

City University of New York (CUNY)

## CUNY Academic Works

---

All Dissertations, Theses, and Capstone  
Projects

Dissertations, Theses, and Capstone Projects

---

10-2014

### **Law Without Recognition: The Lack of Judicial Discretion to Consider Individual Lives and Legal Equities in United States Immigration Law**

John Clark Salyer

*Graduate Center, City University of New York*

[How does access to this work benefit you? Let us know!](#)

More information about this work at: [https://academicworks.cuny.edu/gc\\_etds/377](https://academicworks.cuny.edu/gc_etds/377)

Discover additional works at: <https://academicworks.cuny.edu>

---

This work is made publicly available by the City University of New York (CUNY).  
Contact: [AcademicWorks@cuny.edu](mailto:AcademicWorks@cuny.edu)

LAW WITHOUT RECOGNITION: THE LACK OF JUDICIAL DISCRETION  
TO CONSIDER INDIVIDUAL LIVES AND LEGAL EQUITIES IN  
UNITED STATES IMMIGRATION LAW.

by

JOHN CLARK SALYER IV

A dissertation submitted to the Graduate Faculty in Anthropology in partial fulfillment of the requirements for the degree of Doctor of Philosophy, The City University of New York

2014

© 2014

JOHN CLARK SALYER IV

All Rights Reserved

This manuscript has been read and accepted for the Graduate Faculty in Anthropology in satisfaction of the dissertation requirement for the degree of Doctor of Philosophy.

Dr. Michael Blim \_\_\_\_\_

\_\_\_\_\_  
Date

\_\_\_\_\_  
Chair of the Examining Committee

Dr. Gerald Creed \_\_\_\_\_

\_\_\_\_\_  
Date

\_\_\_\_\_  
Executive Officer

Dr. Michael Blim \_\_\_\_\_

Dr. Donald Robotham \_\_\_\_\_

Dr. Glenn Petersen \_\_\_\_\_  
Supervisory Committee

THE CITY UNIVERSITY OF NEW YORK

## **Abstract**

Law Without Recognition: The Lack of Judicial Discretion  
to Consider Individual Lives and Legal Equities in  
United States Immigration Law.

by

John Clark Salyer IV

Advisor: Michael Blim

Law is not separate and apart from society but exists as a unique institution within society both being directed by social change and affecting social change. The history of U.S. immigration law shows that immigrants were welcomed or rejected depending on economic, political, and social factors (such as racial attitudes) and the legal definitions of what sorts of immigration were permissible or excludable differed over time. Since the 1990s, hostile attitudes towards certain immigrants have been represented in laws to a greater and greater extent, most significantly with the 1996 amendments to the Immigration and Nationality Act. As a result of these laws, immigration judges often have no discretion to consider personal circumstances and equities of the individuals who come before them. The effects of these laws have resulted in greater numbers of individuals being detained and deported and a significant increase in the militarization of the border.

In this work, I examine the workings of the immigration law enforcement system in New York City, including government agencies and immigration courts, from the perspective of the immigration lawyers who advocate on behalf of migrants within that system. Drawing on the experience and expertise of these lawyers, as well as my own participant observation experience as an immigration lawyer at a community based organization, I demonstrate the limitations of the current immigration law system to consider the various historical, economic, political, social, and

personal factors of migrants; demonstrate where these sorts of considerations may be possible; and demonstrate the need for immigration law to be better able to consider and attend to these individual factors and equities. Additionally, this work demonstrates that consideration of the complexity of specific immigration statutes, regulations, and practices provides a clearer understanding of the limitations and possibilities in U.S. immigration law.

## **Acknowledgements**

While I owe a number of debts of gratitude to individuals at the Graduate Center, chief among them is the debt I owe to the members of my committee: Michael Blim, Donald Robotham, and Glenn Peterson. I owe a special thanks to my outside reader, Marco Jacquemet of the University of San Francisco, for his careful reading and thoughtful comments, which he generously provided on unreasonably short notice. In particular, I owe a debt of appreciation to my dissertation Chair, Michael Blim, who patiently provided me with advice, direction, encouragement, and friendship throughout this entire process. Additionally, I express my thanks to Shirley Lindenbaum who served on my second exam committee and was a reliable source of advice and encouragement during the early part of my studies at the Graduate Center. I also owe a special debt to Ellen DeRiso, for her unfailing skill at navigating all things Graduate Center. Finally, I owe thanks to Neil Smith, without whom I probably would not have attended the Graduate Center. Neil was always supportive and encouraging both when I first spoke to him about the possibly going to graduate school and later in the numerous courses I took with him.

I also owe a debt of gratitude to the immigration lawyers who took time to speak with me as part of this study and to the numerous lawyers who have assisted me in better understanding immigration law both as a researcher and as an immigration attorney. Deserving special mention is Nancy Morawetz of the New York University Law School Advanced Immigrants Rights Clinic for her generosity of time and her scope of knowledge and insight. I also want to thank everyone at the Arab American Family Support Center (“AAFSC”), where I am the immigration law clinic’s staff attorney. I am particularly indebted Hizam Wahib without whose assistance I could not do my job and without whose humor and friendship I would not want to. I would also

like to express my thanks to the hundreds of clients I have represented at AAFSC for their trust and for sharing their experiences.

There are also a number of individuals in my more distant past without whom I would never have considered myself able to conduct academic work in any serious way. John Brauer, who was my grade school teacher for eight years, allowed me to realize whatever modest potential I had through his patient, good humored, and persistent efforts. I am sure that with a less engaged and committed teacher I would still be struggling to read at a fifth grade level much less be able to complete a dissertation. Similarly, I owe debts to David Halley and Mark Williams at the University of Georgia, Department of Anthropology, both of whom provided me with numerous opportunities while an undergraduate and showed considerable more faith in my abilities and level of responsibility than I reasonably deserved. Also, while an undergraduate at the University of Georgia, I was introduced to graduate level work in the best way possible, by being befriended by the greatest cohort of graduate students to have ever existed. In particular, Adam King, Keith Stephenson, Jennifer Harris, Guy Harris, Robbie Ethridge, Paige West, and Sammy Smith along with her husband John Burns, showed me boundless friendship and kindness.

Of course, I owe more of a debt to my parents, sister, and family than I could ever hope to enumerate. Particularly, I want to thank my mother, Pat Wadsworth, for being a consistent example of an engaged and empathetic person. I would also like to thank Pat West for her friendship, support, and expert cat sitting services. Additionally, Colleen and Ed Bongiovanni have provided support, kindness, and humor in good times and bad. I would also like to thank Silke Aisenbrey, Debra Minkoff, and Noah Aisenbrey-Minkoff for essentially being my family in New York City.

One of the most famous expressions of gratitude is Yogi Berra saying, "I want to thank you for making this day necessary" to the fans on Yogi Berra Day in 1947. In my case there was absolutely nothing necessary about returning to graduate school, pursuing this research, and completing this dissertation. I was already a practicing lawyer with a satisfying position as a staff attorney with the American Civil Liberties Union and quitting my job to go back to school was certainly not a conventional – or wise – career decision. My motivation stemmed from a dawning realization that the purpose of life was to explore the world and satisfy one's curiosity during the limited time we have on this spectacular planet. For this realization, I must credit my best friend and wife, Paige West, who has shown me what is important in life clearer than anyone else I know.

## **Table of Contents**

Abstract	iv
Acknowledgements	vi
Table of Contents	ix
List of Tables and Illustrations	x
Chapter 1. The Complexity of U.S. Immigration Law and Deportation	1
Chapter 2. A Social History of the Development of U.S. Immigration Law	42
Chapter 3. Law without Recognition: Excluded Equities and Judges without Discretion	100
Chapter 4. The Role of Lawyers and Judges in U.S. Immigration Law	133
Chapter 5. The Limitations and Possibilities of U.S. Immigration Law	164
Appendix	185
Bibliography	187

## **List of Tables and Illustrations**

Figure 1: “Close the Gate,” a political cartoon from 1919 67

Table 1: Number of Deportations from 1996 to 2012 92

## **Chapter 1**

### **The Complexity of U.S. Immigration Law and Deportation**

#### **Introduction**

If you were sitting in a county jail somewhere in New Jersey the night before you were to be transported to immigration court in New York City to go before a judge to have your fate decided, what would you want to tell that judge? You might want to explain that you grew up in a rural area of Mexico and left for the United States when the land your family had access to could no longer support your parents and siblings and that you have been working for years in the United States to send money home to support your family. You might want to explain that since coming to the United States, you have gotten married and had children of your own, who are U.S. citizens. You might want to explain that you work multiple jobs, putting in far more than 40 hours per week, and that because of these efforts your family is healthy and happy and your children are excellent students making strides to achieve the American dream. Because you do not have a lawyer and because you do not understand the document that outlines the reasons the government says you should be deported, you decide the best you can do in your defense is tell the judge about yourself and your family and hope that she will see that you are not a bad person and that since coming to the United States you have lived like a good “citizen.”

If the next morning you were sitting on the bench in an immigration courtroom charged with deciding which people are entitled to stay in the United States and which people are to be removed – possibly separating them from a spouse, children, or even the only country they have known since childhood – what would you want to know about the people who come before you? Would you want to know about their families, the length of time they have lived in the United

States, why they came to the United States, whether they were law abiding during their time in the United States, and whether they had been hardworking? Under current U.S. immigration law, these sorts of facts and life stories are often irrelevant in the determination of the fate of migrants in the immigration system because the laws that determine whether someone is entitled to a lawful immigrant status or whether someone will be deported often do not allow for consideration of personal history, achievements, hardships, merits, or equities. For example, for many people the act of entering the United States without authorization means that they are without hope of obtaining a lawful immigration status regardless of all other aspects of their life. Similarly, even those who have lawful immigration status, such as greencard holders, can find that a single criminal offense, such as minor drug conviction will result in deportation without any possibility of relief. As a result of these laws, in many cases immigration judges have no discretion in determining the fate of individuals who appear before them. Even though every individual charged with violating immigration law has a different history and life story, the only punishment for violating immigration law is to be deported from the U.S. Unlike other areas of law, such as criminal law or torts, where there are degrees of culpability, consideration of equities, and gradations of punishment, in immigration law there are scant opportunities to consider ameliorating justifications or equities and there is no gradation in consequences.

### **Limits and Potentials in U.S. Immigration Law**

“The power of the lawyer is in the uncertainty of the law.”  
Jeremy Bentham

The structure of immigration law determines the fate of millions of individuals and their families. For some individuals, immigration laws provide a path towards legalization of immigration status, while for many others the strictures of the current laws result in remaining undocumented, losing immigration status, or being deported. The specifics of the laws and

procedures that determine who is allowed legal status in the United States and who will be denied such a status have not been adequately considered within the existing social science critiques of U.S. immigration law. These strictures, and the consequences they impose on the lives of individuals, stem not just from immigration law and policy, writ large, but also from the implementation of specific statutes and provisions. While it is possible, and valuable, to critique the immigration system and its results as a whole, it is also necessary to concretely identify the specific causes of its harms in order to be able produce a more fine-grained examination the immigration law and policy than generally occurs. This dissertation augments existing critiques of U.S. immigration law by providing even greater specificity in the identification of the statutes, policies, and mechanisms that comprise current immigration law in the United States, and by providing a clearer description of the process and individual actors that implement that law.

For individuals within the immigration system, non-citizens facing deportation; lawyers attempting to assist their clients or to represent the government; and judges responsible for implementation of existing law, there is a practical exigency which requires addressing the specifics of individual cases within the existing framework of current law. While the structure of the current system limits the sorts of arguments that can be made and the sorts of evidence that will be considered relevant, in some cases migrants and the lawyers that assist them still find that they are able to achieve favorable results. In critiquing immigration law, understanding such successes is as important to understanding how the system operates as is identifying examples of the system seeming unfair, inhumane, or unjust. Only through fully evaluating the potentials, as well as the limitations, of the current system can one begin to formulate a critique that not only identifies the harms created by current law but also points toward possible alternatives and reforms that can make significant differences in the lives of individuals whose fates are

controlled by these laws. Immigration lawyers, who need to practice law within the system as it is currently structured, are not precluded from forming opinions and critiques of the system in which they must operate; indeed, quite the opposite is true. By regularly applying, contesting, and attempting to expand this law, these lawyers gain an understanding of both its general application and its limits. This project takes advantage of this expert knowledge by drawing the experience of immigration lawyers through participant observation and interviews.

### **Immigration, “Illegality”, and Deportation**

Saskia Sassen has observed, “[t]here is a strong tendency in immigration policy in developed countries to reduce the process to the actions of individuals. The individual is the site for accountability and enforcement. Yet it is now increasingly being recognized that international migrations are embedded in larger geopolitical and transnational economic dynamics” (Sassen 1999: 17). There is a paradox in immigration policy because both legal and undocumented migration is a social phenomenon but immigration law is written and enforced against people who are seen as individuals choosing to ignore immigration law for their own self-interested benefit. This is in spite of the fact that many scholars and lawmakers believe that the socioeconomic push factors and pull factors influence, and are even determinative of, the number of immigrants coming to the United States. Of course, it is not illogical to exercise the sanction of immigration law against individuals who transgress its rules, however, it should be recognized that currently immigration law allocates the blame entirely against those individuals who are most subject to the broader systemic forces and who are disenfranchised from the political process that creates the laws to which they are subject. There are a multiplicity of historical, economic, political, social, and personal factors at play in migration patterns in general and in the life of someone who is undocumented or subject to deportation specifically.

Under current immigration law, most of these factors are not held to be relevant and are not considered when answering the question of whether a person will be entitled to stay in the United States. While there is a “vast social science literature” on the subject of U.S. immigration and “illegal immigration” (De Genova 2002: 420), there is not nearly so large a body of work addressing the actual legal process by which individual migrants are deported and the factors at work in that process. This dissertation addresses this lacuna by examining the workings of the immigration law enforcement system in New York City, including government agencies and immigration courts, from the perspective of the immigration lawyers who advocate on behalf of migrants and their interests within that system. My objective is to demonstrate the limitations on the ability to consider the various historical, economic, political, social, and personal factors within the immigration law system, to demonstrate where these considerations may be possible, and to demonstrate the need for immigration law to be better able to consider and attend to these individual factors and equities.

The current political and social debate regarding immigration in the U.S. focuses on the core juridical concepts of law, legality, and illegality. While these terms are used as if they are self-defining, they contain a vagueness and generality that implies that the immigration system is a system of justice while at the same time occluding the history and socio-economic practices that have been developed from, motivated by, and enabled by the unequal legal status of migrants. As a result, it is not always recognized that the concept of “law” as applied in the context of immigration is vastly different than a concept of law that embraces principles of equality, due process, and democracy. In daily legal practice and in the enforcement of immigration laws, the historical and current socio-economic context of migration in the United States is not generally relevant or given much consideration. In evaluating the U.S. immigration

system, however, this context is required to both form policy judgments about current law and to evaluate how current law does and does not account for relevant factors. By focusing on how specific laws apply in various situations, this dissertation demonstrates that one of the main limitations on the immigration law system's ability to consistently produce fair, just, and humane results is its lack of flexibility and discretion to take into account the circumstances and equities of different individuals' lives and histories.

This chapter will provide that context by reviewing the literature that complicates conventional notions regarding why migration occurs by demonstrating how political and economic processes that originate in migrant receiving countries, in fact, stimulate migration to those countries. Next it will examine how anthropologists, and other social scientists, who have worked specifically on the issues of migration, "illegality," and deportation have interpreted the role of immigration law. By analyzing an example of how there is a lack of attention to the specifics in how immigration law works in practice, this chapter will show that neglecting such detail lessens the usefulness and persuasiveness of otherwise valuable work. Finally, this chapter will describe how this project examined the specific limitations imposed on individuals in the immigration law system in New York City through participant observation and interviews with practicing immigration lawyers.

### Complex Causes of Migration

As will be discussed in the next chapter, immigration law has developed as an area where the judiciary is uniquely deferential to the political branches of government – Congress and the executive. Indeed, the Supreme Court has repeatedly held that, "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be

unacceptable if applied to citizens."<sup>1</sup> In exercising that broad power, the political branches have enacted a series of punitive laws that apply to individuals whose conduct ranges across vastly different levels of culpability. As Sassen noted, the central conceit of immigration law is that it structures enforcement against individuals who are driven by political, social, and economic forces beyond their control. The cruel irony is that the more desperate the plight of individuals becomes due to these broader systemic forces, the greater the motive and need to migrate becomes, and all too often the response is to increase the frequency and severity of modes of enforcement.

Douglas Massey and colleagues identified six bodies of theory that purported to describe the causes of migration (Massey et al. 1998). These theories were “*neoclassical economics* (Todaro 1976); the *new economics of labor migration* (Stark 1991); *segmented labor market theory* (Piore 1979); *world systems theory* (Sassen 1988); *social capital theory* (Massey, Goldring, and Durand 1994); and the theory of *cumulative causation* (Massey 1990)” (Massey 2009: 28). Much of this literature frames the causes of immigration in terms of “push and pull factors” which either push migrants away from their country of origin or pull them to a migration destination. Neoclassical economics posits that migrants are attracted by the higher wages available in developed countries while the new economics of labor migration argues that it’s more than just the wage differential, it’s also the lack of institutions to provide credit, insurance, and capital, as well as the lack of a welfare state, drives migrants to seek such institutions abroad. Massey argues that “segmented labor market theory and world systems analysis seem to account better for why demand for immigrant labor arises in host societies” (Massey 2009: 29). The segmented labor market theory argues that post-industrial neoliberal economies create segmented

---

<sup>1</sup> *Demore v. Kim*, 538 U.S. 510, 521 (2003).

labor markets with a highly paid primary sector and a secondary labor market, with low pay and few benefits, which has a high demand for immigrant labor. Works drawing on world systems theory argue that the process of globalization leads to the displacing of people from land and the disembedding of livelihoods while at the same time creating the political and economic linkages that create networks of migration. As early migrants obtain social capital, such as the expertise reflected in enclave economies, “the process of network expansion itself becomes self-perpetuating because each act of migration creates social infrastructure capable of promoting additional movement (the theory of cumulative causation)” (Massey 2009: 30).

