explain how I use them in my thesis. The Fourteenth Amendment of the United States Constitution establishes that “[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” The United States Code defines “naturalization” as “the conferring of nationality of a state upon a person after birth, by any means whatsoever.”³ Thus, anyone who was born in the United States or underwent the process of naturalization falls under the term “citizen.” Anyone who is not a citizen, according to the code, is an “alien.”⁴

By contrast, a “lawful permanent resident” or “legal permanent resident” is a noncitizen with “the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration law.”⁵ Because the code defines “immigrants” as all aliens who do not fit within an extraordinarily long and complicated list of exceptions that are irrelevant to this thesis, I use the words “immigrant” and “alien” interchangeably in my thesis. I limit my use of the terms to those living legally in the United States. Although many of the concepts and consequences of deportation apply equally to undocumented aliens, there are distinctions between the two types of immigrants that are outside the scope of this

³ 8 U.S.C. §1101(23).

⁴ 8 U.S.C. §1101(3). There is also a nonalien category called “national,” which includes both citizens those born in one of the United States territories. 8 U.S.C. §1101(22). Noncitizen nationals are not subject to deportation and therefore, for the sake of simplicity, I fold them into the definition of citizen in this thesis.

⁵ 8 U.S.C. §1101(20).

project. Further, I include in my definition of “immigrant” and “alien” those who entered the country as refugees or asylees.

The United Nations Convention and Protocol Relating to the Status of Refugees defines “refugee” as a person who, “owing to wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”⁶ I discuss the legal meaning of “refugee” in more detail in Chapter 2, so here I will state that I use the term “refugee” in the general sense of a person who has fled their home country due to fears of persecution or violence.⁷ Although there are legal differences between refugees and asylum-seekers, the distinctions are irrelevant in the context of criminal deportations, so for the sake of simplicity, I do not distinguish between them in my thesis. I also assume, for the purposes of this thesis, that refugees are categorized as legal permanent residents under US law.

My thesis argues that the deportation regime in the United States, as applied to lawful permanent residents convicted of crimes, reflects a larger, centuries-old struggle between the country’s idealistic image of itself as a land of immigrants and a history of nativist, anti-immigrant state policies and practices, a tension that continues to tear at the nation today. I focus on legal aliens who have committed crimes because, unlike those living in the country without legal status, permanent residents were legally admitted as members of the society. By creating a system of

⁶ Article One, 1951 Convention Relating to the Status of Refugees, as amended by the 1967 Protocol Relating to the Status of Refugees.

⁷ Merriam-Webster’s Dictionary of Law defines “refugee” as “an individual seeking refuge or asylum, esp.: an individual who has left his or her native country and is unwilling or unable to return to it because of persecution of fear of persecution (as because of race, religion, membership in a particular social group, or political opinion).” *Merriam-Webster’s Dictionary of Law* (Springfield, MA: Merriam-Webster, Inc, 1996).

automatic deportation for wide categories of criminal behavior, the United States disregards the social value—the value to society an individual contributes that develops from a full collection of their experiences, relationships, and circumstances, as well as the investment the society has made in the individual⁸—of these immigrants that may offset the harm they caused.⁹ The deportation system marks a vast departure from the historical immigration ethos of almost unconditional membership in American society.¹⁰

United States law related to deportation has changed dramatically over the past century, moving from just a few types of deportable offenses and wide judicial discretion over removal determinations to broad categories of deportability and little ability for immigration judges to prevent unjust removals.¹¹ The first real immigration legislation came in 1875 with an act that prohibited entry into the country by convicts and prostitutes.¹² In the years following, Congress expanded the classes of people who could not enter the United States, but it was not until 1917 that it made classes of noncitizens deportable for conduct that occurred on American soil.¹³ Congress continued to tinker with immigration laws until 1996, when it made sweeping changes through the AEDPA and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).¹⁴ Together, these laws expanded the list of deportable offenses, stripped immigration judges of much of their discretion, and eliminated much of the due process afforded to defendants

⁸ Juliet P. Stumpf, "Doing Time: Crimmigration Law and the Perils of Haste." *UCLA Law Review* 58, no. 6 (2011): 1705-1748.

⁹ Daniel I. Morales, "Transforming Crime-Based Deportation," *New York University Law Review* 92 (June 2017), 701.

¹⁰ Morales, "Transforming Crime-Based Deportation," 710-714.

¹¹ *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010).

¹² *Padilla v. Kentucky*, 599 U.S. at 360.

¹³ *Padilla v. Kentucky*, 599 U.S. at 361.

¹⁴ Pub. L. No. 104-208, 110 Stat. 3009-546 (1996); Donald Kerwin, "From IIRIRA to Trump: Connecting the Dots to the Current US Immigration Policy Crisis," *Journal on Migration and Human Security* 6, no. 3 (2018): 193.

in immigration proceedings.¹⁵ Under IIRIRA, when a noncitizen is convicted of an “aggravated felony,” crime of “moral turpitude,” or drug-related crime and sentenced to more than one year in prison, that person is deemed automatically deportable.¹⁶ No longer can a judge consider the individual circumstances of the immigrant, such as how long they lived in the country, the harm that deportation would cause to their families—many of whom are US citizens—or evidence of post-conviction reformation and societal contributions. IIRIRA made the expanded definition of aggravated felony retroactive, so that even those immigrants whose crimes were not deemed deportable under prior laws were now at risk of removal.¹⁷

The consequences of the laws, and especially IIRIRA, were immediate.¹⁸ Widespread roundup and deportations of questionable merit, such as those of legal permanent residents with American-citizen children and who had committed nonviolent crimes years—sometimes decades earlier—began almost immediately.¹⁹ Even supporters of IIRIRA had not anticipated the extent of the effects it would have on deportation of noncitizens deemed to be of low threat to domestic security.²⁰ Many thousands of permanent residents who would not have been deported under prior laws were now being rounded up, locked in detention centers, and ultimately sent to countries they hardly knew. AEDPA and IIRIRA overhauled immigration law in ways that continue to control much of the immigrant experience today.

¹⁵ Kerwin, “From IIRIRA to Trump,” 192.

¹⁶ Sylvia R. Cowan, “Cambodians Go ‘Home’,” in *Return: Nationalizing Transnational Mobility in Asia*, ed. Xiang Biao, Brenda S.A. Yeoh, and Mika Toyota (Durham, NC: Duke University Press, 2013), 105.

¹⁷ IIRIRA, §§312(b) & 9(c); *IRS v. St. Cyr*, 533 US 289, 319 (2001); Cowan, “Cambodians Go ‘Home’,” 106; Daniel Kanstroom, *Aftermath: Deportation Law and the New American Diaspora* (New York: Oxford University Press, 2012), 12.

¹⁸ Patrisia Macías-Rojas, “Immigration and the War on Crime: Law and Order Politics and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,” *Journal on Migration and Human Security* 6, no. 1: 15.

¹⁹ Kerwin, “From IIRIRA to Trump,” 192; Macías-Rojas, “Immigration and the War on Crime,” 15.

²⁰ Macías-Rojas, “Immigration and the War on Crime,” 15.

The US deportation regime has been justified as necessary to protect domestic security and rationalized as a reasonable consequence for the illegal behavior of permanent residents, whose noncitizen status renders them perpetual visitors to the country.²¹ My thesis probes these rationales by examining the political discourse related to the development of nation's deportation laws, with a particular focus on the rhetoric during the debates and passage of the 1996 laws. I posit that although the harsh laws are purported to be needed for protecting the internal security of the US, in reality they are used as an unnecessarily harmful political tool that perpetuates the marginalization some of its society's most vulnerable members. Since the early days of the republic, as my thesis will show, deportation policy has been guided more by emotion than by logic, resulting in a regime that causes more harm than good.

My thesis is presented in three parts. In the first chapter, I chronicle the history of immigration and deportation policy in the United States and set that policy within the framework that developed simultaneously within the international system. This history shows that since the founding of the country, US immigration policy has been a constant struggle between the progressive, democratic ideals over which the American Revolution was fought and a strain of anti-immigrant nativism that continues to stain US society today. I also show that the current United States deportation policy violates the human rights norms that have developed to protect immigrants from arbitrary removal. The second chapter takes a closer look at the political discourse of the 1996 laws, traces the linking of crime and immigration in the discourse and development of deportation policy, then analyzes the realities of such a harmful practice, arguing that while the US's strict deportation policy is purported to be necessary to protecting American citizens, the harm it inflicts far outweighs the supposed benefits. Finally, in my third chapter, I offer

²¹ Cowan, "Cambodians Go 'Home,'" 100; Kanstroom, *Aftermath*, 38.

a case study on the country of Cambodia. Thousands of Cambodian refugees came to the United States as a result of US involvement in the civil strife of the 1970s and 80s. I show that their journey has been one of multiple displacements—from fleeing their homes and making the treacherous journey to dirty, crowded refugee camps in neighboring countries to arriving on the shores of an unwelcoming and foreign land—that for far too many ends with removal back to Cambodia. The case of Cambodia provides a stark illustration of how US policy failures both caused and perpetuated the marginalization of some of its most vulnerable members of its society.

This thesis does not argue that deportation of criminal aliens is never merited, rather, it argues that the current system that has lost sight of its foundation in justice. Those who have lived for long periods in the United States are products of that society. When they violate the codes of that society, their role in that society deserves to be considered in determining whether their conduct merits permanently banishing from the country they consider to be their home. The longer they have lived in the country, the stronger their moral claims weigh toward treatment that accounts for their contributions to the American community and takes account of the society that led them astray.²² The strict “citizen-as-member” approach that characterizes US deportation policy leads to unjust results that deviate from the country’s “nation of immigrants” myth. “The basic legitimacy of the nation-state and its borders does not demand absolute, disproportionate or arbitrary power. The assertion that someone has broken the law is the beginning of a conversation, not the end of one.”²³ This thesis continues that conversation.

²² Joseph H. Carens, *The Ethics of Immigration* (Oxford, UK: Oxford University Press, 2013), 89.

²³ Kanstroom, *Aftermath*, 10.

Theoretical framework and literature review

The study of deportation “offers a salient example of the deep tension between the best ideals of liberal universalism and human rights and the realities of restricted membership in this nation-state.”²⁴ In framing my argument about the deportation of criminal legal aliens, I turned to Michael Walzer’s theory of distributive justice and concept of membership. In *Spheres of Justice*, Walzer writes that membership in a community is a good, arguably the most important good that is distributed.²⁵ He likens countries to membership communities and writes that the members of the community “have a collective right to shape the resident population,”²⁶ that is, to determine immigration admissions, constrained only by the “political choice and moral constraint.”²⁷ Once a person resides within the borders of the state, however, he or she is no longer a stranger, and to treat them as such would amount to “tyranny.”²⁸ Justice requires that those living inside the boundaries of the state under those conditions be included in political decision-making as well. Once someone is inside the national community, they must be treated the same as other members, or at least be on track to gain full membership.

Applying this idea to the context of deportation, I argue that justice requires that the position of legal permanent residents on that track toward membership should be taken into account when determinations are made as to their exclusion from membership in the community. For myriad reasons that I discuss in Chapter 3, many LPRs do not pursue or are not precluded from applying for naturalization. Yet even immigrants who never achieve full membership are not

²⁴ Kanstroom, *Aftermath*, xi.

²⁵ Michael Walzer, *Spheres of Justice* (Basic Books, 1983), 29.

²⁶ Walzer, *Spheres of Justice*, 52.

²⁷ Walzer, *Spheres of Justice*, 62.

²⁸ Walzer, *Spheres of Justice*, 62.

outsiders. They have been admitted by the members of the community: they live, work, and are shaped by the community. As I will show in my thesis, rather than valuing that position in American society and accepting responsibility for society's role in their shaping, the United States disregards its role and the immigrant's position and simply discards the immigrant as if they had no value.

The question then becomes whether that dispassionate, arbitrary approach can be justified. Justice, in Walzer's view, is not absolute but is determined by the shared understandings of the community about what is just. My thesis attempts to "interpret to [my] fellow citizens the world of meanings that we share" by arguing that the deportation laws in the United States were developed on the basis not of shared understanding of justice toward those who break societal codes but on racially-motivated, politically driven fearmongering and scapegoating. I support this assertion by showing a pattern of historical scapegoating in US immigration policy, in the discourse both before and after passage of the 1996 watershed laws, and in the reaction to the consequences of implementing the new regime, including media accounts, activism, and political efforts to soften the laws' harshest provisions.

In addition to Walzer's work, I also found the ideas of Joseph Carens to be helpful. Like Walzer, Carens sees democratic justice as a constraint on the distinction between residents and citizens. "[L]ong-term residence in society," he writes, "creates a moral entitlement to the legal rights of membership."²⁹ The moral claims become strong the longer the person lives within that society.³⁰ At some point in their residence, "they pass a threshold that entitles them to virtually the same legal status as citizens, whether they acquire formal citizenship or not."³¹ He finds support

²⁹ Carens, *The Ethics of Immigration*, 109.

³⁰ Carens, *The Ethics of Immigration*, 89.

³¹ Carens, *The Ethics of Immigration*, 89.

for this assertion in historical context, human rights, membership principles, and the fundamental right of security of residence.³²

While Walzer claimed that members of the national community have the right of self-determination in admission and exclusion, Carens rejects discretionary control over immigration, arguing that it is “incompatible with fundamental democratic principles and that justice requires open borders.”³³ He urges the generally accepted principle of the right of states to control borders is constrained by moral considerations.³⁴ He supports this assertion by explaining that closed borders restrict freedom of movement, which is a “an important human freedom itself” but also serves as a prerequisite to other human freedoms. Restricting freedom of movement cannot be justified because it fails to take into consideration the interests of those who are excluded as well as those already inside.³⁵ He argues that freedom of movement is essential for equality of opportunity, and increased freedom of movement would contribute to reducing economic, social, and political equality by allowing for inclusion of all people in seeking opportunities.³⁶

Although I am not prepared to accept an open borders position, I find Carens’ underlying moral argument that people who have lived for an extended period in a society are morally entitled to enhanced rights within that society to be a sound starting point for considering questions of morality and justice. I apply these moral issues in examining the development of deportation in its historical context to consider questions of justice toward those who are living legally among us but who have broken the social code.

³² Carens, *The Ethics of Immigration*, 90-109.

³³ Carens, *The Ethics of Immigration*, 10.

³⁴ Carens, *The Ethics of Immigration*, 7.

³⁵ Carens, *The Ethics of Immigration*, 227.

³⁶ Carens, *The Ethics of Immigration*, 228.

The word “deportation” joins other benign terms such as exclusion, removal, return, and repatriation that fail to convey the profound impact the practice has on those who are being deported. Parsing out a precise definition of “deportation” in either law or literature is surprisingly difficult. Daniel Kanstroom offers a functional definition of deportation as “a powerful government assertion of high stakes sanctions including detention, forced movement, and exclusion in low formality settings aimed at noncitizens who are often the most powerless and marginalized members of society.”³⁷ Matthew Gibney defines deportation as “the expulsion of noncitizens by a state through the (threatened or actual) use of force,”³⁸ and Nathalie Peutz and Nicholas De Genova define it as “the compulsory removal of ‘aliens’ from the physical, juridical, and social space of the state.”³⁹ “There is no single definition of deportation or, as it is technically named, ‘removal’ within the approximately five hundred-page Immigration and Nationality Act⁴⁰ that, along with hundreds of pages of regulations, governs United States immigration law.”⁴¹ US immigration law uses the term “removal,” which means deporting with a court order, to distinguish it from “return,” which does not.⁴² Because my thesis applies only to cases of legally ordered removal, and because academic literature tends to use the terms “deportation” and “removal” interchangeably, I follow the same approach.

³⁷ Daniel Kanstroom, “Deportation as a Global Phenomenon: Reflections on the ILC Draft Articles on the Expulsion of Aliens,” *Harvard Human Rights Journal* 30 (2017): 50.

³⁸ Matthew Gibney, “Deportation,” in *The New Oxford Companion to Law*, ed. Peter Cane and Joanne Conaghan (Oxford University Press, 2009), <https://www-oxfordreference-com.ezproxy.library.uvic.ca/view/10.1093/acref/9780199290543.001.0001/acref-9780199290543-e-608?rskey=2iCQTX&result=607>.

³⁹ Nicholas Peutz and Nathalie De Genova, *Deportation Regime: Sovereignty, Space, and the Freedom of Movement* (Durham and London: Duke University Press, 2010), 1.

⁴⁰ 8 U.S.C. §1101 et seq.; Act of June 27, 1952; Ch. 477 of 82nd Congress; 66 Stat. 163 (as amended through Public Law 116-159, enacted October 1, 2020) [also known as the *McCarran-Walter Act*].

⁴¹ Kanstroom, *Aftermath*, 30.

⁴² Congressional Research Service, “Alien Removals and Returns: Overview and Trends,” report, February 3, 2015, available at <https://crsreports.congress.gov/product/pdf/R/R43892> (accessed June 15, 2021).

The definitions offered in the literature form the basis of deportation scholarship, an area of research that has grown exponentially in liberal democracies over the last few decades, reflecting the growth and normalization of the practice of deportation of all types of immigrants in the United States and in other Western liberal states, including the United Kingdom, Canada, Australia, Germany, and the Netherlands.⁴³ Scholars posit that the “deportation turn,” as Gibney calls it, in Western states came as numbers of migrants increased in the late twentieth century and the practical and normative barriers to deportation lessened.⁴⁴ Deportation requires technologies to move bodies from one country to another, and the advancement of those technologies was crucial to the expanded use of deportation. Ethan Blue documents how the development of the rail structure in the United States became foundational to the expanded use of deportations by providing the logistical means of conducting mass removals.⁴⁵ William Walters builds on that work to show the role of aviation in the modern deportation system.⁴⁶ Thanks to these advances in transportation, as Walters explains, “Today there exist virtually no colonies to which you can transport your unwanted people.”⁴⁷ Anderson, Gibney, and Paoletti suggest that the rise in

⁴³ Shahram Khosravi, *After Deportation: Ethnographic Perspectives* (Cham, Switzerland: Palgrave Macmillan, 2018), 1; Bridget Anderson, Matthew J. Gibney, and Emanuela Paoletti, “Citizenship, Deportation and the Boundaries of Belonging,” *Citizenship Studies* 15, no. 5 (2011); Nassim Majidi and Liza Schuster, “Deportation and Forced Return,” in *Forced Migration: Current Issues and Debates*, ed. Alice Bloch and Giorgia Doná (London: Routledge, 2019), 90-92; Matthew J. Gibney, “Asylum and the Expansion of Deportation in the United Kingdom,” *Government and Opposition* 43, no. 2 (2008): 146–167.

⁴⁴ Gibney, “Asylum and the Expansion of Deportation,” 149; Liza Schuster, “A Sledgehammer to Crack a Nut: Deportation, Detention and Dispersal in Europe,” *Social Policy & Administration* 39, no. 6 (December 2005): 606. Historically used in Europe as a mechanism for responding to specific crises, deportation became normalized after European states saw a huge influx in asylum seekers following several major upheavals in the region, including the fall of the Berlin Wall, the collapse of the Soviet Union, and the war in Yugoslavia, as well as on-going conflicts in Africa, Asia, and Latin America.

⁴⁵ Ethan Blue, “Strange passages: carceral mobility and the liminal in the catastrophic history of American deportation,” *National Identities* 17, no. 2 (2015): 175–194.

⁴⁶ See, e.g., William Walters, “The Flight of the Deported: Aircraft, Deportation, and Politics,” *Geopolitics* 21:2 (2016): 435-458.

⁴⁷ William Walters, “Expulsion, power, mobilization,” *Radical Philosophy* 2, no. 3 (December 2018): 34.

deportations in the United States and United Kingdom is to “due developments in infrastructural capacity and legal powers to deport, along with a new-found public and official enthusiasm for expulsion.”⁴⁸ States use increased controls and restrictions, both inside and outside state borders, to show their effectiveness in managing immigration. As such, scholarship by migration scholars that is specifically focused on deportation has developed. In reviewing literature related to immigration, deportation, and citizenship, several themes began to emerge. Far from a benign administrative practice, deportation engenders complex sociopolitical notions of sovereignty, citizenship, nationalism, and state-imposed harm.

Deportation history

Deportation of criminal immigrants depends on the dehumanization of the immigrant, changing them from a *de facto* member of society into a dangerous menace that must be purged from the body politic. Some deportation authors, such as Kanstroom,⁴⁹ Hasselberg,⁵⁰ and Maira,⁵¹ employ the image of deportation as a “cleansing” of unwanted blemishes—immigrant bodies—that stain the nation. Maira writes, “Underlying the moral panic about expelling these polluting bodies is a racist regime of governmentality that fuels xenophobic hysteria and paranoia about individuals and groups that are sully or destroying the nation.”⁵² As a result of that paranoia, says Paoletti, “states have come increasingly to rely on narratives, norms, and practices that are

⁴⁸ Anderson, Gibney, and Paoletti, “Citizenship, Deportation and the Boundaries of Belonging,” 547.

⁴⁹ Daniel Kanstroom, “Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases,” *Harvard Law Review* 113, no. 8 (June 2000): 1892.

⁵⁰ Ines Hasselberg, *Enduring Uncertainty: Deportation, Punishment and Everyday Life* (New York and Oxford: Berghahn Books, 2016), 28.

⁵¹ Sunaina Maira, “Radical Deportation Alien Tales from Lodi and San Francisco, in *Deportation Regime: Sovereignty, Space, & the Freedom of Movement*, ed. Nicholas De Genova and Nathalie Peutz (Durham, NC: Duke University Press, 2010), 298.

⁵² Maira, “Radical Deportation,” 298.

drawn from the criminal justice system. Expulsions and deportations have come to be among the main devices to enforce modern migration policies.”⁵³ While once an immigrant would have been forgiven for most transgressions and permitted to stay in the country, the contemporary system no longer accommodates “human frailty,” says Morales.⁵⁴ In the United States, this linking of crime and immigration has led to the development of the largest, most brutal deportation regime in the country’s history.⁵⁵

A “powerful strand of American thinking that has linked immigration, openness, and universalism” to form “the logic of American history” emerged in writing about the United States from time of the founding of the country, according to Kunal Parker.⁵⁶ George Washington is believed to have uttered, “May America be an Asylum to the persecuted of the earth!,” as he toasted the departure of last British soldiers from American soil after the revolution,⁵⁷ and Thomas Paine proudly declared in *Common Sense* that America would be “an asylum for mankind.”⁵⁸ This idea of openness and welcome bears out in sheer numbers of immigrants—millions have left their homelands to make a new life in America. But in other ways, the country has failed to live up to the vision of a place of refuge for all, and the nation’s history has been tarnished by exclusion and nationalism,⁵⁹ which I will examine more closely in Chapter 1.

⁵³ Emanuela Paoletti, “Deportation, non-deportability and ideas of membership,” Working Paper Series No. 658, Refugee Studies Centre, Oxford Department of International Development, University of Oxford, July 2010.

⁵⁴ Morales, “Transforming Crime-Based Deportation,” 699-701.

⁵⁵ Kanstroom, *Aftermath*, 5; Morales, “Transforming Crime-Based Deportation,” 699-700.

⁵⁶ Kunal M Parker, *Making Foreigners: Immigration and Citizenship Law in America, 1600–2000. New Histories of American Law*, Cambridge: Cambridge University Press (2015), 2.

⁵⁷ Jill Lepore, *This America: The Case for the Nation* (New York: Liveright Publishing Corporation, 2019).

⁵⁸ Thomas Paine, *Common Sense* (New York and London: G.P. Putnam’s Sons, 1894), 101.

⁵⁹ Adam Goodman, *The Deportation Machine* (Princeton, NJ: Princeton University Press, 2020), 3; Parker, *Making Foreigners*.

Parker and Adam Goodman show that even for many native-born Americans, citizenship in the United States has been unequal or even unavailable.⁶⁰ Human enslavement was a legal practice for much of American history, and even free Blacks in antebellum America were legally subordinate to whites.⁶¹ Legal disabilities on women, Blacks, and Native Americans, and other non-white groups remained firmly in place and were removed only very slowly and after great struggle.⁶² Despite achievements in greater legal equality for marginalized groups, systemic racism, sexism, and xenophobia continue to plague the country today. Parker links the histories of these groups with that of immigrants and finds that both insiders and outsiders have been excluded and rendered foreign.⁶³ More optimistic about America's future, Lepore places immigrants within the "agony of the nation's past" but finds hope in a future built on its ideals of equality, "America's best idea."⁶⁴ "The United States is a nation founded on a revolutionary, generous, and deeply moral commitment to human equality and dignity," she writes, and regardless of the struggles of the past and the challenges of the future, the country still holds to these beliefs.⁶⁵

Kanström roots US deportation history in laws compelling the removal of particular groups of people, such as the brutal removal of American Indians from their native lands and the forced return of fugitive slaves to their owners.⁶⁶ He traces the history of US deportation law from the early English antecedents through today and finds that the US deportation regime "has grown

⁶⁰ Parker, *Making Foreigners*, 18-19.

⁶¹ Goodman, *The Deportation Machine*, 3; The Fugitive Slave Act of 1850, for example, required that slaves be returned to their owners, even when the slaves were located in free states. Pub. L. 31-60, 9 Stat. 462, available at <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/9/STATUTE-9-Pg462.pdf> [accessed June 11, 2021].

⁶² Parker, *Making Foreigners*, 86-99.

⁶³ Parker, *Making Foreigners*.

⁶⁴ Lepore, *This America*, 135.

⁶⁵ Lepore, *This America*, 135.

⁶⁶ Daniel Kanström, *Deportation Nation: Outsiders in American History* (Cambridge, MA: Harvard University Press, 2007).

slowly, incrementally, and reactively.”⁶⁷ Extended border control based on anti-Chinese sentiment in the nineteenth century begat deportation policies based on post-entry social control in the twentieth century, which gradually expanded into the “tsunami” unleashed on criminal aliens over the last few decades.⁶⁸ More than simply part of the immigration system, he writes, deportation “is 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.”⁶⁹

Goodman and Torrie Hester both build upon that foundation with more recent scholarship. Goodman examines deportation in the United States as an expression of national identity and power, against which both citizens and noncitizens have struggled “to define what it means to be American.”⁷⁰ Like Kanstroom, Goodman connects expulsion of immigrants to the forced removals of Native Americans and fugitive slaves in finding deportation to be “part of a longer continuum of projects of empire, exploitation, and forced migration throughout US history.”⁷¹ Because national deportation regimes are formed within the international system of states, Hester looks outside the US borders to place its deportation history within the international framework that was developed beginning in the early twentieth century. His work shows that the international legal regime facilitated deportations from the United States by creating a framework that gave states the

⁶⁷ Kanstroom, *Deportation Nation*, 6.

⁶⁸ Kanstroom, *Deportation Nation*, 227-28.

⁶⁹ Kanstroom, *Deportation Nation*, 5.

⁷⁰ Goodman, *The Deportation Machine*, 2.

⁷¹ Goodman, *The Deportation Machine*, 3.

ability to both send and receive deportees.⁷² Together, all of these scholars show that deportation in the United States has developed from a rarely implemented process to a vast, well-oiled machine that dehumanizes and punishes primarily immigrants from poor, less developed countries.

A sliver of the literature that chronicles the history of deportation specifically focuses on the passage of one of the laws that are primarily addressed in this thesis, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Kerwin, for example, analyzes the effects of IIRIRA to show how it laid the groundwork for the Trump administration's policies. By expanding the most punitive elements of deportation law already in place, IIRIRA provided the "legal and operational structure" Trump needed to implement his anti-immigration policies.⁷³ IIRIRA, he argues, "represented a signal attack on due process, immigrant families, and asylum seekers."⁷⁴ It eroded the rule of law and set up a deportation system that "too often serves as an instrument of exclusion and marginalization, and has become a symbol to the world of US cruelty and injustice."⁷⁵

While much of the historical literature has documented the legal concerns and detrimental impacts of IIRIRA-based deportation policy, less examined is the discourse—the rhetoric and politics—that drove the passage of the law. Macías-Rojas presents an excellent account of the role the War on Crime, and specifically mass incarceration, played in shaping the debate about immigration.⁷⁶ Crime politics of the 1980s and 1990s linked immigration with crime, influencing deportation policymaking by intensifying the most punitive crime provisions of IIRIRA. Macías-

⁷² Torrie Hester, *Deportation: The Origins of US Policy* (Philadelphia: University of Pennsylvania Press, 2017). The international framework also placed limits on the state's ability to deport, such as the principle of *non-refoulement*.

⁷³ Kerwin, "From IIRIRA to Trump," 192.

⁷⁴ Kerwin, "From IIRIRA to Trump," 201.

⁷⁵ Kerwin, "From IIRIRA to Trump," 202.

⁷⁶ Macías-Rojas, "Immigration and the War on Crime," 1-25.

Rojas faults both parties for the punitive turn deportation policy took during this period, a legacy that endures in immigration discourse today. Johnson links race and class to immigration policy from the same period, finding that US immigration laws “are nothing less than a ‘magic mirror’ into the nation's collective consciousness about its perceived national identity--an identity that marginalizes poor and working immigrants of color and denies them full membership in American social life.”⁷⁷ It is from this general immigration foundation that my research branches into a focus on crime policy, racism, and nativist sentiment in the development of deportation of criminal aliens.

Deportation and belonging within the system of states

As deportation has become more normalized, scholars have begun to theorize about the role deportation plays within the modern international system of states. Walters, De Genova, and Putz say that deportation is constitutive of citizenship and of state sovereignty under the modern system of states: it is premised on territorially-defined states, and within those states, members and non-members.⁷⁸ The development of state system, says Barker, fused states, populations, and territories, relocating claims of authority over populations from affiliations based on blood, tribes, or religion to territorial markers.⁷⁹ “[T]he medieval patchwork was slowly transformed,” writes Cornelisse, “into a more rigid system of independent territorial states in which political power was exercised over people, no longer on account of their specific position in the body politic, but

⁷⁷ Kevin R. Johnson, “The Intersection of Race and Class in US Immigration Law and Enforcement,” *Law and Contemporary Problems* 72, no. 4 (fall 2009): 1.

⁷⁸ Walters, “Deportation, Expulsion, and the International Police of Aliens,” 288; Peutz and De Genova, *The Deportation Regime*, 7; Anderson, Gibney, and Paoletti, “Citizenship, Deportation, and the Boundaries,” 548.

⁷⁹ Vanessa Barker, “Democracy and Deportation,” in *The Borders of Punishment*, ed. Katja Franko Aas and Mary Bosworth (Oxford, UK: Oxford University Press, 2013), 242.

because they lived in a certain, clearly demarcated territory.”⁸⁰ In 1648, the Peace of Westphalia “anchored the principal of territorial sovereignty in international law,” assigning states authority over “a distinct, territorially defined population,” according to Cornelisse.⁸¹ A world based on borders created clear distinctions between “inside” and “outside” and eventually between “us” and “them,” says Barker.⁸² Anderson, Gibney, and Paoletti call deportation a “particularly definitive and symbolically resonant way of dividing citizens from (putative) strangers.”⁸³ Because a key feature of the modern state is that its authority to deport applies only to foreigners and not to citizens,” they explain, deportation is an act of defining membership within the state, “a uniquely powerful way in which state officials reassure the public of where the boundaries of citizenship and membership lie.”⁸⁴

Scholars, including Nyers, Barker, Cornelisse, and Gibney, explain how dividing the world into sovereign states responsible for people inside their territories reinforced the idea that there exists a natural order of people and places. Nyers, in writing about irregularity in citizenship, says that, under the international system, irregular migrants are “out of place” and deportation is the mechanism by which they are returned to their “proper place.”⁸⁵ “Nationalized citizenship reinforces the boundaries of belonging and limits access to rights,” according to Barker.⁸⁶ Looking through a human rights lens, Cornelisse finds that deportation serves as a “litmus test” for the

⁸⁰ Galina Cornelisse, “Immigration Detention and the Territoriality of Universal Rights,” in *Deportation Regime: Sovereignty, Space, & the Freedom of Movement*, ed. Nicholas De Genova and Nathalie Peutz (Durham, NC: Duke University Press, 2010), 106.

⁸¹ Cornelisse, “Immigration Detention and the Territoriality,” 107.

⁸² Barker, “Democracy and Deportation,” 242.

⁸³ Anderson, Gibney, and Paoletti, “Citizenship, Deportation and the Boundaries,” 556.

⁸⁴ Anderson, Gibney, and Paoletti, “Citizenship, Deportation and the Boundaries,” 547.

⁸⁵ Peter Nyers, *Irregular Citizenship, Immigration, and Deportation* (London: Routledge, 2018), 7.

⁸⁶ Barker, “Democracy and Deportation,” 242.

international system of territorial citizenship.⁸⁷ She argues that through “the indiscriminate detention of unwanted foreigners, under conditions that seem to flagrantly violate some of the very values that supposedly underpin liberal Western democracies,” this test shows that the modern discourse of human rights has failed to live up to its aspirations.⁸⁸ Similarly, Gibney sees deportation as a legitimized form of forced migration that works with the system of states, which sees deportees as simply returning to where they belong.⁸⁹ According to Gibney, contemporary states portray themselves as not simply random collections of people within the same territory but of communities of shared values. Deportation affirms those values by rejecting those whose behavior is unacceptable to the idealized values of the community.⁹⁰ As Maira writes, “Deportation connotes a moral judgment of worthiness and desirability that differentiates between “good” immigrants who are not deported and “bad” immigrants who are.”⁹¹

Modern deportation, therefore, relies on and reaffirms the “globalized system of citizenship” governed by sovereign states.⁹² For much of history, expulsion was not between states but within empires and between localities.⁹³ In modern times, deportation has an “international character” that requires not only the act of deporting from a state but also a state in which the deportee will be received.⁹⁴ This process “continually rescribe[s] the borders of the nation.”⁹⁵ As

⁸⁷ Cornelisse, “Immigration and Detention and the Territoriality,” 102.

⁸⁸ Cornelisse, “Immigration and Detention and the Territoriality,” 102.

⁸⁹ Matthew J. Gibney, “Is Deportation Forced Migration?,” *Refugee Survey Quarterly* 32, No. 2 (2013): 116.

⁹⁰ Matthew J. Gibney, “Deportation, Crime, and the Changing Character of Membership in the United Kingdom,” in *The Borders of Punishment*, ed. Katja Franko Aas and Mary Bosworth (Oxford, UK: Oxford University Press, 2013), 219.

⁹¹ Maira, “Radical Deportation,” 298.

⁹² Anderson, Gibney, and Paoletti, “Citizenship, Deportation, and the Boundaries,” 548; Walters, “Deportation, Expulsion,” 288; Nyers, “Irregular Citizenship,” 7.

⁹³ Walters, “Deportation, Expulsion,” 275.

⁹⁴ Walters, “Deportation, Expulsion,” 275; Nyers, “Irregular Citizenship,” 7.

⁹⁵ Maira, “Radical Deportation,” 298.

migration between states has grown, so too have concerns about loss of control and sovereignty of states in an increasingly globalized world.⁹⁶ Gibney and Hasselberg explain that deportation is a mechanism whereby the state can retake control of its sovereignty by exercising its right to determine who belongs within its borders.⁹⁷ Through deportation, a state “reinforces its own sovereignty, renovating concepts such as ‘citizens’ and ‘aliens’ that establish the boundary between those who are included and those excluded, attributing certain benefits to the former that are denied to the latter,”⁹⁸ including the right to remain within the territorial boundaries of the state.⁹⁹

Hindess, Kochenov, and Kanstroom explain that modern citizenship defines the relationship between the state and its citizens and acts as a marker of belonging—citizens are full members while noncitizens are something less.¹⁰⁰ “If citizenship can be seen not just as rights and responsibilities exercised within a polity, but a ‘marker of identification, advising state and non-state agencies of the particular state to which an individual belongs,’” writes Paoletti, quoting Hindess, “then deportation represents a means by which this principle can be operationalized.”¹⁰¹ While states historically banished their own members, the protection by the state against expulsion of its own citizens is a relatively recent phenomenon, explain Anderson et al., Gibney, Kanstroom,

⁹⁶ Cornelisse, “Immigration and Detention,” 104.

⁹⁷ Peutz and De Genova, *The Deportation Regime*, 30

⁹⁸ Hasselberg, *Enduring Uncertainty*, 23.

⁹⁹ “Perhaps the most important right of citizenship is the right not to be deported. This is true under US law, the laws of other countries, and international law. Peter J. Spiro, *Citizenship: What Everyone Needs to Know* (New York: Oxford University Press, 2020), 68. In the United States, see, e.g., 8 USC 1101(a)(3); *Bilokumsky v. Tod*, 263 U.S. 149 (1923), finding that “alienage is a jurisdictional fact; and...an order of deportation must be predicated upon a finding of that fact.”

¹⁰⁰ Barry Hindess, “Citizenship and Empire,” in *Sovereign Bodies: Citizens, Migrants, and States in the Postcolonial World*, ed. Thomas Blom Hansen and Finn Stepputat (Princeton: Princeton University Press, 2009), 242; Dimitry Kochenov, *Citizenship* (Cambridge, MA: The MIT Press, 2019), 37; Kanstroom, *Deportation Nation*, 17.