Despite this identified complexity and the identification and even integration of multiple theories regarding the explanations and motives for migration, the assumptions underpinning U.S. immigration policy have largely been built on straightforward neoclassical theory. Policies, such as the increased militarization of the border; increased detention and deportation of migrants; and efforts to make life more difficult for the undocumented, are aimed at shifting the cost-benefit calculation individual migrants are presumed to be undertaking before coming to the United States (Ryo 2013; Massey and Riosmena 2010). Such policies, which ignore other aspects of migration and focus exclusively on attempting to deter migration through the imposition of additional costs, have had a poor track record in terms of meeting their enforcement aims. For instance, increased enforcement on the United States – Mexico border has raised the cost of crossing to the United States in terms of both dollars and lives but does not appear to have appreciably deterred unauthorized migration across the border (Cornelius and Salehyan 2007). Additionally, neoclassical approaches to migration theory are “individualistic and ahistorical” in their portrayal of individual migrants as attempting to maximize their earning potential by traveling when there are significant differences between wages in sending and

receiving countries because the theory does not examine the origins of such global inequalities nor do the laws rooted in such policies (Sager 2012: 63).

Massey argues that these neoclassical economic assumptions about migration fail to comprehend the complex motives, methods, and character of migration. First, Massey rejects the idea that most immigration can simply be attributed to the wage gap that exists between developing nations and developed nations. Desire to maximize income earning potential is only one of a host of factors that Massey identifies. Rather he says, “[c]ontrary to common perceptions, *international migration does not stem from a lack of economic development, but from development itself* ... The fact of the matter is that no nation has yet undergone economic development without a massive displacement of people from traditional livelihoods” (Massey et al. 2002: 144). When individuals are faced with this sort of displacement, they migrate to places that are already linked through economic, social, and political history and relationships. Here, Massey is drawing on Sassen’s analysis of how increased capital mobility leads to foreign capital investment that simultaneously creates economic, political, cultural, and military links between sending and receiving countries as it disrupts local social structures and subsistence practices through the establishment of commercial agriculture and export manufacturing (Sassen 1988). Sassen argues that U.S. business, military, and diplomatic activities create objective and ideological linkages that induce migration and this explains why immigration occurs from certain countries and not others even if they share common economic conditions that neoclassical theorists would expect to impel migration equally. Sassen argues, “the presence of foreign plants not only brings the United States or any other ‘western’ country closer, but ‘westernizes’ the less developed country and its people. Emigration to the United States emerges as an option” (Sassen 1988: 20). Moreover, “the same set of basic processes that has promoted emigration from

several rapidly industrializing countries has also promoted immigration into several booming global cities” (Sassen 1988: 22). By this Sassen, means that in developed countries, such as the United States, the process of deindustrialization, the shrinking of the middle class, and the growth of a service sector dependent on part-time flexible labor has lead to increased demand for a “growing concentration of immigrant labor in service jobs” that “can be viewed as the correlate of the export of jobs to the Third World” (Sassen 1988:53). Thus, rather than migration being seen as the solely the result of decisions and actions by individual migrants, migration is the result of global political economic processes instigated in the migrant receiving nations.

In terms of motives for migration, Massey explains that the desire is often to migrate temporarily to achieve a specific goal such as accumulating business capital to address economic problems back home, or reduce risk by diversifying family income sources. This points up the fact that decisions to migrate are often influenced by economic, social, and political institutions other than labor markets, such as availability of credit or insurance. Regardless of motive, migrants build knowledge and experience while abroad, which facilitates and encourages longer or permanent immigration and builds networks to facilitate migration by kin and community members. Finally, Massey argues that because migration is in effect a workaround for the lack of functioning economic, social, political institutions, which uses those institutions in developed countries to achieve personal, family, and community goals back home, migration aids in development that eventually reduces the need for migration (Massey et al. 2002: 145-146). Remittances are, of course, a prime example of this. In the case of migration from Mexico, Massey argues that policies that facilitate short-term labor migration with economic incentives to return home are consistent with most Mexican migrants desires (Massey et al. 2002: 159-161; Massey 2009: 40). Additionally, he argues that such short-term migration should be paired with

bilateral programs to provide insurance, financial services, and credit to address many of the reasons people chose to migrate in the first place (Massey et al. 2002: 161-162).

Based on this view, Massey criticizes the changes to U.S. immigration law that have limited the routes for temporary Mexican migration to the U.S. and practices that have been put in place to enforce them. As discussed more fully in the next chapter, the passage of the 1965 Hart-Celler Act radically restructured U.S. immigration policy by eliminating the discriminatory quota system but it did so by imposing numeric limits on migration from the Western Hemisphere, including Mexico, for the first time. In 1976, an annual limit of 20,000 visas per country was put into place that further restricted migration from Mexico. Massey points to these and other legislative changes, which limited opportunities for Mexicans seeking legal entry to work in the United States, as the cause of increased undocumented migration. Moreover, he claims that increases in enforcement, particularly on the United States – Mexico border, beginning with the passage of the Immigration Reform and Control Act of 1986 (“IRCA”), have limited the temporary circular undocumented labor migration that had been the norm for Mexican migration. Massey claims that IRCA and the limits imposed on circular migration, both authorized and undocumented, "transformed what had been a well-functioning, predictable system into a noisy, clunking, dysfunctional machine that generated a host of unanticipated outcomes that were in neither country's interests" (Massey et al. 2002: 2).

### The Postmodern Paradox of Migration and Exclusion

Both Sassen (1988) and Massey (2009) highlight the complex relationships between people and institutions in migrant sending and receiving countries to demonstrate how much of the pressure and motivation to migrate to countries such as the United States originates with global and transnational processes that have their origins in those migrant receiving countries.

As Sassen notes, the shift to globalized capital flows and the deindustrialization of the United States results in a reconfiguration of labor in favor of flexible, temporary, and less secure employment, which are the very sorts of jobs available to newly arriving migrant workers. Massey, looking at a number of studies regarding historical factors that lead to restrictionist immigration policies, identified three main factors: (1) macroeconomic health, such as the relative wages of unskilled workers and unemployment rates, (2) volume of immigration, and (3) ideological currents such as desire for social conformity (Massey 2009: 32-33). Massey argues that there is a “postmodern paradox” because “while the globalizing economy unleashes...diverse flows of migrants...it simultaneously creates conditions...that promote the implementation of restrictive immigration policies by increasing the share of foreign-born residents, raising levels of inequality, and increasing economic insecurity” (Massey 2009: 33-34). In this way broader socio-economic factors not only influence migration from the Global South to the Global North, they play a large role in conditioning the attitudes toward migration and the laws that are made regarding it.

#### Interpretations of the Role of Immigration Law

The following scholars’ interpretation of the role of immigration law all share a goal of explaining what immigration law does in a social context and providing an explanation of the purpose, on a macro level, that the law is serving. These interpretations are quite valuable for three reasons. First, they demonstrate the immigration law’s character as a form of regulation quite different from law in general. Second, they demonstrate the hardships and inequality that often stems from immigration law. And third, they help to explain the “gap” (see Cornelius, Martin, and Hollifield 1994) that exists between the formally professed purpose of immigration laws and how those laws are implemented in practice. What they often fail to do, however, is

analyze immigration law itself, from the inside out. There is a comprehension that the immigration law, as an entity, is responsible for the observed effects but there is generally not an examination of the individual provisions of the laws or an explanation of how they operate.

Kitty Calavita's *Inside the State* (1992), based on extensive archival research, looks at the Immigration and Naturalization Service ("INS") and the Bracero Program, the guest worker program that brought millions of temporary migrant laborers to the U.S. from Mexico between 1942 and 1964. Calavita argues that state action and law are influenced by more than the ascendancy of a powerful interest group or a compromise among interest groups. Rather, Calavita sees the state's actions with respect to both the Bracero Program and undocumented labor as the result of Congress delegating the job of dealing with the irreconcilable conflict of competing political and economic interests to the INS. Specifically, the interests in allowing undocumented migrants to serve as cheap flexible source of labor irreconcilably conflict with claims that there is a desire to uphold immigration law; control the border; and protect jobs, wages, and working conditions for U.S. workers. According to Calavita, "political actors in the highly visible arena of Congress dodge contradictions associated with immigration by delegating authority to less visible and less politically vulnerable administrative enclaves of the state" (Calavita 1992:9). The INS used its broad delegations of authority to meet its own perceived institutional needs, which sometimes meant accommodating agricultural employers through the importation of contract labor, sometimes engaging in "benign neglect" of the use of undocumented labor, and sometimes engaging in high profile enforcement action against undocumented workers. When social and political interests outside of the INS resulted in the termination of the Bracero Program in 1964, the INS was faced with a contradiction caused by "economic-structural constraints," in that "it was charged with controlling illegal immigration

but precluded from doing so by the significant economic utility of a porous border” (Calavita 1992: 159). As undocumented migration increased in this post-Bracero era, the INS administration attempted to shelter itself from its failure to enforce immigration law by making important congressional allies and keeping a low profile in Washington by not asking for budgetary increases to its funding, thereby assuring the failure it hoped to obscure (Calavita 1992: 162). By the 1980s, the INS was receiving significant criticism for being ineffectual but immigration officials expressed frustration that they were caught in the middle, with one Border Control agent complaining that politicians in Washington “don’t want us to do our job. Illegal aliens come in and feed the economy and we’re not allowed to do our job” (Calavit 1992: 164).

For Calavita, this account of the INS, and the history of migrant labor during the Bracero Program and thereafter, militates against accepting explanations of law, politics, and society that simply assume an instrumentalist role of capitalist interests because both explanations miss the “far more complex scenario, and greater inconsistencies and ambiguity of state action” (Calavita 1992: 4). Specifically, she objects to the extent that the state is portrayed as a monolith motivated to preserve “the political and economic status quo” and doubts the effectiveness, rationality, and ability of the state to preserve such a social order (Calavita 1992: 174). At the same time, Calavita is sympathetic to empirically driven instrumentalist accounts that demonstrate the entanglements of the state with elite economic interests, such as the work of Theda Skocpol (1985) and Fred Block (1987), as long as such accounts unpack the specifics of this process and explain the role of individual actors. For instance, she finds Block’s description of how managers of the state apparatus protect institutional interests by working out a *modus vivendi* with the elite capitalist class to incorporate the best explanatory elements of both instrumentalist and institutionalism theories (Calavita 1992: 176-77). Because the state

managers have their own interests and their own power, they “pose a potential threat to other classes, particularly those classes that control substantial resources” (Block 1987: 84). But at the same time “state officials are most likely to do things that seem feasible but with the means at hand” (Skocpol 1995: 16). In terms of immigration enforcement, such as the work of an immigration judge, current laws and a high number of deportation cases create institutional pressures to dispose of cases quickly and without significantly probing the individual aspects of the case. Generally, it is only when an immigration lawyer is able to present legal argument as to why the individual merits and equities are relevant that an immigration judge will hear them. Thus, institutional pressures and structures militate against immigration judges exercising discretion but in some cases with sufficient external pressure from immigration lawyers, they can and will act.

For some anthropologists considering U.S. immigration law and policy, tracing the relationships between broader social, political, and economic contexts and immigration law and policy allows for a clearer understanding of the origins of attitudes regarding immigration and the laws that are produced at particular points in time. Leo Chavez has illustrated how both before and after September 11<sup>th</sup>, the U.S. — Mexico border has been seen as dangerous and Mexican migrants have been portrayed as a threat complete with metaphors of *reconquistadors*, invasion, and Québec-like cultural balkanization (Chavez 2001; 2009). Chavez argues that such discourse not only undermines the ability to have civil debate regarding Mexican migration, but has also allowed for the response to metaphors of invasion and war to be the actual militarization of the border area.

In focusing on the implementation of neoliberal ideology through legislation in the 1990s and the response of U.S. ethnographers to these developments, Carol Greenhouse argues that in

congressional discourse on the subjects of civil rights, welfare, and immigration law, “rights were constructed as a form of dependency” (Greenhouse 2013: 104). Drawing on Phyllis Chock’s analysis of congressional immigration debates Greenhouse notes, “legislators most strongly in favor of restricting illegal immigration construct *aliens* and *citizens* as different kinds of persons” (Greenhouse 2013: 104). According to Chock, immigrants who are considered fit for citizenship are “governed by the rationality of the market, they ‘work hard’” and “are assumed to be governed by law; they ‘wait in line’ to enter” whereas those deemed unfit are “governed by desperate, nearly inhuman need, they ‘work cheap,’ depend on welfare, and bear children (or are born) in the wrong place for the wrong reasons” (Chock 1999:50). In this way, neoliberal arguments provide a new vocabulary of unworthiness that obscures overtly racial and gendered discourses. Greenhouse notes that in congressional testimony on civil rights, welfare, and immigration, “key images of raced and gendered subjects were composed in a way that set rights and market principles as trade-offs” (Greenhouse 2013: 105).

While Chavez, Greenhouse, and Chock have good reason to highlight the negative discourse regarding immigrants and how it relates to both law and policy, Peter Schuck (2000) points out that there is a dichotomy in how undocumented immigration law is viewed. The immigration laws, and agencies charged with enforcing the law, strongly condemn unauthorized migration while much of society is sympathetic to undocumented migrants and ambivalent about enforcement of immigration laws. To explore this contradiction, Schuck proposes a variation on the Legal Realist heuristic of discussing the differences between “law on the books” and “law in action” by adding a third category, “law in their minds,” and argues that the differences between these categories are particularly profound in the immigration law context (Schuck 2000:190). By this Schuck not only means that there are differences between the letter of the law and how it is

interpreted and enforced, in practice, but also that “many groups of actors in the immigration system see different aspects of the system or see the same aspects differently” (id. at 191). According to Schuck, many see undocumented migration as a victimless offense and are hesitant to favor enforcement against sympathetic individuals, particularly when many see migrant workers as beneficial, if not essential, to their economic well-being. At the same time, immigration law is not ambivalent and demands to be enforced. Schuck argues that the large populations of undocumented immigrants against whom immigration laws are irregularly and partially enforced serves the “latent social function” of trying to square the circle of having immigration law that demands legal status with a historical and contemporary practice of accepting the benefits of migrant labor through benign neglect of enforcement. Specifically, enforcing immigration laws against a small faction of undocumented individuals present in the United State serves the purpose of “sustaining the attractive, reassuring ennobling myth that the rule of law is a paramount, priceless ideal that we relentlessly pursue.” At the same time, the process of making a show of enforcing immigration laws “obscures the reality that our actual goal is the less exalted one of enriching ourselves by condoning illegality and then concealing this fact beneath a veil of hypocritical high-mindedness” (id. at 196-97).

Since Schuck authored this piece there has clearly been an increase among some parts of the public in favor of greater immigration enforcement as well as a sharp increase in the number of deportations, with nearly 419,384 people deported in 2012.<sup>2</sup> At the same time, there is a far larger undocumented population and many who criticize the increased enforcement efforts and lack of efforts to provide a mechanism for regularizing one’s legal status. In a recent poll, nearly

---

<sup>2</sup> Department of Homeland Security. *Immigration Enforcement Actions: 2012*. Available at [https://www.dhs.gov/sites/default/files/publications/ois\\_enforcement\\_ar\\_2012\\_1.pdf](https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf)

two thirds of people surveyed believed there should be immigration reform with some form of legalization for undocumented migrants (Motel 2014). Thus, while the situation has changed, those changes seem to only accentuate and deepen the contradiction Schuck identified.

In many ways, Schuck's consideration of how and why immigration law is and is not enforced resonates with the work of Nicholas De Genova, who asks that we focus on the "legal production of migrant 'illegality'" (De Genova 2005: 214). By this De Genova means that scholars should highlight how "illegality" results, in part, from legislative decisions regarding access to authorized forms of migration (De Genova 2005: 229-36) and points to the 1965 Hart-Celler Act imposing limits on migrants from the Western Hemisphere and the 1976 imposition of a 20,000 visas per country annual limits. Given the long standing history of interconnection and migration between the United States and Mexico (see next chapter), De Genova argues that this "apparently uniform application of numerical quotas to historically distinct and substantially incommensurable" Mexican migrants created "an unprecedented, expanded, and protracted production of a more rigid, categorical 'illegality' for Mexican/migrant workers than has ever existed previously" (De Genova 2005: 229; De Genova 2002: 433, 435).

To De Genova, there is an instrumentalist agenda behind the structure of immigration law whereby "the legal production of 'illegality' provides an apparatus for sustaining Mexican migrants' vulnerability and tractability – as workers – whose labor-power, because it is deportable, becomes an eminently disposable commodity" (De Genova 2005: 215). The production of "illegality" is not intended to result in the exclusion of undocumented labor from the U.S. but rather to render it more exploitable: "[i]t is deportability, and not deportation per se, that has historically rendered undocumented migrant labor a distinctly disposable commodity" (De Genova 2002: 438). De Genova's argument, in this regard, echoes the earlier analysis made

by Susan Coutin. For instance, in a 1996 article, Coutin examines how the legal status of being undocumented renders one a socially vulnerable individual subject to labor and other exploitation and argues that the power of immigration law is not its ability to prevent illegal immigration but “its ability to constitute individuals within immigration categories” (Coutin 1996: 14). Coutin contrasts her approach to other ways immigration law is perceived and discussed and notes an inherent contradiction in the prevailing approach. Specifically, many scholars see immigration law as unable to overcome the economic and structural forces that lead to undocumented immigration while, at the same time, politicians and a large segment of the public argue that stricter laws and enforcement will reduce undocumented immigration. Coutin explores this paradox by discussing two sets of scholarly perspectives: those of the enforcement-oriented scholars and those of the interest-oriented scholars. The enforcement-oriented scholars assume that the government’s goal is to eliminate or reduce “illegal immigration” so as to protect national sovereignty and the jobs of U.S. workers, but they argue this effort is thwarted by the lack of will to spend the necessary resources and by a hesitancy to incur the social and political consequences of such enforcement (*e.g.* Cornelius, Martin, and Hollifield 1994; Joppke 1998). The other set of scholars, the interest-oriented scholars, see current law functioning in the interest of powerful economic and political forces to render undocumented immigrants more exploitable than native workers. From the point of view of interest-oriented scholars “law is not powerful in its own right, but only as a tool to further other economic and structural processes” (Coutin 1996:13). This approach has also been critiqued because it has decentered the actual legal process of immigration law, focusing instead on other economic and social processes, immigrant subjectivities, and the relationship of immigrants to globalization (Calavita 2007).

Coutin finds both views of immigration law to be unsatisfactory. First, she argues that the “enforcement-oriented method of assessing US immigration law’s effectiveness is incomplete in that it takes for granted what it should be examining, namely, the phenomena of illegal immigration” (Coutin 1996: 12). Scholars who take immigration law’s categories as natural, “fail to treat categories like ‘illegal alien’ as social and legal constructions” (id. at 15). While Coutin is in agreement with the interest-oriented approach to the extent that it recognizes that economic and political influences outside of the law influence immigration law and policy in ways that result in undocumented immigrants being rendered more vulnerable and exploitable, she argues that “the notion that law is a product of structural and economic forces underestimate the degree to which these forces act on differences that are created by law” (id. at 14). Additionally, she notes that the determinism of the interest-oriented approach leads researchers to ignore the fact “that law enables immigrants to resist the forces and groups that oppress them” (id.).

Coutin proposes an approach to immigration law that grows out of her ethnography, which is in contrast to the above two approaches because she states, “the immigrants and immigrant advocates whom I met in the course of my research did not suggest that U.S. immigration law was powerless. On the contrary, these immigrants noted the ways that U.S. immigration law has adversely affected their lives” (id. at 14). Coutin’s approach focuses on “ways that immigration law constitutes individuals within immigration categories” and shows how these categories are increasingly used in the private sphere to determine what is permissible in terms of work, housing, and access to services such as education and health care (id. at 15). The material consequences that flow from these categories help to differentiate undocumented people from the population in general and help to naturalize the categories. Contrary to the

arguments of the enforcement-oriented scholars, Coutin sees immigration law as a powerful force in determining material consequences for individuals but argues that because those categorical determinations are naturalized and many of the consequences occur outside of the formal legal realm, the role of law is not always recognized (*id.* at 17). Coutin acknowledges the role of economic and political interests, but sees law as being complexly related to those interests with new forms of legal recognition influencing and changing political and economic interests and with immigrants and their advocates actively claiming such recognition (Coutin 2003). While Coutin acknowledges that economic and political interests are involved in the way immigration law creates difference, this process is not determinative because law has multiple influences, as well as an independent sphere of influence.

In many ways, both De Genova's and Coutin's works exemplify the salutary aspects of an anthropological approach to immigration law by using ethnographic examination of the lives of immigrants to provide a new and richer understanding of the role that immigration law, and its enforcement, plays both in the lives of immigrants and in society at large. Nevertheless, both Coutin and De Genova provide a fairly flat and monolithic view of immigration law that fails to examine the specifics of the law and its application. This failure to address the specific operation of immigration law and to understand its limits and potentials results in an incomplete critique of the system and a failure to comprehend existing, if limited, liberatory potentials. Specifically, while the effects of immigration law are discussed, the role of other institutional actors, such as immigration officials, immigration judges, and immigration lawyers are generally not addressed and the application of immigration law is not dealt with as anything other than an application of power with deportation being a foregone conclusion.

Because De Genova's work is grounded in his work on Mexican migrants in Chicago, his focus on the situation of Mexican migrants, to the exclusion of other groups, distorts his analysis and conclusions. Indeed, even though De Genova complains that "illegality" has been racialized to almost exclusively refer to Mexican migrants and objects to "the commonplace fallacy that Mexicans account for virtually all 'illegal aliens'" (De Genova 2002: 436), he nevertheless proceeds to reproduce this very relationship by only discussing Mexican migrants as subject to illegality, deportability, and legal vulnerability. In his *Annual Review of Anthropology* article on the subject of migrant "illegality" and deportability, he discusses the situation of undocumented Mexican migrants almost exclusively, despite that fact the nearly half of the undocumented population is non-Mexican. In 2012, it was estimated that there were 5.6 million non-Mexican undocumented migrants in the United States.<sup>3</sup> Additionally, while De Genova's work highlights how "illegality" results, in part, from legislative decisions regarding access to authorized forms of migration (De Genova 2005: 229-36), his analysis remains pitched at the scale of Mexican migrants in general rather than as individuals. Despite his calls for a context specific analysis of "deportability in everyday life" (De Genova 2002), he focuses on the way law has affected Mexican migrants *as a group* as opposed to how law takes individual circumstances into account and he only considers the case of undocumented migrants, as opposed to also examining the situation of lawful permanent residents facing deportation. Finally, De Genova, like Massey (Massey et al. 2002), argues that Mexican migrants, by virtue of being Mexican, are a special case warranting special treatment due to their historical, economic, social, and geographic relationship to the United States. This argument, however, fails to articulate how non-Mexican

---

<sup>3</sup> "Unauthorized immigration from countries other than Mexico fell during the recession and has increased since," from the Pew Research Center (September 23, 2013) available at <http://www.pewhispanic.org/2013/09/23/unauthorized-immigration/4-3/>.

migrants with significant ties to the United States based on both personal history and U.S. economic, political, and military entanglements are less deserving of having their personal equities and situations considered. Coutin and De Genova highlight the unequal, vulnerable, and powerless position that individuals without status are placed in by immigration law and the economic benefits to some segments of the economy from the use of undocumented workers. Their assertion that creating such a population of vulnerable workers is the purpose and intent of immigration law, however, mistakes the phenomenon for the cause and ignores the contradictory interests at play both in the enforcement of immigration law and in the law itself.

In the case of immigration law, there can be little doubt that relations of production have exerted a massive, often determinative, gravity over law, policy, and practice. Scholars, such as Coutin and De Genova, are right to highlight both the historic and current use of immigration policy to create a vulnerable population of flexible labor. However, there are other, often contradictory, interests in play. One of the main flaws of the literature that discusses immigration law and policy is that it purports to ask, “what does law do?” but ignores the questions of “how law does what it does?” and “who makes law do what it does?” By ignoring the inner workings of this process, “law” is viewed as a monolith and the role of individuals in the legal process is not examined in detail. Law has its own institutional setting and ideology, as well as a unique set of institutional actors: legislators, immigration judges, government lawyers, and immigration lawyers.<sup>4</sup> While the practice of immigration law takes place within this larger capitalist context, it is not always determined by that context and explanations that do not take

---

<sup>4</sup> Throughout this dissertation I will refer to the lawyers who represent immigrants as “immigration lawyers.” While it is true that the government’s lawyers in immigration cases are also practicing immigration law, in practice, they tend to be referred to as Assistant Chief Counsels (“ACCs”) or Trial Attorneys (“TAs”).

into account the specifics of this unique area of state action will fail to both accurately describe the process and will fail to recognize areas where emancipatory potentials exists.

#### Addressing the Deficit of Legal Understanding in Legal Anthropology

Another issue that arises in some of the literature on U.S. immigration law is the mishandling of the specifics of immigration law and legal terms that could result in the dismissal of valuable and illuminating ethnographic material by individuals familiar with immigration law. For instance, the edited volume *The Deportation Regime* (De Genova and Peutz 2010) contains a chapter, “Deportation in the U.S. – Mexico Borderlands” (Talavera, Núñez-Mchiri, and Heyman 2010), that presents ethnographic material from an extensive multi-researcher project conducted on the U.S.-Mexico border and attempts to illustrate the human costs of the threat of deportation faced by undocumented individuals and their families. This chapter, however, contains a number of erroneous or confusing references to immigration law that distract from the powerful ethnographic data presented. One example is a reference to the concern a woman has that her husband, who has returned to the United States after previously being deported, could face “an indefinite amount of prison time” (Talavera, Núñez-Mchiri, and Heyman 2010: 173). While being sentenced to prison for unauthorized entry after being deported is, in fact, a crime and one that has been vigorously prosecuted in recent years, the maximum sentence is two years in prison for an individual who is deported for being out of status or a maximum of ten to twenty years for individuals who are deported based on certain criminal convictions.<sup>5</sup> Similarly, the chapter uses the example of a woman, whom they call Luz, to illustrate the rigidity of immigration law and the hardship it imposes, but because it does not actually discuss the law itself, one has no way to understand the legal mechanisms at play:

---

<sup>5</sup> Immigration and Nationality Act (“INA”) at § 276 (“Reentry of removed aliens”).

Luz reported that she could no longer cope with the stress and anxiety she experienced while living in hiding and decided nearly two years ago to legalize her immigration status. She went to the INS office near downtown El Paso to begin the process of legalizing her status. Unfortunately, she was too honest and disclosed to immigration authorities that she had already been living within the United States for several years. Much to her surprise, “They refused my petition because I had already been living in the United States.” She was then deported without a hearing to Ciudad Juárez and was forced to leave her husband and three sons behind. She was warned by the authorities that she was not eligible to petition for “legal” status for a ten-year period and that if she was apprehended in U.S. territory during that period, she would be imprisoned. Luz’s naive surprise at having been denied a visa – apparently in spite of, but in fact because of, her undocumented residence – needs to be understood in terms of the current, rigid law, which prevents most legalization of undocumented people living within the United States even with valid petitions, as opposed to the legalization of those who apply from outside the country (Talavera, Núñez-Mchiri, and Heyman 2010: 174).

On a surface level it is clear that this is the story of a woman who misunderstood the character and requirements of current immigration law with disastrous consequences for her and her family. Despite the authors’ own injunction that this story “needs to be understood in terms of the current, rigid law” they do not provide that information. First, there is not currently anything in immigration law that one would call a “legalization” process; rather there are certain categories of people who are eligible to become lawful permanent residents, or greencard holders. The largest category of people eligible to become greencard holders is individuals who have a U.S. citizen or greencard holder relative who is able to file a petition asking that they be allowed to immigrate. In the case of Luz, there is no indication of whether she has such a relationship or who was petitioning for her; indeed, confusingly, the account states that she was trying to apply for herself.

Second, even if someone fits into one of those categories of relatives who can be petitioned for, there are a number of reasons that people would not be given a greencard based on a statutory ground of inadmissibility, such as a criminal record or past immigration violations.

For instance, someone who is the spouse of a U.S. citizen but who entered the United States without inspection and lived in the United States for a period of time without authorization would fit into a category of a family member who is eligible to apply for a greencard, but would be prohibited from adjusting status to become a greencard holder while in the United States because of their unauthorized entry.<sup>6</sup> Similarly, if they were to leave the United States to attempt to obtain an immigrant visa based on their family relationship, they might run afoul a separate provision that punishes unauthorized presence in the United States by barring reentry to the United States for three years if an individual has more than six months of unauthorized presence in the United States and bars reentry for ten years if one has more than one year of unauthorized presence (commonly called “the three and ten year bar”).<sup>7</sup> In the case of Luz, it is unclear if authorities “refused [her] petition” because she entered the United States without inspection or for some other reason. Because she states that she was removed from the United States without a hearing, it actually appears likely that Luz had a preexisting deportation order. While immigration law allows for “expedited removal” without an order from an immigration judge of individuals who entered the United States without inspection and had not been present in the United States for at least two years<sup>8</sup>, regulations and policies implementing expedited removal have only authorized its use in the case of individuals seeking to enter the United States at a port of entry or by sea or who entered the United States without inspection and are found within 100 miles of a border and have not been continuously present in the United States for 14 days prior to the encounter. Since in Luz’s account she specifically told immigration authorities she had been living in the United States, and in the account this is cited as what caused her problems (*i.e.*

---

<sup>6</sup> INA § 245(a).

<sup>7</sup> INA § 212(a)(9)(B).

<sup>8</sup> INA § 235(b)(1).

“Unfortunately, she was too honest and disclosed to immigration authorities that she had already been living within the United States for several years”), it seems that she would not have been subject to expedited removal and was removed pursuant to an existing deportation order.

The lack of attention to the actual law that is at work in this case makes the authors’ intentions and critique difficult to determine and negates the value of the contribution it attempts to make. Is their critique focused on the fact that immigration law discounts Luz’s lengthy presence and social attachments in the United States? Is it that the law punishes previous undocumented status too severely when it excludes individuals for ten years? Is it that immigration law exists at all? Moreover, the fact that the authors do not appear to have a grasp of the legal mechanisms that they are critiquing makes it all too easy for the valuable information they provide in terms of the effects immigration law has on the lives of people to be dismissed by policy makers, immigration lawyers, and others knowledgeable about immigration law and practice; the very people social scientists should be attempting to reach. Moreover, this is not merely a hypothetical fear. A law professor, who both teaches and practices immigration law and who was on a panel discussion regarding immigration law that I had organized, told me the errors and omissions she saw in social science discussions of immigration law were both a source of frustration for her and diminished that value of those works in her eyes.

A similar problematic example of unclear portrayals of immigration law comes from an ethnographic vignette describing the experiences of individuals in Tijuana who had been recently deported. The piece focuses particularly on a man who had been a lawful permanent resident, a greencard holder, called Don Manuel. We are told:

Don Manuel, a cook, had lived in the United States for over thirty years. All of his children are adult, US citizens. He is one of the thousands of legal residents who are arrested everyday for old violations or unexpired warrants, given no resource

for appeal and deported, their lives altered by returning to a country they no longer know. He is determined to fight his case (Sanchez 2014: 5).

Here, the individual circumstances of Don Manuel's deportation are deemed irrelevant as he is just "one of the thousands of legal residents who are arrested everyday for old violations or unexpired warrants." Further, the explanation that he was arrested for an "old violation or unexpired warrant" does not illuminate the circumstances of his case. While it is true that under current immigration policy there is an expressed emphasis on attempting to deport individuals with criminal records, as will be discussed in Chapter 3, this policy has been criticized for resulting in the deportation of many immigrants with only misdemeanor convictions and even individuals with no convictions at all (Waslin 2011). From the information provided by Sanchez, however, we are unable to determine why Don Manuel has been deported or what Sanchez's critique of that deportation is. Is it objectionable that he was deported because we are to assume he committed a minor offense or is it objectionable because he lived in the United States for over thirty years before being removed and has significant family ties to the United States? There are principled arguments to be made for both positions but this example does not provide sufficient information to make either. The example also underscores a particular difficulty that many anthropologists working on immigration issues encounter: the specifics of immigration law are obscure and confusing to the informants with which they work. Ethnographers faithfully report the information they are provided by the individuals with whom they work but do not attempt to scrutinize it further by contextualizing it within the specifics of immigration law. Their investigation leads them to the door of immigration law where they, with some justification, lay the blame but they do not venture inside to explore the particular aspects of immigration law that are at work.

At its best, social science illuminates the relationships between structure, process, and the lived experience of individuals. While the work of these ethnographers shows the lives of individuals, the authors' lack of knowledge regarding law and legal process yields a situation where those relationships are drawn incompletely. More unfortunately, it creates a situation in which policy makers and members of the legal community may be dismissive of valuable observations and arguments when they appear to be based on an incomplete understanding of immigration law and process. This dissertation will engage in a more thorough examination of the specifics of immigration law. Examining how immigration law is enforced, with attention to the specific laws at play, has three benefits over discussing it as a generalized monolith. First, one is able to identify the most problematic aspects of the current law, such as the immigration judges not having the ability to exercise discretion in individual cases. Second, one is able to identify those circumstances in which individuals have in fact been able to obtain favorable results. Finally, based on the preceding two sets of information, one is able to formulate and suggest specific areas of law that could be changed to achieve fairer results in the future, as will be addressed in chapter 5.

### **Legislative Determinism versus Judicial Discretion**

As discussed in Chapter 2, immigration law has been chiefly the province of the political branches of government and immigration laws, from the Chinese Exclusion Act of 1882 to civil rights era reforms made by the Hart-Celler Act of 1965 to the harsh anti-immigrant laws of 1996, have reflected social and political climates of their time. Only rarely have the courts stepped in to invalidate an immigration law or policy as overreaching and violating the rights of noncitizens. This deference shown to the political branches by the courts in the area of immigration has resulted in legislative supremacy in immigration law. This dissertation

demonstrates that the current immigration laws often result in outcomes of cases being determined by a single factor and result in the exclusion of other aspects of a person's life, circumstances, and personal equities. In particular, current immigration law, particularly the 1996 amendments, makes it easier to deport individuals, harder to obtain relief under immigration law, and harder to obtain review of the merits of a deportation order. This dissertation considers examples of how judicial discretion has been limited in immigration cases as well as examples where judicial discretion has remained to some extent and concludes that reforming the most inflexible aspects of the current immigration laws and restoring greater judicial discretion to consider individual circumstances would ameliorate many of the harsh and seemingly disproportionate results in the current immigration system.

There is, however, a clear objection to the claimed benefits of this project and its emphasis on obtaining reforms within the existing immigration law structure. Specifically, law repeatedly and regularly fails to deliver just, fair, and equitable results as a result of misrecognition or non-recognition (Coutin 2000), through misinterpretation and communicative breakdown (Jacquemet 2009), and through outright bias on the part of individuals involved in the legal process (Alexander 2010). There is indeed indeterminacy to the law that has been identified as a cause of law's failure to fulfill its promise of justice and has served as a source of continuing inequality (Unger 1986). Some scholars, particularly those influenced by Critical Legal Studies have argued that law's indeterminacy fatally undermines its coherence because "the law is not a fixed and determined system, but rather an unruly miscellany of various, multifaceted, contradictory practices, altering from time to time and from context to context as different facets of law are privileged or suppressed" (Gordon 1998: 655).