¹⁰¹ Paoletti, “Deportation, Non-Deportability,” 5.

and Walters.¹⁰² “The rise of deportation as a form of expulsion is therefore marked from the latter half of the nineteenth century onwards by the proliferation of international treaties and laws, alongside diplomacy and informal agreements, which seek to institutionalize this norm,” writes Walters.¹⁰³ As the state hardened into “a more defined membership unit in which insiders needed clearly to be distinguished from outsiders,” Gibney contends, “the claim that each state was the state of a distinct and unique people made it difficult for states to engage in the kind of absolution of responsibility central to banishment.”¹⁰⁴ The rules of the international society that were developing in the nineteenth century also dictated a duty that states accept the return of their own citizens as a necessary corollary of the right to expel, he adds. “The sovereign right to deport,” write Anderson et al., “is an extension of the sovereign right to exclude.”¹⁰⁵

International law has developed limits to the ability of the state to deport through the principle of *non-refoulement*, which protects a person from being sent to a country where they could be subject to torture or other types of serious harm, a protection Kanstroom calls the “cornerstone” of refugee protection and “the core and most important norm of refugee law.”¹⁰⁶ The principle first appeared in Article 33(1) of the 1951 Refugee Convention states that “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Kanstroom

¹⁰² Anderson, Gibney, and Paoletti, “Citizenship, Deportation, and the Boundaries,” 548; Kanstroom, *Deportation Nation*, 26; Gibney, “Deportation, Crime, and the Changing Character,” 221; Walters, “Deportation, Exclusion,” 268.

¹⁰³ Walters, “Deportation, Exclusion,” 275.

¹⁰⁴ Gibney, “Deportation, Crime, and the Changing Character,” 222.

¹⁰⁵ Anderson, Gibney, and Paoletti, “Citizenship, Deportation, and the Boundaries,” 549.

¹⁰⁶ Daniel Kanstroom, “The ‘Right to Remain Here’ as an Evolving Component of Global Refugee Protection: Current Initiatives and Critical Questions,” *Journal on Migration and Human Security* 5 no. 3 (2017), 618.

calls *non-refoulement* the “cornerstone” of refugee protection and “the core and norm of refugee law.” However, he also notes that *non-refoulement* offers “a focused and limited protection” against removal, in part because its application does not benefit all refugees.¹⁰⁷ Section 2 of Article 33 excludes from protection “a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.” In other words, it may not apply to refugees who are deportable due to criminal convictions. The principle of *non-refoulement* is also recognized in the 1984 UN Convention Against Torture (CAT). CAT applies to any person, not just refugees and does not contain an exclusion for criminal behavior.¹⁰⁸ Kanstroom explains that CAT focuses more on the behavior of the receiving country than on the categorization of the person who is deported.¹⁰⁹ For CAT to apply, however, that behavior must rise to the level of torture, a much higher standard for risk of harm than under the Refugee Convention. *Non-refoulement*, therefore, restricts the state’s ability to deport, but its application varies depending on the immigrants’ specific circumstances.

Barker argues that deportation is one of the most extreme forms of state power because it is a public act of severing the relationship between the state and individual, “denying the possibility of membership, forgiveness, or mercy.”¹¹⁰ Anderson et al. also argue that deportation ends “the relationship of responsibility between the state and the non-citizen by forcing the non-citizen

¹⁰⁷ Kanstroom, “The ‘Right to Remain Here’,” 619.

¹⁰⁸ United Nations, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (December 10, 1984), Article 1; Michael John Garcia, “The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens,” Congressional Research Service, January 21, 2009, 3, available at <https://fas.org/sgp/crs/intel/RL32276.pdf>.

¹⁰⁹ Kanstroom, “The ‘Right to Remain Here’,” 623.

¹¹⁰ Barker, “Democracy and Deportation,” 246, citing Anderson, Gibney, and Paoletti, “Citizenship, Deportation, and the Boundaries,” 548.

beyond the sphere of the state's authority,"¹¹¹ effectively, "a kind of civic death."¹¹² For long-term immigrants, argues Ellerman, removal "constitutes a coercive uprooting from their relatives, workplaces, and neighborhoods,"¹¹³ stripping them of *de facto* or *de jure* membership and fully constituting them as aliens.¹¹⁴ Deportation makes non-citizens eternal guests of the state, write Anderson et al.¹¹⁵ It is a power that affects far more people than simply the deportee and that lasts long after the act of removal is complete, explains Hasselberg.¹¹⁶

Beyond a way to confirm membership within a society, the severing of the relationship between the state and the individual through deportation represents an act of performative sovereignty by states, as explained by Nyers. Through the lens of "irregular" migration, he writes, "deportation is one of the contemporary technologies of sovereignty, used to reaffirm and re-stabilize dominant conceptions of political space and identity. If states are founded on acts of exclusion, they performatively re-found themselves through ongoing exclusion."¹¹⁷ Fast, efficient, and widespread deportation sends a signal that the state has the capacity to "control its borders, to protect its population, to govern itself." Deportation "reaffirms the centrality of the state as the political community; it reaffirms the interstate system as the space of the international; and it reaffirms the citizen as the subject of the political."¹¹⁸

¹¹¹ Bridget Anderson, Matthew J. Gibney, and Emanuela Paoletti, *The Social, Political and Historical Contours of Deportation* (New York: Springer, 2013), 1.

¹¹² Barker, "Democracy and Deportation," 246.

¹¹³ Antje Ellermann, *States Against Migrants: Deportation in Germany and the United States* (Cambridge: Cambridge University Press, 2009), 122.

¹¹⁴ Coutin, "Exiled by Law," 353.

¹¹⁵ Anderson, Gibney, and Paoletti, "Citizenship, Deportation, and the Boundaries," 549.

¹¹⁶ Hasselberg, *Enduring Uncertainty*, 29.

¹¹⁷ Nyers, *Irregular Citizenship*, 6.

¹¹⁸ Nyers, *Irregular Citizenship*, 6.

Like Nyers, Peutz and Genova describe deportation as a technique by which a government signals its own effectiveness.¹¹⁹ Deportation policies, writes Hasselberg, “assure the voting public that the problem has been identified, and is being addressed through state power.”¹²⁰ Paoletti agrees that by removing unwanted bodies from the state, the government demonstrates to the polity its authority within national borders.¹²¹ She contends that the state expresses its policing powers by exercising post-entry social controls and excluding those whose presence may pose a threat to public order.¹²² Ellerman concurs, “Deportation is an expression of the basic policing powers of the state: its agents employ this tool to enforce laws that regulate entry across and residence within its borders, and to exclude individuals who may pose a threat to the public order.”¹²³ High levels of deportation, then, are a signal of strength. Thus, through these increasingly draconian controls of borders, says Genova, “the practice of deportation has...emerged as a definite and increasingly pervasive convention of routine statecraft.”¹²⁴

Deportation harm

As deportation has become more normalized in the United States and around the world, a growing body of the scholarship on deportation has studied the physical, psychological, and social harm caused by the practice.¹²⁵ “In particular, deported migrants report poor psychological well-

¹¹⁹ Nyers, *Irregular Citizenship*, 5; Peutz and De Genova, *The Deportation Regime*, 11.

¹²⁰ Hasselberg, *Enduring Uncertainty*, 24.

¹²¹ Paoletti, “Deportation, Non-Deportability,” 6.

¹²² Nyers, *Irregular Citizenship*, 4; Kanstroom, *Aftermath*, 38.

¹²³ Ellerman, *States Against Migrants*, 4.

¹²⁴ Nicholas De Genova, “The Deportation Regime: Sovereignty, Space, and the Freedom of Movement,” in *Deportation Regime: Sovereignty, Space, and the Freedom of Movement*, ed. Nathalie Peutz and Nicholas De Genova (Durham and London: Duke University Press, 2010), 34.

¹²⁵ Kanstroom, *Aftermath*, 141, 151-57; Khosravi, *After Deportation*, 3.

being and high rates of mental health disorders, harmful patterns of substance use, engagement in behavioural risk practices which place them at risk of acquiring HIV or sexually transmitted infections and often face significant barriers to accessing healthcare.”¹²⁶ Buckinx and Fillandra document four dimensions of harm—economic, social, physical, and psychological—in arguing for an approach to deportation they term *jus noci*.¹²⁷ Whether defined as a setback of interests, rights, or conditions, harm is “central to contemporary normative ideals,” and removal of a noncitizen is a violation of that person’s right to not be harmed.¹²⁸ Under *jus noci*, democratic states would be required to take into consideration the harm a deportee would be likely to suffer and refrain from deporting the person when the risk of harm is too great.

Coutin and Dingeman-Cerda find the post-deportation effects to be “confounding”—despite the popular notion of deportation as an unproblematic mechanism for returning migrants *to* their home, deportees experience a sense of exile *from* what they consider their real home.¹²⁹ They deem deportation a form of “social suffering,” that is, the trauma of deportation is inflicted not only on individuals but on the entire society. In the case of returnees to El Salvador, that social suffering has direct ties to the experiences of violence during that country’s civil war. Deportation results not only by the poor choices of the deportees but also by the sociopolitical histories of countries like El Salvador.

¹²⁶ Horyniak et al., “Deportation of non-citizen military veterans: A critical analysis of implications for the right to health,” *Global Public Health* 13, no.10 (2018): 1370.

¹²⁷ Barbara Buckinx and Alexandra Filindra, “The Case Against Removal: *Jus Noci* and Harm in Deportation Practice,” *Migration Studies* 3, no. 3 (2015): 393–416.

¹²⁸ Buckinx and Filindra, “The Case Against Removal,” 397.

¹²⁹ M. Kathleen Dingeman-Cerda and Susan Bibler Coutin, “The Ruptures of Return: Deportation’s Confounding Effects,” in *Punishing Immigrants: Policy, Politics, and Injustice*, ed. Charles E. Kubrin, Marjorie S. Zatz and Ramiro Martínez, Jr. (New York: New York University Press, 2012), 113-137.

Kanstroom¹³⁰ and Nyers¹³¹ posit the existence of what has been deemed the “deportspora,” a diaspora that has been created by deporting large numbers of people with strong ties to the United States but have been isolated far from home. Hundreds of thousands of people around the world who were raised and acculturated in the United States have been exiled either because of criminal activity or because they were living in the United States without legal status. They share certain traits: they are dispersed across the world not by choice but through rejection, and they often maintain a deep connection to the United States, through social, familial, and cultural ties. Through the study of this diaspora, these researchers consider the growing efforts at anti-deportation activism—through law (Kanstroom), political movements (Nyers). Khosravi, too, envisions a diaspora of returnees in arguing that, unlike other forms of diaspora that engender multiple belonging, in deportation renders “the spatial and temporal stretching of abandonment”—non-citizens in one country and estranged citizens in another.¹³²

Researchers have also begun to study the collateral consequences of deportation on the families deportees leave behind. Golash-Boza argues that these families, who are disproportionately among the most vulnerable members of American society, experience punishment similar the harm imposed on families of incarcerated persons.¹³³ Unlike the time-limited terms of incarceration, however, deportees are often removed for life, therefore opportunities for family reunification are limited, according to Boehm.¹³⁴ This life sentence for

¹³⁰ Kanstroom, *Aftermath*, xi

¹³¹ Peter Nyers, “Abject Cosmopolitanism: The Politics of Protection in the Anti-Deportation Movement,” in *Deportation Regime: Sovereignty, Space, and the Freedom of Movement*, ed. Nathalie Peutz and Nicholas De Genova (Durham and London: Duke University Press, 2010), 414.

¹³² Khosravi, *After Deportation*, 10.

¹³³ Tanya Golash-Boza, “From Legal to Illegal,” in *Constructing Immigrant Illegality*, ed. Cecilia Menjivar and Daniel Kanstroom (New York: Cambridge University Press, 2019): 203-221.

¹³⁴ Deborah A. Boehm, “Separated Families: Barriers to Family Reunification After Deportation,” *Journal on Migration and Human Security* 5, no. 2 (2017): 401-416.

both the deportee and the family, she argues, amounts to a humanitarian crisis that extends inside and outside the borders of the United States.

Scholars are overwhelmingly critical of the practice of deportation. In fact, my research did not uncover any scholars who defend the practice. Instead, they overwhelmingly question whether the gains made by such a draconian deportation system is worth the harm it inflicts, especially where the process involves long-term residents. Many immigrants removed from the United States spent years following their criminal convictions becoming valued, productive members of society. They are *de facto* members of the society, regardless of their legal status, says Birnie,¹³⁵ and the value gained from initially welcoming these migrants is lost when that membership in society is simply thrown away. While some deportations may be warranted, argues Kanstroom, the current system in the United States is grossly disproportionate to the dangers many of these immigrants pose to Americans.¹³⁶ Legal re-entry following removal is a very long process, if it happens at all.¹³⁷ Boehm argues that deportees often try to come back illegally to be reunited with their families and return to their real homes, increasing the illegal migrant population and leaving in the shadows the very people from whom the state claims they are protecting their population.¹³⁸

Deportation of refugees

The special case of refugees represents a particularly problematic aspect of deportation. Defined by Betts and Loescher as “people who cross international borders in order to flee human

¹³⁵ Rutger Birnie, “Citizenship, domicile and deportability: Who should be exempt from the state’s power to expel?,” *Citizenship Studies* 24:3 (2020), 373.

¹³⁶ Kanstroom, *Aftermath*, 5.

¹³⁷ Boehm, “Separated Families,” 413.

¹³⁸ Dingeman-Cerda and Coutin, “The Ruptures of Return,” 115.

rights abuses and conflict,”¹³⁹ refugees have been a central feature of the international politics since the beginning of the state system and have been the focus of much scholarly research, especially since the formation of the modern international refugee protection regime following World War II, when millions of people were displaced from their homelands.¹⁴⁰ Through the United Nations, the 1951 Refugee Convention and the 1967 Protocol Relating to the Status of Refugees set the framework for international refugee protection.¹⁴¹ These and other instruments vested in the states, both individually and collectively, the responsibility to care for displaced persons and to defend their rights and security.¹⁴² Decades after the refugee regime was put into place, however, state acceptance of this responsibility has been, as Kerwin describes, “begrudging, half-hearted, and tepid at best.”¹⁴³

Responding to displacement challenges the international system of states and cooperation.¹⁴⁴ Betts and Loescher argue that “[t]he ‘figure of the refugee’ ... [symbolizes] the failure of the state-citizen-territory relationship assumed by the state system to ensure international order and justice.”¹⁴⁵ Implicit in world politics is the understanding that states are responsible for

¹³⁹ Alexander Betts and Gil Loescher, *Refugees in International Relations* (Oxford, UK: Oxford University Press, 2011), 1.

¹⁴⁰ See, e.g., Betts and Loescher, *Refugees in International Relations*, 2; Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (New York: Cambridge University Press, 2004), 133.

¹⁴¹ Alice Bloch, "Reflections and Directions for Research in Refugee Studies." *Ethnic and Racial Studies* 43, no. 3 (2020), 438; United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 UNTS 150, https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en; United Nations Protocol Relating to the Status of Refugees, January 31, 1967, 606 UNTS 267 (entered into force October 4, 1967), available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5.

¹⁴² Donald Kerwin, “How Robust Refugee Protection Policies Can Strengthen Human and National Security,” *Journal on Migration and Human Security* 4, no. 3 (2016): 83.

¹⁴³ Donald Kerwin, "The US Refugee Protection System on the 35th Anniversary of the Refugee Act of 1980," *Journal on Migration and Human Security* 3, no. 2 (2015): 209.

¹⁴⁴ Betts and Loescher, *Refugees in International Relations*, 1.

¹⁴⁵ Betts and Loescher, *Refugees in International Relations*, 1.

ensuring basic rights and protections of their citizens, they write.¹⁴⁶ The inability or unwillingness of the country of origin to provide those rights and protections then breaks down the relationship between citizen and state, requiring another state or states to step in. Arendt wrote that the plight of refugees during World War II made us “aware of the existence of a right to have rights...and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights because of the new global political situation.”¹⁴⁷ That loss of rights continues today, with millions of refugees housed in camps outside their own countries and only a small fraction of the world’s displaced population who are resettled into new countries, including the United States.¹⁴⁸

When the United States does accept refugees, Hing argues, it brings them in as part of the American family.¹⁴⁹ If a refugee makes a mistake and commits a crime, they should be handled in a way that continues the actualization of their incorporation into society rather than that gives up on them.”¹⁵⁰ That responsibility is never greater than in situations where the United States played a role in creating the situations that forced people into their refugee status, such as in Cambodia. The aggressions of the United States in Southeast Asia during the 1970s and 1980s led to hundreds of thousands of displaced persons seeking refuge. The plight of Cambodian refugees, who fled

¹⁴⁶ Betts and Loescher, *Refugees in International Relations*, 6.

¹⁴⁷ Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, Brace and Company, 1951), 294.

¹⁴⁸ “Refugee Statistics,” United Nations High Commissioner for Refugees website, <https://www.unhcr.ca/in-canada/refugee-statistics/#:~:text=Resettlement%20benefits%20only%20a%20fraction,who%20returned%20to%20their%20country> (accessed June 13, 2021); “Refugee Camps,” United Nations High Commissioner for Refugees website, <https://www.unrefugees.org/refugee-facts/camps/> (accessed June 13, 2021). According to UNHCR, more than six million refugees currently live in camps, and in 2019, only one-half of one percent of the world’s refugees were resettled.

¹⁴⁹ Bill Ong Hing, “Deporting Cambodian Refugees: Justice Denied?,” *Crime & Delinquency* 51, no. 2 (April 2005): 280.

¹⁵⁰ Hing, “Deporting Cambodian Refugees: Justice Denied?,” 280.

from unimaginable dangers and arrived in the United States to start a new life, is well documented in the literature. Yet, as Chow, Cowan, and Hing chronicle, oftentimes the hardship did not end when they reached America.¹⁵¹ Upon arriving in the United States, many refugees had little support and few resources and often settled in high-crime, low-income areas.¹⁵² Even today, Cambodian refugees continue to struggle with the traumas of the violence they fled, facing a loss of their previous status and difficulty transitioning to a new and foreign culture.¹⁵³ Refugee children remain caught between two worlds—that of the former homeland that they barely knew and that of their new lives in the United States where they also remain outsiders. These struggles have contributed to the disproportionately high levels of criminal behaviors by Cambodians, putting them at heightened risk for deportation and return to a country they never really knew—a further displacement in their already precarious lives.¹⁵⁴

Deportation becomes the next step in the multiple displacements of Cambodian refugees. Ethnographic accounts, by Cowan and Cengel, for example, of post-deportation Cambodians illustrate their plight upon arrival in their new homeland. Cowan tells the stories of several Cambodian refugees who were deported from the United States due to criminal convictions and documents a number of negative effects once the refugee arrives in the receiving country, including stigmatization, discrimination, and violence.¹⁵⁵ Cengel provides some of the few accounts

¹⁵¹ Gary Kar-Chuen Chow, “Exiled Once Again: Consequences of the Congressional Expansion of Deportable Offenses on the Southeast Asian Refugee Community,” *Asian American Law Journal* 12, no. 1 (2005): 107; Bill Ong Hing, “Detention to Deportation: Rethinking the Removal of Cambodian Refugees,” *University of California Davis Law Review* 38, no. 3 (March 2005): 891; Cowan, “Cambodians Go ‘Home’,” 106.

¹⁵² Hing, “Detention to Deportation,” 891; Cowan, “Cambodians Go ‘Home’,” 108.

¹⁵³ Leakhena Nou, “A Qualitative Examination of the Psychosocial Adjustment of Khmer Refugees in Three Massachusetts Communities,” *Journal of Southeast Asian American Education and Advancement* 1, no. 1 (2006): 1.

¹⁵⁴ Cowan, “Cambodians Go ‘Home’,” 102; Bill Ong Hing, “Deporting Cambodian Refugees,” 273.

¹⁵⁵ Cowan, “Cambodians Go ‘Home’,” 100-121.

specifically focused on mentally ill persons¹⁵⁶ and women¹⁵⁷ who were deported from the United States to Cambodia. Women make up only a small fraction of deportees, and little attention has been focused on the unique challenges women deportees face. These areas, as well as focus on post-removal effects in countries that are still places of conflict, as suggested by Majidi and Schuster, would benefit from additional future research.¹⁵⁸

Methodology

Two main questions frame the research of my thesis. First, how did the United States deportation regime evolve over time into the massive system we see today? To answer this question, I turned primarily toward academic literature research that chronicled the history of immigration and deportation policies in the United States. I reviewed the academic literature to understand the political implications of immigrants within American society and how decisions are made with regard to migration policy. As I outline in Chapter 1, these sources show that immigration was crucial to the development of the United States but deep-seated fears about foreigners often outweighed the practical aspect of immigration. Deportation policy played only a minor role in immigration policy for much of the country's history until the linking of crime and immigration policy in the 1990s led to a turning point. No longer on the periphery, deportations suddenly played a central role in the country's immigration policy.

My second question focuses on that critical juncture and asks what happened during that period to drive the sudden change. To answer this question, I performed primary research through an analysis of contemporaneous discourse. "The goal of discourse analysis is to provide

¹⁵⁶ Katya Cengel, "Death By Deportation": Repatriating the Mentally Ill to Cambodia," *World Policy Journal* XXXIV, No. 3 (fall 2017): 76-82.

¹⁵⁷ Katya Cengel, "Unamerican?: The Fate of Deported Non-Citizen Criminals," *World Affairs* 177, no. 3 (September/October 2014): 87-92.

¹⁵⁸ Majidi and Schuster, "Deportation and Forced Return," 98.

interpretive claims based on a description of power relations in the context of historically specifically situations.”¹⁵⁹ To meet this goal, I scoured the Congressional Record for any actions related to the passage of these laws and located and reviewed the debates that preceded the vote on each act. I researched newspaper articles, focusing on news sources in areas with high concentrations of immigrants, such as Los Angeles and Boston, as well as on major national newspapers, such as *The New York Times* and *The Washington Post*. I also read speeches by political figures, such as Bill Clinton’s State of the Union Address to Congress in 1995, and located and reviewed reports from various bodies, such as from the US Senate Foreign Relations Committee, the Congress Research Service, and the US Government Accountability Office. I also reviewed the National Archives for documentation related to each the bills and found, among other documents, internal memos and reports written by Clinton administration officials. Many of the organizations involved in immigration issues in the 1990s continue to operate today, so I reviewed the website of several pro- and anti-immigration organizations for statements, reports, blog postings, news clippings, and other documentation regarding their stance in relation to the 1996 laws. By analyzing these documents, I found that the political and public discourse of the 1990s used immigrants as a scapegoat to exploit public concerns about crime. As I show in my thesis, marking criminal aliens as clear and imminent threats to the internal security of the United States, despite data that challenged such assumptions, drove the policy-making that resulted in the passage of the 1996 laws.

Because of the continually changing circumstances of deportation in the United States, I also relied on these news sources for updates of changes to the exercise and enforcement of the deportation laws. These sources have provided information about the targeting of refugee

¹⁵⁹ Penny Powers, *The Methodology of Discourse Analysis* (Sudbury, MA: Jones and Bartlett Publishers, 2001), 54.

community groups, actions taken by elected officials to fight mass, indiscriminate deportation enforcement, and the dangers that some deportees have experienced when they were removed from the United States and sent back to their home countries. Collection of individual immigrant stories through news media reports. Because of the difficulty of locating these individuals, their location in countries outside of North America, and the potential for harm due to their vulnerability, I chose not to attempt to interview such individuals directly and instead rely on the personal stories shared with academic researchers and journalists from highly regarded news organizations, such as *The New York Times*, NPR, *The Atlantic*, and *Foreign Policy*.

Throughout my thesis, I use data analysis to support my historical research. I collected multi-year data about various aspects of immigration and crime from a number of sources, including, among others, the US Department of Justice Bureau of Justice Statistics, the US Immigration and Customs Enforcement statistical yearbooks, the US Department of Homeland Security Office of Immigration Statistics, and the Brennan Center for Justice at the New York University School of Law. I then compiled and analyzed the data and created charts to illustrate changes in immigration and crime-related statistics over time.

This thesis is intended to review deportation through a political science, rather than legal, lens. However, it would be impossible to thoroughly evaluate the US deportation regime without at least a high-level analysis of the controlling law. Recognizing that “immigration law is complex to the point where it would ‘cross the eyes of a Talmudic scholar’ and an arena where ‘morsels of comprehension must be pried from mollusks of jargon,’” I did not intend my legal analysis to be exhaustive. I am not an immigration lawyer, and expertise in the field would require years of training. Therefore, I limited my review to the primary legislation that controls US deportation law today, including AEDPA and IIRIRA, as well various sections of Title 8 of the United States code,

“Aliens and Nationality.” In addition to a textual analysis of the statutes, I also researched US Supreme Court case law to understand the Court’s interpretation of the deportation statutes. I also investigated various sources of international law, including United Nations treaties, conventions, and customary international law and reviewed cases brought before various international human rights tribunals and the academic literature with respect to deportation and human rights law.

My intention from the outset of this project was to speak with people who are directly involved in deportation issues. Because of the difficulty of locating deportees and their status as vulnerable individuals, I determined early on that conversations with anti-deportation advocates would be more practical. A number of country-specific community groups have been working to protect members of their communities from deportation enforcement, through rallies, lawsuits, and lobbying. As advocates, these interview subjects personally know many people affected by the deportation policies and remain apprised of the current status of deportation law enforcement. In preparation for interviews, I completed the university’s human research ethics approval through the Office of Research Services, including completion of the Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans Course on Research Ethics (TCPS 2: CORE). Once approval was granted, I sent enquiries to six different advocacy organizations to request interviews: Southeast Asia Resource Action Center (SEARAC), the Florence Project, Formerly Incarcerated Group Healing Together, the American Civil Liberties Union of Michigan, the Immigrant Legal Resource Center, and Asian-Americans Advancing Justice. Only one organization—SEARAC—responded. I interviewed Nary Rath,¹⁶⁰ immigration policy advocate for SEARAC, which advocates for justice and equity for the Vietnamese, Cambodian, and Laotian communities. Ms. Rath, the child of Cambodian refugees, focuses her work on detention and

¹⁶⁰ Ms. Rath did not ask for anonymity.

deportation. My question topics included an overview of the advocacy work and priorities of her work and their coalition partners, updates on the status of deportation advocacy efforts nationally, and her thoughts on the near future of the deportation regime in the United States. I surmise that the lack of response to my additional requests stems from the disruptions caused by the Covid-19 pandemic.

Together, these sources provide a broad understanding of how the US deportation law and policies developed over the course of history, the discourse that directed that development, and how those laws and policies fit within the international deportation regime. They offer a look into the lives of the individuals affected by deportation and the harms that result from such a draconian practice. My thesis uses a framework of justice as it emerges from these historical and political contexts of deportation, then applies that framework to the case of Cambodia to show the moral challenge of a system that has been developed through the push and pull of forces that conflict with fundamental American values of justice.

Chapter 1: The Development of the United States Deportation Regime

The concept of deportation presents a difficult conflict for liberal democracies like the United States.¹⁶¹ On one hand, a longstanding principle dictates that states should be able to determine their membership, including removing those within their borders. On the other hand, states are expected not to harm those under their control, a concept reflected in American jurisprudence—the Bill of Rights presents a list of prohibitions on harms committed by the government. But while one may recognize the legitimate right of a state to control its borders and territory through deportation, that acceptance “surely does not require acceptance of the current system, which has vastly exceeded any historical precedent in terms of its size, its ferocity, its disproportionality, its disregard for basic rights, and its substantial negative effects.”¹⁶² I will establish the development of the contemporary US deportation regime in Chapter 1, and in Chapter 2 I will address the harsh realities that system produces.

Immigration and deportation policy in the United States have changed dramatically over the past two centuries. Although America has long been “celebrated in popular mythology as a nation of immigrants that has welcomed foreigners throughout its history,”¹⁶³ that history has been punctuated by periods of anti-immigrant sentiment, racial animus, hyper-nationalism, and exclusion, which have moved deportation from an extraordinary and rarely used sanction to a formal, automatic penalty, applied expansively and indiscriminately.¹⁶⁴ This chapter traces that transformation, from the colonial era through today. This review shows that United States immigration laws can be seen as a “‘magic mirror’ into the nation’s collective consciousness about

¹⁶¹ Buckinx and Filandra, “The Case Against Removal,” 394.

¹⁶² Kanstroom, *Aftermath*, 5.

¹⁶³ Goodman, *The Deportation Machine*, 1.

¹⁶⁴ *Padilla*, 559 U.S. at 360.

its perceived national identity—an identity that marginalizes poor and working immigrants of color and denies them full membership in American social life.”¹⁶⁵ Alongside the development of the US immigration and deportation regime grew an international deportation regime. This chapter takes a brief look at the development of the international deportation regime and places the contemporary US deportation system within the international human rights framework.

Outsiders and deportation in American history

Practices of exclusion and removal in America began when the first settlers arrived on its shores, decimated indigenous communities, and imposed colonial rule on peoples who had long made the land their home.¹⁶⁶ Colonization required abundant immigration and “was facilitated by English removal laws aimed at over-population, forced movement of the poor and of laborers, control of political dissidents, and punitive measures aimed at convicted criminals.”¹⁶⁷ Indeed, the English practice of banishing criminals to the New World was integral to the populating of the colonies.¹⁶⁸ ‘Sir Walter Raleigh had written passionately of the need for England to ‘disburden’ itself of excess population ‘and lay the load upon others.’”¹⁶⁹ A combination of voluntary migration

¹⁶⁵ Johnson, “The Intersection of Race and Class,” 1.

¹⁶⁶ Cowan, “Cambodians Go ‘Home’,” 103.

¹⁶⁷ Kanstroom, *Deportation Nation*, 26.

¹⁶⁸ Kanstroom, *Deportation Nation*, 27. More than 300 crimes carried the possibility of the death penalty, and the primary mechanism to avoid death was by pleading for clergy and royal pardon, often conditioned upon banishment from the country for a fixed period. A public-private partnership of transporting convicts to the colonies, combining criminal punishment with indentured servitude, led to an estimated 30,000 people being sent from Britain to America in the 18th century. The system remained in effect until the Revolution then picked up again for a short time after the war ended. After complaints from the Continental Congress, Britain began sending convicts to Australia instead. Kanstroom, *Deportation Nation*, 39.

¹⁶⁹ Kanstroom, *Deportation Nation*, 26.

and compulsory removal led to the movement of hundreds of thousands of people to the New World by the mid-eighteenth century.¹⁷⁰

Most colonial governments recognized the need for immigrants and offered inducements to attract new settlers.¹⁷¹ Ultimately, however, immigration and naturalization decisions were under the authority of the British Crown. Originally supportive of sending immigrants to the colonies, the Crown promoted these policies and incentives for immigrants to settle in the New World, but by the late 1700s it had changed course and imposed restrictions on immigration, resisting demands by the colonists for more open immigration policies. Despite being populated primarily by immigrants and understanding the need for new laborers, people in the colonies were never entirely enthusiastic about receiving newcomers. Some towns in New England required consent by a vote of the town before any stranger was allowed as an inhabitant.¹⁷² The general feeling about receiving immigrants has been characterized as “welcome tinged with misgiving.”¹⁷³

Still, removal after an immigrant had arrived remained rare.¹⁷⁴ Challenges such as the cost and difficulty of crossing the Atlantic, the vast expanses of land within the colonies, and the need for labor, as well as confusion about the authority of the Crown and the colonies over immigration, complicated the removal of people from the territory.¹⁷⁵ “Some colonies tried sending expelled criminals or poor immigrants back to England, but that was generally too expensive and inefficient. Consequently, expulsion was not a widespread practice in the colonial period, but when it

¹⁷⁰ Kanstroom, *Deportation Nation*, 28.

¹⁷¹ James Ciment and John Radzilowski, *American Immigration: An Encyclopedia of Political, Social, and Cultural Change* (New York: Routledge, 2014), 127.

¹⁷² Ciment and Radzilowski, *American Immigration: An Encyclopedia*, 127.

¹⁷³ Kanstroom, *Deportation Nation*, 28. Non-English immigrants were considered “denizens,” a status somewhere between alien and citizen.

¹⁷⁴ Kanstroom, *Deportation Nation*, 28.

¹⁷⁵ Kanstroom, *Deportation Nation*, 29; Hester, *Deportation: The Origins*, 2.

occurred, people were ousted from the community with little concern for where they went.”¹⁷⁶ Although rare, deportation in the colonies did exist. “Indeed, the functional forbears of much of our current system may be easily seen.”¹⁷⁷ Removals were driven primarily by economic and religious concerns, and banishment for circumstances such as the failure to meet conditions for admission and even adultery occurred.¹⁷⁸ Legal proceedings over deportation tended to involve considerable discretion, and rigid enforcement was frowned upon.¹⁷⁹ The colonies were a place where people were sent, not where they were removed.¹⁸⁰

“I had always hoped that this land might become a safe & agreeable Asylum to the virtuous & persecuted part of mankind, to whatever nation they might belong.”

—George Washington, 1788

“The Nation’s first 100 years was ‘a period of unimpeded immigration.’”¹⁸¹ Following the revolutionary war, the newly-drafted United States Constitution contained only minimal references to immigration and nothing about deportation. The new government had more pressing issues to address than issues of immigration. The authority over immigration was considered part of the police power of the states rather than a federal concern, further diminishing attention toward the issue.¹⁸² Attitudes among Americans toward immigration toward tended to be contradictory—on one hand was the vision of asylum for the oppressed and personal liberties fought for by the

¹⁷⁶ Hester, *Deportation: The Origins*, 2.

¹⁷⁷ Kanstroom, *Deportation Nation*, 29.

¹⁷⁸ Hester, *Deportation: The Origins*, 2.

¹⁷⁹ Kanstroom, *Deportation Nation*, 29.

¹⁸⁰ Kanstroom, *Deportation Nation*, 29.

¹⁸¹ *Padilla v. Kentucky*, 559 U.S. 356 (2010).

¹⁸² Kanstroom, *Deportation Nation*, 47.

revolutionaries; on the other were concerns about the social consequences of welcoming outsiders, especially incoming convicts.¹⁸³

As in pre-revolutionary times, immigrants' contributions were vital to the success of the country, but many people feared that immigrants would also contribute to societal decay.¹⁸⁴ This conflict was reflected in the debates over the Alien and Sedition Acts of the 1790s. Fighting in Europe strained America's foreign relations and led to disagreements between the parties of the time—the Federalists, led by President John Adams, and the Democratic-Republicans, led by Thomas Jefferson and James Madison. The Federalists wanted stronger relations with the country's major trading partner Great Britain, while the Democratic-Republicans preferred building up relations with France, a burgeoning democracy.¹⁸⁵ Notably, many immigrants had supported Jefferson rather than Adams in the presidential contest of 1796.¹⁸⁶

Adams and the Federalists, fearing that immigrants contributed to the instability of the new republic, sought to protect America from what they saw as radical influence by enacting four laws—the Alien and Sedition Acts—three of which had a profound impact on immigration in the United States.¹⁸⁷ The Naturalization Act¹⁸⁸ made it harder for foreigners to become United States citizens, while the Alien Enemies Act¹⁸⁹ gave the president the power to deport citizens of any

¹⁸³ Kanstroom *Deportation Nation*, 47.

¹⁸⁴ Kanstroom, *Deportation Nation*, 47.

¹⁸⁵ James Pula, "Alien and Sedition Acts (1798)," in *Multicultural America: A Multimedia Encyclopedia*, ed. Carlos E. Cortés (Thousand Oaks, CA: SAGE Publications, 2013): 176.

¹⁸⁶ The Jeffersonians believed that the Federalist philosophy favored the elites. As most immigrants were poor, they tended to support the Jeffersonian view. Ciment and Radzilowski, *American Immigration: An Encyclopedia*, 1146.

¹⁸⁷ Pula, "Alien and Sedition Acts (1798)," 176.

¹⁸⁸ "An Act concerning Aliens," approved June 25, 1798, 1 Stat. 566.

¹⁸⁹ "An Act respecting Alien Enemies," approved July 6, 1798, 1 Stat. 577.

country with which the United States was at war.¹⁹⁰ The Alien Friends Act¹⁹¹ took that power a step further and allowed the president to deport anyone he believed was being subversive.¹⁹² (The fourth act, the Sedition Act,¹⁹³ made criticism of the government a criminal act.¹⁹⁴) During debates over the acts, Madison argued that removal constituted a severe form of punishment: “If a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.”¹⁹⁵ He and his fellow Jeffersonians were gravely concerned about the amount of power the acts gave to the president and the lack of regard for constitutional protections of the Bill of Rights.¹⁹⁶ The debate became an issue in the election of 1800 between Adams and Jefferson, leading to a victory for Jefferson, who used the powers of the presidency to water down the effects of the laws.¹⁹⁷

While the passage of the acts was grounded in fear and formed the root of immigration criminalization in the United States,¹⁹⁸ that tendency was quickly tempered by those who favored a calmer, more balanced approach, offering more integration of immigrants into American society. Daniel Kanstroom explains, “[I]f the powerful rhetoric of the Republican critics of the Federalists’ ‘Aliens laws’ resonates today more than that of the law’s supporters, it is for reasons that should be respected: it speaks to our best constitutional traditions, our highest aspirations, our proudest

¹⁹⁰ Pula, “Alien and Sedition Acts (1798),” 176.

¹⁹¹ “An act for the punishment of certain crimes against the United States,” approved July 14, 1798, 1 Stat. 596.

¹⁹² Pula, “Alien and Sedition Acts (1798),” 177; Goodman, *The Deportation Machine*, 2.

¹⁹³ “An Act in addition to the act, entitled ‘An act for the punishment of certain crimes against the United States,’,” approved July 14, 1798.

¹⁹⁴ Pula, “Alien and Sedition Acts (1798),” 177.

¹⁹⁵ Buckinx and Alexandra, “The Case Against Removal,” 406.

¹⁹⁶ Pula, “Alien and Sedition Acts (1798),” 177.

¹⁹⁷ Pula, “Alien and Sedition Acts (1798),” 177.