Anthropology, in particular, has traced the uneven distribution of, access to, and capacity to assert rights across numerous axes of inequality. Sally Merry has observed, “[s]ociolegal research shows that rights do not constitute a coherent system but are contingent, fragmented, and unevenly supported by the general public. Much work suggests that the articulation of rights does not guarantee their performance” (Merry 2006: 979). Aihwa Ong has discussed, particularly with respect to the effects of neoliberalism and globalization, the variegation of access to rights, which she terms “graduated sovereignty,” in which the state subjects different populations to different regimes of rights, obligations, and security (Ong 1999). According to Ong, “the infiltration of market logic into politics conceptually unsettles the notion of citizenship” and “citizens who are judged not to have such tradable competence or potential become devalued and thus vulnerable to exclusionary practices.” (Ong 2006: 6-7)

Specifically in the area of immigration law, Coutin’s ethnography, *Legalizing Moves* (Coutin 2000), highlights the vast gulf between the complex experiences of individuals seeking legal recognition, such as asylum, and experiences that are legally cognizable in the asylum process. Coutin portrays how whether individuals prevail or not in their cases depends on seemingly arbitrary factors, such as being in the United States by a certain date or whether an individual who has suffered persecution is able to present her persecution in a linear chronological account. Indeed, it is regularly the case that seemingly arbitrary factors are determinative in immigration cases and this dissertation attempts to demarcate, with specificity, where those seemingly arbitrary lines fall and the consequences for the individuals involved.

Nonetheless, recognition of the limits of the legal system does not dictate the appropriate response to those limits. Legal process, and its discourse of liberal rights, has provided a mechanism, however imperfect, to obtain the recognition that was denied in the majoritarian

political process. In particular, scholars of Critical Race Theory have simultaneously radically critiqued law's role in racial subordination but also recognized that, "[w]hile rights may not be ends in themselves, it remains that rights rhetoric has been and continues to be an effective form of discourse for blacks" (Williams 1991: 149). One of the main areas where Critical Race Theory differentiated itself from Critical Legal Studies is in its pragmatic willingness to engage with liberal civil rights jurisprudence: "To the emerging race critics, rights discourse held a social and transformative value in the context of racial subordination that transcended the narrower question of whether reliance on rights alone could bring about any determinate results" (Crenshaw, Gotanda, Peller, and Thomas 1995: xxiv).

With specific reference to U.S. immigration law, Chapters 3 and 4 demonstrate both the limits and potentials that immigration lawyers experience when advocating on behalf of their clients. The experience of immigration lawyers reflects the structural impediments in immigration law as well as areas that immigration lawyers believe there is room to advocate on behalf of deserving clients and obtain favorable results. While most lawyers, in their day-to-day practice, do not reflect on their jurisprudential philosophy, their recounting of experiences and stories reflect a belief that a legal system should provide sufficient flexibility to consider experiences, to recognize the myriad of factors that differentiate one case from the other, and allow an adjudicator to apply a modicum of "common sense." To the extent that current immigration law lacks such nuance, denies judges discretion, and dictates the outcome of cases based on inflexible legislatively mandated criteria, lawyers indicate the system is not working to achieve fair and consistent outcomes.

Finally, as noted earlier, it is a mistake to simply treat an individual's decision to immigrate as an agentive act entirely unconnected to global political, social, and economic

forces. Individuals' motivations to migrate are related to transnational processes of global capital flows and foreign direct investment with attendant social and economic disruptions; to social disruptions from military engagements; to changing employment patterns in deindustrializing nations, such as the United States; and to global climate change. It is beyond the kin and capacity of immigration courts and immigration judges to remedy these situations but it should not be beyond their authority to consider them when ruling on the cases of individuals who come before them.

## **Methods**

This project combined participant observation, based on my work as an immigration lawyer, along with semi-structured interviews with other immigration practitioners. Working as a lawyer and as a researcher presents particular advantages as well as limitations. The methodology of this project was intended to maximize the advantages to be gained, while limiting the negative aspects. As a lawyer, I have firsthand access to numerous experiences and accounts of the encounters that immigrants have with the enforcement of immigration law. While this provides a rich understanding the both the process and substance of immigration law, it also imposes ethical duties to protect the privacy and best interests of clients. From the beginning of the project it was clear that it would be impossible to base the project on the cases I work on as an attorney. Throughout this dissertation, I do use some examples derived from my experience as a lawyer to illustrate aspects of immigration law and the practice of immigration law, but have only done so where such accounts are so generic or general that they in no way reveal identifiable information about clients. To overcome this limitation, I have supplemented my participant observation with semi-structured interviews with immigration lawyers to collect narratives regarding how the current structure of immigration law limits what is considered

relevant and limits the possible arguments for relief from deportation that can be made, as well as to learn about their experience and impressions of practicing immigration law.

### Participant Observation

I have been the staff attorney for the Arab American Family Support Center (“AAFSC”) in Brooklyn, New York since 2006. The AAFSC was established in 1994 to provide social services to the Arab immigrant population in New York City and has programs that address domestic violence, child abuse, family counseling, literacy, access to health care, as well as the legal program that I run. The legal program focuses primarily on immigration law and provides direct representation as well as referral services. The legal program does not charge for its services and has clients from all across New York City, although most clients live in Brooklyn. Because AAFSC has Arabic speaking staff available to translate, most of our clients come from Arabic speaking countries but we also represent many clients from other places, so long as translation is available or they speak English. In addition to working on individual cases, my work at AAFSC gave me an opportunity to meet and discuss immigration law issues with other immigration lawyers and advocates in a variety of settings.

The AAFSC is a member of the New York Immigration Coalition (“NYIC”) and therefore I have been able to attend events and programs organized by them including demonstrations and continuing legal education (“CLE”). In New York, lawyers are required to take twenty-four hours of CLE every two years and most lawyers take these courses in their area of specialization. The CLE programs at the NYIC are taught and attended by immigration lawyers from non-profit organizations as well as immigration lawyers in private practice. These programs tend to be groups of 20 to 30 lawyers and focus on a specific area of immigration law, such as “citizenship and naturalization” or “the immigration consequences of criminal conduct.”

Because these groups are relatively small, they provide an excellent opportunity for lawyers to ask questions or discuss particular issues that they are facing and therefore provided an excellent source of information about what immigration lawyers think about particular areas of the law and the specific sorts of problems that arise in those areas. I have also attended other CLE programs including the Immigration and Naturalization Institute conducted by the Practising Law Institute, which is held annually and surveys changes and developments in immigration law. Similarly, I have attended events on current issues in immigration law at area law schools, including New York Law School and Rutgers Law School and I am also a member of the New York Chapter of the American Immigration Lawyers Association (“AILA”), the voluntary professional association for immigration lawyers. AILA provides a number of resources for its members by providing CLE training, organizing meetings on various topics, producing publications, and hosting an online message board that allows members to ask questions about particular problems they are having with cases.

While I do not recount specific cases I learned about from attending CLE programs, meetings, participating in AILA, or from the AILA message board, these resources made it possible to understand what issues immigration lawyers were experiencing, what they thought about them, and how they responded to them. In addition to these more formal sorts of activities, I also had the opportunity to speak with immigration lawyers in less structured settings, such as in a waiting room at immigration court or at USCIS. I was also able to socialize with immigration lawyers such as by playing softball on a team sponsored by AILA in a summer recreational league for two seasons.

## Semi-Structured Interviews

The project draws on the experiences of immigration law practitioners to map out specific areas in immigration law that are problematic as well as to elicit illustrative examples of each of these areas. By collecting empirical examples of problems with the current structure of immigration law through interviews with immigration law practitioners, this project's critiques are rooted not only in real world examples of apparent injustice but enables those examples to be discussed in relationship to the specific legal provisions which cause them. In addition to meeting and discussing immigration law with lawyers through participant observation, I collected specific stories regarding their experiences by conducting semi-structured interviews with a small subset of those lawyers.

This project used purposeful sampling of immigration lawyers and advocates with expertise in particular areas of immigration law (*e.g.* asylum, defenses to deportation, and immigration consequences of criminal conduct). I also used snowball sampling by asking these experts to identify other immigration lawyers who have experience practicing in particular areas. Using semi-structured interviews with these individuals, I obtained examples of cases where current immigration law limited the ability to present arguments or facts that the advocate felt should be considered. I conducted nine interviews that ranged in length from approximately one hour to two hours and which were recorded and transcribed. The transcribed interviews were read and coded into twenty-nine non-mutually exclusive descriptive categories. In addition to the transcripts of the interviews, I prepared a second notebook that contained excerpts from the interviews organized by topic, such that all mentions of "asylum", for instance, would be contained in the asylum section of the notebook regardless of whose interview they occurred in. This allowed me to review all of the comments made regarding each of the twenty-eight topics.

Because the categories were non-exclusive, some comments or sections of comments were included in multiple sections. For instance, a comment by a lawyer on how she thinks immigration judges in New York view asylum seekers would be included under the each of the categories “Asylum,” “Discretion (Immigration Judges),” and “New York/New Jersey Districts.” A list of the topics from the semi-structured interview and a list of the twenty-eight topics that emerged from the transcribed interviews are contained in the Appendix.

### **Reexamining Immigration Law**

The above criticism, that social science scholars who examine immigration laws and their consequences need to have a greater focus on the particularity of those laws and the procedure by which they are carried out, may be somewhat unfair in practice. Immigration law is often described with adjectives such as “byzantine” and “Kafkaesque” and even a Federal Court of Appeals has commented that it is a “labyrinth almost as impenetrable as the Internal Revenue Code.”<sup>9</sup> In this respect, my criticism arises from my perspective and background as a practicing immigration lawyer who has the advantage of familiarity with immigration law and procedure. That is not to say, however, that I am so steeped in the ethos of immigration law culture as to be habituated to its assumptions, traits, and peculiarities. Indeed, my interest in immigration law stems from the very fact that it is, in many ways, at variance with ideas, principles, and practices I associate with law and justice from my earlier work in other areas of the law.

Prior to working in immigration law, I had practiced constitutional, civil rights, and civil liberties law as a lawyer for the American Civil Liberties Union (“ACLU”) at the ACLU National Legal Department and at the ACLU of New Jersey affiliate. My experience with immigration law remained tangential until the government’s response to the September 11<sup>th</sup>

---

<sup>9</sup> Escobar-Grijalva v. I.N.S., 206 F.3d 1331, 1334 (9th Cir.2000).

attacks resulted in large numbers of Muslim, Middle Eastern, or South Asian non-citizens being detained in county jails in New Jersey on the pretext of immigration violations, when the government's stated goal was to investigate the terrorist attacks. Immediately following September 11, then-Attorney General John Ashcroft made clear that he intended to use the immigration system's lax standards of protection to circumvent individual rights that are protected in the criminal justice system. On October 25, 2001, Ashcroft told a meeting of the United States Conference of Mayors that "taking suspected terrorists in violation of the law off the streets and keeping them locked up is our clear strategy to prevent terrorism within our borders." To Ashcroft this policy meant, "if you overstay your visa—even by one day—we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible." (Ashcroft 2001). As the staff attorney for the ACLU of New Jersey, I started to be contacted by family members of Muslim, Middle Eastern, or South Asian men who were arrested in the post-September 11 investigation in New York and New Jersey based on their immigration status. According to a 2003 report by the Department of Justice Office of the Inspector General ("OIG"), 762 individuals were detained by the Immigration and Naturalization Service ("INS") as a part of the September 11 investigation conducted by the Federal Bureau of Investigation ("FBI") in New York and New Jersey (OIG 2003). Although the OIG concluded that the individuals who were detained had generally violated some aspect of immigration law, there was no effort by the FBI or INS to differentiate between individuals who were out of immigration status from individuals for whom there was evidence to link them to September 11 or terrorism of any kind. As a result, hundreds of individuals were held incommunicado and without access to legal counsel. Attempts by the ACLU and others to visit the detainees or even obtain an account of those being detained were rebuffed by the government.

I worked with a coalition of other organizations, law schools, and immigration lawyers, and we were eventually able to gain access to the individuals detained in New Jersey jails by organizing Know-Your-Rights-Presentations, which the INS detention guidelines allowed non-profit organizations to present. The guidelines also allowed for individual consultation following the presentation that we were able to use to conduct a survey of who was being held and to learn about the circumstances under which they were arrested and detained. Until I got involved with the Know-Your-Rights-Presentations, I had been used to practicing constitutional law with the ACLU where I could often resolve an issue, such as an abridgement of free speech rights, by sending a demand letter to the offending government agency or obtaining a preliminary injunction from a court; I quickly learned that immigration law was quite a different kind of animal. At the presentations, I began meeting with the detainees and hearing about how they had been denied an opportunity to call a lawyer or had not been brought before a judge to be allowed to ask for release on bond, or had not even received notice of the charges against them. When I expressed my outrage to one of the immigration lawyers assisting with the presentation saying something along the lines of, “just because September 11 happened doesn’t mean the government can simply ignore the law,” the immigration lawyer explained to me that “this is what immigration law has always been like.” I began to learn that while the treatment of non-citizens exemplified by the detentions that followed September 11 was, perhaps, more dramatic than in the usual course of immigration law enforcement, it was the vulnerable position that existed long before September 11 that allowed the abuses to these detainees to occur.

Even before going to graduate school, I understood that the mistreatment experienced by immigration detainees after September 11 was rooted in more systematic and historical processes that placed immigrants in a uniquely vulnerable position (Salyer 2002). I also understood from

my work as a lawyer that in some cases, for some people, it was possible to achieve a good result through the legal system and even to achieve larger reforms through legal advocacy. This dissertation attempts to examine the relationship between these strongly determinative systemic forces and the outcomes of individual cases, including those outcomes that seem to contradict what one would expect to occur based only an analysis of those systemic forces. Immigration lawyers have significant knowledge about immigration law and the effects it has on the lives of individuals. Including this knowledge within the many social science critiques of the current U.S. immigration law system will improve their content and usefulness.

### Plan of Dissertation

The next chapter, Chapter 2, addresses how the contemporary position of migrants relates to historical development of U.S. immigration law. The chapter explores the economic interests related to the development of immigration restrictions and the use of scientific racism to justify immigration quotas. The chapter discusses the growth of anti-immigrant sentiment that stemmed from fears regarding safety and security during the red scare and how, despite the fact that these events have been condemned in retrospect, there were no structural changes put in place to prevent them from being repeated, as occurred following the September 11 attacks. Chapter 2 also addresses the ways that contemporary immigration law has been shaped by various popular fears regarding immigrants and how these laws have in turn affected immigrants. The chapter outlines the current structure of the law and argues that since the major reforms to U.S. immigration law that took place in 1965, economic insecurity, concern about public safety, and concern about whether this new group of immigrants would properly assimilate into U.S. society have all generated anti-immigrant attitudes. Numerous laws and policies embodying these anti-immigrant sentiments have been adopted.

Chapter 3 explores the particular aspects of contemporary immigration law and the effects those provisions have on individuals. Drawing on participant observation and the experiences of immigration lawyers who were interviewed, the chapter illustrates areas where current immigration law is inflexible and fails to account for individual circumstances and equities. In particular, the chapter examines how immigration judges have lost discretion to grant relief from deportation under the statutory amendments that occurred in 1996.

Chapter 4 continues to draw on participant observation and interview data to further examine current immigration law and focuses, in part, on areas where immigration judges still retain some discretion, asylum cases, and cancelation of removal cases. The chapter explores how, even within the relatively inflexible system of laws that make up current immigration law, immigration lawyers are able to retain and exploit some flexibility to achieve favorable outcomes for the individuals they assist.

Chapter 5 concludes the dissertation by examining the relationship of current immigration law to broader socio-political structures and how social participation and contributions are generally irrelevant to the political and legal arenas. The chapter then considers the types of cases that were examined in Chapters 3 and 4 and argues that because the nature, origins, and application of those laws differ, it is important for social scientists, who examine immigration law, to understand and discuss these differences with specificity. Finally, by focusing primarily on the punitive, enforcement-oriented amendments to immigration law that occurred in 1996, the chapter concludes by showing how particular individual circumstances and equities are sometimes considered and sometimes excluded, and argues that it is appropriate to consider those factors in each case.

## Chapter 2

### A Social History of the Development of U.S. Immigration Law

The intersection of social, economic, and political factors at various historical periods influenced how immigrants were viewed and treated in society at large, in law, and in how courts determined what rights, if any, immigrants would be recognized as having. This chapter will outline the history of this process and will examine the assumptions regarding these factors and demonstrate how they underlie current immigration law. In general, the trend has been and remains to recognize broad, vague social concerns in order to justify restrictive or punitive laws and policies and for courts to be reluctant to interfere with decisions of the political branches of government. Perceived threats to the interests of the United States and its citizens from immigration are projected in the form of an *abstract alien*, who embodies those dangers, and laws and policies aimed at that abstract alien are created. In practice these laws and policies have been overly broad, in that they affect actual individuals who do not present the imagined dangers that were enunciated to justify the creation of the laws and policies. Because the courts have been reluctant to intervene to protect the rights and interests of these noncitizens, individuals have been without recourse when they are caught within the sweep of harsh and punitive laws. In justifying their abstention, the courts have announced broad doctrines and policies that give primacy to the general justifications claimed by the government while ignoring the specifics regarding the individuals affected. Finally, in upholding the government's power to disadvantage individuals with only vague and attenuated ties to the harms that the laws were meant to prevent, the courts have repeatedly laid the groundwork for the next set of laws and policies that overreach legitimate interests.

Historically, the consideration of race in immigration law was overt; one might say blatant. More recently, race as a factor in immigration has been, more or less, submerged beneath economic, social, and safety and security claims. Of course, such claims can also be used as proxies for race, which may seem like the mirror image of the historic nativist assumption that race could be used as a proxy to select between desirable and undesirable immigrants. In a sense, one could read political economic factors and social factors through the lens of race or one could read racial and social factors through the lens of political economy. Any interpretation that gives primacy to a single factor to the exclusion of the others would, however, miss significant aspects of the motives, structure, and practices that construct the inequalities and injustices within contemporary immigration law.

Early immigration statutes specifically treated individuals differently based on their race. Notoriously, the Naturalization Act of 1790 barred anyone except “free white persons” from becoming naturalized citizens and a series of statutes enacted in the late 19<sup>th</sup> and early 20<sup>th</sup> century excluded first Chinese and later nearly all Asian immigrants. Racist enforcement also took place in the absence of immigration statutes that singled out particular races for disparate treatment, such as the mass deportations that took place in the 1930s of people of Mexican ancestry, both migrants and citizens.

While the racist history of immigration law and enforcement is important to understanding contemporary immigration policy, the provenance of the injustices that exist in contemporary immigration law is not so easily explained. For nearly 50 years, immigration laws have been free of racial exclusions and restrictionist national quotas, but enforcement strategies have continued, at times, to target individuals and groups based on race. Similarly, while overtly racist restrictions and quotas meant to favor particular national origins have been removed, limits

and restrictions on immigration are harsh, pervasive, and dramatically affect millions of people. Many who support vigorous enforcement, such as the members of the vigilante border patrol groups that Roxanne Doty interviewed, argue that they have no racist agenda. As one member of the Minutemen claimed, “I have nothing against [immigrants]. I think they’re pretty courageous people” (Doty 2009: 21). Rather, they claim that their concern is rule of law: “We have laws on the books and they should be upheld” (Doty 2009:20). Such an argument – that lawful immigrants should be welcome and that undocumented immigrants have no basis to complain if the laws they broke are enforced against them – seeks to begin and end the discussion at the point where one’s immigration status is decided. This formalistic point of view does not examine the origins of or the motives behind the laws that determine where to draw the line that determines one’s legal status and it does not consider what aspects of an individual’s life are considered or excluded when determining her legal status.

At one and the same time, the United States is both “a nation of immigrants” *and* a nation that harbors deep fears about the dangerousness of immigration; consistently through the last century of American history, there has been the belief that those who choose to immigrate to the United States from elsewhere could, in fact, be threats to the nation’s well being or even internal enemies. America’s immigration history thus contains, on the one hand, events that bespeak a tradition of welcoming those who seek refuge and the promises of a better life, and, on the other, expressions of hostility to immigration, such as obviously racist exclusionary laws, fundamentally unfair enforcement of immigration laws, and the repeated scapegoating of immigrants for a variety of problems. The anti-immigrant sentiments have generally been rooted in three, often overlapping, categories of concerns: (1) economic concerns, (2) concerns about security and safety, and (3) beliefs about race and nationalism. The concerns regarding the

economy have centered on claims that immigrants both take jobs from American citizens and that immigrants utilize taxpayer funded government services and benefits, such as education, medical care, and welfare. Concerns over security and safety include fears that immigration contributes to increases in crime rates and makes the U.S. more vulnerable to terrorism.

Nationalistic and racist beliefs take the form of claims that newer immigrants come from cultures that make them less able to assimilate, claims that new immigrants fail to learn to speak English, claims that the values and beliefs of these new immigrants are fundamentally incompatible with American society, and even more overtly racist claims regarding characteristics of newer immigrants. Numerous laws and policies embodying these anti-immigrant sentiments have been adopted on local, state, and federal levels. In addition, the debates and justifications regarding most of these laws have included heated and divisive anti-immigrant rhetoric that is often propagated by various interest groups, espoused by politicians, and reported by the media thereby further promoting anti-immigrant sentiments in society at large.

It would, however, be inaccurate to discuss these factors as separate and unrelated. The economics of immigration or the national security aspects of immigration cannot be considered separately from subjective social and cultural factors, such as fears that migration is a threat to dominant cultural norms (Hollifield 1998). The heuristic divisions imposed by the categories of economic, political, and social factors are, if not artificially, somewhat arbitrarily imposed. Nevertheless, each of these factors have exerted considerable individual influence over the development of immigration law and policy such that it is reasonable to consider the results of each of these before synthesizing a more general description of the influences on immigration laws. Finally, each of these issues, and the immigration laws that have resulted from them, have

been affected by geographic factors, particularly configurations and changes in the structure of global capitalism, in general, and the relationship of the United States to Mexico, in particular.

### **Summary of the Development of U.S. Immigration Law**

It is common to divide the history of U.S. immigration law into particular eras or periods that are seen as embodying specific attitudes and practices with respect to immigration. Rather than focus on such broad periodization, this chapter will address specific legislative acts that have defined immigration policy. First, the advent of exclusionary federal policies took place with legislation aimed at limiting Chinese immigration, as exemplified by the Chinese Exclusion Act of 1882, and set the stage for the broader exclusionary legislation seen in the quota laws of the 1920s, which created the concept of the “illegal alien” as a new type of “legal and political subject” (Ngai 2004: 4). Additionally, in upholding the validity of the Chinese Exclusion Act against constitutional challenge, the Supreme Court held that the political branches of government have plenary power to regulate immigration and set an enduring precedent of the courts deferring to Congress and the executive on matters of immigration restrictions. Second, the passage of laws that had strict quotas and restrictions on immigration, in the 1920s, led to the growth of the administrative law structure to enforce those restrictions. This administrative structure, which operated with little judicial oversight, was able to deal with immigrants with unchecked discretion and impunity. This system worked to the benefit of many European migrants without a legal status who were granted discretionary relief and to the detriment of Mexican migrants who were kept in a position of legal subjugation as migrant laborers.

Third, this structure that allowed for narrowly defined instrumentalist objectives, particularly the use of Mexican migrant labor, to dictate policy was most evident in the creation of the Bracero Program in 1942. The program, and the manner in which it was administered,

systematized the position of Mexican labor migrants, both as official Bracero workers and as unauthorized workers who were *de facto* accepted and encouraged. Both legislation and policy during this period made significant impacts on Mexican immigration to the U.S. by creating both social and economic patterns that figure significantly in contemporary U.S. immigration issues. The Bracero Program remained in place in various forms until 1964 when the spasm of attention to social justice of the civil rights era made the program's officially sanctioned exploitation of labor without political rights unpalatable. The end of the official program, however, did not end the political interests of those who had benefited from the program and the official system of depending on migrant labor was replaced by one of benign neglect of undocumented labor migration.

Fourth, the Hart-Celler Act of 1965 finally repealed national quota laws and racial restrictions that had defined the structure of U.S. immigration policy for decades but also radically restructured the immigration system. Specifically, the 1965 law imposed limits on immigration from countries in the Western Hemisphere, including Mexico, that heretofore had had broader access to the United States. The ending of the Bracero program and limiting of other legal methods of migration, along with minimal enforcement resulted in large numbers of unauthorized migrants, a situation which the Immigration Reform and Control Act of 1986 (IRCA) was meant to solve. The theory behind IRCA was to balance a legalization program for undocumented people currently in the United States with the creation of an increased enforcement regime both at the border and to enforce immigration laws in the interior of the United States. IRCA did not, however, increase avenues for lawful migration and did not deter employers who sought to hire migrant labor and thus resulted in the paradoxical situation of increasing both immigration enforcement and undocumented migration.

Finally, in the years that followed the passage of the Hart-Celler Act, authorized immigration increased from parts of the world that had previously had prohibitions or strict limits, most prominently from Asia. At the same time, unauthorized immigration had increased, most prominently from Mexico and other parts of Latin America, and the enforcement mechanisms in IRCA were proving to be ineffective. These changing migration patterns, along with various broader social and economic factors culminated in heightened anti-immigrant sentiments and the passage of three laws in 1996 that had severe consequences for documented and undocumented immigrants. Among other things, the 1996 laws expanded the grounds on which an immigrant can be deported, significantly limited previously available avenues for relief from deportation, increased the number of people who were held in detention, and removed discretion from immigration judges to consider the equities of individual cases.

The pernicious and invidious nature of some of these laws, such as the Chinese Exclusion Act, is obvious, but even the facially neutral laws have the fault of creating a structure that ignores the social, political, and historical aspects that affect immigration flows, choosing instead to treat the individual immigrant punitively, on the assumption that she is solely in control of her choice to migrate. For instance, on a broad policy level, current laws penalize individuals who have violated provisions of immigration law with limited opportunities to have those violations forgiven, while ignoring a long systemic history of official and unofficial policies that established, encouraged, and promoted undocumented migrant labor to come to the United States. Similarly, in individual cases of immigration enforcement, the individual circumstances, history, and equities of an individual are often simply considered irrelevant. Because courts defer to the political branches of government, there is little evaluation of whether laws are written and enforced in a way that meets legitimate ends without unduly harming individuals by

separating families, incarcerating harmless individuals, or penalizing people disproportionately to their infractions.

## **The History of U.S. Immigration Law in Social Context**

### The Chinese Exclusion Act and the Plenary Power Doctrine

Other than setting the eligibility criteria for naturalization, the federal government did not exert significant control over the regulation of immigration until the latter third of the nineteenth century (Ngai 2004; Kanstroom 2007). Beginning in 1875 and continuing throughout the 1880s, Congress started to create categories of individuals considered inadmissible to the United States. People who were in categories of inadmissibility included those convicted of committing a crime involving moral turpitude, those considered prostitutes, those arriving as contract laborers, those with a “dangerous and loathsome contagious diseases,” those considered “insane” or “feebleminded,” and those considered likely to become a public charge (Ngai 2004: 59). Two of these exclusions, the barring of contract labor and those considered to be prostitutes, part of the Page Act of 1875, were specifically intended to limit Chinese immigration. Asian women were considered sexually immoral and thus presumed to be immigrating to engage in prostitution (Barde 1994). At this same time, the Supreme Court, in *Henderson v. Mayor of New York*, 92 U.S. 259 (1875), held that despite no explicit constitutional delegation of power, the federal power over foreign commerce gave Congress the right to regulate immigration.

From 1850 to 1880, the number of Chinese immigrants in the U.S. increased from approximately 7,500 to over 105,000 and Chinese immigrants made up a significant percentage of laborers in California, particularly in the agricultural sector (Kanstroom 2007: 102). Even with this increase in immigration from 1870 to 1880, Chinese made up only 4.3 percent of the total number of immigrants to the U.S. for the same period (Lee 2006: 10). Discriminatory attitudes

against Chinese immigrants increased with the economic depression in the 1870s, which led to lower wages and greater unemployment. Despite the fact that Chinese labor had contributed greatly to both the construction of the transcontinental railroad and the gold mining boom in the West, the Chinese were increasingly targeted by unions and political organizations, which claimed the Chinese were a threat to white working class jobs (Roediger 1992), and politicians took advantage of these claims to place blame for the nation's economic problems on the Chinese (Gyory 1998). These arguments were cast in terms of the unsuitability of the Chinese as a race and their lack of compatibility with American culture and, in California at least, the anti-Chinese movement and the labor movement overlapped significantly (Saxton 1971; Montgomery: 1987). The Chinese Exclusion Act of 1882 banned Chinese laborers, skilled and unskilled, from immigration to the United States. This was the first of a number of laws aimed at barring Chinese immigration to the United States, a policy that remained in effect until the ban was repealed in 1943. Eventually, discrimination against Asian immigrants expanded with the Immigration Act of 1917, which created the Asiatic Barred Zone that virtually restricted immigration from all Asian countries. Lucy Salyer (1995) has argued that the creation of the U.S. Bureau of Immigration in 1891 as well as the enforcement regime created to enforce the Chinese Exclusion Act reconfigured immigration law from a system of judicial justice to one of executive justice with greatly reduced access to rights and due process. It was in the context of enforcing the Chinese Exclusion Law that the Supreme Court held, in *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (also known as *The Chinese Exclusion Case*), that Congress has plenary power over the exclusion of immigrants and similarly, in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), that the corollary sovereign power to the right to exclude was the right to expel.

In the case of *Chae Chan Ping*, Ping had lived and worked in San Francisco for twelve years before traveling back to China in 1887. As the law then required, he obtained a reentry permit to document that he was a U.S. resident so he would be allowed to return to the United States after his trip to China. While he was out of the country, the Chinese Exclusion Act was amended by the Scott Act of 1888 to completely ban Chinese laborers and retroactively rescinded reentry permit that had already been issued. While the Constitution does not explicitly grant Congress authority to regulate immigration, in *Chae Chan Ping*, the Supreme Court held that “[t]he power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution.” *Chae Chan Ping v. United States*, 130 U.S. at 609. In justifying the sovereign power over immigration, the Court analogized to the nation’s need to “preserve its independence, and give security against foreign aggression and encroachment” regardless of whether the threat originated from a foreign nation “or from vast hordes of its people crowding in upon us.” *Chae Chan Ping v. United States*, 130 U.S. at 606. Here, the Court clearly adopted populist claims of threats from the “yellow peril” of Chinese migration and held that the “hordes” of migrants were the legal equivalent of an invading army. In upholding the Act and ruling that Congress has plenary power over the exclusion of immigrants, the Court explained that the political branches are the appropriate forum to balance the relative equities involved:

We do not mean to intimate that the moral aspects of legislative acts may not be proper subjects of consideration. Undoubtedly they may be, at proper times and places, before the public, in the halls of Congress, and in all the modes by which the public mind can be influenced. Public opinion thus enlightened, brought to bear upon legislation, will do more than all other causes to prevent abuses; but the province of the courts is to pass upon the validity of laws, not to make them. *Chae Chan Ping v. United States*, 130 U.S. at 603.

One Senator who was serving when the law passed, however, was less sanguine about committing questions of immigration law entirely to the political branches of government: “I believe the Scott law was one of the most vicious laws that have been passed in my time in Congress... [I]t was a mere political race between the two Houses, then opposed to each other in politics, in the face of a presidential election...between two political parties to try and influence the vote of the Pacific coast” (Kanstroom 2007: 109). Indeed, the Scott Act of 1888 was introduced by Senator William Scott, the chairman of the Democratic National Campaign Committee and was signed by Democratic President Grover Cleveland ahead of the 1888 election (McClain 1994: 192). For Cleveland, who had failed to win in California, Nevada, and other western states in the 1884 election, winning the races in those states was a crucial part of an ultimately failed attempt to win reelection.

While the Court in *Chae Chan Ping* clearly indicated that it would not second guess Congress’ substantive decisions regarding what groups were entitled to immigrate, individual immigrants still had considerable success obtaining relief by filing *habeas corpus* petitions with federal courts claiming that they were excluded or removed in violation of their procedural due process rights, such as being denied access to counsel, being denied the right to confront witnesses, or based on insufficient evidence (Salyer 1995; Barde 1994). In 1905, however, even that avenue was drastically limited, when the Supreme Court, in *United States v. Ju Toy*, 198 U.S. 253, ruled a person claiming that they are entitled to enter the U.S. is not entitled to a judicial hearing to make that determination and that Congress could delegate the task of deciding who is entitled to enter the U.S. to an executive agency. According to Salyer, this decision marked a significant turn in which anti-Chinese animus generated a structure wherein

immigration laws would be created and enforced with little interference from the federal judiciary (Salyer 1995: 248).

The treatment of Chinese immigrants in this era established two templates which would be repeated again and again in U.S. immigration law: (1) the scapegoating of particular immigrant groups for broader social and economic problems and (2) diminishing of the legal rights and protections available to individuals in those groups. A pattern that would soon be repeated with debate over and creation of the quota laws aimed at excluding Eastern and Southern Europeans (Saxton 1971).

### The Quota Laws and the Restructuring of U.S. Immigration Law and Policy

The Chinese Exclusion Law and the enforcement strategies that enforced it created a new philosophy of immigration and the rights of immigrants. It both limited substantive rights to immigrate based on invidious and arbitrary criteria and limited the rights and procedures that one could use to claim a right to enter or remain in the United States. The pattern established in the persecution of Chinese immigrants was soon expanded to encompass far more national and racial groups, reconfigured enforcement across the entire country, and radically altered the nature of immigration in the United States for decades to come.

### *Economic and Social Debate and the Creation of the Quota Laws of 1921 and 1924.*

In the early part of the twentieth century, the relationship of immigrants to the economic system was the principal issue of conflict for immigration policy. Both industrial capitalists and American labor unions had complicated and conflicting relationships with immigrant labor. According to the 1910 census, “immigrants constituted more than 36 percent of the men engaged in the manufacturing industry and more than 45 percent of those in mining” (Downey 1999: 272 n.4). The growth of American industry had only been possible because of the huge increase of

immigrant labor. From 1820 until 1920, more than 35 million immigrants arrived, mostly from Europe (Calavita 1984: 1). While industry benefited from immigrant labor and had often used immigrant labor to break strikes and undermine domestic labor movements, industry also feared that immigrant workers would be more radical and provide dangerous allies to the domestic labor movement. Thus, the fortunes of industrial capitalists were closely linked with exploiting the labor of arriving immigrants but also required that these immigrants be rendered docile and controllable.

American labor unions were essentially in the opposite situation. American workers had long argued that unchecked immigration drove wages down, provided industry with strikebreakers, and generally lowered the nation's standard of living. However, unions were, at least in principle, committed to the unity of the working class and did not want to alienate the third of the work force who were immigrants. Labor's position on immigration at the turn of the twentieth century was therefore no clearer than that of industry. There had long been anti-immigrant segments within unions and, with the increase in immigrants from Eastern and Southern Europe, they steadily moved to an even more solidly anti-immigrant position. Even as much of the membership favored solidarity and believed that "the best trade unionists [are] the foreigners," the leadership of the more conservative unions, such as the American Federation of Labor, pushed an anti-immigrant position, in part to gain control over the political radicals within the unions. For instance, Samuel Gompers of the AFL argued that new immigrants "could not be taught to render the same intelligent service as was supplied by American workers" (Calavita 1984: 111).