¹⁹⁸ Mary Fan, “The Law of Immigration and Crime,” in *The Oxford Handbook of Ethnicity, Crime, and Immigration*, ed. Sandra Bucerius and Michael Tonry (New York: Oxford University Press, 2014), 5.

heritage, and the most expansive egalitarian vision of the nation of immigrants ideal. It reminds us of the transitory nature of fear and of the responsibility of a mature constitutional legal system to transcend fear and to balance it against more long-lasting concerns.”¹⁹⁹

The flow of immigrants was initially slowed during this period due to both the American Revolution and the on-going wars in Europe, but it increased sharply with a great wave of European immigrants in the 1840s.²⁰⁰ One of the primary drivers of immigration was the potato famine, which forced hundreds of thousands to flee Ireland and move to the United States.²⁰¹ The Irish immigrants were generally quite poor, and virtually all were Catholic. Upon arrival in the United States, they faced discrimination from wary native-born Protestant Americans who saw them as a threat and their Catholic faith as suspicious. Political upheaval and economic woes throughout Europe also drove other groups to immigrate in search of new opportunities and a better life during this period of mass migration.²⁰²

“Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door!”

—Emma Lazarus, *The New Colossus*, inscribed on the Statue of Liberty, 1883

After the Civil War devastated the country, President Abraham Lincoln saw immigrants as one key to healing the nation. In his annual address to Congress in 1864, President Lincoln said,

¹⁹⁹ Kanstroom, *Deportation Nation*, 63.

²⁰⁰ Ciment and Radzilowski, *American Immigration: An Encyclopedia*, 133.

²⁰¹ Ciment and Radzilowski, *American Immigration: An Encyclopedia*, 138.

²⁰² Ciment and Radzilowski, *American Immigration: An Encyclopedia*, 143. Among the largest new groups were Germans, who were mostly driven by economic concerns. From 1851 to 1860, Germans made up almost half of new arrivals.

“I regard our immigrants as one of the principal replenishing streams which are appointed by Providence to repair the ravages of internal war and its wastes of national strength and health.”²⁰³ Beginning in 1862 and lasting through the turn of the century, the country embarked on three changes in immigration law that would lead to the creation of a federal deportation system: the federalization of immigration control, the legitimation of federal deportation laws, and the addition of post-entry social control deportation laws to extended border control laws.²⁰⁴

Originally a matter of state police power, from the mid-nineteenth century onward, immigration became a joint state-federal enterprise.²⁰⁵ The Civil War and emancipation created enormous demands for labor, leading to federal laws promoting immigration. By the mid-1870s, however, the mood of the nation had changed, and Congress began passing laws limiting immigration.²⁰⁶ The first real federal immigration legislation came in 1875 with an act that prohibited entry into the country by convicts and prostitutes.²⁰⁷ Around the same time, a pair of cases in the Supreme Court marked the effective end of state involvement in immigration policy in favor of a federal approach.²⁰⁸ Congress extended its powers over the nation’s borders by passing the first comprehensive federal immigration law, the Immigration Act of 1882, which called for the removal of “a variety of persons, including convicts, ‘idiots,’ ‘lunatics,’ and persons

²⁰³ Abraham Lincoln, Fourth Annual Message to Congress, December 6, 1864, available at <https://millercenter.org/the-presidency/presidential-speeches/december-6-1864-fourth-annual-message>.

²⁰⁴ Kanstroom, *Deportation Nation*, 92.

²⁰⁵ Kanstroom, *Deportation Nation*, 92; Hester, *Deportation: The Origins*, 2.

²⁰⁶ Kanstroom, *Deportation Nation*, 93.

²⁰⁷ *Padilla*, 559 U.S. at 290.

²⁰⁸ Kanstroom, *Deportation Nation*, 93, referring to *Henderson, et al. v. Mayor of New York, et al.*, 92 U.S. 259 (1876), and *Chy Lung v. Freeman*, 92 U.S. 275 (1876).

unable to care for themselves.”²⁰⁹ This federal power was part of a newly expanding administrative state—“a central feature of Progressive state building.”²¹⁰

The latter half of the nineteenth century was a period of unprecedented migration globally, as millions of immigrants moved around the world thanks to industrialization labor demands and new transportation technologies.²¹¹ The United States received the largest number of migrants—between 1880 and 1924, more than twenty-four million people moved to America.²¹² In just four decades, the United States population more than doubled, from fifty million to 106 million people.²¹³ “People on US soil, from immigrants to citizens, lawmakers to bureaucrats, confronted enormous changes wrought by the numbers of immigrants, the new streams of immigrants, and massive industrialization and urbanization.”²¹⁴ This huge influx of newcomers, bringing their foreign languages and unusual cultures, challenged traditional notions of what it meant to be American. “The smaller and more fluid the world became, the flimsier were stories of ancient nations made of a single people, united by a shared line of descent, and the more eagerly people keen for political power searched for rationales for exclusion, discrimination, and aggression.”²¹⁵ The United States experienced a surge in xenophobia and calls for immigration controls.²¹⁶

Among those immigrants were large numbers of Chinese, who began arriving in California after the discovery of gold in 1848. In 1850, around 750 Chinese immigrants came to America; by

²⁰⁹ *Immigration Act of August 3, 1882*, 22 Stat. 214; Kanstroom, *Deportation Nation*, 94.

²¹⁰ Kanstroom, *Deportation Nation*, 97; Goodman, *The Deportation Machine*, 21.

²¹¹ Hester, *Deportation: The Origins*, 3; see also *The Chinese Exclusion Case*, 130 U.S. 581 (1889), 594-95.

²¹² Hester, *Deportation: The Origins*, 3.

²¹³ Goodman, *The Deportation Machine*, 10.

²¹⁴ Hester, *Deportation: The Origins*, 3.

²¹⁵ Lepore, *This America*, 71.

²¹⁶ Goodman, *The Deportation Machine*, 10.

1870, that number had exploded to more than 63,000.²¹⁷ Nearly all of the immigrants were men, laborers who toiled in jobs building the western United States, such as laying tracks for the new cross-country railroad.²¹⁸ “Although Chinese labor proved essential to the growth of the United States during the second half of the nineteenth century, many Americans saw Chinese immigrants themselves as posing an existential threat to the nation.”²¹⁹ In response to these anxieties, Congress began passing anti-Chinese immigration laws, including the 1875 Page Act, which excluded from entry certain laborers and women suspected of prostitution.²²⁰ In 1882, President Chester Arthur signed the Chinese Exclusion Act, banning all immigration from China for a period of ten years²²¹ and setting forth the “policy and legal regime in which all deportations from the United States have occurred ever since.”²²² Racial nativism, where whites called for immigration restrictions out of concern for threats to white superiority, had been growing nationally, but especially in the West, with the influx of Chinese migrant laborers, who were subjected to oppressive state and local discrimination.²²³ For the first time, racism was explicitly written into US immigration law.²²⁴

In addition to prohibiting all Chinese laborers from entering the United States, the Chinese Exclusion Act established grounds to deport Chinese immigrants,²²⁵ making it the first federal law

²¹⁷ Goodman, *The Deportation Machine*, 11.

²¹⁸ Goodman, *The Deportation Machine*, 11.

²¹⁹ Goodman, *The Deportation Machine*, 11.

²²⁰ Goodman, *The Deportation Machine*, 12; Jessica T. Simes and Mary C. Waters, “The Politics of Immigration and Crime,” in *The Oxford Handbook of Ethnicity, Crime, and Immigration*, ed. Sandra Bucerius and Michael Tonry (October 2013), 3.

²²¹ Lepore, *This America*, 72; Kanstroom, *Deportation Nation*, 110; Goodman, *The Deportation Machine*, 7.

²²² Hester, *Deportation: The Origins*, 9.

²²³ Hester, *Deportation: The Origins*, 8; Goodman, *The Deportation Machine*, 12.

²²⁴ Torrie Hester, “‘Protection, Not Punishment’: Legislative and Judicial Formation of U.S. Deportation Policy, 1882–1904,” *Journal of American Ethnic History* 30, no. 1 (Fall 2010): 12.

²²⁵ Kanstroom, *Deportation Nation*, 110.

used for deportation.²²⁶ People in the western United States did not wait for the federal government to take charge of deportations of Chinese citizens. “During 1885 and 1886, at least 168 communities carried out Chinese expulsion and self-deportation campaigns, relying on a combination of force and coercion in hopes of accomplishing what the federal government could not, or would not, do. Many of these purges involved violence; some concluded in massacres.”²²⁷ Over time, Congress passed federal laws imposing more restrictions on Chinese immigrants and limiting further immigration.²²⁸

A few years after the Chinese Exclusion Act, the US Supreme Court’s decisions in *Fong Yue Ting v. United States*²²⁹ and *Chae Chan Ping v. United States*²³⁰ (known as *The Chinese Exclusion Case*) expanded the understanding of federal sovereignty over immigration.²³¹ Through those cases, the Court established that deportation is an inherent aspect of the country’s sovereignty and therefore the power to deport rests exclusively with the law-making branches of the federal government.²³² This power is, according to the Court, “absolute and unqualified.”²³³ “The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the Constitution itself and considerations

²²⁶ Goodman, *The Deportation Machine*, 9.

²²⁷ Goodman, *The Deportation Machine*, 13.

²²⁸ Kanstroom, *Deportation Nation*, 97.

²²⁹ 149 U.S. 648 (1893).

²³⁰ 130 U.S. 581 (1889).

²³¹ Hester, *Deportation: The Origins*, 5; Kanstroom, *Deportation Nation*, 118. To date, the US Supreme Court has cited the *Fong Yue Ting* decision almost 100 times, most recently in 2020. The Court also used the plenary power doctrine to sanction Congressional authority over Indian affairs, “describing the tribes a ‘wards of the nation.’” Kanstroom, *Deportation Nation*, 73.

²³² Hester, *Deportation: The Origins*, 5.

²³³ Goodman, *The Deportation Machine*, 23.

of public policy and justice which control, more or less, the conduct of all civilized nations,” wrote Justice Field in *The Chinese Exclusion Case*.²³⁴

In linking deportation to sovereignty, the Court invoked a novel concept called the plenary power doctrine, which limits the judiciary’s authority to review legislative or executive actions.²³⁵ In other words, the legislative and executive branches have virtually limitless power to determine who can come into the United States, who to exclude, and who to expel. Under the plenary power, “the courts routinely permit ‘aliens’ to be expressly disfavored under the immigration laws in ways that United States citizens—including the poor and racial minorities—could never be.”²³⁶ The plenary power doctrine remains the law of the land, and these cases have served as “legal precedent for every deportation from the United States since.”²³⁷

“In the first place, we should insist that if the immigrant who comes here in good faith becomes an American and assimilates himself to us, he shall be treated on an exact equality with everyone else, for it is an outrage to discriminate against any such man because of creed, or birthplace, or origin. But this is predicated upon the person’s becoming in every facet an American, and nothing but an American ... There can be no divided allegiance here. Any man who says he is an American, but something else also, isn’t an American at all. We have room for but one flag, the American flag ... We have room for but one language here, and that is the English language ... and we have room for but one sole loyalty and that is a loyalty to the American people.”

—Theodore Roosevelt 1907

²³⁴ 130 U.S. 581, 604.

²³⁵ Kanstroom, *Deportation Nation*, 119, noting that it is not clear the justices intended for this absolute authority to extend to post-entry conduct; Hester, *Deportation: The Origins*, 14.

²³⁶ Johnson, “The Intersection of Race and Class,” 3.

²³⁷ Hester, *Deportation: The Origins*, 5. These cases still stand. Louis Henkin, “The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny,” *Harvard Law Review* 100, no. 4 (1987): 853. The Tenth Amendment of the US Constitution states that powers not enumerated belong to the states or the people. From the time of the adoption of the US Constitution in 1789 until the decision by the US Supreme Court in the *Chinese Exclusion Case*, there was never any suggestion that international sovereignty gave implied power to the federal government that were not enumerated in the Constitution. Henkin, “The Constitution and United States Sovereignty,” 854.

At the turn of the century, American society was gripped by huge social and economic changes. “People on US soil, from immigrants to citizens, lawmakers to bureaucrats, confronted the enormous changes wrought by the numbers of immigrants, the new streams of immigration, and massive industrialization.”²³⁸ Despite the country’s reliance on immigrants for industrial and agricultural growth, “[r]ising levels of xenophobia often coincided with economic downturns.”²³⁹ Stricter exclusion and deportation laws developed during this period, and “ongoing migration from southern and eastern Europe and parts of Asia raised fears—similar to those that intensified the anti-Chinese movement—about foreigners’ economic impact on the nation.”²⁴⁰ The Ku Klux Klan, originally formed in the 1860s, was reborn during this period. “Its object was to ‘unite white male persons, native-born Gentile citizens of the United States...to maintain forever white supremacy’ and to ‘conserve, protect and maintain the distinctive institutions, rights, privileges, principles, traditions and ideals of pure Americanism.’”²⁴¹

Now that the federal government had full control over immigration, it took broad action to respond to xenophobic anxieties by hardening borders and asserting sovereignty. Congress steadily expanded the list of deportable classes, “narrowing the legal definition of what it meant to be American.”²⁴² Laws prohibiting the admission of immigrants who had engaged in certain activities before landing on American soil were extended to include behaviors committed after entry.²⁴³ In 1907 a federal statute was passed providing that a woman found to be a prostitute within three

²³⁸ Hester, *Deportation: The Origins*, 3.

²³⁹ Goodman, *The Deportation Machine*, 24.

²⁴⁰ Goodman, *The Deportation Machine*, 24.

²⁴¹ Lepore, *This America*, 87.

²⁴² Goodman, *The Deportation Machine*, 24.

²⁴³ Kanstroom, *Deportation Nation*, 125.

years of entry could be deported,²⁴⁴ while a 1910 amendment eliminated the three-year requirement.²⁴⁵ Through the Immigration Act of 1917, for the first time, Congress made broad classes of noncitizens deportable for conduct that occurred on American soil, bringing “radical changes” to the nation’s deportation law.²⁴⁶ This Act served as the foundation for the modern regime of post-entry social control deportation.²⁴⁷

“By the 1920s, the lines between the immigrants with lawful status, those ‘outside the law,’ and US citizens, which were previously somewhat fluid, had hardened significantly, with profound national and international consequences that are unfolding still.”²⁴⁸ A 1920 act added new categories for deportation and denied re-entry for deportees.²⁴⁹ A 1922 law added drug-related crimes to the deportability list.²⁵⁰ The vague language of crimes of “moral turpitude” was born during this era and continues to confound interpretations today.²⁵¹ In 1924, Congress established the United States Border Patrol to guard the border with Mexico, empowering them to determine migrants’ authorization and deport anyone deemed an “illegal alien” for the first time in United States history.²⁵²

²⁴⁴ Kanstroom, *Deportation Nation*, 125.

²⁴⁵ Kanstroom, *Deportation Nation*, 125.

²⁴⁶ *Padilla*, 559 U.S. at 291.

²⁴⁷ Kanstroom, *Deportation Nation*, 133.

²⁴⁸ Hester, *Deportation: The Origins*, 6.

²⁴⁹ Immigration Act, May 10, 1920, 41 Stat. 593.

²⁵⁰ May 26, 1922, 42 Stat. 596, amendment to “An Act to prohibit the importation and the use of opium for other than medicinal purposes,” approved February 9, 1909. Chapter 2, §2(e) requires deportation of any alien convicted of trafficking in the listed narcotics, <https://uscode.house.gov/statviewer.htm?volume=42&page=596#>; Kanstroom, *Deportation Nation*, 134.

²⁵¹ Kanstroom, *Deportation Nation*, 135. “Moral turpitude” survived a vagueness challenge in the US Supreme Court in 1951 in *Jordan v. DeGeorge*, 341 U.S. 223 (1951).

²⁵² Lepore, *This America*, 91.

The biggest change to US immigration policy of the era was a two-part immigration act passed in 1924 that banned immigration completely from Asia and imposed vast restrictions on immigration from Europe.²⁵³ The United States began admitting European immigrants following a quota system based on “national origins.”²⁵⁴ “Determining, on no basis whatsoever, that 75 percent of the population of the United States was descended from the eugenically preferable ‘Nordic,’ or northern European, stock, 75 percent of the new immigrants had to be ‘Nordic,’ too.”²⁵⁵ The national origins system stayed in place until 1965.²⁵⁶ The law also created a new immigrant category called “aliens without proper visas,” who were now eligible for deportation.²⁵⁷ Deportations during this period rose from 2,762 in 1920 to 19,436 in 1932.²⁵⁸

Our beautiful America was built by a nation of strangers. From a hundred different places or more they have poured forth into an empty land, joining and blending in one mighty and irresistible tide. The land flourished because it was fed from so many sources--because it was nourished by so many cultures and traditions and peoples.

And from this experience, almost unique in the history of nations, has come America's attitude toward the rest of the world. We, because of what we are, feel safer and stronger in a world as varied as the people who make it up--a world where no country rules another and all countries can deal with the basic problems of human dignity and deal with those problems in their own way.

—Lyndon B. Johnson, upon signing the 1965 Immigration Act

²⁵³ *Immigration Act of 1924*, Pub. L. 68-139, 43 Stat. 153.

²⁵⁴ Lepore, *This America*, 88.

²⁵⁵ Lepore, *This America*, 89.

²⁵⁶ Hester, “Protection, Not Punishment,” 31; Johnson, “The intersection of race and class,” 1.

²⁵⁷ Hester, *Deportation: The Origins*, 180.

²⁵⁸ Kanstroom, *Deportation Nation*, 165. The Department of Immigration, housed within the Department of Labor at the time, showed little sympathy for the plight of deportees. The increase in deportations over this period reflects the devotion of the department to the task. “The bureau, however, was widely seen as corrupt, rather brutal, and inefficient. Indeed, it was described by one observer in 1934 as ‘an open sewer. . .and a disgrace to civilization.’ It was not until President Franklin Roosevelt appointed Frances Perkins to head the Department of Labor in 1933 that the goals of the department changed. ‘Hereafter the deportation laws will be enforced with due regard to human values, international amenities, and economic conditions within our own and other countries,’ she wrote. Kanstroom, *Deportation Nation*, 165. Her first act was to eliminate “case fixing and terrorization of aliens,” including extorting money from immigrants through threats of deportation. Kanstroom, *Aftermath*, 94.

Deportation policy during the latter half of the twentieth century followed the pattern set by the development of criminal justice laws during the same period: xenophobia and nativist views combined with a growing ethos of good government to create a centralized system of unparalleled force, bureaucracy, and harshness.²⁵⁹ This approach resulted in a “schizophrenic” combination of harsh, unforgiving deportation laws mixed with generous protections of some immigrants, such as the 1986 amnesty of millions of “illegal” noncitizens, the Violence Against Women Act protecting spouses and children from abuse, and laws protecting victims of human trafficking.²⁶⁰

The 1965 Immigration Act,²⁶¹ a centerpiece of President Lyndon Johnson’s civil rights initiatives, ended the national origins quota system and shuffled immigration priorities. Almost immediately, the national origins of immigrants to America began shifting from Europe to other parts of the world.²⁶² Over the following fifty years, Europeans would diminish from around seventy-five percent of the new immigrant population to just over ten percent. The largest increase in total numbers was in immigrants from the Americas, whose share of the immigrant population grew from about one-fifth to more than half, while the sharpest increase came from immigrants from Asia. “As he signed the bill, President Johnson referred to the fairness of the newer system as ‘self-evident.’”²⁶³ Yet even after this monumental change in immigration policy, racial animus toward non-Europeans—especially Asians—continued. Increased entry of Asians into the United States “linguistically, culturally, and racially marked Asians as “foreign” and “outside” the national

²⁵⁹ Kanstroom, *Deportation Nation*, 163.

²⁶⁰ Pub. L. 103-322; 108 Stat. 1796 (1994); Kanstroom, *Deportation Nation*, 226.

²⁶¹ “An Act to amend the Immigration and Nationality Act of 1952,” Pub.L. 89–236, 79 Stat. 911 (1965).

²⁶² Johnson, “The Intersection of Class and Race,” 1.

²⁶³ Kanstroom, *Deportation Nation*, 225.

polity.”²⁶⁴ The passage of the Immigration Act of 1965 marked another phase in the paradox that characterizes United States immigration history, the contradiction between the mythologized image of a land of immigrants and the lived reality of anti-immigrant racism and the permanent marking of immigrants as not “real Americans.”

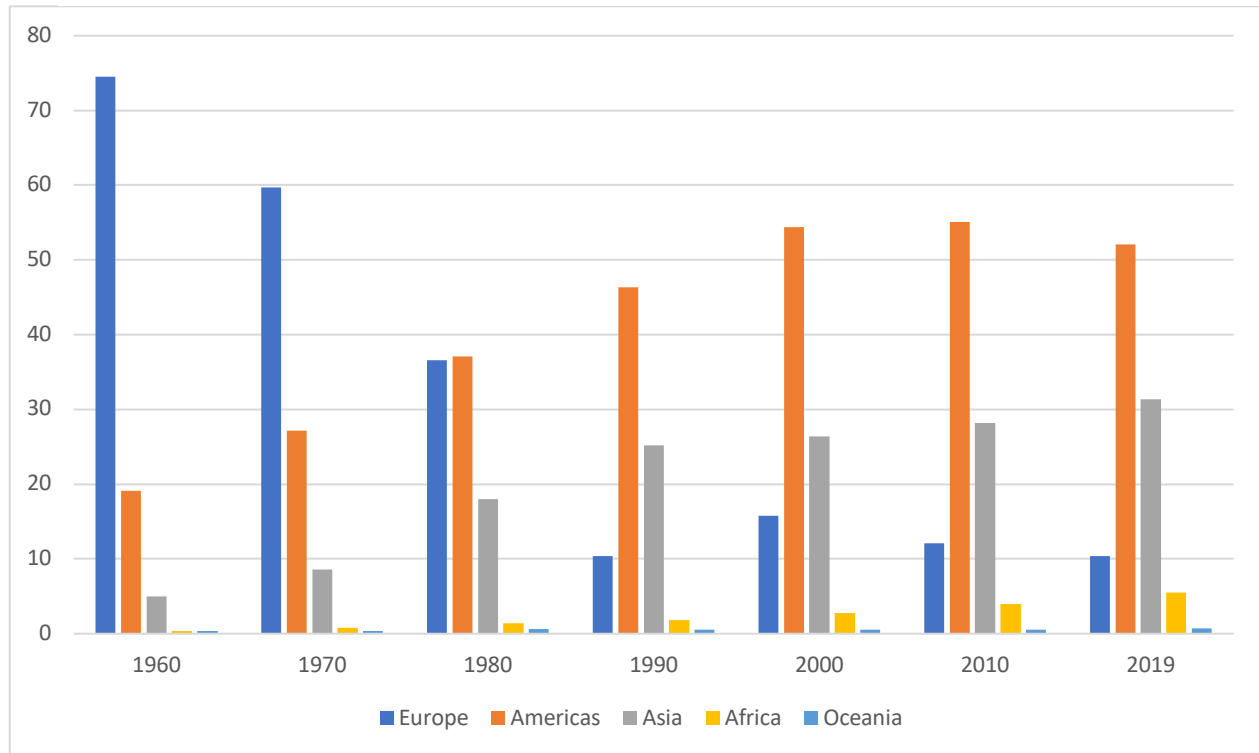
Figure 1 shows the change in national origins of immigrants to the United States just before the passage of the Immigration Act of 1965 and today. Although it had little effect on deportation policy,²⁶⁵ by changing the ethnic make-up of US immigrants, the act played a key role in generating anti-immigrant sentiment that would later lead to the deportation policy of today.²⁶⁶

²⁶⁴ Lisa Lowe, *Immigrant Acts: On Asian American Cultural Politics* (Durham, NC: Duke University Press, 1996), 8.

²⁶⁵ Kanstroom, *Deportation Nation*, 225.

²⁶⁶ Ethnically-motivated pushback against the act can be seen today in right-wing media. On April 29, 2021, Tucker Carlson of Fox News ranted that the Immigration Act of 1965 marked “the worst attack on our democracy” because it “completely changed the composition of America's voter rolls.” In other words, the act diversified the nation by allowing immigrants from all over the world rather than simply those of European origin. <https://www.mediamatters.org/tucker-carlson/tucker-carlson-worst-attack-our-democracy-160-years-how-about-immigration-act-1965>

Figure 1: Regions of Birth for Immigrants to the US, 1960-2019



Source: Migration Policy Institute, Regions of Birth, 1960-2019, <https://www.migrationpolicy.org/programs/data-hub/us-immigration-trends#source>

Refugee policies in the United States also changed dramatically during this period. “While the domestic revolutions legitimated a less Eurocentric focus in refugee affairs and a definition of refugee focused on the protection of individual rights, Cold War foreign policy concerns buttressed the existing justification for aid to refugees and the established meaning of ‘refugee,’”²⁶⁷ a narrower, more ideologically-based definition than that used by the United Nations. The Displaced Persons Act of 1948²⁶⁸ limited “refugees” to Europeans displaced by World War II, following the definition used by the Constitution of the International Refugee Organization (predecessor to the

²⁶⁷ Carl J. Bon Tempo, *Americans at the Gate: The United States and Refugees during the Cold War* (Princeton, NJ: Princeton University Press, 2008), 9.

²⁶⁸ Pub. L. 80-774, 69 Stat. 1009.

United Nations High Commissioner for Refugees, or UNHCR).²⁶⁹ The Refugee Act of 1953²⁷⁰ revised the definition of “refugee” to include those fleeing Communist regimes.²⁷¹ The 1957 Refugee-Escapee Act amended the Refugee Act of 1953 but maintained the communist-oriented definition of refugee (and expanded it to include those fleeing from Middle Eastern countries).²⁷²

While the United States was reaffirming its focus on Communism-related refugees, the United Nations was broadening its scope. The 1967 Protocol Relating to the Status of Refugees removed the reference to World War II-era persecutions that had limited the 1951 Convention Relating to the Status of Refugees.²⁷³ In 1968, the US signed on to the UN Protocol, however,

²⁶⁹ United Nations, *Constitution of the International Refugee Organization*, 15 December 1946, United Nations, Treaty Series, vol. 18, p. 3, available at: <https://www.refworld.org/docid/3ae6b37810.html> [accessed 11 June 2021].

²⁷⁰ Pub. L. 83-203, 67 Stat. 400.

²⁷¹ Section 2 (a) of the *Refugee Act of 1953* reads: "Refugee" means any person in a country or area which is neither Communist nor Communist-dominated, who because of persecution, fear of persecution, natural calamity or military operations is out of his usual place of abode and unable to return thereto, who has not been firmly resettled, and who is in urgent need of assistance for the essentials of life or for transportation. (b) "Escapee" means any refugee who, because of persecution or fear of persecution on account of race, religion, or political opinion, fled from the Union of Soviet Socialist Republics or other Communist, Communist-dominated or Communist-occupied area of Europe including those parts of Germany under military occupation by the Union of Soviet Socialist Republics, and who cannot return thereto because of fear of persecution on account of race, religion or political opinion. <https://www.govinfo.gov/content/pkg/STATUTE-67/pdf/STATUTE-67-Pg400.pdf>

²⁷² Pub. L. 85-316, amendments to *Refugee Relief Act*, Sec. 15(c)(1): the term "refugee-escapee" means any alien who, because of persecution or fear of persecution on account of race, religion, or political opinion has fled or shall flee (A) from any Communist, Communist-dominated, or Communist occupied area, or (B) from any country within the general area of the Middle East, and who cannot return to such area, or to such country, on account of race, religion, or political opinion. <https://www.govinfo.gov/content/pkg/STATUTE-71/pdf/STATUTE-71-Pg639.pdf#page=5>

²⁷³ The UN Convention defined refugees as: “As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. In the case of a person who has more than one nationality, the term “the country of his nationality” shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.” The UN Protocol simply removed the date restriction in the Convention: ‘For the purpose of the present Protocol, the term ‘refugee’ shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article I of the Convention as if the words ‘As a result of events occurring before 1 January 1951 and...’ and the words ‘...as a result of such events’, in article 1 A (2) were omitted.’”

ratification was largely symbolic, and US domestic law continued to base refugee admissions on those fleeing communism.²⁷⁴ Ideological concerns quietly overrode humanitarian ones. This approach officially changed with the passage of the Refugee Act of 1980, which adopted under US law a definition of refugee more closely resembling the definition set by the United Nations.²⁷⁵

Violent conflicts in Southeast Asia in the 1970s—where the United States played a major role in hostilities—led to the most serious refugee crisis since World War II, generating momentum for major reform to the US refugee policy. The 1980 Refugee Act,²⁷⁶ signed by President Jimmy Carter, initiated one of the most successful humanitarian efforts in American history, leading to the resettlement of more than three million refugees in the United States to date.²⁷⁷ Figure 2 shows the change in refugee admissions after the passage of the Refugee Act of 1980. The influx of refugees from around the world also sparked anew concerns over the changing make-up of the country and calls for limiting immigration and refugee admissions. The Act will be discussed in more detail in Chapter 3.

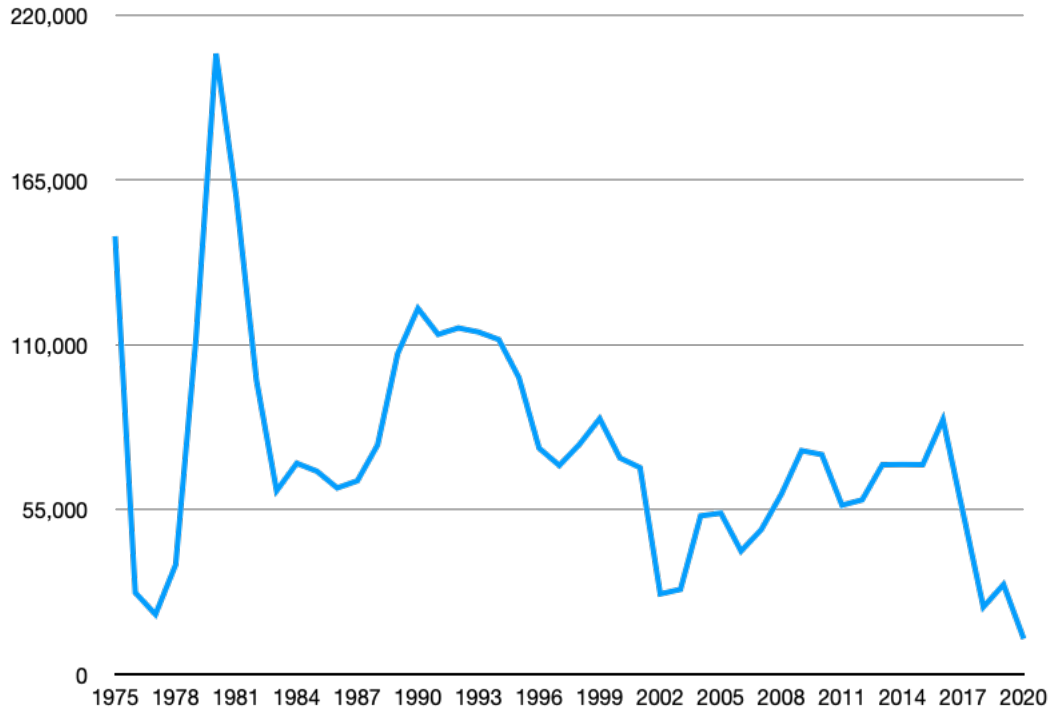
²⁷⁴ Rebecca Hamlin and Philip E. Wolgin, “Symbolic Politics and Policy Feedback: The United Nations Protocol Relating to the Status of Refugees and American Refugee Policy in the Cold War,” *International Migration Review* 46, no. 3 (Fall 2012): 586-7; Barbara M. Yarnold, “The Refugee Act Of 1980 and the Depoliticization of Refugee/Asylum Admissions: An Example of Failed Policy Implementation,” *American Politics Quarterly* 18, no. 4 (October 1990): 528.

²⁷⁵ Section 201 of the Refugee Act of 1980 effectively duplicates the definition of refugee used by the United Nations: “The term 'refugee' means (A) any person who is outside any country of such person, nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as Post, p. 103. defined in section 207(e) of this Act) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”

²⁷⁶ Pub. L. 92-212, 94 Stat. 102.

²⁷⁷ Donald Kerwin, “The US Refugee Resettlement Program —A Return to First Principles: How Refugees Help to Define, Strengthen, and Revitalize the United States,” *Journal on Migration and Human Security* 6, no. 3 (2018): 225.

Figure 2: Refugee Admissions to the US, 1975-2020



Source: US Department of State, Refugee Admissions Report, <https://www.wrapsnet.org/admissions-and-arrivals/>

The Act provided regularized procedures for admissions of refugees into the United States. Republican President Ronald Reagan, who took office in 1981, initially presented to Congress relatively high quotas on refugee admissions, but by 1983, admissions began to shrink.²⁷⁸ Admissions remained low during his administration, reflecting the restrictionist strain of his party, until his last year in office when admissions jumped, due in part to a large increase in refugees from the former Soviet Union.²⁷⁹

The fluctuations in admissions reflect the intertwining of refugee and foreign policy during the Reagan years. United States involvement in the so-called “Northern Triangle” of Central America stemmed from its preoccupation with preventing the spread of communism.²⁸⁰ Seen by the United States as theaters in the Cold War, countries in Central America that tended toward Communism erupted into civil conflicts in the 1980s between US-backed right-wing governments and popular socialist movements.²⁸¹ In El Salvador, Guatemala, and Honduras, military governments—supported by the US—oppressed and brutalized civilians who sought Marxist-oriented reforms. Throughout the region, thousands disappeared, were murdered, or fled their countries, many arriving in the United States. Although the Refugee Act of 1980 had intended to make refugee admissions less ideologically-based, in practice, the US government continued to favor refugees fleeing from communist countries. Cubans fleeing persecution by Fidel Castro, for example, were given preference over asylum seekers from Haiti and Central America.²⁸² Because

²⁷⁸ Bon Tempo, *Americans at the Gate*, 186.

²⁷⁹ Bon Tempo, *Americans at the Gate*, 186.

²⁸⁰ See, generally, John A. Booth, Christine J. Wade, and Thomas W. Walker, *Understanding Central America: Global Forces and Political Change* (New York, NY: Routledge, 2020).

²⁸¹ Susan Gzech, “Central Americans and Asylum Policy in the Reagan Era,” *Online Journal of the Migration Policy Institute* (April 1, 2006), <https://www.migrationpolicy.org/article/central-americans-and-asylum-policy-reagan-era>.

²⁸² Hamlin and Wolgin, “Symbolic Politics and Policy Feedback,” 601, 618.

Salvadoran and Guatemalan migrants were fleeing the brutality of US-backed regimes, Reagan denied that these countries had committed human rights violations. Instead, the administration characterized most of them as economic migrants rather than refugees, denying them asylum in the United States and returning them to their home countries despite the dangers of violence.²⁸³ Thousands stayed in the United States illegally, and in 1985, a class action lawsuit brought by 80 religious and refugee advocacy organizations on behalf of Central American refugees charging that the administration's actions were discriminatory and violated the Refugee Act of 1980.²⁸⁴ The case was settled in 1991 with an agreement that stayed the deportation of asylum seekers and allowed previously denied claims to be reconsidered.²⁸⁵ Some 240,000 people eventually benefitted from the settlement agreement.

In 1986, the Immigration Reform and Control Act (IRCA) gave legal status to approximately three million noncitizens.²⁸⁶ IRCA was a compromise between pro- and anti-immigration forces and was designed as a “carrot and stick” approach to combatting illegal immigration—it provided relief to millions of illegal aliens, but it also imposed strict sanctions on employers of undocumented workers.²⁸⁷ The legislation also included a provision to deport criminal immigrants upon completion of the prison sentences, and the next year Congress increased funding for expediting removals.²⁸⁸ IRCA was the most consequential piece of immigration until 1996.

²⁸³ Gzech, “Central Americans and Asylum Policy.” Approval rates for asylum case were less than three percent.

²⁸⁴ *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991).

²⁸⁵ Goodman, *The Deportation Machine*, 192.

²⁸⁶ Pub. L. 99-603, 100 Stat. 3359 (Nov. 6, 1986); Kanstroom, *Deportation Nation*, 226-27; Bon Tempo, *Americans at the Gate*, 18.

²⁸⁷ Kanstroom, *Deportation Nation*, 226-27; Bon Tempo, *Americans at the Gate*, 185.

²⁸⁸ Macías-Rojas, “Immigration and the War on Crime,” 5; Pub. L. 99-603 §701.

“During the next few years, it sometimes seemed as if a tsunami had been unleashed against ‘criminal aliens.’ A relentless crackdown ensued.”²⁸⁹ The category of “aggravated felony,” initially defined specifically as murder, drug trafficking, and illicit trafficking in firearm, was created, and the attorney general was authorized to bypass certain procedural requirements for deportation. These changes intersected with other neoliberal reforms championed by both the Republicans controlling Congress and Democratic President Bill Clinton, such as the massive overhaul of the nation’s welfare system and the fight against terrorism. Even non-violent crimes, such as tax evasion, and crimes that did not carry prison sentences became “aggravated felonies” under immigration law, thereby subjecting perpetrators to deportation.²⁹⁰ Under this logic, criminal aliens did not deserve to remain in the country not only because they posed a danger to the American public but also because they had broken the social contract.²⁹¹ Like welfare recipients, immigrants were expected to follow certain rules and accept personal responsibility for their behavior. Immigration became, for the first time, a market-like structure, where economic interests had replaced the traditional focus on social norms and moral values.²⁹²

Public sentiment about immigration began to evolve around the turn of the new millennium, thanks to an improved economic outlook and low unemployment. President George W. Bush initially signaled an openness to immigration reform, in part in the hopes of increasing trade with Mexico and the need for immigrant labor.²⁹³ The attacks on September 11, 2001, however, brought an abrupt halt to the immigration reform momentum, turning attention instead

²⁸⁹ Kanstroom, *Deportation Nation*, 227.