By the turn of the twentieth century, the participation of immigrants from Eastern Europe in the growing number of bitter labor disputes was seen as evidence of their greater radicalism.

The New York *Tribune* described striking miners from Eastern Europe as “Huns” and opined that they were “the most dangerous of labor-unionists and strikers. They fill up with liquor and cannot be reasoned with” (cited in Higham 1988: 89). Industry saw a clear benefit in blaming labor unrest on new immigrants from Eastern and Southern Europe, who could be cast as more unreasonable and radical. For industry, the central dilemma was between the contribution immigrants made as a cheap source of labor versus the gains in labor control to be won by blaming immigrants for “the whole repertoire of capitalism’s injustices and irrationalities” (Calavita 1984: 117). Ultimately, industry reconciled itself to supporting and perpetuating the anti-immigrant rhetoric of nativists and eugenicists as explanations for the country’s ills while never supporting any actual legal restrictions on immigration.

The fine line that industry attempted to tread became quite clear in the early 1910s when a number of circumstances came together to stir popular anti-immigrant sentiment and congressional action. First, foreign-born workers who had been shunned by the likes of the AFL came together with more radically socialist American-born workers in the Industrial Workers of the World (IWW or the “Wobblies”) and began to gain political strength — the presidential election of 1912 marked the highest percentage of votes garnered by a socialist candidate in U.S. history when Eugene Debs received nearly 6% of the popular vote. As the IWW attempted to improve their lot through strikes and pickets, public opposition to their activity increased exponentially and blame was laid at the feet of the immigrant members of the movement. In 1912, the IWW mustered a textile mill strike in Lawrence, Massachusetts, involving 22,000 workers, and gained both wage increases and a 48 hour work week. In response, a New York newspaper warned, “the first considerable development of an actually revolutionary spirit comes today, and comes ... among the un-American immigrants from Southern Europe” (Higham 1988:

178). Similar activity among lumberjacks in Washington State led to attacks on strikers by local armed citizens' groups led by Albert Johnson, a local newspaper editor. Energized by these confrontations, Johnson was elected to Congress in 1912 on an anti-Wobbly and anti-immigrant platform (Higham 1988: 178).

Perhaps just as important were the findings of the Dillingham Commission on immigration, which came out in a 42 volume report in 1910 and 1911. Congress had established the commission in 1907 to conduct a comprehensive investigation regarding immigration and report facts and recommendations from which Congress could determine policy. The most fundamentally important aspect of the report was its division of immigrants into the categories of "old immigrants" and "new immigrants. The "old immigrants" were defined as having come from the "most progressive sections of Europe," such as the United Kingdom and Germany, and having assimilated quickly and diffused throughout the American social and geographic landscape. By contrast, the "new immigrants" came from the "less progressive and advanced countries of Europe" and monopolized the unskilled labor pool, lived in ethnic enclaves, and otherwise failed to assimilate (King 2000: 59-60). Worse still, the report concluded that "the new immigration as a class is far less intelligent than the old, approximately one-third of all those over 14 years of age when admitted were illiterate. Racially, they are for the most part essentially unlike the British, German and other peoples who came during the period prior to 1880" (King 2000: 61). In short, the Dillingham Commission attributed most of the social ills that had occurred since the beginning of the 1880s, such as rising unemployment, labor unrest, and urban poverty, to the rise in immigrants from Eastern and Southern Europe who, according to the report, were less intelligent, less able to assimilate, and generally harmful to the American social and economic fabric. One of the only parts of the Dillingham Commission report that

countered these claims was the physical anthropology study conducted by Franz Boas that demonstrated physical adaptation among native-born children of immigrants (Gravlee, Bernard, and Leonard 2003).

For many Americans with anti-immigrant sentiments, the revival of earlier efforts to impose a literacy test for immigrants seemed to be an apt solution to the problems of increased competition from unskilled labor, increased immigration from the assimilation-resistant Eastern and Southern Europeans, and increased radicalism among workers. Albert Johnson, who had become the chair of the House Committee on Immigration and Naturalization, argued, “these teachings [of ‘industrial sabotage’] are coming right along with the influx of more than a million aliens a year. The more illiterate of the aliens, once here, quickly absorb the teachings.” Others in Congress felt that a literacy test would weed out “the menace to our free institutions involved in the arrival of people without training in self-government” (Calavita 1984: 92). In vetoing the legislation, President Woodrow Wilson stated that the bill was unacceptable because the immigration restriction was a dramatic departure from traditional American immigration policy and would impose a penalty on immigrants for coming from a nation that lacked opportunities.

From the point of view of industry, however, it was one thing to blame radical immigrants for fomenting revolutionary ideas among otherwise contented native-born workers and quite another to actually impose a measure that would constrict the flow of immigrant labor into the country’s factories, mines, and mills. One manifestation of industry’s anxiety came in the form of the National Liberal Immigration League (NLIL), a pro-business lobby with a membership that included U.S. Steel and the Susquehanna Coal Company (Calavita 1984: 124; King 2000: 77). The NLIL took a two-pronged approach, arguing that America needed immigrant labor and that immigration restrictions would be a violation of America’s tradition of

providing asylum for those in need. This dual message of American economic interest being coextensive with American idealism was expressed in a 1912 letter to Woodrow Wilson from the NLIL: “it is as impracticable as it is immoral to slam the door in the faces of honest and healthy immigrants, when there is such a crying need for labor” (King 2000: 317 n.113).

The debate surrounding the imposition of a literacy test illustrates the new levels of intensity and complexity that would be represented when conflicting opinions and interests regarding immigration came to the fore. Isolationists, nativists, anti-socialists, and labor overlapped and formed alliances while the industry position was cloaked in the language of individual rights and political freedoms and argued that immigrants could assimilate. The question of whether these new immigrants could assimilate or whether they were insuperably different from the “old immigrants” was indeed at the heart of the debate over how many immigrants America could accommodate.

For industrialists, the hope was that implementing successful programs of assimilation or “Americanization” could both make the new immigrants into docile workers and diminish the perceived need for further immigration restrictions. The National Association of Manufacturers and the National Industrial Council, as well as hundreds of companies, supported and ran Americanization programs (King 2000: 100). Henry Ford saw such programs as a perfect complement to his managed, rationalized assembly line and, in 1914, implemented a “Five Dollar Day” plan where workers could qualify for the Five Dollar Day incentive plan only if they demonstrated that they were learning the correct American way to live. The plan required caseworkers from the Ford “Sociology Department” to visit employees’ homes to instruct and inspect (Barrett 1992: 1003). The Ford program, like many others, had a mandatory English language school for new immigrant workers at which students were taught such phrases as “I am

a good American” and were made to act out a pageant in which students descended into an enormous melting pot dressed as caricatures of foreigners and emerged all dressed the same and holding American flags (Higham 1988: 248). A more direct form of Ford’s Americanization was demonstrated by his firing of about 900 Greek and Russian workers for missing work to celebrate Orthodox Christmas. Ford explained he was justified because “if these men are to make their home in America, they should observe American holidays” (Barrette 1992: 1003). That Americanization schemes were dictatorial, harsh, and unaccommodating is not surprising in light of the fear of unassimilated foreigners living in the United States. Indeed, Congress’s Dillingham Commission had recommended that assimilation include learning English, naturalization, and the abandonment of native customs (King 2000: 64). The hypocrisy of the forced assimilation movement was not lost on everyone: as one critic of the movement observed, “to conserve the inalienable rights of the colonists of 1776, it was necessary to declare all men equal; to conserve the inalienable rights of their descendants in the twentieth century, it becomes necessary to declare all men unequal” (Downey 1999: 257).

*Race and Eugenics and the Creation of the Quota Laws of 1921 and 1924.*

“Civilization’s going to pieces,” broke out Tom violently.  
“I’ve gotten to be a terrible pessimist about things. Have you read ‘The Rise of the Coloured Empires’ by this man Goddard?”  
“Why, no,” I answered, rather surprised by his tone.  
“Well, it’s a fine book and everybody ought to read it. The idea is if we don’t look out the white race will be – will be utterly submerged. It’s all scientific stuff; it’s been proved.”

*The Great Gatsby* (Fitzgerald, 1995[1925]: 17)

In the above quote, Fitzgerald portrays much of the fear and xenophobia that was produced and supported by the eugenics movement in the United States during the 1910’s and 1920’s. The actual book that Fitzgerald is referencing is *The Rising Tide of Color* by a Lothrop

Stoddard, a eugenicist. Even though the title and the author of the book have been fictionalized, Tom Buchanan's reaction is quite representative of the public's reaction to Stoddard's book as well as other books and messages in the eugenics movement.

The eugenics movement asserted its authority based on the newly inaugurated field of genetics, which took as its goal the scientific understanding of the process of natural selection. In the United States the center of the eugenics movement was the Eugenics Record Office ("ERO") at the Cold Spring Harbor Laboratory on Long Island, New York. The ERO was founded by Charles Davenport, whose *Heredity in Relation to Eugenics* (1911) "helped to establish eugenics as a scientific program in America" (Marks, 1995:81). Of even greater significance, with regards to the promotion of eugenic principles as the basis for immigration restrictions, is Harry Laughlin who ran the ERO and served as an "expert eugenics agent" for the House of Representatives committee on immigration from 1920 until 1931, the period of time when congress was considering the Immigration Restriction Acts of 1921 and 1924.

The essential premise of eugenics was based on the concept that immutable heritable traits control social as well as physical phenotypes and that, through study, individuals carrying social or antisocial traits can be identified and dealt with appropriately. As Madison Grant, a New York lawyer and ardent supporter of eugenics, argued in his widely read book, *The Passing of the Great Race* (1916): "moral, intellectual and spiritual attributes are as persistent as physical characteristics and are transmitted substantially unchanged from generation to generation" (cited in Shipman, 1994:124). Thus, eugenics was said to have a "positive" branch, which promoted the preservation of socially beneficial genetic types, and a "negative" branch, whose aim was to discourage the propagation of antisocial genetic types. Positive eugenic schemes were conceived of as something akin to a eugenic matchmaking service that would promote optimal pairing of

marriage partners. However, interest in such projects was negligible and by far the majority of the activities of eugenicists focused on negative eugenic programs, such as sterilization and immigration restrictions (Tyner 1999).

Although immigration by Asians and some other groups of non-whites had been effectively barred by previous immigration laws and the Gentleman's Agreement of 1907 that limited Japanese immigration, Laughlin was greatly concerned that the United States immigration policy was allowing too many undesirable individuals from Southern and Eastern Europe to enter the country to the detriment of its genetic future. Laughlin believed that the United States should consciously define an "American race" which would be based on what Laughlin saw as the original and appropriate immigrants to the United States, mainly, immigrants from England and northeastern Europe. For Laughlin, and other eugenicists, "immigrants from southern and eastern Europe, especially Jews, were racially so different from, and genetically inferior to, the current American population that any mixture would be deleterious" (Allen 1986: 248). A similar message was represented in a widely used textbook, *Applied Eugenics* (1918), which taught, "Looking only at the eugenic consequences, we can not doubt that a considerable and discriminatory selection of immigrants to this country is necessary" (cited in Tyner 1999).

While in principle eugenicists purported to be interested in the genetically heritable traits of individuals, in practice, eugenicists considered nationality a reliable indicator of what sort of genetic traits an individual might have. If the national stock, that is English and northern European, from which the "American race" was drawn, manifestly possesses the most socially beneficial traits, than it only followed that other national groups possessed less beneficial traits. As Laughlin put it in a report titled *Conquest of Immigrants*: "racially the American people, if

they are to remain American ... can successfully assimilate in the future many thousands of northwestern European immigrants ... but we can assimilate only a small fraction of this number of other white races; and of the colored races practically none” (King, 2000:135).

In advocating for stricter immigration restrictions against Eastern and Southern Europe, eugenicists warned that to allow such immigration would cause the degeneration of the American race. It was argued that degeneration would have economic costs because these arriving immigrants and their offspring would be poor, and because they were less intelligent and uneducable. It was also feared that unchecked immigration would result in the deterioration of the national character from miscegenation and because it was believed that the immigrant of “inferior” races would outbreed old stock Americans.

To support these arguments, eugenicists relied on, among other things, vast amounts of social science data on the nature of intelligence. For instance, Henry Goddard, the first American social scientist to use intelligence testing argued that “no amount of education or good environment can change a feeble-minded individual into a normal one, any more than it can change a red-haired stock into a black-haired stock” (Marks, 1995:83). Based on testing at Ellis Island, Goddard concluded that more than 80 percent of the Jewish, Hungarian, Italian, and Russian immigrants were feeble-minded (Gould, 1981:166). Similar arguments were made by Princeton psychologist Carl Bingham, who claimed that tests he conducted of Army recruits proved that race determined type and that Nordic people innately possess greater intelligence than do those from Southern and Eastern Europe (Getz, 2001:28).

Eugenicists partially realized their goals with the passage of the Asiatic Barred Zone Act of 1917, which barred immigration from Asia and adjacent Pacific Islands and additionally

imposed a literacy requirement. The Act was passed over a presidential veto because of Wilson's continuing objection to the literacy requirement.

The Immigration Act of 1924 was the first permanent law setting quotas based on nation of origin. The law set the quota at two percent of the foreign born population from any given country that was present in the United States at the time of the 1890 census. This formulation was the direct result of the arguments made by eugenicists regarding the exclusion of immigrants from Southern and Eastern Europe. Indeed, Laughlin had argued that "while the American white stock seemed fairly well fixed at the end of the generation after the Civil War, still, beginning with the early 1890's and continuing to present, different races of immigrants have entered the country in great numbers" (King, 2000:131). The 1924 law ultimately resulted in 70 percent of the immigrant quotas going to immigrants coming from the United Kingdom, Ireland, and Germany and "was purposely designed to build up a northwestern European vision of American identity and nationality" (King, 2000:229-30).

Higham explained that this "effort in the 1920's to assign all Americans to specific national origins arose at a time of unusual anxiety over menace of immigrants to the whole social order" (Higham, 1975:9). This is by no means surprising, for it is amidst this uncertainty that, as Wiebe describes, the United States developed a professional middle class of experts who sought to fix social problems by resorting to bureaucratic management. Eugenicists and those who advocated for greater immigration restrictions fit squarely within this trend: "Whenever general anxieties rose across the nation, followers of the bureaucratic way had to turn for help to one of several traditional techniques for achieving tighter cohesion. One of these time-honored devices was exclusion: draw a line around the good society and dismiss the remainder" (Wiebe, 1967:156-57). Such an idea was utterly inconsistent with an open door immigration policy that

depended on a euphemistic melting pot to produce a single integrated and orderly society. By establishing ethnic groups as the basis of immigration policy, it was possible to segregate between those ethnic groups that were considered good material for the process of Americanization and those who should be excluded. The immigration process was thereby rationalized and the setting of quotas maximized the percentage of immigrants who come from the U.K. and northeastern Europe.

*Security, the Red Scare, and the Palmer Raids and the Creation of the Quota Laws of 1921 and 1924.*

The committee members were not all there; so some of us sat down in one of the rear rooms to wait. We were talking, when about 9 o'clock three men came in through the back door, having guns in their hands, and about the same time the front door was thrown open and we saw some of these men there. The men in charge on the raiding party ordered those in the back room brought into the front room with commands to hold up our hands and to get over there. We held up our hands until a preliminary search for weapons had been made. After that search had been made we were searched; I might mention this, incidentally, that while we were being herded up against the wall one of the men in the room fainted. After the preliminary search for weapons had been made we were searched for evidence which we might have on our persons, which was placed in envelopes with our names marked on them as described by various witnesses. We were then taken down stairs and crowded into vans.... After answering the questionnaire and signing it, which most of us agreed to do, we were taken down stairs and assigned to cells. I with ten others was assigned to one cell. I remained in that cell until the afternoon of the following day, which was Saturday, about half past 4.

Testimony of a witness arrested during the Palmer Raids. *Colyer v. Skeffington*, 265 Fed. 17, 40-41 (D. Mass. 1920).

The amalgam of these fears only became greater with the outbreak of World War I and the Russian Revolution. In such a climate, immigrants who did not conform were seen as disloyal to their new country and as threats to the political establishment and the economic *status quo*. With the United States' entry into the war, Congress passed the Espionage Act of 1917 and the Sedition Act of 1918 and the government began to rely on them to suppress criticism of the war, primarily by censoring the speech of pacifists, labor leaders, and communists. Immigrants came

under especially close scrutiny with foreign-language publications, which were viewed as so threatening that the Postmaster General required publishers to submit foreign-language newspapers, with translations, to the Postmaster for approval (Hall 1989: 250). Both industry and the government were able to characterize labor unions, protestors, and organizers as subversives harming the war effort. In 1917, members of the IWW were involved in a small number of strikes in industries that were considered vital to the war effort, such as copper mining and timber. In response, the Department of Justice raided forty-eight IWW local halls and brought a number of prosecutions against IWW leaders for conspiracy to hinder the execution of the war by trying “to close mines, factories, and munitions plants, and [encouraging] workers not to join the army” (Renshaw 1968: 66). The leaders of the IWW were convicted and received severe punishments, up to twenty years in prison. Other federal and state prosecutions were essentially able to break the union.

With the ending of the war, fear of communist and other subversives actually increased and animosity towards communists, anarcho-syndicalists, and trade unionists reached its high point. In the context of the slumping postwar economy and high prices, general anxiety was exacerbated by a number of bombings allegedly perpetrated by alien subversives, labor unrest, and the distribution of radical literature (Colburn 1973: 424). The Department of Justice promoted the belief that United States was under threat by foreign radicals. After a series of bombings in June 1919, including one on Palmer’s porch, the director of the Bureau of Investigation (the forerunner to the FBI) claimed that they were “connected with Russian bolshevism, aided by Hun money” (Coben 1964: 60). Attorney General A. Mitchell Palmer was able to secure funding for a division to fight radicalism, the General Intelligence Division (GID) by claiming that “reds” were planning “to rise up and destroy the Government in one fell

swoop,” and he proceeded to use his new power to arrest active immigrant union members (Higham 1988: 229). Also, between 1917 and 1920, Congress extended the grounds on which an alien could be deported, to include teaching or advocating subversion (Immigration Act of 1917), belonging to an organization that entertains beliefs in the violent overthrow of government (Anarchist Act of 1918), and writing, publishing or possessing subversive literature (Act of June 5, 1920).

The Red Scare, with its extreme xenophobia and mistreatment of immigrants, reached its peak in the so-called Palmer Raids of 1919-1920. The Palmer Raids were carried out by the GID, under the direction of J. Edgar Hoover, with the purpose of rounding-up and deporting individuals deemed subversive, specifically focusing on groups such as the Communist Party, Communist Labor Party, and the Union of Russian Workers. During the raids, people were arrested without warrants, held without charges, denied access to legal counsel, and subjected to having their houses and property searched without warrants. Since the government was not relying on arrest warrants, agents often simply arrested everyone at an event who was thought to be subversive, such as when 141 men and women were arrested at a dance sponsored by the “Tolstoi Club” (Williams 1981: 562). Individuals were held in harsh conditions, for days, months, and in some cases over a year. Bonds could be set exceedingly high: on November 11, 1919, the *New York Times* reported that 391 members of the Union of Russian Workers had their bonds set between \$10,000 and \$15,000 (a fortune by the standards of the time). Ultimately, the Palmer Raids resulted in about 550 deportations and many thousands more were arrested and held for at least some period of time (LaFeber, Polenberg, and Woloch 2013: 82).

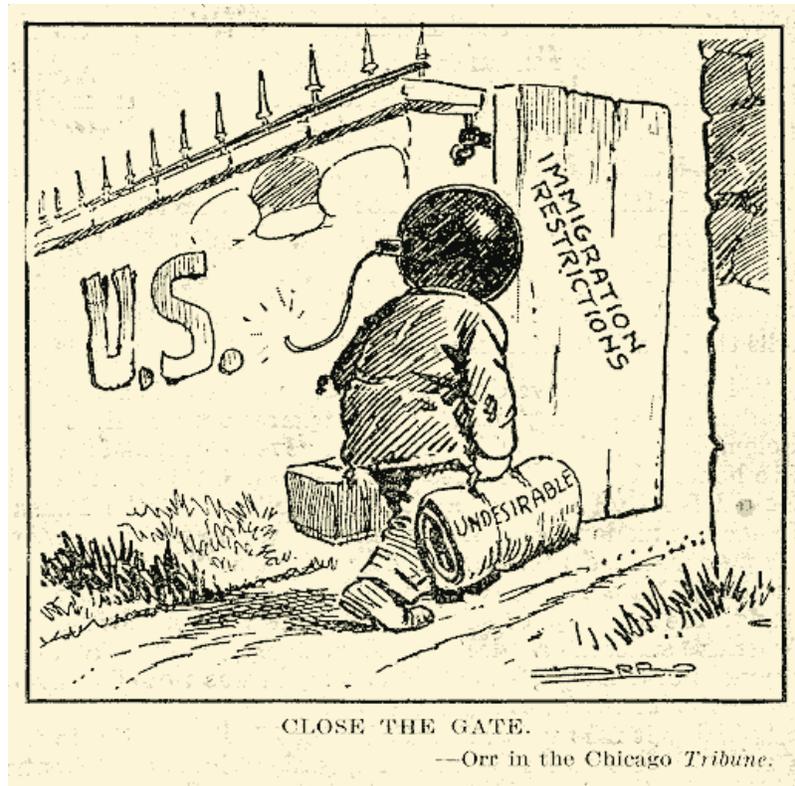


FIGURE 1. *Chicago Tribune* political cartoon by Carey Orr, reprinted in the July 5, 1919 issue of *The Literary Digest*.

In addition to the raids, the press also took pains to paint striking workers as Bolsheviks or anarchists. The great steel strike of 1919 was described as “a serious outbreak of Bolshevism red hot from Russia” (Calavita 1984: 105-6). One description of thirty-nine IWW deportees was oddly feline in its disdain, describing them as “bewhiskered, ranting, howling, mentally warped, law-defying aliens” (Higham 1988: 229). During the most intense period of the Palmer Raids the opinion of newspapers and the public was strongly supportive of the extreme measures taken by the Department of Justice. Political cartoons of the period tended to urge stronger action on the part of the government. For instance a cartoon that originally appeared in *The Chicago Tribune* in 1919, captioned “Close the Gate,” depicts the United States as fenced with an open gate, labeled “immigration restrictions,” through which an immigrant labeled “undesirable” is walking. In place of a head, the immigrant’s shoulders bear an anarchist’s bomb with a lit fuse

(see Figure 1). *The New York Times* expressed similar opinions when it lauded the massive dragnet raids of January 1920: “If some of us, impatient for the swift conclusion of the Reds have ever questioned the alacrity, resolute will, and fruitful, intelligent vigor of the Department of Justice in hunting down those enemies of the United States, the questioners and doubters now have cause to approve and applaud” (quoted in Williams 1981: 563).

The arrests and the manner in which they were carried out did not go completely unchallenged. Following the January 1920 raids, the United States Attorney for the Eastern District of Pennsylvania, Francis Kane, resigned in protest and addressed Palmer in an open letter. He warned, “the policy of raids against large numbers of individuals is generally unwise and very apt to result in injustice” (quoted in Williams 1981: 563). Most notably, two federal district courts considered the legality of the Department of Justice’s actions in habeas corpus proceedings, in Butte, Montana and Boston, Massachusetts. In both cases, the courts issued withering criticisms of the government’s actions. In the Montana case, the court ruled that the petitioner was entitled to a writ of habeas corpus because, “[h]e and his kind are less of a danger to America than those who indorse or use the methods that brought him to deportation, these latter are the mob and the spirit of violence and intolerance incarnate, the most alarming manifestation in America today.”<sup>10</sup>

In setting aside the deportation orders of a group of aliens on due process grounds, in *Colyer v. Skeffington*, the district court described the various violations that the arrestees suffered at the hands of the Department of Justice. For instance, people attending a Communist Party meeting were arrested at gunpoint, without warrants, and were searched without warrants. Also, a group of thirty-nine people were arrested while “holding a meeting to discuss the formation of

---

<sup>10</sup> *Ex Parte Jackson*, 263 Fed. 110, 113 (1920).

a co-operative bakery” and once arrested people were detained in “unfit and chaotic” conditions and were prevented from having access to legal counsel.<sup>11</sup>

After the hysteria of the Red Scare and the Palmer Raids began to die down by the end of 1920, it became clear to some critics that a dangerous precedent had been set, which would augur ill for the rights of immigrants and other political minorities during the next perceived crisis if left unremedied. In the summer of 1920, former Supreme Court Justice Charles E. Hughes was compelled to warn a gathering of Harvard Law School alumni about the abuses to constitutional rights that had taken place. He stated, “We may well wonder, in view of the precedents now established whether constitutional government as heretofore maintained in this republic could survive another great war even victoriously waged” (Beard and Beard 1927: 671). Similarly, Harvard Law School Professor Zechariah Chafee Jr. warned of the need for further remedial measures, stating, “Unless the methods used by the Department of Justice are severely condemned by Congress and the American people they will be repeated in future emergencies” (quoted in Williams 1981: 560).

Unfortunately, there was no severe condemnation, or even investigation, of the Department of Justice and its actions during the period of the Red Scare and the Palmer Raids (Williams 1981: 560-61). Far from being merely “the last symptom of war fever,” the Palmer Raids go down in history as a critical phase in defining immigrants as both potential threats to national security and as undeserving of the constitutional rights afforded to citizens. The Palmer Raids also had a strong racial aspect: the focus was on Eastern European immigrants, that is, the “new immigrants” who were deemed unfit by many opinion-makers to be part of the “American Race.”

---

<sup>11</sup> *Colyer v Skeffington*, 265 Fed. at 40-41, 43, 45 & 48.

Passage of the Johnson-Reed Immigration Act of 1924 resulted in 70 percent of the immigrant quotas going to immigrants from the United Kingdom, Ireland, and Germany. This legislation “was purposely designed to build up a northwestern European vision of American identity and nationality” (King 2000: 229-30). If this new immigration policy resulted from a confluence of trends and developments, including Anglo-Saxon supremacy, fear of aliens as dangerous subversives, and belief that immigrants should not enjoy the rights guaranteed under the Constitution, it should not be surprising that these concepts remained key elements, and contradictions, within the United States’ immigration policy.

*Geography and the Creation of the Quota Laws of 1921 and 1924.*

Occurring simultaneously with labor and political unrest, the Eugenics movement, and the Palmer Raids was a sense that the vast expanse of the American frontier, which had served as a mythological promise of future prosperity for the country, was beginning to show that it had finite boundaries. As Neil Smith explained, “The political economic, historical, and symbolic expansion of the United States outstripped its geography by the end of the nineteenth century.... Whereas in the past, economic expansion was closely associated with and in large part accomplished through expansion in absolute geographical space, henceforth economic expansion would bear a much more complicated relationship to geographic change” (Smith, 2003:14). This closing of the American frontier also figured prominently in the decision to adopt the immigration quota restrictions.

While many immigrants settled in urban areas, in the decades preceding the twentieth century many immigrants also settled in frontier states. Some of the highest ratios of immigrant populations to native-born populations occurred in these states, for instance, according to the 1890 census, 43 percent of the population of North Dakota was foreign-born (Higham, 1975:13-

14). During the period of railroad expansion, the access to natural resources and the ability to produce wealth seemed virtually limitless, but industry was dependent on immigrants to exploit the wealth of the continent. For example, in the 1850's, American railroad companies were so interested in settling their railroad land grants in the vast western expanses that they sent real estate agents to Europe to find new settlers (Higham, 1988:16). If immigrants were seen as necessary and beneficial to the economic expansion of the West, the frontier life was seen as equally beneficial to immigrants. Reflecting on what he considered the American frontier of the past, Frederick Jackson Turner, in his 1920 book, *The Frontier in American History*, opined, "In the crucible of the frontier the immigrants were Americanized, liberated, and fused into a mixed race" (cited in Higham, 1988:22).

However important the relationship between the American frontier and immigration had been, with the dawning realization that the supply of good vacant land was finite, Congress, in 1887, enacted a statute to restrict the ability of non-naturalizing aliens to own property in the federal territories. With the impending closing of the frontier, America began to consider restrictions on immigrants. Conversely, it is also telling that the growing anxiety regarding the number of immigrants arriving at the end of the nineteenth century was temporarily slowed by United States expansionism abroad. Calavita noted "with the relaxation of industrial conflict for a brief period at the turn of the century and with business optimism generated by the Spanish-American War and American expansionism, capitalists once again rose to the defense of the immigrant" (Calavita, 1984:122). One manifestation of this was businesses' staunch opposition to a literacy test requirement for immigrants during this period, indeed, "as the Spanish-American War opened, literacy test proponents could not even get the House to consider the bill" (Calavita, 1984:120 n.1).

Indicative of the motive for restricting immigration was the fact that Mexicans were not covered by the new quota law, nor were nativists and eugenicists able to convince Congress of the need for such restrictions, despite the fact that five sets of hearings were held from 1926 to 1930 (Getz, 2001:29). While to be sure business interests were in favor of allowing Mexican labor to continue working in the United States, previous restrictions against other immigrant groups were opposed by business and industry to no avail. The difference is in the nature of the arguments that were made regarding immigrant Mexicans as opposed to European immigrants. First, agricultural interests lauded the Mexican worker as a “docile animal” who was “specially fitted for the burdensome task of bending his back to picking cotton” and who is “accustomed to life in a semitropical climate. They are children of the sun, and they perform a service for which those born in colder climates are neither suited nor inclined” (Getz, 2001:29-30). Thus, the argument for exempting Mexican workers from immigration restriction was in essence that they are a valuable part of the landscape itself and are useful to the transplanted Anglo-Saxons who are less inclined to grub cotton fields. Viewed this way, Congress had no more reason to fear immigration by Mexican workers than they would the importation of lumber or cattle from Mexico. Second, the argument was made that Mexican workers, because they come from adjacent territory, do not desire to stay in the United States but only to work for a while and return home. Such a temporary worker would be perfect if Congress’ concern was a shrinking of geography for one’s own population but would do little to alleviate the concerns of degradation and contamination that eugenicists preached.

Most importantly, the justifications given, after the fact, for the passage of the Johnson-Reed Immigration Act of 1924 clearly indicate that a primary motive was preserving the limited amounts of absolute space within the United States. One eugenicist reflecting on the passage of

the immigration restrictions stated, “America has had a fright: first about quality of her immigrants, and now the quantity. Realizing that her own soil will soon be needed by her own people, she has now closed her doors to Northern Europeans in great part, to Southern and Eastern Europeans almost completely, and to Asiatics entirely” (cited in Tyner, 1999). Similarly, in a 1924 *Foreign Affairs* article, which sought to explain and justify the new immigration restriction, Robert De Courcy Ward argued that the traditional idea of open immigration had been predicated on the fact that “for many decades the country was very sparsely settled” and “there was abundant free land” (Ward, 1924). Ward claimed that the new immigration restrictions were necessary because economic and social conditions had changed. As he put it, “The cold facts were that the supply of public land was practically exhausted; that acute labor problems, aggravated by the influx of ignorant and unskilled aliens, had arisen; that the large cities were becoming congested with foreigners; that there were too many immigrants for proper assimilation; that large numbers of mentally and physically unfit, and of the economically undesirable, had come to the United States” (Ward, 1924).

It is telling that Ward put the end of open unsettled frontier land at the head of his parade of horrors that had justified the drastic restrictions on immigration. While not a sufficient cause in and of itself, it is the only aspect of the debate that was truly new and unique. As discussed above, domestic labor had long been calling for restrictions on immigration to protect it from cheap, unskilled immigrant labor. Similarly, immigrants in urban centers were not a particularly new phenomena; Russian and Polish Jews had already claimed certain streets on the Lower East Side of New York before the Civil War and significant immigration to urban centers was underway in the 1880’s (Higham, 1975:89). Finally, while eugenicists had placed claims of immigrant inferiority in science-like terms for the first time, their message that the new wave of

immigrants was less desirable than the immigrants of the past was, in substance, no different than the message old-line nativists had been preaching since the 1850's. Thus, the realization that there were new limits to the absolute geography within which the United States catalyzed the old arguments about labor, urban disorder, eugenics, and nativist racism into unprecedented restrictions on the number and types of immigrants who would be allowed.

Moreover, the eugenics movement and ideas of an end to the absolute geography of the United States are not mutually exclusive explanations for the adoption of the immigration quota system, but rather two aspects of an emerging geopolitical way of seeing America's place in the world. If one follows Friedrich Ratzel's theory of *lebensraum* and his argument that organic-states have their own "humanized landscape" (Smith, 2003:38), which requires a certain amount of absolute territory per person to survive, then the identification and exclusion of individuals who are not part of the organic state could be seen as a relative gain in geographic terms. So while the closing of America's geographic expansion provided the motive for excluding immigrants, the terms of that exclusion were defined under previously established ideas of white superiority and justified with the most fashionable scientific jargon – eugenics. It is perhaps this ruthlessly efficient application of geopolitical ideas that lead to Adolph Hitler, in *Mein Kampf*, to express his admiration of the Johnson-Reed Immigration Act of 1924 for excluding "undesirables" on the basis of race (Crook, 2002:368).

#### The Quota Laws and the Creation of the "Illegal Alien"

In *Impossible Subjects*, Mae Ngai (2004) argues that the passage of the Johnson-Reed Immigration Act in 1924 and the legal and policy changes it put into place was a paradigm shift in concretizing the category of "illegal alien" both legally and socially and in defining the limits it placed on individuals as having "no right to be present, let alone embark on the path to

citizenship” (Ngai 2004: 6). The law’s quotas applied to racialized groups of individuals and in the process of creating a racial hierarchy that favored immigrants from some countries over others, the 1924 law not only ranked Europeans in “a hierarchy of desirability” but “constructed a white American race, in which persons of European descent share a common whiteness distinct from those deemed to be not white” (Ngai 2004: 24-25). In addition to setting limits on who might immigrate and in what numbers, the Immigration Act of 1924 expanded the administrative apparatus for enforcement of immigration laws. The law created the Border Patrol and eliminated the statute of limitations on deportations for individuals who entered the United States without inspection by immigration officials, and made such entry a crime for the first time. Immigration law was also enforced domestically, rather than simply excluding people at the border, internal policing became a larger and larger part of the immigration services duties. Removals of people from the U.S. increased from “2,762 in 1920 to 9,495 in 1925 and to 38,796 in 1929” with removals for being present without a proper visa cited as the main reason for removals (Ngai 2004: 60).