²⁹⁰ Christina Gerken, *Model Immigrants and Undesirable Aliens: The Cost of Immigration Reform in the 1990s* (Minneapolis: University of Minnesota Press, 2013): 38.

²⁹¹ Gerken, *Model Immigrants and Undesirable Aliens*, 47.

²⁹² Gerken, *Model Immigrants and Undesirable Aliens*, 38.

²⁹³ Gerken, *Model Immigrants and Undesirable Aliens*, 62.

to homeland security. The USA Patriot Act²⁹⁴ and other legislation tightened controls around immigration admissions. President Bush proposed a temporary worker program and some amnesty for immigrants living illegally in the United States but soon abandoned the ideas for lack of support.²⁹⁵ Efforts at immigration reform remained stalled throughout the Obama and Trump years, as pro- and anti-immigration forces hardened their stances, refusing to find common ground. One area of immigration policy, however, found almost universal agreement: the deportation of noncitizens with criminal convictions.

The Beginning of “Crimmigration”

After the Immigration Act of 1965, politicians discovered that making crime a central political issue was a winning political proposition.²⁹⁶ Crime rates soared in the 1970s, and by the 1980s, when conservatism became “the dominant force in American politics,” conservative politicians began campaigning on dealing with “the breakdown of law and order,” ignoring socioeconomic causes such as increasing poverty and unemployment.²⁹⁷ The prevailing rhetoric, however, continued to paint immigration as an economic rather than crime issue.²⁹⁸ Rising insecurity over the loss of economic control stirred “the anxieties and instabilities that foment moral panics.”²⁹⁹

²⁹⁴ Pub. L. 107–56, 115 Stat. 272 (2001).

²⁹⁵ Gerken, *Model Immigrants and Undesirable Aliens*, 64.

²⁹⁶ Macías-Rojas, “Immigration and the War on Crime,” 2.

²⁹⁷ Macías-Rojas, “Immigration and the War on Crime,” 3.

²⁹⁸ Macías-Rojas, “Immigration and the War on Crime,” 3.

²⁹⁹ Fan, “The Law of Immigration and Crime,” 9.

In his 1980 presidential campaign, Ronald Reagan had capitalized on this anxiety by running on a slogan of “Let’s Make America Great Again” and promising to make America safe.³⁰⁰ Following his election, President Reagan “scapegoated immigrants for the nation’s economic woes and painted them as potential terrorists and threats to national security.”³⁰¹ Reagan’s War on Drugs and his push for mandatory minimum sentencing led to an unprecedented increase in the prison population, resulting in massive overcrowding.³⁰² Increased illegal immigration from Mexico sparked by that country’s economic collapse in 1983 fanned anti-immigrant sentiment, combining stereotypes of Mexicans as criminals with growing concern about surging crime.³⁰³

Thus politicians seeking a way to ease the swollen prison population found a new target: immigrants with criminal convictions. Deportation of criminal immigrants could relieve prison overcrowding while also creating the impression that politicians were keeping their constituents safe from dangerous immigrants. The 1986 Anti-Drug Abuse Act³⁰⁴ expanded grounds for deportation of immigrants with drug-related convictions, and in the same year the Immigration Reform and Control Act (IRCA) more than doubled funding for the Immigration and Naturalization Service to deport immigrants upon completion of their sentences.³⁰⁵ A clear picture of today’s deportation regime began to emerge two years later with the 1988 Anti-Drug Abuse Act,³⁰⁶ which created the category of “aggravated felony,” to include murder and certain drug and

³⁰⁰ Macías-Rojas, “Immigration and the War on Crime,” 3.

³⁰¹ Goodman, *The Deportation Machine*, 170.

³⁰² Macías-Rojas, “Immigration and the War on Crime,” 3.

³⁰³ Fan, “The Law of Immigration and Crime,” 9.

³⁰⁴ Pub. L. 99-570, 100 Stat. 3207.

³⁰⁵ Macías-Rojas, “Immigration and the War on Crime,” 5.

³⁰⁶ Pub. L. 100-690, 102 Stat. 4181.

weapons crimes. Any noncitizen convicted of one of these offenses was presumed to be subject to deportation.³⁰⁷

In the 1990s, Democrats—recognizing the political benefits of the GOP approach—began challenging Republicans’ claim to being the “tough on crime” party and introduced a number of bills to make it easier to deport immigrants with criminal convictions. The Immigration Act of 1990 ramped up the deportation of noncitizens and added money laundering and crimes of violence for which the punishment was at least five years imprisonment.³⁰⁸ Commission of any aggravated felony was considered to show a lack of moral character, thereby eliminating the opportunity for most forms of discretionary relief. Those deported due to an aggravated felony were prohibited from re-entering the country for at least twenty years. In 1994, the US Attorney General was given the authority to bypass certain deportation procedures for aggravated felonies, making removal quicker and easier than ever.³⁰⁹

The new narrative recasting immigration as a crime converged with the new nativism—an intertwining of racism and hostility toward immigrants—that emerged during the period.³¹⁰ As discussed earlier, racial discrimination became specifically implanted in US immigration law in the nineteenth century, with the implementation of laws aimed at Chinese immigrants and continued into the twentieth century with a national-origin based quota system. When that system was dismantled by the Immigration Act of 1965, Asian and Latin American groups, who were more readily identifiable as different from native-born Americans and more easily placed within established racial categories in American society, began to make up an increasing share of the

³⁰⁷ Kanstroom, *Deportation Nation*, 227; Macías-Rojas, “Immigration and the War on Crime,” 5.

³⁰⁸ Kanstroom, *Deportation Nation*, 227; Macías-Rojas, “Immigration and the War on Crime,” 6.

³⁰⁹ Kanstroom, *Deportation Nation*, 227.

³¹⁰ George J. Sanchez, “Face the Nation: Race, Immigration, and the Rise of Nativism in Late Twentieth Century America,” *The International Migration Review* 31, no. 4 (Winter, 1997): 1009-1030.

immigrant population.³¹¹ Stereotypes about these groups helped to rationalize increasingly harsh treatment of immigrants, while urban unrest aimed at particular ethnic groups, such as the 1992 Los Angeles riots, and anti-immigrant policies that exploited racial differences, such as California's Proposition 187 in 1994, reflected the increasing use of immigrants as scapegoats for societal ills. Thus emerged a new nativism that found a home all along the political spectrum.³¹²

Meanwhile, the link between race and crime also hardened during this period. Disproportionate rates of incarceration were long seen as evidence of a propensity by non-Whites toward criminal behavior, despite well-documented research establishing underlying structural racism and historical factors, not some inherent dangerousness of people of color, as the true roots of the imbalance in the prison population.³¹³ Efforts in the 1960s to address those factors and reduce crime instead "metastacized into the modern carceral state," with soaring incarceration rates and young Blacks increasingly targeted by law enforcement.³¹⁴ At the same time, there was a growing sentiment that those who entered the country illegally—overwhelmingly from Latin America—were a security threat.³¹⁵ While illegal immigration is an administrative rather than criminal violation, illegal immigrants were lumped into the "criminal alien" category, and the use of race in enforcement of immigration violations became constitutionally acceptable in

³¹¹ Sanchez, "Face the Nation," 1014; Johnson, "The Intersection of Race and Class," 2.

³¹² Sanchez, "Face the Nation," 1009.

³¹³ Elizabeth Hinton, "From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America," in *Racism in America: A Reader* (Cambridge, MA: Harvard University Press, 2020), 101, 105; Amanda Armenta, "Racializing Crimmigration: Structural Racism, Colorblindness, and the Institutional Production of Immigrant Criminality," *Sociology of Race and Ethnicity* 3, no. 1 (2017), 92.

³¹⁴ Hinton, "From the War on Poverty," 101.

³¹⁵ Yolanda Vasquez, "In the Shadows: Policing Immigration in the Criminal Justice System and Its Impact on Racial Disparities and Identity," in *The Cambridge Handbook of Policing in the United States*, ed. Tamara Rice Lave and Eric J. Miller (Cambridge: Cambridge University Press, 2019), 333.

immigration law in the 1970s.³¹⁶ Together, these dynamics converging race, immigration, and crime set the stage for two pieces of legislation that would upend deportation law.³¹⁷

On April 19, 1995, Timothy McVeigh and Terry Nichols bombed the Alfred P. Murrah Federal Building in Oklahoma City, killing 168 people.³¹⁸ Although McVeigh and Nichols were both American citizens, the Antiterrorism and Effective Death Penalty Act (AEDPA)³¹⁹ passed the following year in reaction to the bombing and included measures to expand the deportation of permanent residents with criminal convictions, fusing immigration with criminality. Although it was not an immigration or border security measure, the law disproportionately affected legal permanent residents and asylum seekers.³²⁰

A second piece of 1996 legislation, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),³²¹ made sweeping changes to immigration law that continue to control much of the non-citizen experience today. IIRIRA “extended ‘zero tolerance’ approaches to ‘immigration reform’ more broadly and ultimately led to the deportation of many long-term legal permanent residents, with dire consequences for their families.”³²² Among the major changes that affected legal permanent resident refugees, IIRIRA expanded the criminal grounds of deportation and made deportation automatic. In addition to AEDPA’s “crimes of moral turpitude” and “aggravated felonies” that included some misdemeanors, IIRIRA added convictions

³¹⁶ Vasquéz, “In the Shadows,” 337.

³¹⁷ Macías-Rojas, “Immigration and the War on Crime,” 9.

³¹⁸ Federal Bureau of Investigations web site, Famous Cases: Oklahoma City bombing, accessed January 25, 2021, www.fbi.gov/history/famous-cases/oklahoma-city-bombing; Macías-Rojas, “Immigration and the War on Crime,” 9.

³¹⁹ Pub. L. 104-132; 110 Stat. 1214 (1996).

³²⁰ Macías-Rojas, “Immigration and the War on Crime,” 10.

³²¹ Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

³²² Macías-Rojas, “Immigration and the War on Crime,” 13.

“accompanied by a sentence of one year or longer.”³²³ It also made deportability for these crimes retroactive, so that immigrants who committed crimes before the law’s passage—even crimes that had previously not been included in the category of deportable offenses—were suddenly eligible for immediate deportation. The passage of the 1996 laws also, for the first time since 1917, removed almost completely the ability of judges to review each case before them and make judgments based on their discretion.³²⁴

These changes to the deportation law “dramatically raised the stakes of a noncitizen’s criminal conviction.”³²⁵ News outlets and legal advocates reported that refugees and legal permanent residents who had lived in the United States for decades—even as long as fifty years—were suddenly facing deportation under the new law.³²⁶ No one, even the most ardent supporters of the law, anticipated the impact it would have on immigration enforcement. Law professor Nancy Moravetz explained, “Overnight, people who had formed their lives here — came here legally or had adjusted to legal status, were working here, building their families, had ordinary lives in which they were on the PTA and everything else — suddenly, because of some conviction, weren’t even allowed to go in front of a judge anymore. They were just fast-tracked to deportation.”³²⁷

This sea change in deportation policy wreaked havoc on immigrant communities. “Since its reinvigoration in the late 1990s, deportation has torn through communities like a capricious tornado: touching down suddenly from dark clouds and leaving a trail of devastation in its wake,

³²³ Macías-Rojas, “Immigration and the War on Crime,” 13.

³²⁴ Macías-Rojas, “Immigration and the War on Crime,” 11.

³²⁵ *Padilla*, 558 U.S. at 6.

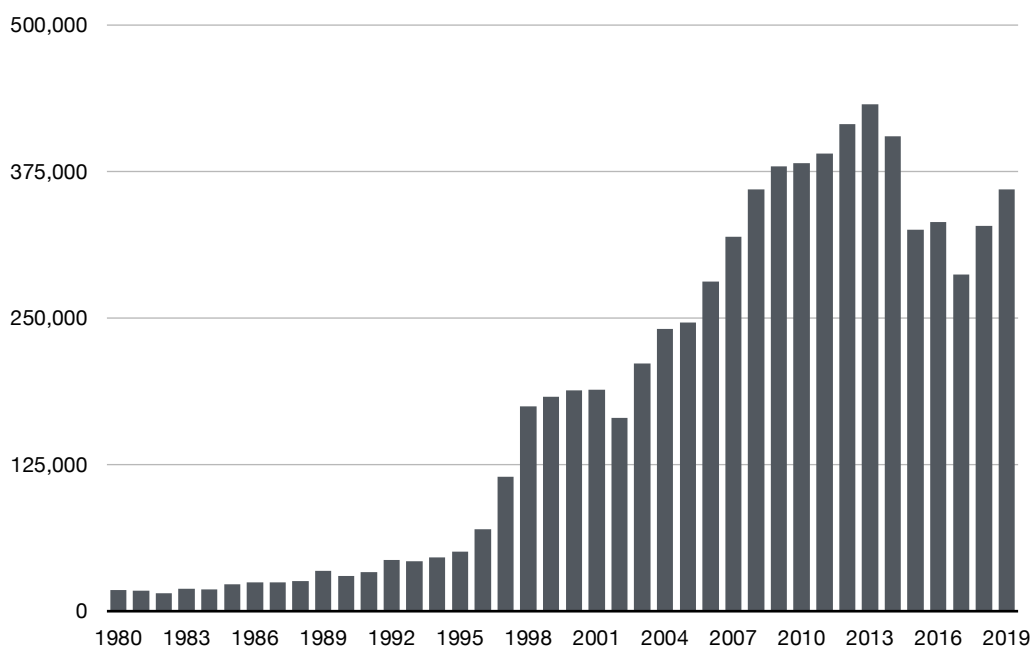
³²⁶ Macías-Rojas, “Immigration and the War on Crime,” 15.

³²⁷ Dara Lind, “The disastrous, forgotten 1996 law that created today’s immigration problem,” *Vox*, April 28, 2016, <https://www.vox.com/2016/4/28/11515132/iirira-clinton-immigration>.

while sweeping away tens of millions of people from our midst.”³²⁸ Figure 3 shows how dramatically the changes in US law increased removals of immigrants.

³²⁸ Kanstroom, *Aftermath*, 7.

Figure 3: Removals from the United States, 1980-2019



Source: Department of Homeland Security, Yearbook 2019, *Aliens Removed or Returned: Fiscal Years 1892 to 2019*

International Deportation Regime

“At the same time that US judges, politicians, and administrators were developing a national deportation policy, an international logic of deportation was emerging.”³²⁹ In the late nineteenth century, much of that international logic was determined by international appeal, “a soft process that involved reciprocal diplomatic power, legal rhetoric, appeals to treaties, and sometimes even threats” by one country to prevent the deportation of its citizens from another.³³⁰ States retained jurisdiction over their citizens abroad, and international appeal was a resource

³²⁹ Hester, *Deportation: The Origins*, 34.

³³⁰ Hester, *Deportation: The Origins*, 35.

citizens could use to protect their rights while outside their home countries.³³¹ The system, however, did not apply equally to all states or to all citizens of a state, and international appeal was not always successful. When deportations occurred, states did not necessarily send deportees back to their countries of citizenship. Often, the deportee decided where to go next.³³² Deportations, then, were largely unilateral, with the receiving country having little input. Destination countries could also vary depending on the heritage of the deportee, the expense of sending immigrants long distances, conflicts in citizenship of husband and wife (a wife's citizenship was generally derivative of her husband's), and the relationships between countries.

By the early twentieth century, “[t]he establishment of deportation policies changed the scale and operating logic of the international regime.”³³³ Deportations started becoming more bilateral, requiring the consent of both the sending and receiving countries. Nations began to negotiate agreements and treaties regarding deportation policies and procedures,³³⁴ and more formal procedures meant citizens were generally returned to their countries of origin. The international regime, then, shifted from a tool to protect a state's emigrants from removal to a formal structure that made states responsible for receiving their own citizens.³³⁵ Today, deportation is accepted on a global basis as an inherent aspect of state power and is practiced routinely, albeit with some limitations that have developed under international human rights law, such as the principle of *non-refoulement*.³³⁶ The automatic, arbitrary, and harsh deportation regime the United

³³¹ Hester, *Deportation: The Origins*, 36.

³³² Hester, *Deportation: The Origins*, 50.

³³³ Hester, *Deportation: The Origins*, 60.

³³⁴ Hester, *Deportation: The Origins*, 59.

³³⁵ Hester, *Deportation: The Origins*, 60.

³³⁶ Hester, *Deportation: The Origins*, 4-5; Cornelisse, “Immigrant Detention and the Territoriality,” 112.

States has developed has come under increasing scrutiny as failing to meet even the most basic human rights standards.

International human rights laws began developing following the horrors of World War II. The formation of the United Nations and its associated human rights movement constituted the most significant events for the rights of non-citizens in the twentieth century.³³⁷ The Universal Declaration of Human Rights,³³⁸ the International Covenant on Civil and Political Rights,³³⁹ the International Covenant on Economic, Social and Cultural Rights³⁴⁰ together make up the International Bill of Human Rights and recognize the rights of family unity, protection against arbitrary deportation, and the prohibition against arbitrarily depriving one of the right to return to one's own country. These rights apply to all humans, regardless of citizenship, complicating interpretation of specific provisions, such as the meaning of one's "own country."³⁴¹ The United States has ratified the first two of these instruments and signed but not ratified the third.³⁴² While

³³⁷ David Weissbrodt, "The Human Rights of Non-Citizens," in *The Human Right to Citizenship: A Slippery Concept*, ed. Rhoda E. Howard-Hassmann and Margaret Walton-Roberts (Philadelphia: University of Pennsylvania Press, 2015), 31.

³³⁸ United Nations General Assembly, *Universal Declaration of Human Rights*, 217 (III) A (Paris, 1948), <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (accessed May 25, 2021)

³³⁹ United Nations General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html> [accessed 9 June 2021].

³⁴⁰ United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <https://www.refworld.org/docid/3ae6b36c0.html> [accessed 9 June 2021].

³⁴¹ For example, in a 2011 case, the Human Rights Committee took a broad understanding of this right, holding that Australia had violated the right to enter one's own country when it deported a man who had lived there since he was 27 days old. Although not a citizen, he held a visa status similar to a U.S. lawful permanent resident alien. Described as a "watershed," this decision was based on the Committee majority's recognition that "there are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality." In such circumstances, deportation is inherently arbitrary and thus illegal. *Nystrom v. Australia*, United Nations Office of the High Commissioner on Human Rights, Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (102nd session), Communication No. 1557/2007, December 22, 2006, 18, <https://juris.ohchr.org/Search/Details/1211>.

³⁴² The ICCPR was adopted by the United Nations in 1966, and President Jimmy Carter signed it in 1977, but it was not ratified by the Senate and signed into law in the United States until 1992. Jimmy Carter, "US finally ratifies

in many signatory countries, these treaties provide immigrants with certain rights in deportation cases, US courts have long held that international law does not supersede domestic law, therefore US courts will not apply these instruments to deportation cases unless they have been fully ratified.³⁴³

Another UN human rights instrument that informs deportation under international law is the Convention on the Rights of the Child. The United States is still the only country in the world that has failed to ratify the Convention on the Rights of the Child,³⁴⁴ even though its overarching standard—states must consider the best interests of the child in any actions where children are concerned—derived from US family law.³⁴⁵ If the United States did apply this standard to immigration law, the government would be required to consider the effects of deportation on the children of deportees. By contrast, the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment,³⁴⁶ known as CAT, was ratified by the United States and implemented into domestic law through legislation, giving it full effect in US courts.³⁴⁷ CAT reflects the international law principle of *non-refoulement* by prohibiting the return of noncitizens to a state where there is substantial risk they will be tortured. Although deportees have found some

human rights covenant,” *Christian Science Monitor*, June 1992, 19. The United States signed the ICESCR in 1977, but it has never been ratified. United Nations website, Status of Ratification Interactive Dashboard, accessed January 22, 2021, <https://indicators.ohchr.org/>.

³⁴³ Henkin, “The Constitution and United States Sovereignty,” 866.

³⁴⁴ UNHCR, Convention on the Rights of the Child, November 20, 1989, available at <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx?fbclid=IwAR35cVUouzhmgWieqVBgZYcB2B0AxOmow0WCMu4zy7eIWfQD-VMAwGkORks>. Somalia ratified the CRC in 2015, leaving the United States as the sole member refusing ratification. UNHCR website, Status of Ratification Interactive Dashboard, accessed May 25, 2021, available at <https://indicators.ohchr.org/>.

³⁴⁵ Kanstroom, *Aftermath*, 217.

³⁴⁶ United Nations, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (December 10, 1984), Article 1.

³⁴⁷ Michael John Garcia, “The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens,” Congressional Research Service, January 21, 2009, 3, available at <https://fas.org/sgp/crs/intel/RL32276.pdf>.

success in preventing deportations under CAT, relief has been granted only sparingly. Since 1999, more than 70,000 CAT claims have been made and only about 1,300 have been granted.³⁴⁸

Alongside the formation of the United Nations, a number of regional organizations were established in the twentieth century to foster cooperation among member states. Formed in 1948, the Organization of American States is comprised of thirty-five states in the Western hemisphere, including the United States.³⁴⁹ Among its missions is the promotion and protection of human rights within the region. The United States has refused to ratify some of the OAS's human rights instruments, in part, because of concerns that its obligations would interfere with United States sovereignty by placing binding decisions in the hands of non-American arbitrators.³⁵⁰ Deviating from international law understandings, the United States finds human rights and civil matters to be entirely within its domestic jurisdiction. Nevertheless, claims of violation of human rights by the United States can be brought before the Inter-American Commission for Human Rights (IACHR), although that body has no enforcement authority. In a case decided in 2010 specifically related to deportation of criminal non-residents, the IACHR found that while states have the right to determine which noncitizens live in their countries, international law had clearly established a requirement that noncitizen residents be given an opportunity to present a defense based on humanitarian and other reasons, which the United States had failed to do.³⁵¹ The IACHR did not say that a state cannot deport noncitizen residents, rather that "each Member State's administrative

³⁴⁸ US Department of Justice Executive Office for Immigration Review, *Statistics Yearbook: Fiscal Year 2018*, 37, available at <https://www.justice.gov/coir/file/1198896/download>.

³⁴⁹ Organization of American States web site, "Who We Are," accessed May 25, 2021, http://www.oas.org/en/about/who_we_are.asp.

³⁵⁰ Joseph Diab, "United States Ratification of the American Convention on Human Rights," *Duke Journal of Comparative & International Law* 2, no. 2 (Spring 1992): 323-344, 335.

³⁵¹ Interamerican Commission on Human Rights, Report No 81/10 CASE 12.562 [IAHCR]; *Smith, Armendariz, et al. v. United States* (July 12, 2010), available at <https://www.cidh.oas.org/annualrep/2010eng/USPU12562EN.DOC>.

or judicial bodies, charged with reviewing deportation orders, must be permitted to give meaningful consideration to a non-citizen resident's defense, balance it against the State's sovereign right to enforce reasonable, objective immigration policy, and provided effective relief from deportation if merited."

During the drafting of the United Nations Charter and the Universal Declaration of Human Rights, the United States was among the most diligent nations in promoting U.N. efforts toward human rights protection. Indeed, former First Lady Eleanor Roosevelt chaired the commission that wrote the Declaration, and its human rights provisions were based largely off the United States Constitution.³⁵² Although the United States has been one of the driving forces in promoting the protection of human rights at the international level, it has been reluctant to submit itself to the safeguards it expects other states to follow. As Louis Henkin, the pioneering human rights lawyer remarked, "In the cathedral of human rights, the United States is more like a flying buttress than a pillar—choosing to stand outside the international structure supporting the international human rights system, but without being willing to subject its own conduct to the scrutiny of that system."³⁵³

The clash between the United States' historical commitment to human rights and its willingness to step outside of international norms is perfectly reflected in the harsh and arbitrary deportation regime that has developed over the last century and a half. Founded as a nation of immigrants with "a revolutionary, generous, and deeply moral commitment to human equality and dignity," the United States has deported more than 57 million people since the first comprehensive

³⁵² Diab, "United States Ratification," 324.

³⁵³ William Grimes, "Louis Henkin, leader in field of human rights law, dies at 92," *New York Times*, October 16, 2010, <https://www.nytimes.com/2010/10/17/us/17henkin.html> (accessed May 25, 2021).

immigration legislation was enacted in 1882.³⁵⁴ While most of those deportations have arisen from immigration infractions, a growing share of removals are of immigrants with criminal convictions. In the next chapter, I take a deeper look at the watershed deportation laws that passed in 1996, AEDPA and IIRIRA, and the link they codified between crime and immigration. I analyze the effect of “cimmigration” discourse on policymaking and present the real-life consequences that have arisen in the aftermath of those policies.

³⁵⁴ Goodman, *The Deportation Machine*, 1.

Chapter 2: The Othering of Criminal Aliens in Deportation Discourse and Policy-making

Immigration policy “is literally a matter of who we are as a nation, and who we become as a people,” wrote Barbara Jordan, chair of the US Commission on Immigration Reform, in a 1995 *New York Times* opinion piece.³⁵⁵ Immigration was now front and center of American politics,³⁵⁶ and the passage a year later of AEDPA and IIRIRA marked what would become a critical juncture in American deportation policy. Together, these pieces of legislation completely altered the deportation framework of America and spoke volumes about how the United States saw itself as a people. The popular and political discourse of the era suggests that Americans saw themselves as a people under attack from within.

“Since the United States declared its independence, individuals in positions of power—as well as ordinary citizens—have continued to use fear in order to define who belongs to their communities and to determine who must leave.”³⁵⁷ After many years of small changes, the country fully embraced the linking of immigration to criminality, confirming the “othering” of immigrants and reinforcing its sovereignty through the mass deportation of non-citizens, both legal and illegal. These notions of belonging seem misplaced in a country that has always held itself out as a “nation of immigrants,” founded on civic ideals of refuge, individual liberties, and democracy. In this chapter, I review the public debates and messaging surrounding the passage of the 1996 laws and in the discourse on deportation policy in the twenty-five years since to reveal a strong anti-

³⁵⁵ Barbara Jordan, “The Americanization Ideal,” *New York Times*, Opinion, September 11, 1995. In 1973, Jordan became the first African-American woman from the South elected to the US Congress. The US Commission on Immigration Reform, which she guided until her death in January 1996, recommended a number of changes to immigration policy, including stronger protections against illegal immigration and lower legal immigration caps. Her words are still used by anti-immigration activists to justify their arguments for limiting immigration into the United States.

³⁵⁶ Lepore, *This America*, 128.

³⁵⁷ Goodman, *The Deportation Machine*, 5.

immigrant, nativist strain that, to this day, prevents the US from living up to the lofty civic ideals of its founding. I then examine the consequences of those policy decisions, which I argue are, in reality, much more harmful than the problem they are purported to solve.

Linking of Crime and Immigration

As chronicled in Chapter One, changes to immigration policy in the 1990s coincided with the increasingly important role of crime policy in United States political discussion. The crime rate in America began rising in the 1960s, and by the 1980s crime—especially drug-related crimes—led to a social panic and the demand that elected officials take action. Politicians saw those concerns as a winning issue for elections. In response to the increasing use of drugs, and especially crack cocaine, President Reagan declared a War on Drugs and Congress passed the 1986 Anti-Drug Abuse Act,³⁵⁸ which imposed minimum mandatory sentences for drug crimes and expanded the grounds for deportation noncitizens convicted of drug crimes.³⁵⁹ Two years later, the 1988 Anti-Drug Abuse Act created the category of “aggravated felony,” which included serious crimes like murder, drug trafficking, and trafficking in illegal arms.³⁶⁰ Noncitizens convicted of one of these crimes would be “conclusively presumed” to be subject to deportation.³⁶¹

The economic woes of the 1970s brought the “Reagan Revolution,” a political realignment and massive economic reforms that cut taxes, reduced the size of government, and rolled back

³⁵⁸ Pub. L. 99-570, 100 Stat. 3207.

³⁵⁹ Macías-Rojas, “Immigration and the War on Crime,” 3; Todd S. Purdum, “The Crime-Bill Debate Shows How Short Americans’ Memories Are,” *The Atlantic*, Politics, September 12, 2019. <https://www.theatlantic.com/politics/archive/2019/09/joe-biden-crime-bill-and-americans-short-memory/597547/>.

³⁶⁰ Pub. L. 100-690, 102 Stat. 4181.

³⁶¹ Kanstroom, *Deportation Nation*, 227.

regulations.³⁶² A “conservative infrastructure,” such as think tanks, advocacy organizations, and Fox News, blossomed during the Reagan era, setting a tone of aggressive conservatism that would influence politicians and the public.³⁶³ Tightening of economic policies sparked a recession in 1981, the worst economic downturn since the Great Depression.³⁶⁴ Inflation continued to dog the economy, and unemployment peaked at almost eleven percent in 1982. The Mexican debt crisis and economic collapse of 1983 led to an influx of immigrants into the United States and further intensified fears of losing control.³⁶⁵ “President Reagan scapegoated immigrants for the nation’s economic woes and painted them as potential terrorists and threats to national security.”³⁶⁶

Election years during this era meant politicians had to continually demonstrate how tough they were on crime by ratcheting up the rhetoric and coming up with harsher policies that gave the appearance of taking control of the crime problem—a 1992 *Washington Post* editorial noted that crime bills had been introduced every two years since 1980 and were always popular.³⁶⁷ Politicians up for re-election, the piece noted, “can ill-afford to be labeled as do-nothings.” That year, as Republicans got political mileage out of labeling Democrats as soft on crime, the Democrats wrote a crime bill that sounded as tough as Republicans. President George HW Bush, however, said it was not tough enough, and Republicans deemed it a “pro-crime bill.” Even unwinnable fights over

³⁶² Edward Ashbee, John Dumbrell and Alex Waddan, *The American Right After Reagan* (Cheltenham, UK: Edward Elgar Publishing Ltd., 2019), 4.

³⁶³ Edward, Dumbrell and Waddan, *The American Right After Reagan*, 5.

³⁶⁴ Federal Reserve History, “Recession of 1981–82,” <https://www.federalreservehistory.org/essays/recession-of-1981-82#:~:text=July%201981%E2%80%93November%201982,effort%20to%20fight%20mounting%20inflation.&text=Prior%20to%20the%202007%2D09,States%20since%20the%20Great%20Depression.>

³⁶⁵ Fan, “The Law of Immigration and Crime,” 9.

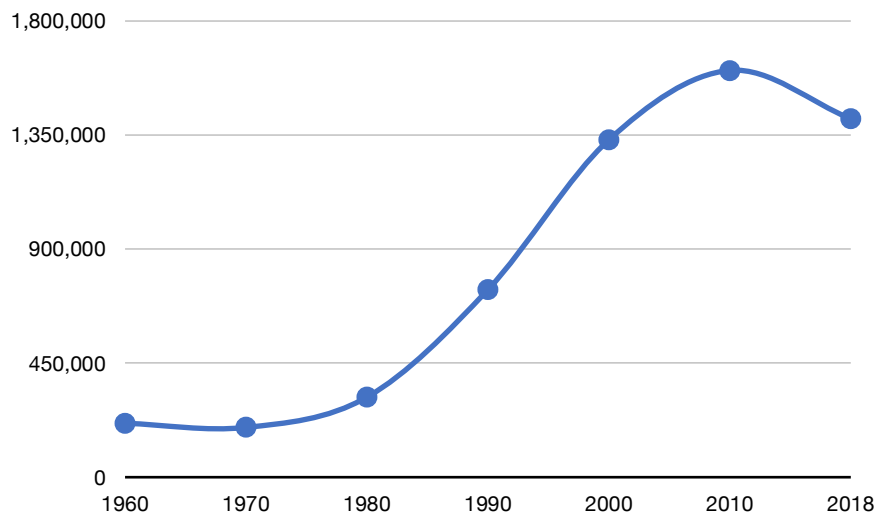
³⁶⁶ Goodman, *The Deportation Machine*, 170.

³⁶⁷ Guy Gugliotta, “Crime Bill a Hostage of Politics,” *Washington Post*, August 5, 1992, <https://www.washingtonpost.com/archive/politics/1992/08/05/crime-bill-a-hostage-of-politics/e3ecbbdb-8259-4cc7-a407-deee5038bbd0/>.

who was tougher on crime were politically more advantageous than doing nothing, as it was better to have gridlock over a bill than to have the other side get credit for taking stronger action against crime.

As the crime rate rose, so too did the rates of incarceration. “Instead of attempting to reform socially deviant individuals, prisons now attempt[ed] to ‘manage’ dangerous persons, who [were] then ‘warehoused’ as part of ever-growing prison populations.”³⁶⁸ Between 1973 and 1997, the number of people behind bars increased by five hundred percent, requiring huge investments in prison construction and operation.³⁶⁹ Figure 4 shows just how dramatically the prison population increased during the 1980s and 1990s.

Figure 4: US Incarcerated Population, 1960-2018



Source: The Sentencing Project, Criminal Justice Facts, <https://www.sentencingproject.org/criminal-justice-facts/>

³⁶⁸ Susan Bibler Coutin, “Exiled By Law,” in *Deportation Regime: Sovereignty, Space, and the Freedom of Movement*, ed. Nathalie Peutz and Nicholas De Genova (Durham and London: Duke University Press, 2010), 356.

³⁶⁹ Karyl Kicenski, *Cashing in on Crime: The Drive to Privatize California State Prisons* (Boulder, CO: Lynne Rienner Publishers, 2013), 1.

In the same manner, greater numbers of noncitizens awaiting deportation were removed from society and sent to detention centers. Private corporations had become major players in the building and operating of immigrant detention centers beginning in the late 1970s, and by 1988, held thirty percent of aliens under the control of the Immigration and Naturalization Service (INS).³⁷⁰ From that foundation, private corporations began to fill the need for additional prison beds, resulting in the development of what has been deemed the “prison-industrial complex.”³⁷¹ Prisons and detention centers became a very profitable business that could only be sustained through continued incarceration of criminals and detention of aliens. Commodifying imprisonment did not result in decreased crime rates, but the system did achieve “exponential growth of businesses selling products and services to maintain high rates of imprisonment, and entire corporations—whose stock is publicly traded—devoted to building and managing prison facilities.”³⁷² Studies have found that private prison corporations have spent millions on lobbying efforts, including on immigration and immigrant detention issues, over the past few decades.³⁷³ The quality and cost-effectiveness of these private prisons remains a heated topic of debate.³⁷⁴

Coinciding with the crackdown on illegal immigration and the deportation of criminal aliens in the mid-1990s, the immigrant detention center population exploded, as shown in Figure 5.

³⁷⁰ Kicenski, *Cashing in on Crime*, 6.

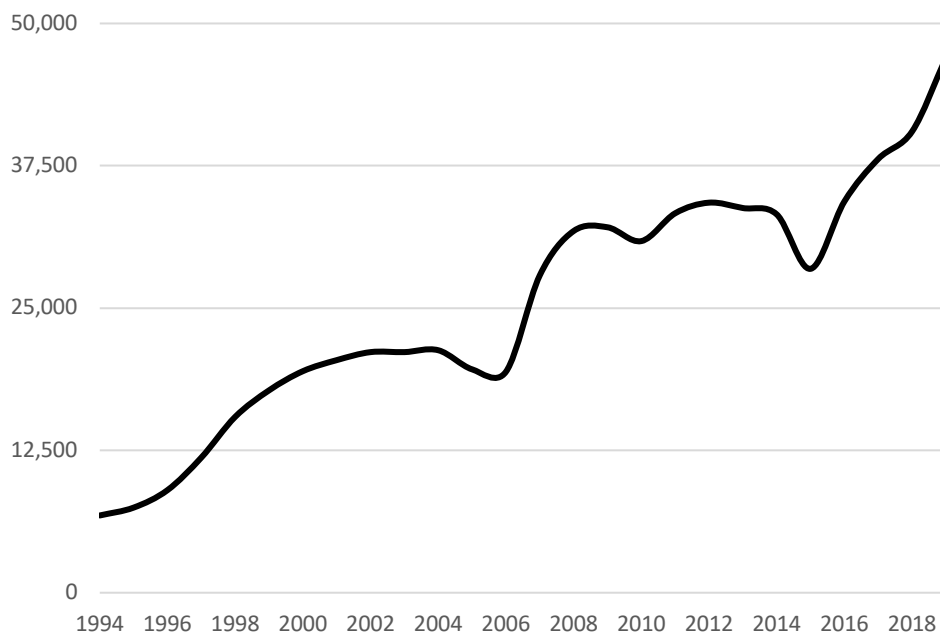
³⁷¹ Kicenski, *Cashing in on Crime*, 2.

³⁷² Kicenski, *Cashing in on Crime*, 12.

³⁷³ Bethany Carson and Eleana Diaz, “Payoff: How Congress Ensures Private Prison Profit with an Immigrant Detention Quota,” report, Grassroots Leadership, April 2015, https://grassrootsleadership.org/sites/default/files/reports/quota_report_final_digital.pdf; Hauwa Ahmed, “How Private Prisons Are Profiting Under the Trump Administration,” Center for American Progress, August 30, 2019, <https://www.americanprogress.org/issues/democracy/reports/2019/08/30/473966/private-prisons-profiting-trump-administration/>.

³⁷⁴ Clyde Haberman, “For Private Prisons, Detaining Immigrants Is Big Business,” Retro Report, *New York Times*, October 1, 2018, <https://www.nytimes.com/2018/10/01/us/prisons-immigration-detention.html>.

Figure 5: Average Daily Population of US Immigrant Detention Centers, 1994-2018



Source: Center for Migration Studies, cmsny.org/publications/virtualbrief-detention/

As states sought to decrease their inmate population, private prison operators saw immigrant detention as a growing source of future revenue.³⁷⁵ Both private and public detention facilities suffer from reports of dangerous conditions, lack of medical care, lack of transparency, and inconsistent standards of operation.³⁷⁶ Nevertheless, detention is a stop on the deportation pipeline for thousands each year. “Detention, which had been largely abolished by [the Immigration and Naturalization Service] in 1954, except for those who were likely to abscond or who were deemed dangerous to national security or public safety, has gradually come to be a defining characteristic of the immigration enforcement system.”³⁷⁷

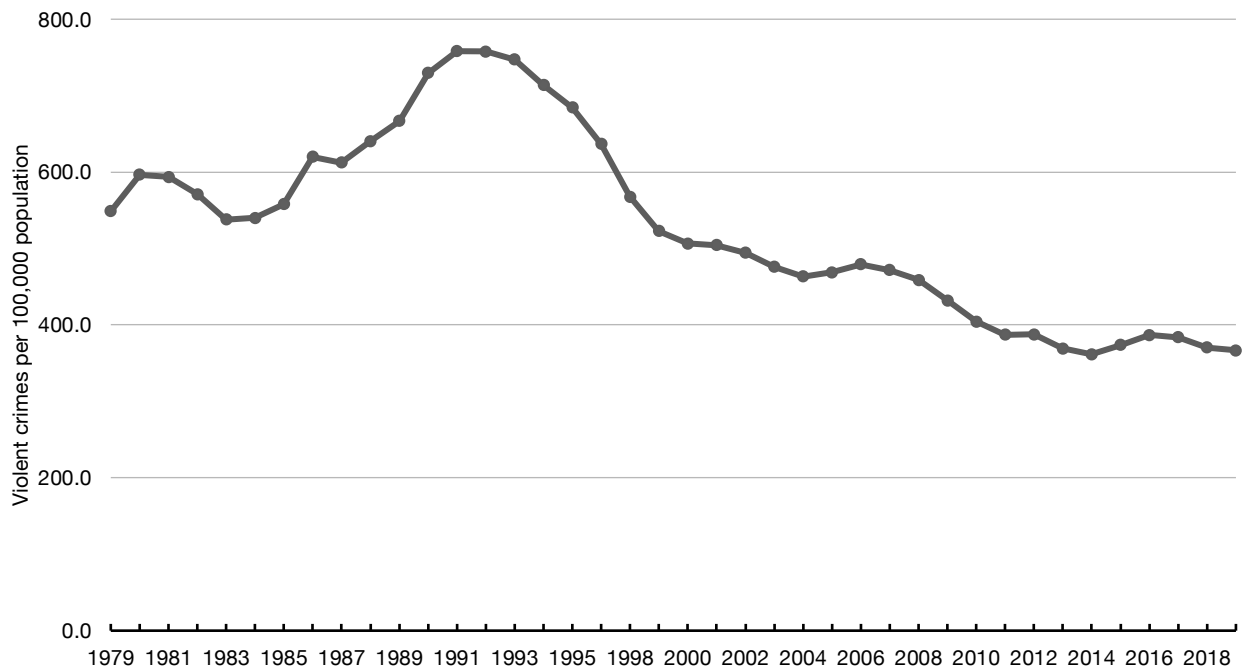
³⁷⁵ Alissa R. Ackerman and Rich Furman, “The Criminalization of Immigration and The Privatization of the Immigration Detention: Implications for Justice,” *Contemporary Justice Review* 16, No. 2(2013): 257.

³⁷⁶ Kanstroom, *Aftermath*, 92-94.

³⁷⁷ Kanstroom, *Aftermath*, 90.

While crime had become an overriding political issue and led to the dramatic increase in laws and incarcerations, violent crime actually saw a dramatic decrease beginning around 1991.³⁷⁸ Data from both the Federal Bureau of Investigations (FBI) and Bureau of Justice Statistics (BJS) show sharp decreases in both violent and property crimes beginning in the early 1990s (Figure 6). Yet Gallup polls show that in the same years the majority of Americans generally believed that crime had gone up.³⁷⁹

Figure 6: US Violent Crime Rate, 1979-2019



Source: Uniform Crime Reporting, Federal Bureau of Investigations

³⁷⁸ Oliver Roeder, Lauren-Brooke Eisen, and Julia Bowling, *What Caused the Crime Decline?*, Report, Brennan Center for Justice at New York University School of Law, 2015, 3 [hereinafter, Brennan Center Report].

³⁷⁹ <https://www.pewresearch.org/fact-tank/2020/11/20/facts-about-crime-in-the-u-s/>. A 2015 report from the Brennan Center for Justice at New York University found that mass incarceration had a negligible impact on crime rates during that period and that the primary drivers of reduced crime were data-driven policing, socio-economic improvement, an aging population, and decreased alcohol consumption. Brennan Center Report, 2015, 4.

Politicians knew they had found a winning issue and continued to capitalize on the tough-on-crime rhetoric that won them votes. Samuel Glascock, a Virginian state legislator, explained, “If you’re tough on crime, then I’ve got to be tougher.”³⁸⁰ In 1994, Congress passed the largest crime bill in United States history,³⁸¹ which “extended the death penalty to 60 new crimes, stiffened sentences, offered states strong financial incentives for building new prisons, and banned a range of assault weapons,” and led to a wave of mass incarcerations.³⁸² Then-Senator Joe Biden, who sponsored the bill in the Senate, touted the lengths Democrats would go to in order to show how tough they were on crime, saying, “if someone came to the floor and said we should barb wire the ankles of anyone who jaywalks, I think it would pass.”³⁸³

The 2020 election of Biden to the Oval Office has led to a re-evaluation of the 1994 crime bill. Congressman Charles Rangel of New York recalled in 2019 that although he had voted against the bill at the time, he was in a safely Democratic district and did not face the same pressures as many of his colleagues to implement tough crime control measures. “When you go to town-hall meetings, people just demand that you explain what the hell you’re going to do to reduce crime. I can’t overemphasize,” he said. “You’re not there to give a course in sociology or the impact of slavery or poor schools and lack of economic opportunity or self-esteem....When someone is scared to walk the goddamn streets, anything that you can tell them to help alleviate that fear is

³⁸⁰ Paul Wright, “Federal Crime Bill Passes,” *Prison News*, December 15, 1994, <https://www.prisonlegalnews.org/news/1994/dec/15/federal-crime-bill-passes/>.

³⁸¹ US Department of Justice Fact Sheet, “Violent Crime Control and Law Enforcement Act of 1994,” <https://www.ncjrs.gov/textfiles/billfs.txt>.

³⁸² Purdum, “The Crime-Bill Debate Shows.”

³⁸³ “Examining Joe Biden's Record on Race: 1994 Crime Bill Sponsorship,” October 13, 2020, *National Public Radio*, <https://www.npr.org/2020/10/13/923170325/examining-joe-bidens-record-on-race-1994-crime-bill-sponsorship>. Biden has since both taken credit for the crime bill’s positive effect on reducing crime and distanced himself from some of the negative outcomes.

going to be accepted.”³⁸⁴ Criminals were the lowest rung of American society, and voters demanded stronger action to take them off the streets.

It was out of that fear that the so-called “three strikes” laws also emerged in the 1990s. Although highly controversial, three-strikes laws, which impose mandatory sentencing for repeat offenses, were passed in almost half of the states between 1993 and 1995.³⁸⁵ The basic idea behind these laws is that they incapacitate dangerous, habitual criminals by keeping them off the streets for extended periods—sometimes for life—and that they correct a criminal justice system that acts as a revolving door for offenders. By triggering mandatory sentencing after multiple convictions, three-strikes laws are supposed to also act as a deterrent.³⁸⁶ Opponents, however, argue that long sentences remove the incentive for offenders to rehabilitate and instead raise a sense of hopelessness that may actually make the offender more dangerous.³⁸⁷ Furthermore, automatic sentencing exacerbates racial disparities within the criminal justice system and the incarceration of minorities.³⁸⁸ Minimum sentencing schemes such as the three-strikes laws, along with the aggressive crack-down on drug crimes, further exacerbated the existing overcrowding of state and federal prisons that had begun in the 1970s.³⁸⁹ The increase in incarceration rates led to skyrocketing costs of managing prisons and prisoners, and politicians recognized that by deporting noncitizen prisoners, they could ease the prison population, reduce prison costs, and still be seen as removing one of the sources of crime that Americans feared. While criminals were banished

³⁸⁴ Purdum, “The Crime-Bill Debate Shows.”

³⁸⁵ Grimes, “Three Strikes Laws,” 2.

³⁸⁶ Grimes, “Three Strikes Laws,” 4-5.

³⁸⁷ Grimes, “Three Strikes Laws,” 5.

³⁸⁸ Grimes, “Three Strikes Laws,” 6.

³⁸⁹ Simes and Waters, “The Politics of Immigration and Crime,” 15.

from society while they were in prison, alien criminals could be exiled from American society forever.

Discourse around 1996 laws

Considering the huge impact the 1996 laws would have on thousands of legal permanent residents in the United States, there was surprisingly little debate about them prior to their passage. What discussion there was in Congress showed the growing fusion of immigration and crime in deportation policy. Although, as discussed in Chapter One, AEDPA was drafted in response to the Oklahoma City bombing, which was an event of domestic terrorism, Congressman William Martini (R-NJ) conflated immigrants and terrorism in his floor speech in support of the bill, saying, “We must strengthen the death penalty for terrorist crimes which result in the death of an American citizen abroad or at home, we must improve the current law to facilitate Government deportation of criminal aliens, and we must allow United States citizens to bring suit against a sponsoring terrorist nation in Federal Court.”³⁹⁰ Discussion of the bill often centered on “alien terrorists,” far more menacing sounding than “noncitizens accused of terrorism.” Even Congressman Jerrod Nadler (D-NY), who offered only reluctant support of the bill, in part, said he would for it because it made it easier to deport “alien terrorists.”³⁹¹ Senator Orrin Hatch (R-UT), one of the bill’s sponsors, praised the bill as “tough on crime,” and touted the Senate version of the bill, which had restored the “the terrorist alien removal provision which allows courts to expeditiously deport alien terrorists.” It was now easier, he said, because it allowed courts to consider classified evidence without even having to disclose that evidence to the immigrant accused.

³⁹⁰ *Antiterrorism and Effective Death Penalty Act of 1996*, S. 735, 104th Cong., 2nd sess., *Congressional Record* 141 (April 18, 1996): H3605.

³⁹¹ *Antiterrorism and Effective Death Penalty Act of 1996*, H3616.

The language supporting the bill tended to paint immigrants as predators and Americans as their innocent victims. Senator Spencer Abraham (R-MI), expressing concern that deportations were too slow, said, “many [aliens] will be released back into society to prey on more American citizens. No country, no matter how civilized, should continue to tolerate this abuse.”³⁹² On the House side, Congressman Ron Packard (R-CA) said that AEDPA “ensures that the forgotten Americans—the citizens who obey the law, pay their taxes, and seek to raise their children in safety—will be protected from the criminals and terrorists who want to prey on them.”

In his floor speech, Congressman Packard expressed concern that increasing numbers of crimes were being committed by noncitizens, however, he omitted some important data from that era. The number of noncitizen prosecutions had virtually levelled out by then, and the majority of non-citizen incarcerations were due to immigration violations. A Bureau of Justice Statistics press release issued in 1994 touted the increased incarceration of noncitizens over the previous ten years but also noted that prosecutions of noncitizens between 1989 and 1994 had been “relatively stable.”³⁹³ The press release also noted that aliens were much less likely to be prosecuted for violent crimes than were citizens—1.4 percent versus 8.5 percent—and that when noncitizens were convicted of drug offenses they were more likely to have played a minor role in the crime compared to citizens arrested for drug offenses. Nevertheless, Congressman Packard ignored these statistics and promoted the passage of the AEDPA bill through fear rhetoric, claiming, “The escalation of criminal and terrorist activity in our country is robbing Americans of the freedom to

³⁹² *Antiterrorism and Effective Death Penalty Act of 1996*, S. 735, 104th Cong., 2nd sess., *Congressional Record* 141 (June 7, 1995): S7823.

³⁹³ “More Prosecutions and Tougher Sentencing Guidelines Prompt Increased Incarcerations of Non-Citizens,” press release, Office of Justice Programs Bureau of Justice Statistics, (August 4, 1994), <https://www.bjs.gov/content/pub/press/NIFCJS.PR>.

walk their neighborhood streets, the right to feel secure in their homes, and the ability to feel confident that their children are safe in their schools,” he said.³⁹⁴

“AEDPA fused ‘counterterrorism’ measures targeting Arab and Muslim immigrant communities in the United States with domestic crime bills disproportionately impacting Blacks and Latinx in the criminal justice system, and ‘criminal alien deportation’ provisions directly affecting mostly Latin American and Caribbean immigrants caught in the drug war.” Among its most concerning provisions was the limitation of the use of habeas corpus,³⁹⁵ a legal doctrine that allows a defendant to challenge his or her confinement. Despite the concerns expressed by critics of AEDPA,³⁹⁶ the limitation was quickly upheld by the US Supreme Court in the 1996 case of *Felker v. Turpin*.³⁹⁷

Although AEDPA was predicated on fighting terrorism, its effects were, in many ways, more severe for long-term permanent residents convicted of relatively minor crimes than for accused domestic terrorists. Under the heading “Criminal Alien Procedural Improvements,” AEDPA expanded the criteria for “crimes of moral turpitude,” allowed wiretapping and secret evidence in deportation proceedings, and recharacterized certain misdemeanors as deportable aggravated felonies, which disproportionately affected immigrants whose cases had long been settled.³⁹⁸ As one immigration lawyer noted, “Suspected terrorists under the act have the right to appointed counsel, the right to bond proceedings, the right to a court hearing and the right to judicial review in removal proceedings while the same law takes away all of those rights for long-

³⁹⁴ *Antiterrorism and Effective Death Penalty Act of 1996*, S. 735, 104th Cong., 2nd sess., *Congressional Record* 142 (April 18, 1996): H3617.

³⁹⁵ AEDPA, §§101-108.

³⁹⁶ Macías-Rojas, “Immigration and the War on Crime,” 10-11.

³⁹⁷ 518 U.S. 651 (1996).

³⁹⁸ AEDPA, Subtitle D; Macías-Rojas, “Immigration and the War on Crime,” 11.

term permanent residents who have had even a minor criminal violation, with no possibility for relief from deportation.”³⁹⁹ These distinctions are crucial because immigrants are far more likely to lose deportation cases without legal counsel than when they have representation.⁴⁰⁰

In a show of political unity, Congress overwhelmingly passed AEDPA quickly so that it could be announced on the anniversary of the Oklahoma City Bombing.⁴⁰¹ President Clinton signed the legislation with much fanfare on April 24, 1996, but also issued a signing statement that noted the bill included “major, ill-advised changes in immigration laws that have nothing to do with terrorism,” including eliminating remedial relief for long-term immigrants. Clinton noted in the signing statement that his administration would urge Congress to correct the legislation. Meaningful corrections, however, never came.

Instead, IIRIRA was passed just a few months later by a large majority of the House and Senate.⁴⁰² The law further expanded the classes of deportable offenses, applied to crimes retroactively, and made mandatory detention of deportable legal resident aliens.⁴⁰³ Before this law, an immigrant could request a waiver from deportation based on the specific circumstances of their case, such as the length of time they had lived in the country, family hardship, or evidence of their

³⁹⁹ Richard C. Reuben, “McDeportation,” *ABA Journal*, August 1996, 34.

⁴⁰⁰ Karen Berberich and Nina Siulc, “Why Does Representation Matter? The Impact of Legal Representation in Immigration Court,” Fact sheet, November 2018, Vera Institute of Justice, <https://www.vera.org/downloads/publications/why-does-representation-matter.pdf>. The authors note that “[o]nly 5 percent of cases that won between 2007 and 2012 did so without an attorney; 95 percent of successful cases were represented.”

⁴⁰¹ Reuben, “McDeportation.”

⁴⁰² Ironically, one of the Members of Congress who supported the bill, Duke Cunningham, later resigned from Congress and pleaded guilty to various tax and conspiracy charges. He was sentenced to eight years in prison. If he had been a non-citizen, these convictions would have resulted in automatic deportation. Instead he received a presidential pardon by Donald Trump in January 2021. Todd Ruger, “Trump pardons former congressman whose actions helped prompt earmark ban,” January 21, 2021, *Roll Call*, <https://www.rollcall.com/2021/01/20/trump-pardons-former-congressman-whose-actions-helped-prompt-earmark-ban/>.

⁴⁰³ Kerwin, “From IIRIRA to Trump,” 194.

good moral character.⁴⁰⁴ IIRIRA removed the ability of immigration judges to use their discretion in making removal decisions.

The familiar language of immigrants as predators reappeared in discussion about this law. Senator Hatch, in discussing mandatory detention prior to deportation, said detention would prevent “the release of criminal aliens to further prey on American citizens.”⁴⁰⁵ Congressman Benjamin Gilman (R-NY) called on the Members of the House to also pass the bill, saying, “We have a strong obligation in protecting our citizens from illegal criminal aliens who prey on them with drugs, and other crime-related activity.”⁴⁰⁶ Action was needed, they argued, to keep Americans safe from dangerous immigrants.

Some members of Congress anticipated the harm the deportation provisions would bring to immigrants and expressed concern about IIRIRA’s potential for damage. Congressman Nadler, who had reluctantly voted for AEDPA, could not support IIRIRA it had been “poisoned with unconscionable provisions that violate fundamental American values.”⁴⁰⁷ Nevertheless, Clinton signed the bill into law on September 30, 1996, making almost no mention of the sweeping changes in deportation law by the bill.⁴⁰⁸ Years later a Freedom of Information Act search revealed a memo written in November of 1996 from then-senior advisor Rahm Emanuel to President Clinton encouraging him to “claim and achieve record deportations of criminal aliens.”⁴⁰⁹ He could,

⁴⁰⁴ Coutin, “Exiled by Law,” 357; Kerwin, “From IIRIRA to Trump,” 194.

⁴⁰⁵ Detention and 212(C) Waivers for Criminal Aliens Provisions of H.R. 2202, *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 104th Cong., 2nd sess., *Congressional Record* 142 (October 3, 1996): S12295.

⁴⁰⁶ *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*; 104th Cong., 2nd sess., *Congressional Record* 142 (September 25, 1996): H11085.

⁴⁰⁷ *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*; 104th Cong., 2nd sess., *Congressional Record* 142 (September 25, 1996): H11085

⁴⁰⁸ Signing statement on the *Omnibus Consolidated Appropriations Act, 1997*, September 30, 1996, <https://www.govinfo.gov/content/pkg/PPP-1996-book2/pdf/PPP-1996-book2-doc-pg1729-2.pdf>.

⁴⁰⁹ Lind, “The disastrous, forgotten 1996 law.”

Emanuel urged, build upon the tough-on-crime legacy of the 1994 Crime Bill by creating a similarly tough record on immigration. Clinton, it turns out, was playing both sides.

For those who advocated for a zero-tolerance policy when it came to criminal aliens, the changes in deportation policy were exactly what they had hoped for. The Immigration Act of 1965 had sparked an anti-immigration movement rooted in white supremacy, which had become more mainstream among conservatives in the Reagan era and would become more prominent still after 9/11.⁴¹⁰ These anti-immigrant activists saw noncitizens as guests, not as members of the society, regardless of the contributions made to American society. The most powerful and influential anti-immigration organization in the country was Federation for American Immigration Reform (FAIR), founded in 1979 to promote the restriction of all immigration to the United States in the belief that immigrants posed an existential threat to the well-being of the American people.⁴¹¹ After the passage of AEPDA and IIRIRA, FAIR representatives went on a media blitz touting the strong deportation provisions of both acts. "People who commit serious crimes have forfeited their right to come into this country," said K.C. McAlpin, FAIR's deputy director.⁴¹² Dan Stein, the organization's director, praised the legislation and said it was "moral, correct" that the United States cease its obligations to noncitizens who commit crimes because they are not part of the country. "The constitution says 'We the people.' This issue involves who are 'we the people,' who

⁴¹⁰ Leonard Zeskind, "The New Nativism: The alarming overlap between white nationalists and mainstream anti-immigrant forces," Special Report, Immigration Reform, *American Prospect*, November 2005, A15, available at <https://prospect.org/special-report/new-nativism/>.

⁴¹¹ Zeskind, "The New Nativism"; Goodman, *The Deportation Machine*, 111. FAIR has been labeled a hate group by the Southern Poverty Law Center. A number of members of the Trump administration who worked on immigration issues had close ties to FAIR, including Julie Kirchner, Jeff Sessions, Kris Kobach, Kellyanne Conway, and Stephen Miller. <https://www.splcenter.org/fighting-hate/extremist-files/group/federation-american-immigration-reform>

⁴¹² Jonathan S. Landay, "Legal Immigrants Deported If They Have a Criminal Past," *Christian Science Monitor*, September 5, 1996, <http://ezproxy.library.uvic.ca/login?url=http://search.ebscohost.com/login.aspx?direct=true&db=ulh&AN=9609172417&site=ehost-live&scope=site>.

are the people and who are they, who are not the people? If you don't become a citizen, you're not 'we the people.' If you become, if you're an alien, you're there, those people."⁴¹³ Those who immigrate and do not intend to naturalize are not welcome, he claimed.

Immigration advocates, however, saw non-citizens differently. Jeanne Butterfield, executive director of the American Immigration Lawyers Association, explained that the 1996 laws affected both citizens and non-citizens: "This is not United States and them. This is us. These are American families."⁴¹⁴ Dallas immigration lawyer Wheat Gibson said, "These laws accept some very extreme and evil premises, that whole classes of people can be destroyed just because of where they happen to be born."⁴¹⁵ In the debate between these opposing viewpoints, the advocates of strict deportation measures had the upper hand. Criminal aliens were not, as a class, a group that engendered much sympathy, and by broadly accusing criminal aliens as dangers to the American public, anti-immigration advocates and politicians capitalizing on the electorate's fear could make sweeping changes to United States deportation policy with little pushback.

Although AEPDA and IIRIRA were passed with overwhelming support, there were early indications that the legislation had gone too far. The wide net of the laws caught thousands of noncitizens who even the staunchest of the laws' defenders agreed were not the intended targets. The media began to publish story after story about long-term permanent residents whose crimes had been relatively minor and often long in the past who were now being removed from their homes and sent to places to which they had little connection.⁴¹⁶ Individual stories highlighted the

⁴¹³ "Deporting Americans: A Story of Men Without a Country," *Nightline*, ABC News, November 27, 1998.

⁴¹⁴ "Deporting Americans," *Nightline*.

⁴¹⁵ Frank Trejo, "The long, long arm of immigration law," *Dallas Morning News*, November 18, 1997: 1.

⁴¹⁶ See, e.g., Landay, "Legal Immigrants Deported; Louis Freedberg, "Immigrants' Peril -- 'One Strike and You're Out'," *San Francisco Chronicle*, September 3, 1996: A1; R.A. Dyer, "Residents falling through cracks of deportation law," *Houston Chronicle*, June 9, 1996: 1; Trejo, "The long, long arm"; Susan Levine, "A Foreigner at

nuances of immigrants' situations, generating kernels of sympathy for a group that had been widely denounced as threats to the safety of American citizens. These individual stories would prove a key tool in renewed mobilization campaigns against deportations during the Trump era, which will be discussed further in Chapter Three.

Senator Spencer Abraham (R-MI), who helped write the deportation provisions of the laws, expressed surprise that the INS was pursuing old and relatively minor cases, even though the laws removed the agency's flexibility in making deportation decisions.⁴¹⁷ INS legal counsel at the time David Martin expressed concerns over the inflexibility of the new laws, stating, "It is a serious matter if someone commits a crime, but the law has to have some flexibility to take into account individual circumstances for people who have paid their debt through the criminal justice system."⁴¹⁸ Even the Commissioner of the INS, Doris Meissner, admitted at the time that "Congress had 'probably gone a bit too far' and that her agency need[ed] more flexibility if legal residents of this country [were] to be treated like human beings."⁴¹⁹ AEDPA and IIRIRA left INS with little choice but to enforce the laws.⁴²⁰

Still, hardline anti-immigration activists did not see the mass deportations as the detriment that most people did. For them, deportation was a righting of the natural order of society. "Deportation...is not a criminal conviction," said FAIR's Dan Stein. "We're not putting people in jail. We're liberating them to their own jurisdiction, their own country...to bloom where they're

Home," *Washington Post*, March 5, 2000: A1; Barry Newman, "For Criminal Aliens, The Deportation Boot Is a Very Swift Kick," July 9, 1999, *Wall Street Journal*.

⁴¹⁷ Trejo, "The long, long arm."

⁴¹⁸ Freedberg, "Immigrants' Peril."

⁴¹⁹ Michael Huspek, "Casting a wide net," *San Diego Union Tribune*, January 21, 1999.

⁴²⁰ Reuben, "McDeportation".

planted.”⁴²¹ A *Washington Times* editorial defended the law as appropriate punishment for those who have demonstrated “a willful disregard for the laws of their adopted country.”⁴²² Concluding that anyone subject to the law must have committed “an especially horrendous crime,...it hardly seems too extreme to establish and enforce a rule of ‘zero tolerance’ when it comes to drug dealing in a nation where marijuana and cocaine consumption by teenagers and pre-teens has soared during the past four years.”

Congressman Lamar Smith (R-TX), one of the law’s strongest proponents, and Edward Grant, a congressional attorney, drew on tough-on-crime rhetoric for a law review article defending the laws’ tough approach to deportation. “These measures are not driven by vindictiveness, but by idealism,” they wrote.⁴²³ “When immigration is accompanied by lawlessness, the American people suffer through loss of life, health, and property. In addition, when accompanied by crime, immigration comes to be seen not as a source of pride and renewal for all Americans but as a contributor to our problems. In the end, therefore, it is the immigrants themselves who pay for our failure to be decisive in our treatment of criminal aliens.”

However, not even the staunchest defenders of the laws could have anticipated just how severe the effects of the laws would be on long-term permanent residents and their families, and efforts to revise the laws’ harshest elements began soon after passage. Immigration advocates, including the National Immigration Forum and the American Civil Liberties Union, launched “Fix ’96,” a campaign to reform the 1996 laws.⁴²⁴ By 1999, some members of Congress joined the Fix

⁴²¹ “Deporting Americans,” *Nightline*.

⁴²² “Yes to immigration, no to crime,” *Washington Times*, April 13, 1997: B2. <https://infoweb-newsbank-com.ezproxy.library.uvic.ca/apps/news/document-view?p=AWNB&docref=news/0EB0F26E0B6B1D2C>.

⁴²³ Lamar Smith and Edward Grant, “Immigration Reform: Seeking the Right Reasons,” *St. Mary’s Law Journal* 28, no. 4 (1997): 936.

⁴²⁴ Macías-Rojas, “Immigration and the War on Crime,” 15.

'96 Fight, including Republicans.⁴²⁵ One of those who helped write the law, Congressman Bill McCollum, was running for the United States Senate in Florida and was competing for the Hispanic vote. He acknowledged that the bill had gone too far.

Several members of Congress—including Congressman Smith, the chief architect of the law—wrote a letter in 1999 to then-Attorney General Janet Reno, recognizing the “apparent extreme hardship” the law was causing to some legal permanent residents who had come to the United States as children and had committed low-level crimes. The letter expressed concern that Reno had not used prosecutorial discretion to prevent those deportations.⁴²⁶ With media stories chronicling the stories of many low-risk immigrants caught up in the laws’ wide reach, sympathy for reform of these policies grew. Politicians began courting the growing number of Hispanic voters, and momentum for strict immigration laws began to shift. “I don’t think immigrant bashing is going to be popular in 2000,” said Senator Lincoln Diaz-Balart (R-FL).⁴²⁷

In addition to the publicity campaigns against the aggressive deportation laws, movement within Congress to soften the laws began just a few years after they were passed. Beginning in 1999, Congressman Barney Frank (D-NY) proposed legislation numerous times that would ameliorate the effects of the deportation law on families by giving the Attorney General the authority to cancel the removal of permanent legal residents under certain circumstances. Yet as quickly as efforts to reform the laws began, so too did the anti-immigrant, fear-based rhetoric. After Congressman Frank introduced his bill, anti-immigration activists pounced with claims that

⁴²⁵ William E. Gibson, “Immigrants Flexing Their Political Muscle,” *National, Sun-Sentinel* (Fort Lauderdale, FL), October 18, 1999.

⁴²⁶ Macías-Rojas, “Immigration and the War on Crime,” 15. This letter was brought to light in recent years when Rep. Smith claimed that President Obama was exceeding his authority by exercising prosecutorial discretion to prevent the deportation of DREAMers.

⁴²⁷ Michael Higgins, “Bordering on a Softer Stance,” *ABA Journal* 85, no. 7 (July 1999): 71.

Frank wanted “to let foreign criminals stay in this country.”⁴²⁸ James R. Edwards Jr. of the Hudson Institute wrote, “[C]oddling criminal immigrants is anything but pro-family -- it's pro-criminal, anti-American and anything but a laughing matter.”⁴²⁹ The legislation never made it to a vote.

In 2000, Senator Ted Kennedy introduced a bill with bipartisan support to repeal the harshest provisions of IIRIRA. “The 1996 law has had harsh consequences that violate fundamental principles of family integrity, individual liberty, fairness, and due process,” said Kennedy in introducing the bill.⁴³⁰ “Families are being torn apart. Persons who are no danger to the community have languished in INS detention. Individuals who made small mistakes and atoned for their crimes long ago are being summarily deported from the United States to countries they no longer remember, separated from all that they know and love in this country.” In a 2001 address to Congress, as he prepared to leave office, President Clinton lamented the effect the 1996 laws had on immigrants and encouraged Congress to take up the cause. “It is time to restore due process and judicial discretion,” he said, “to ensure that unnecessary family tragedies do not continue.”⁴³¹ These efforts to repeal detention and deportation provisions, though, were soon thwarted by the events of 9/11.⁴³²

If Americans had been fearful of immigrants before, the attacks on September 11, 2001, by immigrants who had come to the United States legally, left the country paralyzed in terror. Any

⁴²⁸ James R Edwards, Jr., “Barney Frank’s Immigration-Reform Redux,” *Insight on the News* 18, no. 19 (May 27, 2002): 46, <http://ezproxy.library.uvic.ca/login?url=http://search.ebscohost.com/login.aspx?direct=true&db=bwh&AN=6690307&site=ehost-live&scope=site>.

⁴²⁹ Edwards, “Barney Frank’s Immigration-Reform Redux.”

⁴³⁰ *Immigrant Fairness Restoration Act of 2000*, S. 3120, 106th Cong., 2nd sess., *Congressional Record* 146 (September 27, 2000): S9387.

⁴³¹ Bill Clinton, “President William J. Clinton’s Message to Congress: The Unfinished Work of Building One America,” January 15, 2001, https://clintonwhitehouse5.archives.gov/library/hot_releases/January_15_2001_6.html.

⁴³² Macías-Rojas, “Immigration and the War on Crime,” 15.

hopes of reforming AEDPA and IIRIRA were lost and instead controls on immigrants and immigration tightened.⁴³³ The USA PATRIOT Act,⁴³⁴ a sweeping piece of legislation enacted in 2001 just weeks after the attacks of 9/11, augmented the policies created by AEDPA and IIRIRA by further extending the categories of deportable offenses.⁴³⁵ Although intended to prevent future acts of terrorism, the expanded deportation regime primarily affected immigrants from Latin America, not the countries from which the 9/11 terrorists originated.⁴³⁶ Linking immigration to terrorism gave political cover for racially-oriented restrictions and violations of human rights.⁴³⁷ In 2003, President George W. Bush folded the Immigration and Naturalization Service into the Department of Homeland Security, marking an official merging of immigration and crime. The Bush administration continued its crackdown on criminal aliens in 2008 with the introduction of a program that increased technology and information sharing between federal and state officials, with the provocative name “Secure Communities.” The program’s goal was to “improve and modernize efforts to identify aliens convicted of a crime, sentenced to imprisonment, and who may be deportable, and remove them from the United States once they are judged deportable.”⁴³⁸ The program saw immediate success, quadrupling deportations in its first four years.⁴³⁹

⁴³³ Goodman, *The Deportation Machine*, 180.

⁴³⁴ *USA PATRIOT Act*, Pub. L. 107–56, 115 Stat. 272 (2001), <https://www.congress.gov/bill/107th-congress/house-bill/3162/text>. Signed by President George W. Bush on October 26, 2001, USA PATRIOT Act is an acronym for Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism.

⁴³⁵ Douglas S. Massey, “Creating the exclusionist society: from the War on Poverty to the war on immigrants,” *Ethnic and Racial Studies* 43, no. 1 (2017): 27.

⁴³⁶ Massey, “Creating the exclusionist society,” 27.

⁴³⁷ Goodman, *The Deportation Machine*, 180.

⁴³⁸ US Immigration and Customs Enforcement, Secure Communities Program Presentations, https://www.ice.gov/doclib/foia/secure_communities/securecommunitiespresentations.pdf.

⁴³⁹ Goodman, *Deportation Machine*, 181.

President Barack Obama continued the Safe Communities program as well as other deportation enforcement programs, under the mandate of deporting “felons, not families.”⁴⁴⁰ While some argued that he was right to focus deportation efforts on criminals, others felt that this outsized focus on criminal aliens “ultimately reinforced systemic injustice while failing to increase public safety or inspire comprehensive immigration reform.”⁴⁴¹ Secure Communities and other removal enforcement policies during the Obama administration resulted in so many deportations that the President earned the nickname “Deporter-in-Chief.”⁴⁴² Secure Communities was heavily criticized, with charges that the program led to racial profiling and instilled fear in the undocumented community, thus making communities less secure.⁴⁴³ A study from August 2014 found that “Secure Communities [had] led to no meaningful reductions in the FBI index crime rate,” nor had it reduced violent crimes such as rape and murder.⁴⁴⁴ The evidence showed, according to the report, “that the program [had] not served its central objective of making communities safer.”⁴⁴⁵ Recognizing criticism of the program, the Obama administration suspended Safe Communities a few months later.⁴⁴⁶

⁴⁴⁰ Macías-Rojas, “Immigration and the War on Crime,” 15; Daniel Kanstroom, “Passed Beyond Our Aid: U.S. Deportation, Integrity, and the Rule of Law,” *Fletcher Forum of World Affairs* 35, no. 2 (summer 2011): 97.

⁴⁴¹ Kathryn Miller, “Immigration Detention and Deportation Under the Obama Administration,” in *Debates on Immigration*, ed. Judith Gans, Elaine M. Replegle, and Daniel J. Tichenor (Thousand Oaks, CA: SAGE Publications, 2012), 2, <http://ezproxy.library.uvic.ca/login?url=http://search.ebscohost.com/login.aspx?direct=true&db=bwh&AN=6690307&site=ehost-live&scope=site>.

⁴⁴² Goodman, *Deportation Machine*, 196.

⁴⁴³ Goodman, *Deportation Machine*, 182.

⁴⁴⁴ Thomas J. Miles and Adam B. Cox, “Does Immigration Enforcement Reduce Crime? Evidence from “Secure Communities,” draft, https://www.law.uchicago.edu/files/file/does_immigration_enforcement_reduce_crime_082514.pdf, later published at *Journal of Law & Economics* 57, no. 4 (November 2014): 937-973.

⁴⁴⁵ Miles and Cox, “Does Immigration Enforcement Reduce Crime?,” draft version.

⁴⁴⁶ Jeh Charles Johnson, Secretary of US Department of Homeland Security, to Thomas S. Winkowski, Acting Director, US Customs and Immigration Enforcement; Megan Mack, Officer, Office of Civil Rights and Civil Liberties; and Philip A. McNamara, Assistant Secretary for Intergovernmental Affairs, memorandum, November 20, 2014, https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf; “Obama Ends

Despite the fairly moderate policies of the Obama administration, the election of the first Black president sparked a backlash by many Americans. The conservative Tea Party movement and Birtherism—the belief that President Obama was not born in the United States and was therefore a foreigner—emerged soon after his election and stoked right-wing tensions throughout his two terms. “It is...difficult to escape the conclusion that the intense personal animus towards President Obama, particularly that expressed by the Birther movement, was driven by racially-edged sentiments and a suspicion that Obama was regarded by many conservatives as an illegitimate outsider because of his race.”⁴⁴⁷

Leading the birther movement during Obama’s presidency was celebrity businessman Donald Trump, whose dog-whistling was well-received among the right wing and became a staple on the campaign trail for the presidency. Once elected in 2018, he turned his xenophobic, anti-immigration rhetoric into brutal and oppressive policy, with escalation of deportation as a key feature. Despite the lack of evidence for Secure Communities’ effectiveness, days after taking office in 2017, Donald Trump signed executive orders to reinstate the program and to “broaden categories of crime that make people deportable, ramp up detention and deportation, and deepen ties between the immigration and criminal justice system.”⁴⁴⁸ Trump pressured the immigrants’ home countries to accept their return,⁴⁴⁹ reinterpreted laws and long-standing practices to find legal

Secure Communities Program That Helped Hike Deportations,” NBC News, updated November 21, 2014, <https://www.nbcnews.com/storyline/immigration-reform/obama-ends-secure-communities-program-helped-hike-deportations-n253541>.

⁴⁴⁷ Edward, Dumbrell, and Waddan, *The American Right After Reagan*, 19.

⁴⁴⁸ Macías-Rojas, “Immigration and the War on Crime,” 16; “Enhancing Public Safety in the Interior of the United States,” Federal Register, Executive Order No. 13768, January 30, 2017, <https://www.federalregister.gov/documents/2017/01/30/2017-02102/enhancing-public-safety-in-the-interior-of-the-united-states>.

⁴⁴⁹ Yesenia Amaro, “It’s an Immigration Crisis Few Know of. And Fresno County Might Be at the Center of It,” *Fresno Bee*, September 8, 2018, available at <https://www.fresnobee.com/news/local/article216807055.html>; Charles Dunst and Krishnadev Calamur, “Trump Moves to Deport Vietnam War Refugees,” *The Atlantic*, Global, December

support for his efforts, and boosted enforcement by sending immigration officers to raid refugee communities.⁴⁵⁰ “Zero tolerance for criminal aliens,” Trump told rallygoers at a campaign rally in 2016. “Zero. Zero. Zero.”⁴⁵¹ According to Trump, President Obama did not sufficiently enforce deportation laws and allowed “thousands of criminal aliens to freely roam our streets, walk around, do whatever they way, crime all over the place....Probably a couple in this room.” Trump’s administration was rife with rhetoric that dehumanized immigrants and denigrated non-Americans.

Twenty-five years after the passage of AEDPA and IIRIRA, efforts to make major revisions to the laws continue to fail, and the rhetoric painting immigrants as threats to the American public endures. In 2019, Congressman Chuy Garcia introduced the New Way Forward Act, a bill that would radically overhaul many immigration laws including deportation of criminal aliens. The goal of the bill was to correct “racial and anti-immigrant injustices embedded in our immigration laws, many of which have enabled the Trump Administration’s inhumane assault on non-citizens in the United States and at our southern border.”⁴⁵² Response to the bill was fierce, following the familiar rhetoric of casting immigrants as threats to the safety of American citizens. An opinion writer for *The Hill* said the bill would “use tax dollars to import crime to American” and expressed concern that the bill would “let aliens loose into the heartland while they await” a

13, 2018, available at <https://www.theatlantic.com/international/archive/2018/12/donald-trump-deport-vietnam-war-refugees/577993/>

⁴⁵⁰ Anh Do, “As more Cambodian and Vietnamese immigrants are targeted for deportation, advocates say they ‘can’t stay silent,’” *Los Angeles Times*, California, January 25, 2018, available at <https://www.latimes.com/local/lanow/la-me-ln-asian-deportations-20180125-htlstory.html>; Dunst and Calamur, “Trump Moves to Deport Vietnam War Refugees.”

⁴⁵¹ *New York Times*, text of immigration speech, August 30, 2016.

⁴⁵² “Representatives García, Pressley, Jayapal and Bass Introduce the New Way Forward Act to Fight the Criminalization of Immigrants,” press release, Office of Jesús “Chuy” García, December 10, 2019, <https://chuygarcia.house.gov/media/press-releases/representatives-garc-pressley-jayapal-and-bass-introduce-new-way-forward-act>.

deportation hearing.⁴⁵³ Congressman Bradley Byrne (R-AL) asked in an op-ed piece, “Why would we want to protect convicted felons from being deported? This legislation would roll out a welcome mat for them.”⁴⁵⁴ A concerned reader of the *Pittsburgh Post-Gazette* wrote in a letter to the editor, “Under no circumstances should this bill be passed. Doing so would be the downward spiral of America into a borderless land mass where U.S. citizens once safely roamed and thrived, to be overrun by unscrupulous immigrants.”⁴⁵⁵

TV pundit Tucker Carlson aired a long segment on his Fox News show railing against the bill. “The New Way Forward act is the most radical single piece of legislation we’ve seen proposed in this country,” he said, warning that the bill would give “anti-American immigration judges – and many of them are exactly that – [...] a blank check to open the borders. No vote required.” Carlson found the most egregious aspect of the bill to be the provision for bringing back deportees whose removals would not have occurred under the law as proposed. “What could be more destructive than changing U.S. law, specifically to allow rapists, child molesters, and drug dealers to stay in America? How about this: Using taxpayer money to bring deported criminals back into America. That’s right. This bill would not only abolish your right to control who lives in your own country, but it invents anew right in return: the “right to come home.” America, he claimed, would become “a borderless rest area for the world’s worst predators and parasites.” The bill failed to

⁴⁵³ Nolan Rappaport, “House Democrats' immigration bill would use tax dollars to import crime to America,” *The Hill*, February 13, 2020, <https://thehill.com/opinion/immigration/482910-house-democrats-immigration-bill-would-use-tax-dollars-to-import-crime-to>.

⁴⁵⁴ Bradley Byrne, “The New Way Forward Act is an assault on our borders,” *Alabama Political Reporter*, February 19, 2020, <https://www.alreporter.com/2020/02/19/opinion-the-new-way-forward-act-is-an-assault-on-our-borders/>.

⁴⁵⁵ Patty Bajek, “Be informed,” *Pittsburgh Post-Gazette*, February 18, 2020, News, <https://infoweb-newsbank-com.ezproxy.library.uvic.ca/apps/news/document-view?p=AWNB&docref=news/179315168BE33A68>.

move forward during the 116th Congress, but Congressman Garcia reintroduced the measure in the new Congress in January 2021, where it has been referred to committees for review.⁴⁵⁶

In February 2021, President Biden presented an immigration reform bill, introduced in the House by Congresswoman Linda Sánchez, called the United States Citizenship Act.⁴⁵⁷ Among its provisions, the Act would allow the Attorney General or the Department of Homeland Security to issue a waiver against the removal of a permanent resident for humanitarian, family unity, or public interest purposes. The waiver would be considered based on criteria such as the severity of the crime, the duration of the non-citizen's residence, evidence of the alien's rehabilitation, and the effect deportation would have on the family. Again, detractors pounced. A fellow of the Center for Immigration Studies, an anti-immigration think tank, suggested renaming the bill, "The Drug Trafficker, Pimp, and Racist Relief Act."⁴⁵⁸

Ultimately, regardless of the party in power, the deportation of criminal aliens has expanded dramatically over the past twenty-five years. Both parties capitalized on fears of immigrants to win votes and created policies that resulted in the mass deportation of criminal aliens, and presidents of both parties implemented policies that continued to justify deportation of criminal aliens as "being in the interests of public safety and homeland security, and implicitly rationalized by the notion of a natural return to the deportees' homeland."⁴⁵⁹ Nevertheless, over

⁴⁵⁶ *The New Way Forward Act*, H.R. 536, 117th Cong., 1st sess., *Congressional Record* 167 (January 28, 2021), <https://www.congress.gov/bill/117th-congress/house-bill/536/all-actions?q=%7B%22search%22%3A%5B%22new+way+forward%22%5D%7D&s=6&r=1>.

⁴⁵⁷ *U.S. Citizenship Act of 2021*, H.R. 1777, 117th Cong., 1st sess., *Congressional Record* 167 (February 18, 2021); see also, <https://www.nafsa.org/regulatory-information/us-citizenship-act-2021#:~:text=On%20February%2018%2C%202021%2C%20Representative,system%2C%20and%20for%20other%20purposes>.

⁴⁵⁸ Andrew R. Arthur, "Criminal Alien Amnesty Hiding in Biden Amnesty Bill: The 'Drug Trafficker, Pimp, and Rapist Relief Act,'" Center for Immigration Studies, March 1, 2021, <https://cis.org/Arthur/Criminal-Alien-Amnesty-Hiding-Biden-Amnesty-Bill>.

⁴⁵⁹ Cowan, "Cambodians Go 'Home,'" 100; Coutin, "Exiled By Law," 353.

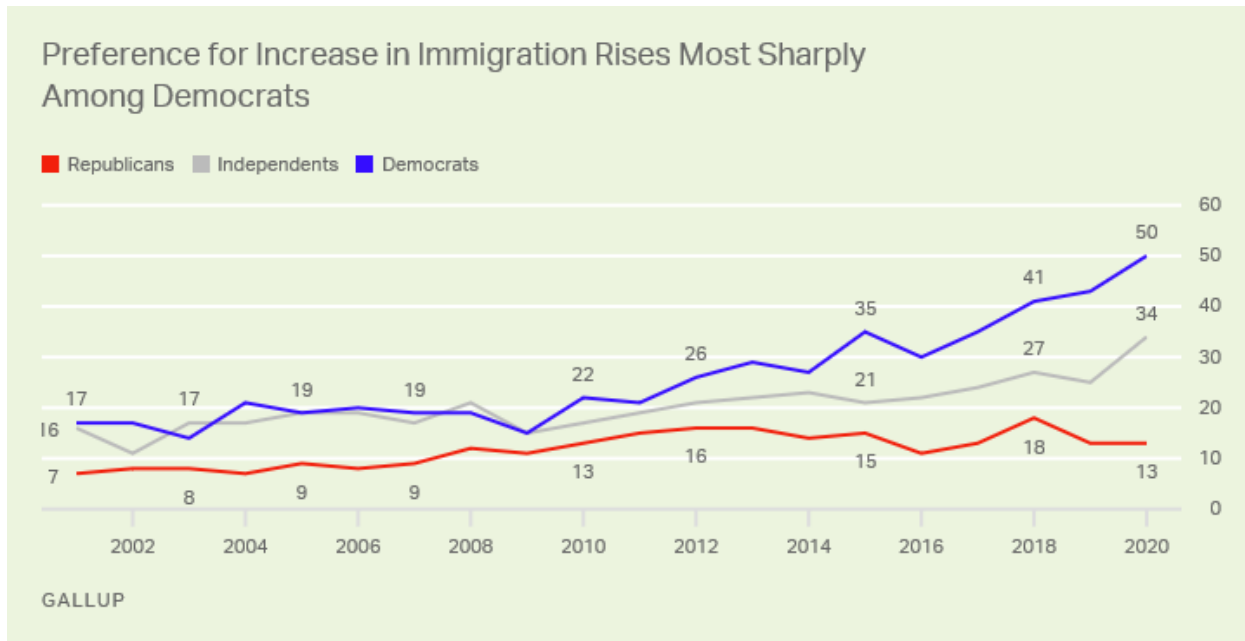
the same period, public polling shows that Americans have become increasingly more welcoming of immigrants overall. In the early 1990s and leading up to the passage of the 1996 immigration laws, Gallup polling showed that the percentage of Americans who felt the country was allowing too much immigration reached sixty-five percent, with only about seven percent favoring an increase in immigration levels.⁴⁶⁰ By 2020, only twenty-eight percent of respondents believed immigration levels should be decreased, while thirty-four percent believed it should be increased and thirty-six percent thought current levels were about right. These shifts occurred even while the country admitted far more immigrants.

Much of that change can be attributed to changes in attitude by Democrats over the past few decades, as shown in Figure 7.⁴⁶¹ Only seven percent of Republicans in 2001 favored increased immigration, a figure that more than doubled until Trump took office then softened again to around thirteen percent today. Support by Democrats for increased immigration, on the other hand, has jumped from seventeen percent in 2001 to around fifty percent today.

⁴⁶⁰ Gallup, immigration polling, <https://news.gallup.com/poll/1660/Immigration.aspx> (accessed May 25, 2021).

⁴⁶¹ Mohamed Younis, "Americans Want More, Not Less, Immigration for First Time," *Gallup News*, July 1, 2020, Politics, <https://news.gallup.com/poll/313106/americans-not-less-immigration-first-time.aspx>.

Figure 7: Preference for Increase in Immigration by Party Affiliation



Source: *Americans Want More, Not Less, Immigration for First Time*, Gallup, <https://news.gallup.com/poll/313106/americans-not-less-immigration-first-time.aspx>

Quantifying American opinions about deportation of criminal aliens would be difficult, however, the shift in rhetoric and policy proposals shows that a split has formed separating the parties. There seems to be a cooling of the passions that united politicians in passing the 1996 laws and a recognition on the left that the draconian policies they created have led to systemic injustice against immigrants who call America home. While acceptance of immigrants into society has grown among many Americans, however, many others still do not recognize the value of diversity in American society. This rift in perceptions reflects a larger divide that has appeared in recent years in how the American populace sees itself, and who Americans are as a people: a country that strives to live up to its founding ideals of refuge for the persecuted, individual liberty, and human dignity, or one intent on dehumanizing and expelling those who do not fit within its limited vision of who belongs.

Realities of deportation

“The most common justification for imposing such a precarious existence on noncitizens is rhetorically resonant but complex: these people, it is said, have violated the ‘rule of law.’”⁴⁶² Immigrants are technically visitors to the United States and thus do not merit protection from deportation as citizens do. If they commit crimes, they should be sent back to where they came from. While this all-or-nothing approach has rhetorical appeal, the reality is that deportation is much more involved than simply shipping home foreigners who broke the rules. A 1999 editorial in the *Miami Herald* marking the third anniversary of IIRIRA called it “a somber day in this nation built by immigrants.”⁴⁶³ Calling for reform of the law, the newspaper said, “Now plainly littered in its wake are broken families, devastated U.S. citizens, and people unjustly deported and jailed indefinitely—a new class of political prisoners in the land of the free.” Far from being a benign, bureaucratic governmental function, deportation has deep, painful, and lasting consequences for the deportee, their families—who are often United States citizens—and for the countries to which they return. The country has accepted legal permanent residents to be part of the society, and as discussed in the introduction, disregarded that position in society is morally unjustifiable. Yet even if some removals may be justified, the current United States deportation regime is vastly disproportionate to the levels needed to protect those within the borders from harm. As I have demonstrated, the number of deportations today is unprecedented in US history, and the growth of the system can be traced to a foundation based more on racial than security grounds. In this section, I will explain some of the primary concerns about the effects that such a large and severe system have on deportees, their families, and both the United States and the receiving countries.

⁴⁶² Kanstroom, *Aftermath*, x.

⁴⁶³ “Restore justice,” *Miami Herald*, September 30, 1999.

Many deportees are long-term residents of the United States and are often sent back to countries where they have not lived since they were very young or sometimes not at all.⁴⁶⁴ For deportees, returning “home” often means starting a new life in a strange place, a concept anthropologist Shahram Khosravi calls “estranged citizenship.”⁴⁶⁵ Deportees may lack the skills and abilities they need to succeed in the new economy and society.⁴⁶⁶ Deportees are at an economic disadvantage living in their new countries, whose economies are not as strong as those of the United States. There may be high rates of unemployment, and deportees may be ill-prepared to meet the needs of the local job market.⁴⁶⁷ Lack of language proficiency, skill sets that don’t match the local needs, and unfamiliarity with the structures and social networks of the country can all be stumbling blocks to successfully adjusting to their new homes.⁴⁶⁸ The more they were integrated into American society, the harder it may be for deportees to adjust to their new situation. Even the receiving state itself may also put up obstacles, such as refusing to give deportees identity cards.⁴⁶⁹

In addition to the economic difficulties deportees face, they may also encounter social stigmatization once they arrive in their country of citizenship. Locals know that refugees have been returned to their country from the United States due to criminal convictions and often treat deportees not as returned countrymen but as unwelcome bad elements.⁴⁷⁰ Deportees stand out when they are unfamiliar with the local customs or social norms or when they dress differently

⁴⁶⁴ Cowan, “Cambodians Go ‘Home’,” 100; Hing, “Detention to Deportation,” 902.

⁴⁶⁵ Khosravi, *After Deportation*, 2.

⁴⁶⁶ Buckinx and Filindra, “The Case Against Removal,” 398.

⁴⁶⁷ Buckinx and Filindra, “The Case Against Removal,” 398.

⁴⁶⁸ Buckinx and Filindra, “The Case Against Removal,” 398.

⁴⁶⁹ Buckinx and Filindra, “The Case Against Removal,” 399; Khosravi, “After Deportation,” 3.

⁴⁷⁰ Khosravi, *After Deportation*, 3-4.

from locals.⁴⁷¹ Even if they speak the local language, they may have an accent that marks them as different.⁴⁷²

Noncitizens who are deported due to criminal convictions may never see their families again. US immigration law provides little opportunity for return, and the reality is that a future life in the United States is unlikely.⁴⁷³ “Deportation can be a kind of life sentence for individuals who have been deported, but also for their family members.”⁴⁷⁴ Indeed, the United States Supreme Court has long recognized deportation as an especially severe penalty for criminal conduct—“the equivalent of banishment or exile”⁴⁷⁵ that “deprives a person of “all that makes like worth living.”⁴⁷⁶ Judge Learned Hand, writing in 1926, explained,

Whether [a deportee] came here in arms or at the age of ten, he is as much our product as though his mother had borne him on American soil. He knows no other language, no other people, no other habits, than ours; he will be as much a stranger in Poland as any one born of ancestors who immigrated in the seventeenth century. However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples. Such, indeed, it would be to any one, but to one already proved to be incapable of honest living, a helpless waif in a strange land, it will be utter destruction. That our reasonable efforts to rid ourselves of unassimilable immigrants should in execution be attended by such a cruel and barbarous result would be a national reproach.⁴⁷⁷

⁴⁷¹ Buckinx and Filindra, “The Case Against Removal,” 399.

⁴⁷² Buckinx and Filindra, “The Case Against Removal,” 399.

⁴⁷³ Boehm, “Separated Families,” 402, 409.

⁴⁷⁴ Boehm, “Separated Families,” 413

⁴⁷⁵ *Delgadillo v. Carmichael*, 332 U.S. 338, 390-391 (1947).

⁴⁷⁶ Bill Ong Hing, “Re-Examining the Zero-Tolerance Approach to Deporting Aggravated Felons: Restoring Discretionary Waivers and Developing New Tools,” *Harvard Law and Policy Review* 8, no. 1 (2014): 176, quoting Justice Brandeis in *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

⁴⁷⁷ *United States v. Davis*, 13 F.2d 630, 630-31 (2d Cir. 1926).

Although a person faces deportation as an individual, family members, too, are deeply affected.⁴⁷⁸ When an immigrant is deported, the family may lose a parent, breadwinner, and caregiver, as well as a loved one. Immigration enforcement practices “unsettle and impoverish families” by removing members and creating single-parent households or leaving children without a parent.⁴⁷⁹ The children of the deportees are usually American citizens, who lose their right to an intact family.⁴⁸⁰ “The constant threat of deportation erodes families’ sense of well-being and security. Children whose parents have been deported experience fear, depression, difficulties at school, displacement, and poverty.”⁴⁸¹ Yet the effects of deportation on the family are all but ignored under US law. Financial consequences can also be severe, for both the deportee and for the family members left behind. Immigrants who have spent years building businesses may be forced to close them. Job prospects in the receiving country are often low and, if the deportee does manage to find employment, the wages are likely to be much lower than they were earning in the United States. Family members left behind lose a source of income, and in some case, relatives in the deportee’s home country may lose remittances the deportee had sent from the United States, a valuable source of support in many countries.⁴⁸²

The harm of deportation extends through the entire immigrant community. “Since its reinvigoration in the late 1990s, deportation has torn through many communities like a capricious tornado: touching down suddenly from dark clouds and leaving a trail of devastation in its wake,

⁴⁷⁸ David A. Thronson, “Unhappy Families: The Failings of Immigration Law for Families That Are Not All Alike,” in *The New Deportations Delirium: Interdisciplinary Responses*, ed. Daniel Kanstroom and M. Brinton Lykes, (New York: New York University Press, 2015), 36.

⁴⁷⁹ Kerwin, “From IIRIRA to Trump,” 198.

⁴⁸⁰ Boehm, “Separated Families,” 408.

⁴⁸¹ Kerwin, “From IIRIRA to Trump,” 198.

⁴⁸² Khosravi, “After Deportation,” 3.

while sweeping away tens of millions of people from our midst.”⁴⁸³ In addition to losing a member of the community, targeted raids on immigrant communities reinforces the “otherness” immigrants already feel in the United States. Deportations of some refugees spread fear that the risk could extend to others within the community.⁴⁸⁴ As one activist said, “For members of our Southeast Asian communities, they’re speaking to a growing level of fear of government, and fear of mainstream Americans.”⁴⁸⁵ If it could happen to one member of the community, it could happen to any member.

The United States government offers little support for returnees post-deportation. A few countries have developed programs and resources to help resettle returnees, but they are the exception. “Once these people are deported—no matter how long they have lived in the United States—they are someone else’s responsibility.”⁴⁸⁶ For those deportees who came to the United States as refugees, the country of return may be unable to manage their resettlement. “As one prosecutor argued, ‘We’re sending back sophisticated criminals to unsophisticated, unindustrialized societies.’”⁴⁸⁷ Local authorities may be overwhelmed.

Despite the purported goal of increasing domestic security through removals, the automatic deportation of noncitizens convicted of crimes has negative ramifications for the broader population of the United States. Immigrants bring real and tangible benefits to their US communities, and deportation often removes productive members of that community, tears apart

⁴⁸³ Kanstroom, *Aftermath*, 7.

⁴⁸⁴ Matt McKinney, “Deportation Proposal Shakes Minnesota’s Southeast Asian Refugee Community,” *Star Tribune*, December 14, 2018, Local, <http://www.startribune.com/deportation-proposal-shakes-minnesota-s-southeast-asian-refugee-community/502746022/>.

⁴⁸⁵ McKinney, “Deportation Proposal Shakes.”

⁴⁸⁶ Kanstroom, *Aftermath*, 16.

⁴⁸⁷ Kanstroom, *Aftermath*, 17.

families, and reinforces a division between native and immigrant populations. The negative effects of deportation can be felt not only by the deportees and their families but also on the country to which the deportee is returned. “To call such countries ‘home’ for many of the deportees is at best a cruel joke.”⁴⁸⁸ The receiving countries may have problems integrating and supporting deportees who are struggling to adjust to their new lives. People who may have been successful—or at least functioning—in their post-conviction lives in the United States may become lost in their new homes, becoming a burden on their new community or even joining a gang or engaging in criminal behavior out of desperation. Although it can be difficult to study these effects, research has found instances of serious increases in crime and economic problems by some US deportees.⁴⁸⁹ Even if having deportees in the community does not lead to an increase in crime or gang activity, there may be a perception among locals that it will, bringing shame to relatives who take in deportees upon their return.⁴⁹⁰

Although international law prohibits the deportation of immigrants to places where they are at serious risk of harm, as discussed in Chapter One, deportees often still face security risks when they are sent to their home countries. Many returnees are sent to countries that continue to deal with violence and poverty.⁴⁹¹ Their rights may be denied by the receiving state, and they are left vulnerable not only to the violence of both the state and ordinary citizens.⁴⁹² Gangs pose a threat to many returnees, especially in Central America, where there are also real dangers of

⁴⁸⁸ Kanstroom, *Aftermath*, 16.

⁴⁸⁹ Kanstroom, *Aftermath*, 152.

⁴⁹⁰ Cowan, “Cambodians Go ‘Home’,” 144.

⁴⁹¹ Tanya Golash-Boza, “Punishment Beyond the Deportee: The Collateral Consequences of Deportation,” *American Behavioral Scientist* 63, no. 9 (2019): 1334.

⁴⁹² Khosravi, *After Deportation*, 4.

kidnapping and extortion.⁴⁹³ “Some deportees may be direct relatives of the resistance fighters, such as those recruited by the United States during the Vietnam War, placing them in danger of retaliation.⁴⁹⁴ Many ‘become victims before they can become victimizers.’ They are regarded as pariahs, hunted by vigilante squads, and some have been shot down within days of stepping off the places from the United States.”⁴⁹⁵ Refugee deportees, especially, are returned to countries that may themselves be struggling with past traumas.⁴⁹⁶ Rebuilding may be complicated by accepting for reintegration those who left the country during its struggles.

Some countries simply refuse to cooperate with the return of their citizens from the United States and are thus labelled “recalcitrant countries.” There is little the United States can do to force the countries to cooperate other than issue visa sanctions prohibiting certain types of travelers from entering the US. Visa sanctions are considered a harsh measure and damaging to foreign relations, prior to the Trump administration, was used only once—against Guyana in 2001. The Trump administration issued visa sanctions against ten recalcitrant countries during its single four-year term—The Gambia, Cambodia, Eritrea, Guinea, Sierra Leone, Burma, Laos, Cuba, Ghana, and Pakistan—eventually lifting sanctions against Guyana, Guinea, and The Gambia after they complied.⁴⁹⁷ Less developed countries, then, may lose their citizens to the United States then be

⁴⁹³ Golash-Boza, “Punishment Beyond the Deportee,” 1334; *see, e.g.*, “Deported to Danger: United States Deportation Policies Expose Salvadorans to Death and Abuse,” Human Rights Watch, February 5, 2020, <https://www.hrw.org/report/2020/02/05/deported-danger/united-states-deportation-policies-expose-salvadorans-death-and>; “Easy Prey: Criminal Violence and Central American Migration,” report no. 57, Latin America & Caribbean, International Crisis Group, July 28, 2016, <https://www.crisisgroup.org/latin-america-caribbean/central-america/easy-prey-criminal-violence-and-central-american-migration>.

⁴⁹⁴ Amaro, “It’s an Immigration Crisis.”

⁴⁹⁵ Kanstroom, *Aftermath*, 17.

⁴⁹⁶ Cowan, “Cambodians Go ‘Home,’” 113.

⁴⁹⁷ US Immigration and Customs Enforcement website, “Visa Sanctions Against Multiple Countries Pursuant to Section 243(d) of the Immigration and Nationality Act,” last updated May 12, 2021, [ice.gov/remove/visa-sanctions](https://ice.dhs.gov/remove/visa-sanctions) (accessed May 25, 2021).

forced by the US to accept their return, regardless of their ability to properly manage their re-integration. Long-term resident deportees were shaped by their lives in America, but when they commit criminal acts, America disavows its responsibilities for those members and casts them back to countries with which they may have little connection. Through deportation, the United States exercises its imperialism by imposing its considerable might to bend the will of smaller, more fragile nations.

As appalling as deportation is for deportees and the countries of return, it would be easier to justify if the United States were truly sending back the worst of the worst.⁴⁹⁸ Yet, the data show that is not the case. The Transactions Records Access Clearinghouse (TRAC) at Syracuse University maintains a database on immigration enforcement.⁴⁹⁹ Their data shows that in FY2020, only 35 percent of ICE removals were for aggravated felonies; the other 65 percent were for other criminal charges. Categorizing various offenses according to seriousness, TRAC's data shows that, since 2003, by far the most deportations arose from the least serious offenses—more than 1.3 million Level Three crimes versus just over 950,000 Level One crimes.⁵⁰⁰ The most common Level Three offenses have been drug possession, illegal entry, and driving under the influence.⁵⁰¹ Level One crimes include the most serious offenses, such as drug trafficking, sexual crimes, and homicide. The vast majority of noncitizens being deported for criminal activity, therefore, are not the worst of the worst, or even the second worst. They are primarily low-level, non-violent offenders.

⁴⁹⁸ Kanstroom, "Passed Beyond Our Aid," 98.

⁴⁹⁹ TRAC Immigration, "Latest Data: Immigration and Customs Enforcement Removals," <https://trac.syr.edu/phptools/immigration/remove/> (accessed May 21, 2021).

⁵⁰⁰ TRAC Immigration, <https://trac.syr.edu/immigration/> (accessed May 25, 2021).

⁵⁰¹ A few other odd Level 3 crimes that have resulted in deportation include contempt of Congress, government official not performing duties, and "abortion act on self."

Despite his bravado about getting rid of “bad hombres,” Donald Trump’s deportation record shows that his post-entry deportation efforts have also resulted in the removal of primarily lower-level offenders. After an initial bump in the percentage of Level One removals upon taking office, removals for the most serious crimes as a percentage of overall removals have dropped each year, from a high of twenty-three percent in 2017 to just 14.3 percent in 2019, with preliminary 2020 numbers reflecting a continuation of the trend.⁵⁰² The executive order Trump issued upon taking office prioritized deportations of aliens who were merely charged with a criminal offence, even if their case has not yet been adjudicated.⁵⁰³ His concern in using harsh deportation techniques seemed to have little to do with making communities safer and more to do with simply removing those he and his supporters believe do not belong.

Where a deportee lives also seems to matter a great deal. TRAC’s data shows that since 2003 Texas has led the nation with over 2.4 million deportations, including almost 1.3 million criminal alien removals.⁵⁰⁴ California is second, with just over a third of the Texas number—875,000 deportations over the same period, including almost half a million criminal deportees—despite having an immigrant population that is more than double that of Texas.⁵⁰⁵ Deportation enforcement, therefore, appear to be highly arbitrary and unevenly applied.

While concern about crime, regardless of the immigration status of the perpetrator, is legitimate, there is little evidence of any kind of empirical relationship between crime and

⁵⁰² TRAC Immigration, “ICE Detains Fewer Immigrants with Serious Criminal Convictions Under Trump Administration,” December 6, 2019, <https://trac.syr.edu/immigration/reports/585/>.

⁵⁰³ Federal Register, Executive Order No. 13768.

⁵⁰⁴ TRAC Immigration, “Latest Data,” <https://trac.syr.edu/phptools/immigration/remove/>.

⁵⁰⁵ Pew Research Center, “Foreign born, by state and region of birth: 2018,” most recent data as of August 20, 2020, available at https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2020/08/Pew-Research-Center_Current-Data_Statistical-Portrait-of-the-Foreign-Born-2018.pdf.

immigration.⁵⁰⁶ In fact research has found an inverse relation: noncitizens commit crimes at lower rates than native-born citizens.⁵⁰⁷ That holds true for both legal and illegal immigrants. A study by the conservative Cato Institute of 2015 data from Texas found that legal immigrants had a conviction rate that was sixty-six percent lower than that of native-born Texans.⁵⁰⁸ The overall crime rate has gone down in the last few decades in America⁵⁰⁹—including sharp drops in violent crimes—even as immigrants have been making up a much larger share of the population of the United States. Nevertheless, the stereotype of the criminal immigrant persists in US political discourse.

As this chapter has explained, this discourse has been a boon to politicians looking to shore up electoral support. Heavy-handed deportation policy provided an avenue for elected officials to show effective governance by scapegoating a generally unsympathetic group with little political influence. “Though the specific political reasons for each step in this harsh turn were complex, this much is clear: the post-entry social control deportation system was a perfect vehicle for most politicians to demonstrate toughness on crime at virtually no political cost.”⁵¹⁰ By turning attention toward criminal aliens, officials could be seen as doing something meaningful about all immigration problems, including “the more intractable, resurgent problem of undocumented

⁵⁰⁶ Simes and Waters, “The Politics of Immigration and Crime,” 2.

⁵⁰⁷ Simes and Waters, “The Politics of Immigration and Crime,” 3.

⁵⁰⁸ Alex Nowrasteh, “Criminal Immigrants in Texas: Illegal Immigrant Conviction and Arrest Rates for Homicide, Sex Crimes, Larceny, and Other Crimes,” CATO Institute (February 26, 2018), <https://www.cato.org/publications/immigration-research-policy-brief/criminal-immigrants-texas-illegal-immigrant#background>.

⁵⁰⁹ Sines and Waters, “The Politics of Immigration and Crime,” 5; John Gramlich, “What the data says (and doesn’t say) about crime in the United States,” Pew Research Center, November 20, 2020, <https://www.pewresearch.org/fact-tank/2020/11/20/facts-about-crime-in-the-u-s/>; see Figure 6.

⁵¹⁰ Kanstroom, *Deportation Nation*, 227.

immigration. Those individuals, families, and communities who bore the brunt of these policies and those who feared their implications and trends went largely unheard.”⁵¹¹

The “tough on crime” rhetoric of the late twentieth century also coincided with a growing trend by the United States toward a realist approach to world affairs. The country’s post-World War II commitment to human rights and the promotion of liberal institutions such as international law was a temporary reaction to the massive war-time human rights violations, but these progressive notions were quickly supplanted by suspicion of these institutions and an ambivalence toward the human rights practices the country had once promoted.⁵¹² A notable exception to this trend was under President Jimmy Carter, who “elevated concern for human rights abroad to the first tier of US objectives.”⁵¹³ It was during Carter’s tenure that the calamitous results of US involvement in affairs in Southeast Asia during the 1960s and 1970s bubbled into a full-blown humanitarian crisis. Reaction to that crisis created a clash between the national mythology of America as a place of refuge and of a protectionist America leery of admitting large numbers of refugees. In the next chapter, I will consider this struggle between American values in the context of US deportation policy through the lens of the unique case of Cambodia.

⁵¹¹ Kanstroom, *Deportation Nation*, 227. Among those most affected by the changes were noncitizens who were eligible for deportation. ICE activities were heavily affected by the Covid-19 pandemic in FY2020, but the agency still conducted more than 185,000 removals of noncitizens, of which 92 percent had criminal convictions or pending criminal charges, up from 67 percent in 2011. US Immigration and Customs Enforcement, ERO FY2020, report, last updated December 29, 2020, available at <https://www.ice.gov/features/ERO-2020>.

⁵¹² Julie Harrelson-Stephens and Rhonda L. Callaway, “‘The Empire Strikes Back’: The US Assault on the International Human Rights Regime,” *Human Rights Review* 10, no. 3 (2009): 442.

⁵¹³ David P. Forsythe, “US Foreign Policy and Human Rights: Situating Obama,” *Human Rights Quarterly* 33, no. 3 (August 2011): 770.

Chapter 3: The Deportation of Cambodian Refugees from the United States

The United States boasts a long and proud history of providing refuge to displaced persons from around the world. “From George Washington's 1783 expression of open arms to the ‘oppressed and persecuted,’ to the admission of more than 14,000 Kosovo refugees in 1999, two centuries of similar statements from leaders and citizenry alike have helped to project, even if they did not always accurately reflect, a certain national generosity of spirit.”⁵¹⁴ Since the passage of the Refugee Act of 1980,⁵¹⁵ which set a new standard for the United States as “a haven for the persecuted and dispossessed,”⁵¹⁶ the United States has resettled more than three million refugees, more than any other country in the world.⁵¹⁷ Yet that record is also tainted by the role America played in creating the conditions that led many people to flee. Intervention by the United States in Southeast Asia in the 1970s contributed to the displacement of hundreds of thousands of people from their homes, including thousands of Cambodians. Among those refugees was Lundy Khoy.

Lundy Khoy was born in 1980 in a refugee camp in Thailand after her parents fled the violence of war in Cambodia.⁵¹⁸ She and her family arrived in the United States when she was one, and Lundy became a legal permanent resident. In 2000, as a nineteen-year-old college student, Lundy was walking down a street with a friend when they were stopped by the police. She was asked whether she had any drugs, and she answered honestly: she was carrying seven tablets of

⁵¹⁴ Hing, “Detention to Deportation,” 923.

⁵¹⁵ *Refugee Act of 1980*, Pub. L. No. 96-212, 94 Stat. 102 (1980).

⁵¹⁶ Kerwin, “The US Refugee Protection System,” 205.

⁵¹⁷ “U.S. Resettles Fewer Refugees, Even as Global Number of Displaced People Grows,” Pew Research Center, October 12, 2017, <https://www.pewresearch.org/global/2017/10/12/u-s-resettles-fewer-refugees-even-as-global-number-of-displaced-people-grows/#:~:text=The%20U.S.%20has%20resettled%20more,by%20the%20U.S.%20has%20increased>.

⁵¹⁸ Lundy Khoy, “Mr. Trump: I am an Immigrant with a criminal record,” *New York Times*, Opinion, November 24, 2016, available at <https://www.nytimes.com/2016/11/24/opinion/mr-trump-i-am-an-immigrant-with-a-criminal-record.html?emc=eta1>.

the narcotic Ecstasy. Lundy was arrested and charged with possession with intent to sell, a felony in the Commonwealth of Virginia. On the advice of her lawyer, she pleaded guilty, received a five-year suspended prison sentence, and served three months in a correctional facility and four years of probation. She went about getting her life back on track. On a routine visit to her probation officer, she was met by immigration officers, who detained her and told her she was likely going to be deported to Cambodia, a country in which she had never set foot. Pending deportation, Lundy was held in a detention center for nine months, but because Cambodia did not issue the necessary travel documents, she was eventually released. She received a pardon from the governor of Virginia, but more than twenty years after her conviction, she remains at risk of deportation.

Lundy's case is not unique. More than 250,000 Cambodian Americans live in the United States,⁵¹⁹ and they “are among the poorest, least educated, and least-integrated Asian American subgroups” in the US today.⁵²⁰ They also have a disproportionately high level of criminality, which now puts many Cambodians who have lived most of their lives in the United States at risk of deportation. Since 2003, more than 1,000 Cambodian citizens have been deported, more than half having arrived in the United States before 2002.⁵²¹ Mistakes made as young people have been punished by what amounts to a life sentence away from their families, their communities, and their homes. In Cambodia, they face economic, social, and emotional harms, with little opportunity for amelioration of their situations. Chapters One and Two traced how the US deportation system

⁵¹⁹ US Census, Selected Population Profile in the United States, Table S0201, 2019: ACS 1-Year Selected Population Profiles, <https://data.census.gov/cedsci/table?t=-04%20-%20All%20available%20detailed%20Asian%20races&tid=ACSSPP1Y2019.S0201&hidePreview=false>.

⁵²⁰ James Ciment and Justin Corfield, “The Cambodian American Experience: History and Culture,” in *Asian American History and Culture: An Encyclopedia*, ed. Huping Ling and Allan W. Austin (London and New York: Taylor & Francis Group, 2010), 97.

⁵²¹ TRAC Immigration Data, Latest Data: Immigration and Customs Enforcement Removals, ICE Data through February 2020, <https://trac.syr.edu/phptools/immigration/remove/>.

developed over time, the role of anti-immigration rhetoric in policymaking, and the deleterious effects deportation has on deportees, their families, and the countries of return. Chapter two also included a discussion of the Refugee Act of 1980, which was passed in reaction to the refugee crisis caused by the wars in Southeast Asia. In this chapter, I will look at the US deportation regime through the case of Cambodia, a country that provides a striking example of the conflict between the US's moral ideals and the racialized policies that pervade its immigration laws.

The United States has a moral duty to treat those people who it turned into refugees with greater deference than other immigrants.⁵²² Yet the US deportation policy does not consider refugee origins when Cambodian refugees commit crimes. In this chapter, I outline the multiple traumas Cambodian refugees experienced, from the violence of war to their time in refugee camps to their difficulties in resettlement, and show how US policies played a role in each step. These traumas created the conditions under which susceptibility toward criminal behavior flourished. Yet when a Cambodian refugee commits a crime, they are automatically expelled from the United States as if they were a stranger. By disregarding the country's responsibility for the multiple displacements of Cambodian refugees, the United States fails to live up to the intentions of the Refugee Act and its moral ideals as a place of refuge for the "huddled masses yearning to be free."

Initial displacement

Virtually all Cambodian immigrants arrived in the United States as refugees in three waves sparked by crises in Cambodia from the 1970s through early 1990s. The first wave of Cambodian refugees arrived after civil war erupted in Cambodia from 1970 through 1975, when the Communist Khmer Rouge, led by Pol Pot, one of the most notorious dictators in twentieth century,

⁵²² Walzer, *Spheres of Justice*, 49.

fought the Cambodian government for control.⁵²³ Part of the US strategy to combat the spread of communism in the region was to help the Cambodian government fight against the Khmer Rouge through a massive bombing campaign—first across the countryside, then targeted at more populated areas. The bombing killed or displaced thousands of civilians.⁵²⁴ The official US policy was to minimize its efforts to aid victims, instead trying to keep a low profile in Cambodia. By 1972, however, the war had displaced nearly 700,000 Cambodians, and the United States began to send aid. Wealthier, elite Cambodians began to make their way to the US, marking the first wave of refugees.

In 1975, the Khmer Rouge toppled the Cambodian government and took control.⁵²⁵ The barbarous Pol Pot regime led to executions, forced labor, malnutrition and starvation, and disease, resulting in a genocide that caused the deaths of between 1.5 and 2 million people—nearly 25 percent of the country’s entire population.⁵²⁶ The Khmer Rouge was so brutal that columnists for the Washington Post wrote in July 1977, “Adolf Hitler at his worst was not as oppressive as the Communist rulers of tiny Cambodia.”⁵²⁷ Approximately 200,000 Cambodians fled, arriving mainly in Vietnam and Thailand.⁵²⁸ Around 6,000 Cambodian refugees went to America, the first time large numbers of Cambodians went to live in the United States.⁵²⁹

The third and most significant wave of refugees occurred after Vietnam invaded Cambodia in 1978 and overthrew Pol Pot’s regime. The Khmer Rouge continued to fight, and by 1982,

⁵²³ Hing, “Detention to Deportation,” 912.

⁵²⁴ Hing, “Detention to Deportation,” 912. The US dropped more than one hundred thousand tons of bombs on the Cambodian countryside in the early 1970s then began bombing more populated areas.

⁵²⁵ Hing, “Detention to Deportation,” 913.

⁵²⁶ Hing, “Detention to Deportation,” 891.

⁵²⁷ Hing, “Detention to Deportation,” 913.

⁵²⁸ Ciment and Justin Corfield, “The Cambodian American Experience, 97.

⁵²⁹ Hing, “Detention to Deportation,” 914.

hundreds of thousands of Cambodians had fled the chaos into neighboring countries, primarily Thailand.⁵³⁰ The journey to the camps was treacherous. “Thai soldiers, renegade resistance soldiers, and bandits all preyed upon Cambodian refugees fleeing into Thailand. Even though the majority of Cambodian refugees were ill, wounded, exhausted, and starving, women and young girls were frequently raped, and any goods, extra clothes, or hidden gold was confiscated. Thousands of land mines planted by retreating Khmer Rouge caused jungle paths into Thailand to become littered with Cambodian corpses and body parts.”⁵³¹ “For most refugee families from Cambodia, the harrowing journey across mined terrain to find domicile in a new country was only the beginning of a difficult transition.”⁵³²

The refugee crisis presented arguably the most difficult humanitarian challenge of the post-World War II era.⁵³³ Although the refugee camps provided relief for residents’ immediate needs, they were often dangerous, dirty, and demoralizing. Camps along the border housed both civilians and combatants and became a target of attacks, injuring and killing some camp residents and forcing evacuations.⁵³⁴ Food aid was often diverted or sold to military forces, and conditions inside the camps were often squalid.⁵³⁵ The camp population was controlled in a number of ways, such as perimeter fencing to restrict movement, punishment for rule violations, and fear and

⁵³⁰ Christine M. Su, “Deportation of Cambodians,” in *Asian American History and Culture: An Encyclopedia*, ed. Huping Ling and Allan W. Austin (London and New York: Taylor & Francis Group, 2010), 104.

⁵³¹ Janet McClellan, *Cambodian Refugees in Ontario: Resettlement, Religion, and Identity* (Toronto: University of Toronto Press, 2009), 30.

⁵³² Cowan, “Cambodians Go ‘Home’,” 107.

⁵³³ Terry Fiona, *Condemned to Repeat? The Paradox of Humanitarian Action* (Ithaca, NY: Cornell University Press, 2013).

⁵³⁴ Terry, *Condemned to Repeat?*, 125; “Cambodian Factions Battle: 200 Refugees Killed in Camp,” *New York Times*, World News Briefs, January 5, 1980, <https://timesmachine.nytimes.com/timesmachine/1980/01/05/111133259.html>.

⁵³⁵ Terry, *Condemned to Repeat?*, 129.

intimidation.⁵³⁶ “During a 1988 Congressional hearing on Cambodia, Kitty Dukakis, the wife of Democratic presidential nominee, who organized a task force on Cambodian children, described these camps as places where “brutality escalates hopelessness, suicide, child abuse; attitudes and behaviors of a tragic kind have become the norm.”⁵³⁷ Although intended to improve the plight of the refugees, the refugee camps in many ways prolonged their suffering.

Social hierarchies and cultural norms broke down in the camps, and refugees entered a state of “inbetweenness,” no longer who they were and not yet who they would become.⁵³⁸ Displacement exiled them not due to consequences of their own actions but because of the accident of their circumstances. Once they fled their country, membership in the community they had always known was suddenly gone and replaced by a new status of “refugee.” “Before they became refugees, Cambodians did not realize the extent to which others and other differences existed in this world. They were not aware of having “ethnic identity”; they were instead defined by their work, education, family, and village.”⁵³⁹ It was only after they had left Cambodia and arrived at the refugee camps that they became aware of their identity as Cambodians, distinguished from other nationalities. The differences such as class, which had been important in Cambodia, no longer mattered; all Cambodians were now seen by camp officials as one group.⁵⁴⁰ It was the first time many Cambodians became aware of nationalities different from their own.

⁵³⁶ Terry, *Condemned to Repeat?*, 137.

⁵³⁷ Hing, “Detention to Deportation,” 921.

⁵³⁸ Carol Mortland, “Transforming Refugees in Refugee Camps,” *Urban Anthropology and Studies of Cultural Systems and World Economic Development* 16, no. 3/4 (Fall-Winter, 1987): 380.

⁵³⁹ Carol A. Mortland, “Cambodian Refugees and Identity in the United States,” in *Reconstructing Lives, Recapturing Meaning*, ed. Linda A. Camino, Ruth M. Krulfeld (London: Routledge, 1994), 17.

⁵⁴⁰ Mortland, “Cambodian Refugees and Identity,” 8.

To orient the refugees to their new lives, the camps offered residents training to acculturate into American society. English language classes, job training, cultural orientation courses taught Cambodian refugees skills for adapting to their new lives, while encouraging them to leave behind their Cambodian-ness.⁵⁴¹ Control over their present and future no longer belonged to the refugees themselves but to the camp staff who managed daily affairs and to refugee officials who would determine their fates. Thus the camps marked the next step in the cycle of displacement through the process of denationalizing the refugees, transitioning them from “Cambodians” into “Cambodian refugees.”

The modern refugee system in the United States was born from one of the darker spots in world history. During World War II, fear grew of immigrants and refugees, who were seen as threats to national security in the United States and other allied nations. The US systematically refused to provide safe haven for Europeans displaced or endangered by the war.⁵⁴² “Even when the U.S. government in the 1930s initiated a few programs to admit European Jews fleeing Nazism, the federal government’s bureaucracy consciously worked to slow refugee admissions.”⁵⁴³ Perhaps the lowest point came in June 1939, when the United States, along with Canada and Cuba, denied admission to more than 900 Jewish refugees fleeing the brutality of Nazi Germany and sent them back to Europe. More than 250 passengers of the *M.S. St. Louis* ultimately perished in concentration camps.⁵⁴⁴

Days after the bombing of Pearl Harbor in 1941, President Franklin Roosevelt declared all non-naturalized Italian and German citizens, including German Jewish refugees, as “enemy

⁵⁴¹ Mortland, “Transforming Refugees in Refugee Camps,” 400.

⁵⁴² Bon Tempo, *Americans at the Gate*, 11.

⁵⁴³ Bon Tempo, *Americans at the Gate*, 11.

⁵⁴⁴ Allison Lawlor, *The Saddest Ship Afloat: The Tragedy of the MS St. Louis* (Halifax, NS: Nimbus Publishing, 2006).

aliens.”⁵⁴⁵ National security concerns led to a tightening of restrictions on admission of refugees to the United States.⁵⁴⁶ Nevertheless, the ravages of the Nazi regime led to the movement of millions of people throughout the 1940s, and the United States’ heightened role on the world stage as a result of its involvement in the war meant it was required to play a larger role in dealing with the refugee crisis in the war’s aftermath.⁵⁴⁷ The war, then, became a turning point for American refugee policy.

After the war ended, President Harry Truman proposed a vast expansion of European refugee admissions outside of the existing quota system to aid in the region’s general post-war reconstruction.⁵⁴⁸ In the first televised State of the Union address in the nation’s history, Truman lamented that his administration had reached the end of its legal authority to accept refugees and called on Congress to “turn its attention to this world problem, in an effort to find ways whereby we can fulfill our responsibilities to these thousands of homeless and suffering refugees of all faiths.”⁵⁴⁹ The result was the passage of the Displaced Persons Act, enacted in 1948, just as a Cold War between the United States and Russia broke out.⁵⁵⁰ The US turned to its refugee policy as a way to fight the spread of communism.⁵⁵¹ America’s focus on refugees fleeing communism continued to guide us refugee policy through the 1950s and 60s, with a particular focus on Cuban

⁵⁴⁵ National Archives, “Brief Overview of the World War II Enemy Alien Control Program,” last reviewed on January 7, 2021, available at <https://www.archives.gov/research/immigration/enemy-aliens/ww2>. By the end of the war, more than 31,000 “enemy aliens” and their families had been interned at camps across the United States.

⁵⁴⁶ Many of these refugees felt, at the categorization as “alien enemies,” a sense of foreboding of worse to come, based on their experience in Europe of classification and registration. George L Warren, “The Refugee and the War,” *The Annals of the American Academy of Political and Social Science* 223, no. 1 (1942): 94.

⁵⁴⁷ Bon Tempo, *Americans at the Gate*, 11-12.

⁵⁴⁸ Bon Tempo, *Americans at the Gate*, 22; Gibney, *The Ethics and Politics of Asylum*, 135.

⁵⁴⁹ Harry S. Truman, “Annual Message to the Congress on the State of the Union,” January 6, 1947, available at <https://www.trumanlibrary.gov/library/public-papers/2/annual-message-congress-state-union-2>.

⁵⁵⁰ Bon Tempo, *Americans at the Gate*, 24.

⁵⁵¹ Gibney, *The Ethics and Politics of Asylum*, 132; Bon Tempo, *Americans at the Gate*, 2-3.

refugees,⁵⁵² while the 1970s saw new influxes of Soviet Jews and refugees from Indochina into the United States.⁵⁵³

During their period in control, the Khmer Rouge regime had cut off communication from Cambodia with the outside world, so it was not until the Vietnam invasion that the international community became fully aware of the atrocities that had been committed. In response, the United States, recognizing there was no real alternative to admitting Cambodians, committed to large-scale resettlement of refugees. The crisis served as a catalyst for a reform of US refugee policy, resulting in the Refugee Act of 1980,⁵⁵⁴ which opened the door to resettlement of thousands from Cambodia, Laos, and Vietnam.

Until the Refugee Act of 1980, much refugee policy was *ad hoc* and treated refugees inconsistently. In the 1970s, a division grew between refugee advocates and opponents, with each side formalizing their organization and hardening their views. Advocates, led by Massachusetts Senator Ted Kennedy, argued that the policy should stem from humanitarian concerns and that communism-focused framework should be expanded to one less grounded in Cold War-era ideology and focused on principles of humanitarianism.⁵⁵⁵ Restrictionists were concerned about the impact of refugees on jobs, the costs of resettlement, and the ability to successfully integrate refugees into American society.⁵⁵⁶ North Carolina Senator Jesse Helms shared the restrictionist view by explaining, “[T]his Nation has experienced more and more social problems as a result of the melting-pot theory. . . . There is the feeling that the traditions of our ethnic groups are being

⁵⁵² Bon Tempo, *Americans at the Gate*, 86.

⁵⁵³ Bon Tempo, *Americans at the Gate*, 133.

⁵⁵⁴ *Refugee Act of 1980*, Pub. L. No. 96-212, 94 Stat. 102.

⁵⁵⁵ Bon Tempo, *Americans at the Gate*, 172.

⁵⁵⁶ Bon Tempo, *Americans at the Gate*, 169.

undermined, as well as the sense of identity and community. . . . There is widespread concern over the adaptability of such a group to American values. . . . There is the language question.”⁵⁵⁷ Essentially, they worried that Southeast Asian refugees would not become “American” enough.

The new law found a middle ground by redefining “refugee” to meet a broader category of persecution and by establishing structure on the admissions process, setting limits on refugee admissions and requiring consultation between the executive and legislative branches.⁵⁵⁸ The Act set a new standard for the United States as “a haven for the persecuted and dispossessed”⁵⁵⁹ and has led to the resettlement of more than three million refugees in the United States since its enactment.⁵⁶⁰ The law, which still guides US refugee policies today, allowed the President to establish caps on refugee admissions each year and to determine the source region of those refugees.⁵⁶¹ In 1980, the Carter administration allotted 169,000 openings to refugees from Southeast Asia, and refugees began pouring into the country, becoming the largest refugee group ever admitted. The movement was politically unpopular—a CBS/New York Times poll taken just after the move found that 62 percent of Americans disapproved.⁵⁶² Nevertheless, by 1993, some 150,000 Khmer refugees had arrived in the US.⁵⁶³ These influxes of huge groups of refugees created unprecedented logistical challenges and generated damaging, sometimes violent anti-

⁵⁵⁷ Bon Tempo, *Americans at the Gate*, 169.

⁵⁵⁸ Bon Tempo, *Americans at the Gate*, 167.

⁵⁵⁹ Kerwin, “The US Refugee Protection System,” 205.

⁵⁶⁰ Kerwin, “The US Refugee Protection System,” 207.

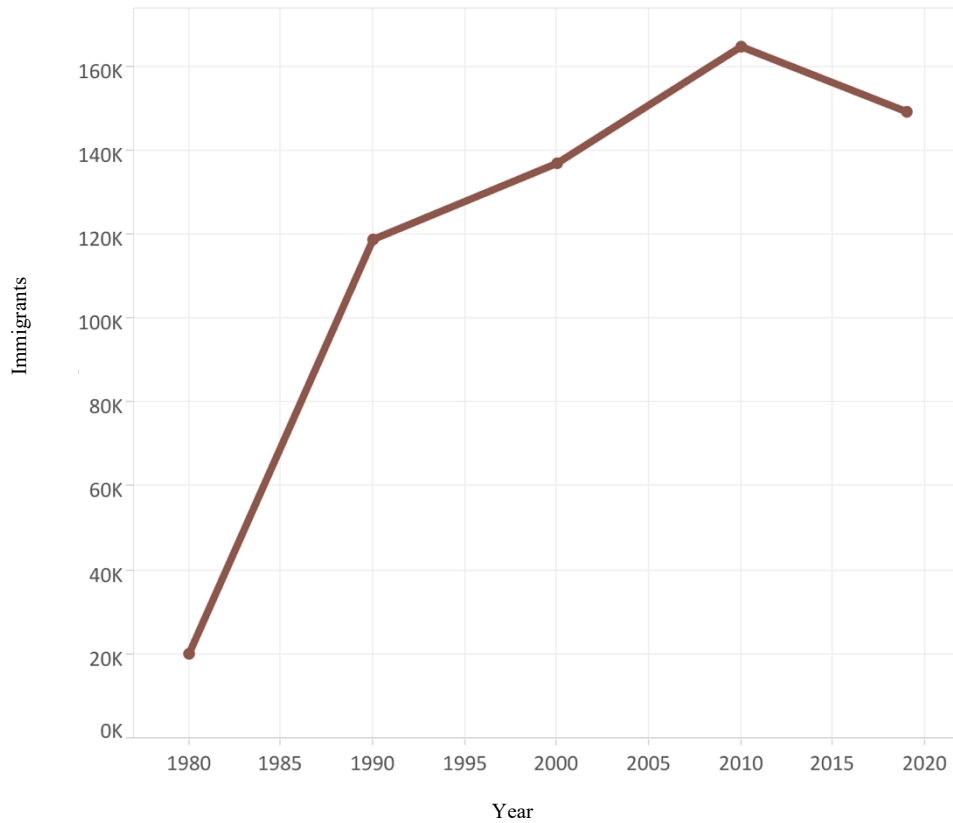
⁵⁶¹ Hing, “Detention to Deportation,” 932. The evolution of US policy is reflected by the shift in the origins of refugees in the US over the past four decades, beginning with refugees from war-torn Southeast Asia in the 1980s, to those from the former Soviet Union in the 1990s, to refugees from various parts of Africa and Asia in the early 2000s and Syria more recently. Ruth Igielnik and Jens Manuel Krogstad, “Where refugees to the U.S. come from,” Pew Research Center, February 3, 2017, available at <https://www.pewresearch.org/fact-tank/2017/02/03/where-refugees-to-the-u-s-come-from/>.

⁵⁶² Drew Desilver, “U.S. public seldom has welcomed refugees into country,” Pew Research Center, November 19, 2015, <https://www.pewresearch.org/fact-tank/2015/11/19/u-s-public-seldom-has-welcomed-refugees-into-country/>.

⁵⁶³ Hing, “Detention to Deportation,” 920, 939.

Asian sentiment. Figure 8 shows the increase in the number of Cambodian immigrants in the United States since 1980.

Figure 8: Cambodians in the United States, 1980-2019



Source: Migration Policy Institute, Countries of Birth for U.S. Immigrants, 1960-Present, <https://www.migrationpolicy.org/programs/data-hub/us-immigration-trends#history>

Resettlement in the United States

Once they arrived in America, the “refugee” label took on a different meaning than it had in the camps. In the United States, they soon realized being a refugee allowed them certain advantages that other forms of migrants did not enjoy, such as welfare benefits and training opportunities.⁵⁶⁴ However, they also recognized that they stood out as different. They often bounced back and forth between holding on to their Cambodian-ness while also trying to be more American.⁵⁶⁵ Although the camps were intended to give Cambodians the skills to successfully transition into the United States, they found upon arrival that they were not necessarily well prepared for this new life. Their language skills were often deficient, and they were not employable well-paying jobs, leaving them dependent on governmental support.⁵⁶⁶ Their lowly status within the United States made adapting to their new home yet another hurdle.

Although all newcomers to a country face challenges with acculturation, Cambodian refugees arrived with additional obstacles, many of which continue to be plague the refugee community today. Southeast Asian war refugees arrived with an array of health problems due to the time they spent in unsanitary and dangerous conditions.⁵⁶⁷ Cambodians were in particularly poor health, “showing more symptoms of malnourishment, more tuberculin reactors, higher hepatitis B indicators, more parasites, and much lower mean haemoglobin and red blood count volumes than other Southeast Asian refugee groups tested.”⁵⁶⁸

⁵⁶⁴ Mortland, “Cambodian Refugees and Identity,” 8.

⁵⁶⁵ Mortland, “Cambodian Refugees and Identity,” 4.

⁵⁶⁶ Mortland, “Transforming Refugees in Refugee Camps,” 401.

⁵⁶⁷ Chow, “Exiled Once Again,” 114.

⁵⁶⁸ McClellan, *Cambodian Refugees in Ontario*, 34.

The unimaginable brutality of the Pol Pot regime left Cambodian refugees physically and psychologically traumatized.⁵⁶⁹ A 1987 study of Southeast Asian refugees found that Cambodians were the most severely traumatized, having experienced an average of sixteen traumatizing events, such as torture and the witnessing of killing.⁵⁷⁰ “More than 90 per cent of all Cambodian refugees experienced sustained trauma and inhumane living conditions, regardless of age, gender, religion, ethnicity, or class status.”⁵⁷¹ Surveys of Cambodian children in the United States documented the multiple traumatic events they had endured: family separation, witnessing of brutality, loss of family and community members, starvation, and near-death experiences.⁵⁷² “Cultural bereavement”—the loss of one’s culture—added to the anguish among Cambodian refugees, who were under great pressure to abandon their past and acculturate into Western society.⁵⁷³ The trauma affected not only individuals, but also the collective psyches of the Cambodian people.⁵⁷⁴

Years of trauma wrought long-lasting psychological and mental harm on Cambodians, who continue to exhibit high rates of mental health illness.⁵⁷⁵ A 2005 meta-analysis of mental health research on refugees found that refugees have ten times the rate of serious mental distress than the general population, and Cambodian refugees have the highest rates of PTSD and depression of any refugee groups.⁵⁷⁶ Suicidal thoughts and feelings of having a “lost soul” were common among

⁵⁶⁹ Hing, “Detention to Deportation,” 922.

⁵⁷⁰ Nou, “A Qualitative Examination,” 1.

⁵⁷¹ McClellan, *Cambodian Refugees in Ontario*, 34.

⁵⁷² McClellan, *Cambodian Refugees in Ontario*, 34.

⁵⁷³ McClellan, *Cambodian Refugees in Ontario*, 34.

⁵⁷⁴ Nou, “A Qualitative Examination,” 18.

⁵⁷⁵ Grant N. Marshall et al., “Mental Health of Cambodian Refugees 2 Decades After Resettlement in the United States,” *Journal of the American Medical Association* 294, no. 5 (August 3, 2005): 571.

⁵⁷⁶ *Health Emergency in the Cambodian American Community: A Summary Report*, Submitted to the Commissioners of the National Cambodian American Town Hall Meeting and the Steering Committee of the National Cambodian American Health Initiative, July 2006, 8, <https://khmerhealthadvocates.org/wp-content/uploads/2019/05/reportonnationalcamboidanamericanhealthemergency8-29.doc>.

refugees.⁵⁷⁷ “Given the trauma that Cambodian refugees have endured, depression and other symptoms of post-traumatic stress disorder that would pervade much of the new community could be anticipated.”⁵⁷⁸ Yet the healthcare services provided to the refugees upon resettlement were clearly not sufficient to deal with the severe psychological and emotion harm they had endured.⁵⁷⁹

The Khmer Rouge targeted much of its violence toward the educated and economic elites, so the Cambodian refugees who arrived in the United States were largely rural and uneducated who did not speak English and lacked the skills needed to thrive in the industrial US.⁵⁸⁰ School was often a place of further torment for young Cambodian refugees, who were ridiculed and bullied.⁵⁸¹ With undereducated parents and little support at school, Cambodian refugee children growing up in the United States saw relatively low levels of educational achievement. Cambodians continue to have lower levels of educational attainment today as compared with other Asian groups and the overall American population.⁵⁸² Cambodians also have a lower rate of English proficiency compared to other Asian groups in the United States: 63 percent of Cambodians are English proficient while all other Asians have a 72 percent proficiency level.⁵⁸³

⁵⁷⁷ Nou, “A Qualitative Examination,” 18.

⁵⁷⁸ Hing, “Detention to Deportation,” 952.

⁵⁷⁹ Nou, “A Qualitative Examination,” 20.

⁵⁸⁰ Ciment and Corfield, “The Cambodian American Experience,” 98; Chow, *Exiled Once Again*, 117.

⁵⁸¹ The US Commission on Civil Rights recounted an incident in 1990 where two Cambodian students in Rhode Island opened fire on a group of youths who had been harassing them, wounding two students. US Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s: A Report of the United States Commission on Civil Rights*, February 1992, <https://www.ojp.gov/pdffiles1/Digitization/135906NCJRS.pdf>.

⁵⁸² Abby Budiman, “Cambodians in the U.S. Fact Sheet: Educational attainment of Cambodian population in the U.S., 2019,” Pew Research Center, <https://www.pewresearch.org/social-trends/fact-sheet/asian-americans-cambodians-in-the-u-s/#educational-attainment-of-cambodian-population-in-the-u-s--2019>.

⁵⁸³ Abby Budiman, “Cambodians in the U.S. Fact Sheet: English proficiency of Cambodian population in the U.S., 2019,” Pew Research Center, <https://www.pewresearch.org/social-trends/fact-sheet/asian-americans-cambodians-in-the-u-s/#english-proficiency-of-cambodian-population-in-the-u-s--2019>.

Difficulty acculturating, mental health challenges, and lower rates of educational achievement made socioeconomic success exceedingly difficult for Cambodian refugees. Without the skills needed to thrive in the industrial economy, many refugees received welfare assistance. Welfare reform in 1996 dropped many Cambodians from public assistance and pushed them into menial, low-wage jobs.⁵⁸⁴ Today, Cambodians have a median annual income of \$67,000, much lower than the overall Asian population, whose median annual income is \$85,800.⁵⁸⁵ Cambodians are also more likely than other Asians to live below the poverty line.⁵⁸⁶ Research has found that the trauma Cambodians endured can serve as a predictor for future financial status, suggesting that these experiences are among the causes of their lower economic success.⁵⁸⁷ Because Cambodians tend to live in lower-income areas, their children often attend lower performing schools, contributing to the lower rates of educational attainment—a cycle of difficulties that partly explains the disproportionately high levels of criminality among the Cambodian American population.

Upon arrival in the United States, refugees were divided into small groups and scattered throughout the country with little orientation to help with the adjustment.⁵⁸⁸ Although they were mostly from rural areas in Cambodia, most refugees were sent to urban areas, “where they competed for scarce resources with other minority or disenfranchised groups.”⁵⁸⁹ Refugees were

⁵⁸⁴ Michael Truong, “Welfare reform and liberal governance: disciplining Cambodian-American bodies,” *International Journal of Social Welfare* 16, no. 3 (2007): 262.

⁵⁸⁵ Abby Budiman, “Cambodians in the U.S. Fact Sheet: Economic characteristics of U.S. Cambodian population, 2019,” Pew Research Center, <https://www.pewresearch.org/social-trends/fact-sheet/asian-americans-cambodians-in-the-u-s/#economic-characteristics-of-u-s-cambodian-population-2019>.

⁵⁸⁶ Budiman, “Cambodians in the U.S. Fact Sheet: Economic characteristics of U.S. Cambodian population, 2019.”

⁵⁸⁷ Laura Uba and Rita Chi-Ying Chung, “The Relationship Between Trauma and Physical Well-Being Among Cambodians in the United States,” *The Journal of General Psychology* 118, no. 3 (1991): 215.

⁵⁸⁸ Chow, *Exiled Once Again*, 112.

⁵⁸⁹ Cowan, “Cambodians Go ‘Home’,” 107.

sent to every state except Alaska.⁵⁹⁰ Because they were isolated from one another and deprived of needed support, many refugees left their original place of resettlement to move to concentrated refugee enclaves in California, Texas, and Louisiana. “By 1980, forty-five percent of the first waves of Southeast Asian refugees had undergone a second migration relocating from their initially assigned location to Southeast Asian communities in different states.”⁵⁹¹ Forcing refugees into a secondary migration, US resettlement policy uprooted them and destabilized their lives yet again, further contributing to the cycle of displacement. Eventually, the government found that dispersal was not advantageous and instead resettled refugees into fewer, less-dispersed areas. Nevertheless, across the United States, the arrival of Cambodian and other Southeast Asian refugees had revived a deep-seated anti-Asian sentiment.

Anti-Asian racism and policy were nothing new in the United States, which has a long history of policies that have supported violence and discrimination against Asian immigrants and Asian-Americans. The sanctioning of bigotry against Asians through official US policies such as the Chinese Exclusion Act of 1882, colonial rule of the Philippines after the Spanish-American War in 1898, and the internment of American citizens of Japanese origins during World War II, generated acts of violence against Asian Americans. In 1885, white coal miners in Wyoming killed twenty-eight Chinese miners in an act of shocking brutality that included scalping and castrating victims.⁵⁹² The Watsonville riots in California in 1930 grew from tensions between locals and Filipino farm workers during the Great Depression, stoked by xenophobic rhetoric of politicians.⁵⁹³ Hostilities toward people of Japanese descent continued long after the ultimate act of Asian

⁵⁹⁰ Hing, “Detention to Deportation,” 935.

⁵⁹¹ Chow, “Exiled Once Again,” 114.

⁵⁹² Simeon Man, “Anti-Asian violence and US imperialism,” *Race & Class* 62, no. 2 (2020): 24-33, 26.

⁵⁹³ Howard A. De Witt, “The Watsonville Anti-Filipino Riot of 1930: A Case Study of the Great Depression and Ethnic Conflict in California,” *Southern California Quarterly* 61, no. 3 (Fall 1979): 291- 302.

violence—the dropping of atomic bombs on two cities in Japan. President Harry Truman set the tone when he justified the bombings in a letter: “When you have to deal with a beast you have to treat him as a beast.”⁵⁹⁴

The failed wars in Southeast Asia in the 1970s served as a continuation of that pattern. Asian immigrants, regardless of their country of origin, represented a reminder of the United States’ military failure in the Vietnam War.⁵⁹⁵ The arrival of refugees “embodie[d] the displacement from Asian societies in the aftermath of war and colonialism to a United States with whose sense of national identity the immigrants are in contradiction precisely because of that history.”⁵⁹⁶ Their arrival also coincided with an economic downturn, and many people saw the refugees as threats to their jobs.⁵⁹⁷

Cambodian refugees, who had already survived multiple traumas, also had to cope with a rising anti-Asian bias and fears of racially-motivated violence. A 1992 report by the US Civil Rights Commission confirmed that, despite popular belief, Asian Americans were subject to widespread prejudice, discrimination, and victimization.⁵⁹⁸ The report found that “[t]he general tendency to view all Asians as alike and the stereotype of Asians as foreigners make Asian Americans particularly vulnerable to the vicissitudes of the United States relations with Asian

⁵⁹⁴ Letter from Harry S. Truman to Samuel McCrea, General Secretary of the Federal Council of The Churches of Christ in America, August 11, 1945, available at <https://www.trumanlibrary.gov/library/research-files/correspondence-between-harry-s-truman-and-samuel-cavert>.

⁵⁹⁵ Vathana Seourn, “Cambodian Americans Seeking Safety Unprepared for Anti-Asian Sentiment,” *Voice of America*, April 17, 2021, <https://www.voanews.com/usa/race-america/cambodian-americans-seeking-safety-unprepared-anti-asian-sentiment>.

⁵⁹⁶ Lowe, *Immigrant Acts*, 16.

⁵⁹⁷ Robert Lindsey, “Asian-Americans See Growing Bias,” *New York Times*, September 10, 1983, <https://www.nytimes.com/1983/09/10/us/asian-americans-see-growing-bias.html?searchResultPosition=8>.

⁵⁹⁸ US Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s*.

countries.”⁵⁹⁹ Hate crimes statistics from the era are incomplete and unreliable,⁶⁰⁰ but contemporaneous news articles chronicled a feeling of growing racism and violence against Asian Americans.⁶⁰¹

In a 1990 report, the US Commission on Civil Rights blamed racial animosity in the United States on five contributing factors: “1) racial integration of neighborhoods leading to “move-in violence”; 2) deep-seated racial hatred played upon by organized hate groups; 3) economic competition among racial and ethnic groups; 4) insensitive media coverage of minority groups; and 5) poor police response to hate crimes.”⁶⁰² Their 1996 report found that all of these factors played a role in anti-Asian racism, but also that anti-Asian violence had other unique sources as well. Unlike other minorities, the long history of bigotry against Asians in America was exacerbated in the post-1965 by the sudden arrival of thousands of Asian immigrants and refugees. In areas that had not experienced much diversity, these new faces brought foreignness, and with it, tensions. Cultural, linguistic, and religious differences “produce[d] a gulf of misunderstanding.”⁶⁰³ Even a handful of refugees could radically change the ethnic make-up of a

⁵⁹⁹ US Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s*, 24.

⁶⁰⁰ Yan Zhang, Lening Zhang & Francis Benton, “Hate Crimes against Asian Americans,” *American Journal of Criminal Justice* (2021), <https://link.springer.com/article/10.1007/s12103-020-09602-9>.

⁶⁰¹ See, e.g., Fox Butterfield, “Violent Incidents Against Asian-Americans Seen as Part of Racist Pattern,” *New York Times*, August 31, 1985, <https://www.nytimes.com/1985/08/31/us/violent-incidents-against-asian-americans-seen-as-part-of-racist-pattern.html?searchResultPosition=4>; Marvin Howe, “Group Raises Concern Over Anti-Asian Violence,” *New York Times*, October 19, 1986, <https://www.nytimes.com/1986/10/19/us/group-raises-concern-over-anti-asian-violence.html?searchResultPosition=5>; Lisa Lyvatt Rykman, “Wave of Violence Against Asians Plagues the Nation,” February 1, 1987, *Los Angeles Times*, <https://www.latimes.com/archives/la-xpm-1987-02-01-mn-309-story.html>.

⁶⁰² US Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s*, 22, referring to U.S. Commission on Civil Rights, *Intimidation and Violence: Racial and Religious Bigotry in America* (Clearinghouse Publication 96, September 1990), available at <https://babel.hathitrust.org/cgi/pt?id=uc1.31210023598269&view=1up&seq=18>.

⁶⁰³ Kyeyoung Park, “Use and Abuse of Race and Culture: Black-Korean Tension in America,” *American Anthropologist* 98, no. 3 (September 1996): 492; US Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s*, 24.

small community in the Midwest, and their short stays before migrating again meant refugees often remained separated from locals.⁶⁰⁴

In big cities, the sudden influx of huge numbers of refugees from Southeast Asia stoked tensions with other marginalized groups, sometimes resulting in violence. In the Boston suburb of Lowell, the refugee population grew swiftly, and by 1987, Southeast Asians made up approximately fifteen percent of the city's population of 100,000. Hostilities grew as quickly as the Asian population did, and hot button issues such as bussing to enforce integration became lightning rods for enmity. But the entire community was still shocked when an 11-year-old boy was charged with murder after a 13-year-old Cambodian refugee was found in a canal and died the next day.⁶⁰⁵ In Lynn, Massachusetts, in 1988, thirty-one Cambodians were left homeless after arsonists destroyed their apartment building.⁶⁰⁶

In 1983, a prominent member of the small Cambodian community in Dallas was murdered outside his apartment after an argument with a group of Black men, the most violent of a number of instances of unrest between Asians and Blacks brought about by rising interracial tensions following the civil rights movement and immigration reforms of the 1960s.⁶⁰⁷ The dramatically altered racial composition of the country following the removal of ethnic quotas on immigration created a clash in racial groups fighting for empowerment and equality.⁶⁰⁸ Despite the official

⁶⁰⁴ Deborah Sontag, "New Immigrants Test Nation's Heartland," *New York Times*, October 18, 1993.

⁶⁰⁵ "Killing and School Plan Stir Tensions in Lowell," *New York Times*, October 25, 1987, <https://www.nytimes.com/1987/10/25/us/killing-and-school-plan-stir-tensions-in-lowell.html?searchResultPosition=7>.

⁶⁰⁶ US Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s*, 31.

⁶⁰⁷ Peter Applebome, "Racial Tension Said to Underlie Cambodian's Death in Dallas," *New York Times*, August 2, 1983, <https://www.nytimes.com/1983/08/02/us/racial-tension-said-to-underlie-cambodian-s-death-in-dallas.html?searchResultPosition=7>.

⁶⁰⁸ Claire Jean Kim, "Imagining race and nation in multiculturalist America," *Ethnic and Racial Studies* 27, no. 6 (2004): 988.

national narrative celebrating diverse, multicultural, and equal society, racialized differences remained marked by power differentials that created conflict between not only whites and minorities but also between minority groups. Misconceptions of Asians as a “model” race that received preferential treatment contributed to resentment by other minority groups and gave rise to hostilities that sometimes became violent.⁶⁰⁹ Governmental policies generally overlooked these interracial tensions,⁶¹⁰ and Cambodian refugees, distrustful of authority, often declined to seek assistance from police and other governmental actors.⁶¹¹

The resettlement system that welcomed Cambodian refugees was set up to serve their immediate needs rather than their long-term success. Like refugees from other war-torn areas, Cambodian refugees have been caught up in a resettlement system that has set them up to fail, a system that bears some blame for the relatively high levels of criminal activity within the community.⁶¹² “Without a long-term view toward adjustment, the US resettlement program has failed in its responsibility—a responsibility that included helping Cambodians assimilate.”⁶¹³ Bill Ong Hing compares the situation to a host and guest, where the guest is present but the guest’s privilege may be revoked.⁶¹⁴ In this case, however, the guest is only wandering because of the actions of the host, and the host has a responsibility to provide hospitality.⁶¹⁵ Cambodian refugees are refugees only because of the US’s policy, yet they are not provided the resources they need to

⁶⁰⁹ National Asian Pacific American Legal Consortium [now called Asian Americans Advancing Justice], *Understanding Violence Against Asian Americans*, report, May 1993, available at https://www.dropbox.com/s/71rsv15rjop69k/1993_1st_Report_ViolenceAgainstAsianPacificAmericans.pdf?dl=0; US Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s*, 19.

⁶¹⁰ Park, “Use and Abuse of Race and Culture,” 493; Kim, “Imagining race and nation,” 988-89.

⁶¹¹ US Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s*, 21

⁶¹² Hing, “Detention to Deportation,” 954.

⁶¹³ Hing, “Detention to Deportation,” 956.

⁶¹⁴ Hing, “Detention to Deportation,” 956, citing Professor Leti Volpp.

⁶¹⁵ Hing, “Detention to Deportation,” 956.

thrive in their new home.⁶¹⁶ “Sadly, many Cambodian families who survived the killing fields of the Khmer Rouge, have lost the battle to survive in America,” writes Hing.⁶¹⁷ “The battle was lopsided; they were given no tools to adjust after being uprooted by a genocide with which the United States is all too familiar and all too connected.”⁶¹⁸

Deportation to Cambodia

Poverty and isolation from their former home continue to make life for Cambodian refugees and their children difficult, even when their safety is no longer threatened.⁶¹⁹ Although many refugees thrive in their new lives, many others struggle, with little support beyond their immediate financial needs. A 2010 study performed for the Senate Foreign Relations Committee found that the US resettlement program was outdated, underfunded, and failed to fully address the long-term needs of refugees entering the United States.⁶²⁰ The report cited a 2009 study by Georgetown University Law Center’s Human Rights Institute, which concluded that “the United States is opening its gates to refugees and simply forgetting about them after they have arrived.”⁶²¹

⁶¹⁶ Hing, “Detention to Deportation,” 956.

⁶¹⁷ Hing, “Detention to Deportation,” 970.

⁶¹⁸ Hing, “Detention to Deportation,” 970.

⁶¹⁹ Bloch, “Reflections and Directions,” 451.

⁶²⁰ *Abandoned upon arrival: Implications for refugees and local communities burdened by a U.S. resettlement system that is not working*, A Report to the Members of the Committee on Foreign Relations United States Senate, One Hundred Eleventh Congress, Second Session, July 21, 2010, <https://www.govinfo.gov/content/pkg/CPRT-111SPRT57483/html/CPRT-111SPRT57483.htm>. The report noted that even basic information about living the United States was lacking and referred as an example to a case where four refugee youth died in a fire that was sparked when they improperly used a household appliance.

⁶²¹ Georgetown University Law Center Human Rights Institute, *Refugee Crisis in America: Iraqis and Their Resettlement Experience*, report (2009), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1001&context=hri_papers.

Forgetting about them, that is, until they commit crimes. The foreseeable consequence of failing to provide adequate supports for Cambodian refugees is that some will fall through the cracks of their new society. Poverty, difficulty with integration, and other challenges plague refugees—sometimes permanently—and when added to the trauma that made them refugees in the first place, can lead to desperation and criminal behavior. Cambodia was destabilized, in part, by the intervention of the United States in Southeast Asian affairs, yet the US washes its hands of responsibility, casting aside long-term members of the community as if they were strangers, then proudly proclaims that American citizens are safer without them. Despite US culpability in creating the refugee situation and failing to properly resettle the refugees, the United States treats Cambodian refugees who have criminal convictions with a “one strike and you’re out” approach.⁶²²

Even today, decades after entering the United States, Cambodians struggle with mental health challenges and low levels of education and socioeconomic gain compared with other Asian immigrant groups and with the overall American population. Cambodian refugees who arrived as children were caught between two worlds—the traditional, agrarian world their parents left and the industrialized, developed world of the United States where they were growing up.⁶²³ Many rejected their Cambodian histories and culture in order to fit in to American society. Already traumatized and fighting for economic survival, parents had difficulty properly caring for their children. Upon arrival in the United States, Cambodian parents often had to work multiple jobs, leaving their children with little supervision.⁶²⁴ Psychologically brutalized parents struggling with mental health problems were detached from their children. Children had to take care of their

⁶²² Hing, “Detention to Deportation,” 954.

⁶²³ Cowan, “Cambodians Go ‘Home’,” 108.

⁶²⁴ Cowan, “Cambodians Go ‘Home’,” 108.

parents, serving as interpreters both of language and of life in the United States.⁶²⁵ The gap between the generations grew, and traditional sources of support, such as temples, were no longer available. Their children often rebelled or searched the home for belonging and support, explaining the relatively high rates of gang membership and criminality among Cambodians.

Today, the largest Cambodian communities are in Lowell, Massachusetts, and Long Beach, California. Long Beach, part of the Los Angeles area, is home to at least ten Asian street gangs.⁶²⁶ “U.S. resettlement efforts have provided refugee parents and communities with few tools or resources to address the challenges of parenting, guidance, and mentoring that youngsters need in a radically different cultural environment where old approaches and mechanisms fail or cannot be adapted (especially given emotional, social, and financial challenges to the parents).”⁶²⁷ Gangs often filled the needs. For those who became embroiled in the criminal justice system, the risk of deportation reinforced the notion that they did not quite belong in either the traditional Cambodian world of their parents or American society in which they grew up.

As refugees to the United States, Cambodians hold legal permanent resident (LPR) status, or in the common parlance, they are green card holders. After a period of time, LPRs can apply for full citizenship, which gives them effectively the same civil, social, and political rights of natural born citizens.⁶²⁸ The citizenship application process can be confusing, expensive, and time-consuming.⁶²⁹ Like many LPRs, many Cambodian refugees have foregone becoming citizens due

⁶²⁵ Jonathan Rosen, “Deported to Their Parents’ Homeland, Cambodian Americans Start Anew,” *Foreign Policy*, August 14, 2019, available at <https://foreignpolicy.com/2019/08/14/deported-to-their-parents-homeland-cambodian-americans-start-anew/#>.

⁶²⁶ Cowan, “Cambodians Go ‘Home’,” 107

⁶²⁷ Hing, “Deporting Cambodian Refugees,” 278.

⁶²⁸ Spiro, *Citizenship*, 76. The only right reserved exclusively for natural-born American citizens is the right to serve as the President. U.S. Constitution, Art. II, Sec. 1.

⁶²⁹ Golash-Boza, “From Legal to Illegal,” 204. The citizenship application process requires filling out an application, taking a test on the US Constitution and English language, swearing an oath, and paying a fee of \$725.

to the expense and effort required. Many mistakenly believe that citizenship is not required to stay in the United States permanently, not recognizing that only citizens are immune from the risk of deportation.⁶³⁰ As of 2019, more than half of Cambodian Americans were born outside the US, and about a quarter of the Cambodian immigrants living in the United States had not taken up US citizenship.⁶³¹ All of those who lack citizenship remain vulnerable to removal.

After the passage of the 1996 deportations laws (AEDPA and IIRIRA), around 1,400 Cambodians were ordered to be deported due to felony convictions,⁶³² however, the lack of a removal agreement with Cambodia prevented them from being deported despite their criminal backgrounds.⁶³³ In 2002, in secret negotiations, Cambodia and the United States signed the Cambodian Repatriation Agreement (CRA), permitting the US to deport Cambodians convicted of an “aggravated felony.”⁶³⁴ The agreement limited repatriation to no more than ten deportees per month and provided \$100 to Cambodia for processing each deportee but nothing for resettlement.⁶³⁵ On June 22, 2002, a trickle of six deportees arrived in Phnom Penh.⁶³⁶ The Bush and Obama administrations sent back about three dozen deportees per year.⁶³⁷ In 2017, Cambodia

This means the process requires collecting supporting documents, travel to the citizenship and swearing in ceremony, and taking time off work to follow the required steps.

⁶³⁰ Su, “Deportation of Cambodians,” 104; Golash-Boza, “From Legal to Illegal,” 205. Some of the primary reasons LPRs report for not applying for citizenship are: the fees, lack of strong English skills, lack of time, lack of knowledge about the process, fear of losing their citizenship in their country of birth, and not realizing they are not already US citizens.

⁶³¹ United States Census Bureau, “Selected Population Profile in The United States,” 2019, <https://data.census.gov/cedsci/table?t=-04%20-%20All%20available%20detailed%20Asian%20races&tid=ACSSPP1Y2019.S0201&hidePreview=false>.

⁶³² Su, “Deportation of Cambodians,” 105.

⁶³³ Hing, “Deporting Cambodian Refugees,” 266.

⁶³⁴ Su, “Deportation of Cambodians,” 105.

⁶³⁵ Cowan, “Cambodians Go ‘Home’,” 102.

⁶³⁶ Su, “Deportation of Cambodians,” 105; Hing, “Deporting Cambodian Refugees,” 266; Rosen, “Deported to Their Parents' Homeland; Cowan, *Cambodians ‘Go Home’*,” 100.

⁶³⁷ Rosen, “Deported to Their Parents' Homeland.”

briefly backed off accepting deportees, prompting Trump to impose visa sanctions against Cambodian officials.⁶³⁸ Cambodia relented, raids on the Cambodian community began, and in 2018, the United States sent more than 100 deportees to Cambodia.⁶³⁹ Figure 9 shows removals of Cambodians from the United States from 1992 through 2019, the most recent year for which statistics are available. US Immigration and Customs Enforcement anticipates approximately 200 removals per year going forward.⁶⁴⁰ As of July 2019, according to a press release issued by ICE touting the deportation of 37 Cambodians on a flight from Dallas to Phnom Pehn, more than 1,900 Cambodian nationals living in the United States were awaiting deportation, including more than 1,400 with criminal convictions.⁶⁴¹

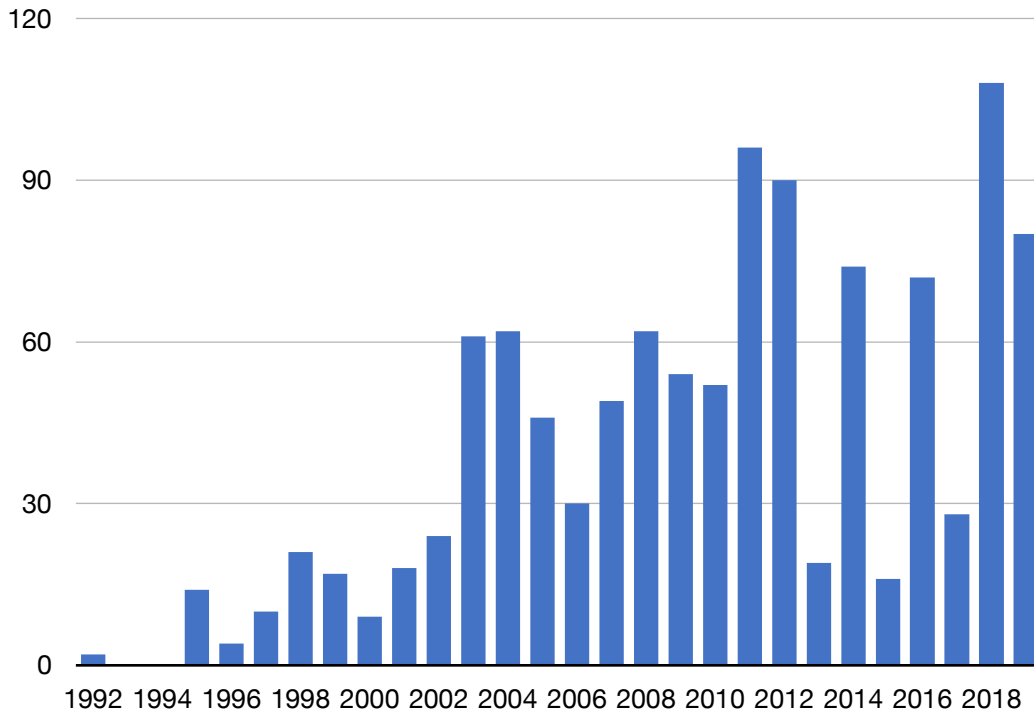
⁶³⁸ Rosen, “Deported to Their Parents' Homeland.”

⁶³⁹ Rosen, “Deported to Their Parents' Homeland.”

⁶⁴⁰ Rosen, “Deported to Their Parents' Homeland.”

⁶⁴¹ “ICE removes 37 Cambodian nationals,” US Immigration and Customs Enforcement, ICE Newsroom, July 3, 2019, <https://www.ice.gov/news/releases/ice-removes-37-cambodian-nationals>.

Figure 9: Removal of Cambodians from the US, 1992-2019



Source: <https://trac.syr.edu/phptools/immigration/remove/> (2002-2019); Department of Homeland Security, Yearbook of Immigration Statistics (1992-2001)

Once they arrived in Cambodia, deportees faced difficulty adjusting to life in their new home. They stood out as different—their clothes, accents, and demeanors are more American than Cambodian. They are often seen as outsiders who left the country rather than patriots who stayed to rebuild. Returnees are perceived to be criminals, with no place in local Cambodian society. Many remain vulnerable to drugs and violence, and some harbor memories of the brutality of the Khmer Rouge and the loss of family members.⁶⁴² Some have committed suicide. Rather than being returned to the place they belong, they are banished from their true home, the United States. Some

⁶⁴² Dunst, “Cambodians Deportees Return.”

Cambodians have been wrongly deported, either because their convictions were not of the type classified as deportable or because they are actually US citizens.

Deportees leave behind families—often American citizen spouses and children—and are ineligible to return for many years, if at all.⁶⁴³ Deportation tears families apart, removing members who are parents of young children, breadwinners, or caregivers for the elderly.⁶⁴⁴ Deportation also has profound impacts on the wider Cambodian community as well, by reinforcing their “otherness,” creating a sense of always at being at risk, and contributing to the feeling that they lack a permanent, welcoming home.⁶⁴⁵ Removal adds to the cycle of alienation that Cambodian refugees have experienced their entire lives, from fleeing their homes under terrifying conditions, to long periods spent in limbo in bleak refugee camps, to alienation within US society, to being rejected by the United States and sent to Cambodia, where they are often, despite their citizenship status, unwelcome.⁶⁴⁶ Far from simply sending people back to where they came from, removal of refugees “instead engender(s) their redisplacement.”⁶⁴⁷

According to Hing, “[W]e committed to bringing refugees into our American family. As part of that process, if they become caught up in the justice system, that system ought to be designed in a way that continues the actualization of their incorporation into society rather than giving up on them.”⁶⁴⁸ In other words, once we have accepted a refugee as part of our society, we

⁶⁴³ Cowan, “Cambodians Go ‘Home’,” 101; Boehm, “Separated Families,” 402.

⁶⁴⁴ Boehm, “Separated Families,” 408.

⁶⁴⁵ Charles Dunst, “Protections Fall for Vietnamese Immigrants as Trump Pushes Deportations,” *Just Security*, August 29, 2019, <https://www.justsecurity.org/66015/protections-fall-for-vietnamese-immigrants-as-trump-pushes-deportations/>; McKinney, “Deportation Proposal Shakes”; Monica Velez, “‘Woken Up’ By Trump Presidency; Southeast Asian Immigrants Flock to Citizenship Classes,” *Valley Public Radio*, January 30, 2019, <https://www.kvpr.org/post/woken-trump-presidency-southeast-asian-immigrants-flock-citizenship-classes>.

⁶⁴⁶ Cowan, “Cambodians Go ‘Home’,” 101.

⁶⁴⁷ Cowan, “Cambodians Go ‘Home’,” 101.

⁶⁴⁸ Hing, “Detention to Deportation,” 960.

have a moral obligation to continue to integrate them into the society, regardless of their behavior. But the current deportation regime does not take into account the traumas—both pre- and post-migration—of refugees. Instead it exacerbates that trauma by breaking the social contract with refugees who commit crimes and returning them to the very places that made them refugees in the first place.

Anti-Asian racism has long been embedded into American criminal and immigration laws—as discussed in Chapter One, the Chinese Exclusion Act of 1882 was the first codification of many ethnically-based immigration laws—and can be seen today in focused efforts on the deportation of Asian immigrants. Violence against Asians, say Asian-American advocacy groups, comes not just from a man with a gun but from governmental policies that target Asians and trigger fear within their larger communities.⁶⁴⁹ Deportation is a form of violence by the state because it tears apart families, inflicts emotion trauma on an already-vulnerable population, and leaves Asian-American communities in turmoil. These policies are especially concerning during the Covid-19 pandemic, when xenophobia and anti-Asian violence in the United States have exploded, by confirming that Asian immigrants are unfit to be a part of American society.

Fighting removal

Although the numbers are relatively small, these deportations have an out-sized impact on the small, close-knit Cambodian communities.⁶⁵⁰ The increase in deportations of refugees has galvanized a new wave of activism by the Southeast Asian community and immigration advocates.

⁶⁴⁹ Jeff Gammage, “Deporting Asian refugees, activists say, is anti-Asian violence – and removals are up,” *The Philadelphia Inquirer*, News, March 27, 2021, https://www.inquirer.com/news/immigration-immigrant-southeast-asia-asian-violence-cambodia-vietnam-laos-deportation-detention-20210327.html?fbclid=IwAR1SK_k10vcUgkZav8tbJiGxboakjrcxMgdDiUQXra8G1vi-8_21SMxEVsc.

⁶⁵⁰ Gammage, “Deporting Asian refugees.”

Challenges to individual removals, as well as efforts to overhaul the deportation regime, have met with varying amounts of success. Broadly speaking, “advocates have been able to insert alternative discourses of security, public safety, community, and belonging into immigration debates even as they are constrained by the power of the federal government, thus reasserting the broader message of the immigrant rights movement.”⁶⁵¹

Asian-American advocacy groups across the United States have been protesting against the deportations, attempting to bring attention to the issue.⁶⁵² They have been providing legal assistance and other support to potential deportees and lobbying elected officials to make changes to the draconian laws. Immigration advocacy organizations have also been working to change the rhetoric surrounding deportation, de-stigmatizing deportees, and educating the public about the realities of these immigrants.⁶⁵³ Nary Rath of SEARAC explained that if society does “not see immigrants worthy of redemption, worthy of compassion and humanity, then legislatures won’t pass laws that are humane, compassionate, and equitable.”⁶⁵⁴ As chronicled in Chapter Two, these efforts have seen some success, as the rhetoric surrounding criminal aliens has evolved in recent years. Proposed deportation reform legislation, while not yet successful, has found support in Congress, and President Biden’s professed open-mindedness to change has given advocates hope. Upon taking office, Biden issued a 100-day moratorium against deportations, in the hopes that low-level offenders would be protected from removal while waiting for legislative reform and give

⁶⁵¹ Christopher Strunk and Helga Leitner, “Resisting Federal–Local Immigration Enforcement Partnerships: Redefining ‘Secure Communities’ and Public Safety,” *Territory, Politics, Governance* 1, no. 1 (2013): 79.

⁶⁵² Philip Marcelo, “Asian American groups set to protest Cambodian deportations,” *Christian Science Monitor*, September 30, 2019, <https://www.csmonitor.com/USA/2019/0930/Asian-American-groups-set-to-protest-Cambodian-deportations>.

⁶⁵³ Nary Rath, in discussion with the author, January 29, 2021.

⁶⁵⁴ Rath interview.

the administration time to review removal policies.⁶⁵⁵ A federal judge in Texas appointed by Trump, however, quickly banned the moratorium, ruling it violated federal administrative procedure.⁶⁵⁶

Until the deportation laws are changed, opportunities to prevent removals are limited. Before the passage of the 1996 laws, noncitizens at risk of removal had the opportunity to present their case to a judge, who could consider the specific circumstances of the noncitizen's situation.⁶⁵⁷ The 1996 laws removed that discretion and made the process almost automatic for noncitizens convicted of crimes. Because immigration is considered a civil rather than criminal matter, many constitutional rights enjoyed under criminal law, including the right to counsel and the prohibition against retroactive punishment, are unavailable to non-citizen residents facing deportation.⁶⁵⁸ Options for preventing removal through the courts, then, are restricted.

Several state governors have granted pardons for some crimes, which have prevented imminent removals.⁶⁵⁹ Former US Attorney General William Barr, however, issued a declaration in late October 2019 that effectively meant that pardons by state governors would not prevent removals.⁶⁶⁰ Barr's declaration reflects a conflict between federal laws—one allowing removal for

⁶⁵⁵ “Why reforming the U.S. approach to deportations could be Biden’s biggest immigration challenge,” *PBS Newshour*, February 3, 2021, <https://www.pbs.org/newshour/politics/why-reforming-the-u-s-approach-to-deportations-could-be-bidens-biggest-immigration-challenge>.

⁶⁵⁶ “Judge Bans Enforcement of Biden’s 100-Day Deportation Pause,” *Associated Press*, February 24, 2021, <https://apnews.com/article/judge-bans-100-day-deportation-pause-d83309628f757732c57a260ea99a48b1>

⁶⁵⁷ Hing, “Deporting Cambodian Refugees,” 268.

⁶⁵⁸ Mae Ngai and Daniel Kanstroom, “Executive Justice?,” *Dissent* 62, no. 2 (Spring 2015): 38; Golash-Boza, “From Legal to Illegal,” 206.

⁶⁵⁹ Matt Driscoll, “With Pardons, Democratic Governors Try to Halt Immigrant Deportations,” *Sacramento Bee*, News, May 17, 2019, <https://www.sacbee.com/news/article230287444.html>; Adiel Kaplan, “Cambodians Use Pardons to Beat Trump Admin’s Deportation Orders,” *NBCNews.com*, Immigration, December 13, 2018, <https://www.nbcnews.com/politics/immigration/cambodians-use-pardons-beat-trump-admin-s-deportation-orders-n945996>.

⁶⁶⁰ Bob Egelko, “Newsom runs up against US Justice Department rules in pardoning immigrants,” *San Francisco Chronicle*, Metro, November 9, 2019. <https://www.sfchronicle.com/news/article/Newsom-runs-up-against-US-Justice-Department-14821637.php>.

certain crimes and another allowing gubernatorial pardon to relieve of removal for certain crimes.⁶⁶¹ Although the AG’s opinions do not have legal effect, they do have persuasive authority.

As another tactic to fight deportations, courts and legislatures have been decreasing the terms of sentences to 364 days to avoid one-year sentencing requirement for automatic removal.⁶⁶² An on-going class-action lawsuit challenging the detention of Cambodian migrants has had some success in temporarily preventing deportations.⁶⁶³ The long-term implications of the case, however, remain to be seen.

On February 24, 2021, the Washentaw County, Michigan, prosecutor’s office cited Lundy Khoy’s case to illustrate its new policy of not coordinating with federal immigration efforts. The goal of the new policy is to protect noncitizens in the community by from unjust immigration consequences. The department cited the need to build trust between the criminal justice and immigrant communities, noting that many immigrants fear of the legal system makes noncitizens less likely to report crimes to the police, making all community members less safe. For noncitizens criminal defendants, the policy specifically instructs prosecutors to avoid outcomes that may lead to deportation where it can be avoided and still be consistent with public safety. “To be absolutely clear,” said Washentaw County prosecutor Eli Slait, “we will continue to charge serious crimes appropriately—whether or not they carry immigration consequences. But it is unjust to forcibly separate a noncitizen from their family, friends, and community for activity that would not even carry jail time for a U.S. citizen.”

⁶⁶¹ Egelko, “Newsom runs up against.”

⁶⁶² Egelko, “Newsom runs up against.”

⁶⁶³ Do, “As More Cambodian and Vietnamese Immigrants.”

The anti-immigrant policies by the Trump administration has “woken up” many permanent residents to the potential for negative consequences.⁶⁶⁴ As a result, many Southeast Asian immigrants began pursuing citizenship to protect them from the risk of removal.⁶⁶⁵ After a steady decline beginning in 2012, naturalizations of Cambodians started climbing with the Trump administration’s term, growing from 2,184 in 2017 to almost 2,900 in 2019, the most recent year for which data is available.⁶⁶⁶ For those already carrying criminal convictions, however, naturalization is not an option.

Conclusion: Deportation of Cambodians

The wars in Southeast Asia led to the largest resettlement of refugees in US history—more than one million over a thirty-year period.⁶⁶⁷ Today, more than 2.5 million people of Southeast Asian descent live in the United States, a large number of whom struggle with socioeconomic insecurity.⁶⁶⁸ According to the Southeast Asia Resource Action Center (SEARAC), refugees from Southeast Asia are three times more likely to be deported for old criminal convictions than other immigrants.⁶⁶⁹ “The inadequate support of SEAA refugees upon initial resettlement, coupled with the rise in mass incarceration and the growth of immigration detention and deportation in the U.S.,

⁶⁶⁴ Velez, “‘Woken Up’ by Trump Presidency.”

⁶⁶⁵ Velez, “‘Woken Up’ by Trump Presidency.”

⁶⁶⁶ “Profiles on Naturalized Citizens,” US Department of Homeland Security, accessed May 28, 2021, <https://www.dhs.gov/profiles-naturalized-citizens>.

⁶⁶⁷ *Southeast Asian American Journeys: A National Snapshot of Our Communities*, 2020 report, Southeast Asia Resource Action Center (SEARAC), 2020, 5, https://www.searac.org/wp-content/uploads/2020/02/SEARAC_NationalSnapshot_PrinterFriendly.pdf [hereinafter, SEARAC report].

⁶⁶⁸ SEARAC report, 10.

⁶⁶⁹ SEARAC website, “Immigration,” accessed May 28, 2021, <https://www.searac.org/programming/national-state-policy-advocacy/immigration/>.

have made this community uniquely vulnerable to the prison-to-deportation pathway.”⁶⁷⁰ Once they have arrived in Cambodia, they are again displaced, excluded from mainstream Cambodian society and left on their own, fighting for survival. Each of the three steps in the cycle of trauma of Cambodian deportees—displacement, resettlement, and removal—can be traced to failures on the part of the United States. As one commentator explained, “In the same way that society is coming to grips with the inadequacies, irrationalities and abuses of the criminal legal system, a parallel process to defund from harms and invest in community programs is also appropriate in immigration, especially as they've come to be so entwined. It is precisely there, at the intersection of law enforcement and immigration enforcement, where some of the gravest harms are done to Black and brown immigrant communities.”⁶⁷¹

Deportation of Cambodian refugees exposes “deeply rooted paradoxes in America’s self-professed claim to provide refuge to persons fleeing violent and oppressive conditions.”⁶⁷² The US refugee program helps save the lives of vulnerable people, continues the country’s commitment to welcoming people and helping those who flee violence and oppression, and promotes stability around the world.⁶⁷³ Yet the United States has also played a role in destabilizing the places where many refugees come from and has moral responsibility to help those who are fleeing the chaos it helped create. That moral responsibility does not end when these vulnerable members of society make mistakes and commit crimes, rather the country owes refugees a duty to continue working toward incorporating them into society.

⁶⁷⁰ SEARAC report, 11.

⁶⁷¹ Frances Madson, “‘Juan Crow’ Immigration Laws Mirror the Injustices of U.S. Crime Laws, Advocates Say,” *Newsweek*, Politics, January 19, 2021, <https://www.newsweek.com/juan-crow-immigration-laws-mirror-injustices-us-crime-laws-advocates-say-1562825>.

⁶⁷² Cowan, “Cambodians Go ‘Home’,” 101.

⁶⁷³ Kerwin, “The US Refugee Resettlement Program,” 208.

Historically, American society has been inured to fear internal, sometimes invisible, enemies: paranoia about communism, and, currently, anxieties about so-called terrorism. These ideological specters and the interests they serve not only have justified America's right to resort to aggressive external interventions but also have simultaneously shaped U.S. immigration policies, particularly those pertaining to exclusions and deportation. The paradox is clear: a global reach in policing has invited or materialized those same threats to American interests and has left behind an unraveling trail of political and economic fragility.⁶⁷⁴

Perhaps nowhere is that paradox clearer than in Cambodia and Southeast Asia. "Forty-three years ago, a lot of the Southeast Asian communities [...] fled their countries and their homeland due to the war, which the U.S. was involved in, fleeing for their safety and the safety of their families," said Kevin Lam, the organizing director of the Asian American Resource Workshop, an advocacy group. "The U.S. would do well to remember that."⁶⁷⁵

⁶⁷⁴ Cowan, "Cambodians Go 'Home'," 101.

⁶⁷⁵ Dunst and Calamur, "Trump Moves to Deport."

Conclusion

For thousands of legal permanent residents of the United States who have been convicted of crimes, their stories of forced removal continue. They are sent to start new lives in places that are unfamiliar, away from their families and friends and the lives they had known. Their fates are often determined based on their ability to survive in a foreign and, in many cases, dangerous new land. The sovereign power of the United States to remove people within its territories is far more than a harmless administrative procedure—it is the power over life itself.

Although banishment was a common practice in the ancient world and continued to be practiced until the last few centuries, deportation of criminal aliens on a massive scale is a decidedly modern practice. Today's US deportation regime is an unprecedented machine that indiscriminately displaces, dehumanizes, and denationalizes thousands of legal immigrants each year. This thesis has shown how United States law related to deportation has changed drastically over history and especially over the past century. The current deportation system in the United States derives from two immigration and crime laws that, when adopted in 1996, led almost immediately to an enormous increase in deportations of noncitizen criminals, a trend that continues today.

While initially intended merely as a way to deal with immigration, deportation today is a form of post-entry social control focused more on criminal behavior than on administrative immigration procedures. For non-citizen legal immigrants who commit crimes that fit within the broad range of categories that require deportation, there is little hope of fighting a removal order. Regardless of how much of an immigrant's life has been spent in the US, the deportation regime dictates that an order to remove a legal permanent resident reflects “the determination that the aliens' ties to this community are insufficient to justify their continued presence in the United

States.”⁶⁷⁶ Long-term noncitizens are just as ingrained in their communities as citizens, especially those who immigrants arrive in the country as children. Removing them from their homes and families imposes extraordinary harms on the deportees and their families—often US citizens—and their communities. And they are often returned to countries that have, by definition, failed in the past to protect them and are often still ill-equipped to help them assimilate. Chances of re-entry in the future are also low.

As I chronicled in Chapter One, the story of America’s deportation policy reflects an ebb and flow that has characterized feelings toward immigration the country’s founding, at times embracing new arrivals and progressivism and at other times actively working to alienate, marginalize, and dehumanize those who were not born inside its borders. I traced the development of deportation policy, in particular, to show how it had hardened over the centuries, and I argued that the current incarnation of deportation law violates fundamental human rights norms in which the United States was instrumental in developing, but by which it refuses to abide.

In Chapter Two, I dug deeper into the discourse that surrounded the passage of the 1996 laws to show how the discourse reflected the nationalist sentiment that was typical of the period. Crime had soared, and politicians, looking for ways to appear effective and for a politically feasible solution to overcrowded prisons, linked immigration to crime to justify deportation laws that caused unconscionable pain to thousands of immigrants and their families. Supporters cheered, while immigrant advocates fought back against the injustice. The pull of the laws, however, has proved intractable to this day.

In the final chapter, I presented a case study on the country of Cambodia to scrutinize the United States’ response to the refugee crisis it was instrumental in creating in the 1970s. My

⁶⁷⁶ *Zadvyas v. Davis*, 533 U.S. 687, 720 (2001).

research showed that US actions in Southeast Asia and its languid efforts at supporting the hundreds of thousands of refugees it admitted created a cycle of displacement that placed Cambodian refugees in a permanent state of precarity and rendered many Cambodian youth vulnerable to lifelong challenges. When Cambodian refugees were welcomed to the United States, the country had a duty to treat them as part of the American family. Yet when they make mistakes and commit crimes, the United States violates that moral responsibility by rendering them unwanted bodies and banishing them instead.

In recent years, the election of Donald Trump showed the country had swung toward the nationalist side of the political pendulum, while the rejection of Trumpism in 2020 suggests a correction toward a more moderate approach to governance. Along with this moderation has come a rejection in the protectionist tendencies of Trump and the accompanying anti-immigrant sentiment he fomented. While Trumpism may have lost at the polls, however, at the same time, a segment of the US population is hardening its stance, throwing all of their weight behind the failed president. This growing divide between Americans and the bitter partisanship in government dims hope for long-sought and much-needed immigration reforms. Deportation law reform should be high on the priority list.

As I have argued in this thesis, the US deportation regime leaves much room for improvement under both domestic and international law. Deportation requires abandoning certain principles on which the United States was founded and which citizens hold dear. Deportation may be more detrimental to one's life than a term of incarceration, "[y]et courts continue to treat immigration proceedings as civil proceedings, refusing to view deportation as a separate and additional punishment." As such, many constitutional rights enjoyed under criminal law, including the right to counsel and the prohibition against retroactive punishment, are unavailable to non-

citizen residents facing deportation. At the same time, the US Supreme Court has found the penalty so severe that the failure of an attorney to advise a client of the risk of deportation constitutes “ineffective assistance of counsel” in violation of the Sixth Amendment.⁶⁷⁷ Immigrants are punished twice for the same crime—first through criminal penalties, then through deportation.

How, then, can the law be rewritten in a way that both protects the internal security of the country but also treats immigrants fairly and respects the fundamental values that Americans hold dear? The first step to improving the laws is reinstating flexibility—of enforcement agents, of prosecutors, and especially of immigration judges. The 1996 immigration laws that set up the deportation regime of today eliminated most judicial review of deportation decisions.⁶⁷⁸ “[T]he immigration judge, who is in a good position to assess the individual facts, can consider evidence of rehabilitation, remorse, family support, and prospects for the future.”⁶⁷⁹ Judges must be able to recognize family unity as a primary consideration, and automatic deportation without judicial discretion disregards the rights of US citizen children to have their best interests considered.⁶⁸⁰ Deportation is all but automatic for certain convictions, regardless of when they were committed, how long the defendant has lived in the United States, what they have contributed to their

⁶⁷⁷ *Padilla v. Kentucky*, 559 U.S. 356 (2010). In *Padilla*, the Court found that immigrants have “constitutionally competent counsel would have advised [the noncitizen defendant] that his criminal conviction...made him subject to deportation.” The defendant, an immigrant from Honduras who had served in the US military in Vietnam and lived in the United States for more than 40 years pleaded guilty to transporting through Kentucky a large amount of marijuana in his tractor-trailer. His lawyer had advised him that he “did not have to worry about immigration status since he had been in the country so long.” This erroneous advice would have resulted in his automatic deportation, a consequence the Court found so serious that the failure of his attorney to notify him of the risk constituted ineffective assistance of counsel under the Sixth Amendment. The Court noted that “deportation is...intimately related to the criminal process” but danced gingerly around the notion that deportation is, in fact, a punishment. Nevertheless, the Court’s determination that failure to advise defendants of the risk of deportation amounts to a Sixth Amendment violation may provide a foundation on which deportation cases may add further substantive constitutional protections.

⁶⁷⁸ Golash-Boza, “From Legal to Illegal,” 206.

⁶⁷⁹ Hing, “Detention to Deportation,” 962; Hing, “Re-Examining the Zero-Tolerance Approach,” 170.

⁶⁸⁰ Boehm, “Separated Families,” 411.

community during that time, the effects of deportation on their family, or any other factors that might demonstrate to a reasonable arbiter that the damage of deportation outweighs its benefits.

Scholars have proposed a number of alternatives to deportation modeled on criminal justice techniques that focus on rehabilitation rather than rejection—including probation, diversion programs, community service, and group living arrangements—providing offenders with on-going treatment and teaching them skills to become productive members of society.⁶⁸¹ “Beyond the benefits to the individual, the family, the community, and the entire society stand to gain from a constructive rehabilitative approach. In contrast, the destructive forces of deportation wreak havoc on all the parties and their relationships.”⁶⁸²

The election of Joe Biden as president may offer a glimmer of hope to immigration advocates and deportees. So far, he has worked toward undoing the worst policies of his predecessors and has made racial equity one of the pillars of his administration, giving hope to advocates who see immigration reform as a crucial element of racial justice.⁶⁸³ He appointed as head the Department of Homeland Security Alejandro Mayorkas, a Cuban refugee and the architect of DACA under President Obama, giving a supportive voice to immigrants.⁶⁸⁴ Biden raised the cap on refugee admissions for 2021 from an historic low of 15,000 under his predecessor to 62,500 and plans to introduce other reforms supportive of immigrants. He directly disavowed the policies he helped implement when he was Vice-President under President Obama and

⁶⁸¹ Hing, “Detention to Deportation,” 967-68.

⁶⁸² Hing, “Detention to Deportation,” 968.

⁶⁸³ Rath interview.

⁶⁸⁴ Maria Sacchetti and Nick Miroff, “The family of Alejandro Mayorkas, Biden’s pick to head DHS, fled the Nazis and then Cuba before arriving in the United States,” *Washington Post*, National, January 18, 2021, available at https://www.washingtonpost.com/national/alejandro-mayorkas-dhs-biden-immigration/2021/01/18/8a34b2bc-40b8-11eb-a402-fba110db3b42_story.html.

promised to place humanitarian values at the core of his immigration policies.⁶⁸⁵ For more than twenty-five years, the cruel deportation regime of the United States has torn apart families, alienated immigrants, and banished members of the community to a life of peril. It is long past time for America to live up to the values and ideals on which it was founded.

⁶⁸⁵ “The Biden Plan for Securing Our Values as a Nation of Immigrants,” Joe Biden for President campaign web site, <https://joebiden.com/immigration/>.

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