The 1924 law built on the preexisting discrimination of the Naturalization Act of 1790 which had limited naturalization to free white individuals, a restriction that was amended in 1870 following the Civil War to include individuals of African decent but was otherwise maintained. The 1924 law barred “aliens ineligible to citizenship” from immigrating. Numerous lawsuits brought by individuals seeking to naturalize brought scrutiny to the question of who could be considered white, with the Supreme Court ruling Japanese and Asian Indians were not white, in *Ozawa v. United States*, 260 U.S. 178 (1922) and *United States v. Thind*, 261 U.S. 204 (1923), respectively. In reaching this determination, the Court, in *Thind*, emphasized that, “the words ‘free white persons’ are words of common speech, to be interpreted in accordance with the

understanding of the common man.” Thind had argued as a Hindu he was both a Caucasian and an Aryan and thus should be considered white for purposes of naturalization. The Court in *Thind*, however, held that regardless of whatever ethnologists might say, the physical appearance of Asian Indians made them distinct from European immigrants and, therefore, unassimilable. Through this “common knowledge” test, the Court said that whiteness was a social determination and the Court would protect those discriminations through the exercise of legal power (López 2006: 3-7). Mexican immigrants, on the other hand, were not barred from naturalizing, despite deep seeded animosities and discrimination directed against them. At the end of the Mexican-American War, large portions of Northern Mexico were ceded to the United States in the Treaty of Guadalupe Hidalgo of 1848. Mexican nationals in the territories covered by the treaty were considered U.S. citizens unless they declared their intent to remain Mexican citizens. Based on this treaty, a court decided in 1897, that Mexicans, regardless of appearance or contemporary anthropological race theory, were white for purposes of the naturalization statute.<sup>12</sup> As Ngai points out, however, Mexicans being deemed white under the naturalization statute was “an unintended consequence of conquest” (Ngai 2004:54), but did not mean they were accepted and in practice did not protect them from discrimination or even exclusion or removal from the United States.

As industrial agriculture grew throughout the Southwest so did the numbers of migrant laborers employed as seasonal agricultural workers. In 1911, the Dillingham Commission Report expressed the opinion that a Mexican “is less desirable as a citizen than as a laborer” (quoted in Calavita 1992:180). During World War I, Mexican migrants were depended on to meet labor needs and the Attorney General suspended the literacy test and \$8 head tax, both of which had

---

<sup>12</sup> *In re Rodriguez*, 81 F. 337 (D.C.Tex. 1897).

been imposed by the 1917 Immigration Act, for new Mexican arrivals (Massey, Durand, and Malone 2002: 29). Similarly, when the Immigration Act of 1924 imposed national quota limits, it exempted countries in the Western Hemisphere, which meant that Mexican immigrants were not subject to quantitative limits on visa availability. By the 1920s, there was “an average of 62,000 legal and an estimated 100,000 undocumented entries a year” (Ngai 2004: 131). The view of Mexican immigrants as a vital source of labor but wholly undesirable as citizens continued to dominate law and policy. Congressional debate from a hearing on the subject of "Temporary Admission of Illiterate Mexican Laborers," which took place in 1920, exemplifies the view that many would have of Mexican migrants for the next century. Mexicans were represented as being particularly well suited for manual farm labor and as more productive than other workers. As one witness advocating the liberalizing of migrant labor controls testified, “The prices that they charge are much less than the same labor would be from either the negro or the white man.” Moreover, it was argued that this increased productivity at lower cost would result in the increased production of food and clothing that would be a benefit to the country as a whole by reducing the cost of living. Those testifying on behalf of the proposal argued that, while Mexicans were not “particularly desirable citizens,” this was not cause for concern because “[t]hey will stay here for four or five months until they have saved, perhaps \$150, and then they will go back to Mexico, go back to their homes, and when the money is gone they will come back to the United States” (U.S. House of Representatives 1920: 4-6). Thus, the arguments being made in this 1920 hearing outline how Mexican labor was utilized and conceptualized for the rest of the century. Mexican workers were economically beneficial, even necessary, but their presence in the United States would be tolerated only as an undesirable necessity and Mexican migrants would be encouraged to engage in circular labor migration but not to settle in the

United States and would never be invited to enjoy social or political membership (Calavita 1992; Massey et al. 2002).

While there was no quota limit imposed on migration from Mexico under the 1924 quota law, use of administrative measures were used to control Mexican migration. The U.S. consulate in Mexico denied visas by strictly enforcing legal provisions such as the literacy test, prohibitions on contract labor, or concluding that a person was likely to become a public charge (Ngai 2004: 54). Additionally, ports of entry had extensive regulation and controls with visa requirements, imposed head payments, and mandatory delousing and bathing (Ngai 2004: 68). Either because they were unable to obtain a visa or to evade these expensive and onerous requirements, many Mexican migrant workers continued to enter the United States without inspection as they had been doing before the 1924 law. Under the terms of the 1924 law, however, such entry was both a crime and resulted in them being considered “illegal aliens.”

With the arrival of the Great Depression in 1929 there was an even greater focus on reducing the number of individuals of Mexican ancestry in the United States and the Secretary of Labor explicitly advocated deportation of Mexicans as a way to create jobs for American workers (Kanstroom 2007: 215). At the same time as they were blamed for taking American jobs, complaints were also made that Mexicans were living off of public relief and many of the deportations were instigated by the relief organizations themselves. From 1929 to 1937, 458,000 Mexicans were expelled from the United States and many more left of their own volition rather than face continued persecution (Massey, Durand, and Malone 2002: 34). Many Mexican families were made up of parents who had immigrated from Mexico and U.S. citizen children who had been born in the United States, but the mass removals often did not make this

distinction and the number of individuals removed to Mexico, including their U.S. citizen children, could have been as many as one million (Balderrama and Rodriguez 1995: 122).

Ngai points out, however, that not all “illegal aliens” were subject to deportation. Beginning in 1933 legislation and policies were put in place to prevent deportation and family separation in “exceptionally meritorious” cases (Ngai 2004:81). This relief came mainly in three forms: (1) waivers of deportation, (2) a process called pre-examination, where an out-of-status immigrant could briefly leave the United States and return on a preapproved visa, and (3) the Registry Act, which allowed certain long-term residents to legalize their status. Using these methods, as many as 200,000 out of status immigrants legalized their status from 1925 until 1965 (Ngai 2004:89). Mexican immigrants who were out of status, however, were generally not afforded this clemency. European “illegal aliens” were often presented as deserving of relief while “Mexicans emerged as iconic illegal aliens. Illegal status became constitutive of a racialized Mexican identity and of Mexicans' exclusion from the national community and polity” (Ngai: 2004: 58).

The status of Mexican migrants as laborers without political or social membership was formalized in the Bracero Program (Calavita 1992: 180). The program, which was originally established due to labor shortages during World War II, was periodically reauthorized and ended up operating from 1942 until 1964 and brought over 4.5 million Mexican workers to the U.S. under temporary and restrictive permits (Kanstroom 2007: 219). The Bracero Program aided, and was primarily utilized by, large industrial farms that were consolidating land and replacing many of the smaller farms that were owner or tenant operated (Ngai 2004: 139). During the Bracero era the average farm size increased by 99% and the total number of farms decreased by 22% (Mitchell 2012: 402). Even though the wages of the program were ostensibly set by

contract, many Braceros complained of being paid significantly less than the contract rate and the effect of the program was to drive down wages in the agricultural sectors by providing abundant labor to commercial agricultural interests from politically disenfranchised workers (Melnick 2006: 261).

While one of the stated purposes of the Bracero Program was to provide an alternative to undocumented labor, in practice the program ended up increasing the overall amount of undocumented workers entering the United States from Mexico. The reasons that the Bracero Program also begot significant amounts of undocumented labor are numerous, and in hindsight, seemingly obvious. First, the program established recruitment, migration, and employment networks into the interior of Mexico and advertised the availability of well-paying work in the United States on the radio and in newspapers, but there were not nearly as many Bracero positions available as individuals interested in working in the United States (Ngai 2004: 152). Second, Mexico initially refused to include Texas, Arkansas, and Missouri in the program because of their Jim Crow-style discrimination against Mexicans so farmers in these states recruited and hired undocumented immigrants. Indeed, even many farmers who had access to Braceros preferred to hire non-Bracero workers to avoid regulations and higher wages (Kanstroom 2007: 220), and those who hired undocumented workers could do so without fear of consequences because the Immigration and Naturalization Service (INS) expressed little interest in preventing the use of undocumented labor. In 1948, the INS District Director for El Paso told his staff, “Until Texas farmers are given the privilege of legally importing farm laborers from Mexico, their farms should not be indiscriminately raided” (Ngai 2004: 152). Similarly, in 1952, at the urging of the congressional delegation from Texas, a law making it a crime to transport an undocumented migrant or induce an undocumented migrant to stay in the United States was

amended by the “Texas Proviso” to exempt employers of undocumented workers from liability (Massey, Durand, and Malone 2002: 36) and “the amendment was interpreted by the INS as *carte blanche* to employ undocumented workers” (Calavita 1989: 158).

Eventually, however, the INS felt pressure to address the large number of undocumented workers, whose presence undermined the Bracero Program, depressed wages, and began to attract criticism from politicians and interest groups. The INS responded by creating an enforcement program entitled “Operation Wetback” in 1954, which used aggressive tactics to conduct large raids and deported over one million people (Kanstroom 2007:223-24). The purpose of Operation Wetback, however, was not to eliminate Mexican labor migration but to control it. On many occasions undocumented workers were deported only to be immediately readmitted as Braceros, in a procedure INS officials called “drying out the wetbacks” (Ngai 2004: 154; Calavita 1992).

One of the most lasting effects of the Bracero Program was its creation of a permanent population of Mexican migrant laborers and its establishment of migration and employment networks. Those who participated in the program learned how to be U.S. workers, understand employer expectations, speak English, and negotiate American society (Massey, Durand, and Malone 2002: 42). By the time the Bracero Program was ended in 1964, “the symbiosis between Mexican migrants and employers in the Southwest was well-entranced, the product of over fifty years of formal and informal policy-making” (Calavita 1989: 158).

### **Reform and the Advent of the Immigration and Nationality Act**

#### Hart-Celler Immigration Act of 1965 and the New Structure of Immigration Law

The passage of the McCarran-Walter Act of 1952, also known as the Immigration and Nationality Act (INA), eliminated racial bars to immigration and naturalization. Further, the civil

rights era Hart-Celler Immigration Act of 1965 amended the Immigration and Nationality Act to abolish the national origins quota system that had been in place since 1921, and which had restricted immigration to the United States based on ancestry and nation of origin. Undeniably, the Hart-Celler Act resulted in the liberalization of U.S. immigration policy. These changes resulted in unprecedented numbers of migrants from areas of the world that had been significantly underrepresented in the past, including large numbers of lawful immigrant admissions from Asia and Latin America. Over the following decades, these changes reshaped American society as millions of immigrants and their families came to live and work in the United States. In the 1980s, 80 percent of a record number 7,338,000 immigrants who came to the United States were from Asian or Latin American countries. “Between 1971 and 1996, 5.8 million Asians were admitted into the United States as legal immigrants, and over 1 million Asians have been admitted as refugees since 1975,” and additionally, from 1991 to 1997, 6,943,000 immigrants came to the United States, half of whom were from Latin American countries (Lee 2006: 18). While the Hart-Celler Act did impose limits on the number of migrants from the Western Hemisphere for the first time, other social, political, and economic factors were promoting immigration from Latin America. Direct capital investment and military involvement in Latin American countries disrupted social relationships and traditional livelihoods and created displaced and mobile populations. These same interventions by United States government and corporations, which created the mobile populations, also created linkages between the United States and the other countries, which made migrating to the United States both conceivable and materially possible (Sassen 1988). This process, along with the restructuring of the U.S. postindustrial economy to favor flexible part-time labor, explains how

and why Latin American immigration rose even as changes to immigration laws, on their face, might have been expected to decrease such migration.

In abolishing the quota system, the 1965 law used a numerical cap on the number of immigrant visas that would be allocated according to a family-based and employment-based preference system. Initially, the numerical cap was allocated differently between countries in the Eastern Hemisphere and countries in the Western Hemisphere but by 1978 a single worldwide cap of 290,000 visas per year was established with a per country limit of 20,000 visas per year. In addition to these visas, immediate relatives of U.S. citizens (i.e. spouses, minor children, and parents) were made eligible to immigrate without being subject to numerical limit, although the visas they receive are deducted from the overall number of available visas. Since 1995, the total number of available family based immigrant visas has been 480,000 per year and the total number of employment based immigrant visas has been 140,000 per year and the per country limit has been 25,620. Also, an additional 55,000 visas are available through the diversity lottery to individuals from countries with low rates of migration to the U.S. The levels of refugee admissions are determined separately on an annual basis by the President.

Many scholars and advocates have argued that the formal equality created under the per country limit on available visas, which began in 1978, has in fact been the law's main flaw due to the fact that the limit does not begin to capture the number of individuals from high demand countries, such as Mexico, who seek to immigrate to the United States and who are sought by employers in the U.S. (Ngai 2004; Massey, Durand, and Malone 2002; De Genova 2005). Under this view, the law has not provided sufficient opportunities to immigrate legally, especially given the long established patterns of labor migration between the United States and Mexico, and is a significant factor in the rise in the number of undocumented immigrants in the United States.

These limits, aggravated by a series of amendments in the 1970s, meant that “[b]etween 1968 and 1980...the number of visas accessible to Mexicans dropped from an unlimited supply to just 20,000 per year (excluding immediate relatives of U.S. citizens)” (Massey, Durand, and Malone 2002: 43). Aristide Zolberg points out that, with the end of the Bracero program in 1964, “illegal entries rose rapidly” as a result of the limitation of avenues for legal migration brought on by Hart-Celler, lax controls at the border, a pool of eager U.S. employers, and few meaningful penalties for working in the United States without authorization (Zolberg 2006: 334-35).

As the economic disparity between the global north and the global south has increased, many people have migrated to the United States in an attempt to provide for themselves and their families despite the lack of available visas. This trend is also encouraged by the fact that the U.S. economy is highly dependent on, and welcoming to, low-wage immigrant labor in such economic sectors as agriculture, construction, food services, hotels, custodial labor, and landscaping. Additionally, long after the end of the Bracero Program, “[p]olicies promoted by the state’s leaders in the 1980’s actively encouraged illegal immigration into California, and as a result hundreds of thousands of illegal immigrants came” (Brinkley 1994:1). Following the passage of the Hart-Celler Act, apprehensions of undocumented immigrants, a commonly cited metric to indicate changes in the size of the undocumented population, rose from 500,000 in 1970 to one million in 1977 (Lee 2006: 25). According to one estimate, approximately 28 million undocumented Mexican migrants entered the U.S. between 1965 and 1986, while only 1.3 million legally immigrated, and only 46,000 came as temporary workers (Massey and Singer 1995). While there were earlier concerns regarding illegal border crossing, before 1964 control of the U.S.–Mexico border was seen as primarily an issue of managing labor rather than sovereignty and national security. Throughout the late 1970s and early 1980s, there was an

increase in expressions of concern over the growth of the undocumented population, particularly undocumented entry across the U.S. – Mexico border. During this period much of the rhetoric used to discuss the issue, even in mainstream news outlets, discussed immigration from Mexico as “an invasion,” a “*reconquista*,” and intimation that Mexicans sought a Quebec-style version of cultural and political autonomy. Leo Chavez, after reviewing feature stories about the U.S. – Mexico border that have appeared in mainstream news magazines from 1965 to 1999, concluded, “[i]f there has been one constant in both pre- and post-9/11 public discourse on national security, it has been the alleged threat to the nation... posed by Mexican immigration and the growing number of Americans of Mexican descent in the United States” (Chavez 2009: 82).

Additionally, in the early 1970s the U.S. economy was becoming increasingly deindustrialized and losing manufacturing jobs. U.S. workers faced high inflation, high unemployment, and decreasing wages (Massey, Durand, and Malone 2002: 43). By the 1980s the Reagan administration was enacting economic policies that stressed cutting government benefits and services, such as education, healthcare, and social services, so that taxes could be reduced. As working class and middle class Americans began to feel economically vulnerable, legislation limiting or eliminating immigrants’ rights to government services and benefits were introduced. In 1975, for instance, the Texas state legislature passed a law denying funds for the education of children not “legally admitted” into the U.S. and allowing schools to deny them admission. In the 1982 case, *Plyler v. Doe*, 475 U.S. 202 (1982), the U.S. Supreme Court struck down the law in decision that held that the law violated the equal protection clause of the 14<sup>th</sup> Amendment because it discriminated against children for a legal status they had no control over, and because it would perpetuate a subclass of less educated people within the general population. The decision, which was decided by a vote of five to four, was emblematic of the growing

division over how to address the growing undocumented population. The majority opinion recognized both U.S. society's complicity in benefiting from migrant labor as well as the need to recognize migrants, or at least their children, as members of society noting that, "[t]his situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents" (*Plyler v. Doe*, 475 U.S. at 218-19). The four dissenting justices echoed public concerns that undocumented migrants were exacting high social costs on the welfare state and stated that they would have upheld the legislature's right to allocate limited public resources only to lawful residents. It should be noted, however, that even the dissenting justices stated that if they were legislators, as a matter of public policy they would be in favor of providing publicly funded education regardless of immigration status.

#### *Immigration Reform and Control Act of 1986*

*Plyler* was illustrative of both the growing sense that undocumented migration was an important issue, as well as the fact the U.S. public was somewhat ambivalent and divided on how to address it (Newton 2008: 67). Congress attempted to address the problem of undocumented migrant labor when it passed the Immigration Reform and Control Act of 1986 (IRCA), which combined a program of legalization for certain undocumented people with increased enforcement aimed at deterring further undocumented immigration, including imposing sanctions on employers who hired undocumented workers. In discussing the congressional debate regarding IRCA's legalization provision, Newton (2008) identifies the various narratives that were deployed both against and for the legalization program. Those who opposed the passage of IRCA argued that the undocumented were lawbreakers who should not be rewarded for their malfeasance and that to do so would benefit lawbreakers at the expense of those waiting

to immigrate lawfully as well as send the wrong message by rewarding lawbreakers (Newton 2008: 85-89). Those favoring IRCA highlighted the deserving, hardworking character of undocumented immigrants, many of whom had families with U.S. citizen children, and also noted the ambivalence of the U.S. public, who both opposed undocumented migration while wanting relief to be provided for individual undocumented friends and neighbors (Newton 2008: 89-91). One supporter, Congressperson Peter Rodino, argued that legalization should be available to “those aliens who have built up equities in this country and who have contributed for years toward our economic and social well-being” (Newton 2008: 90).

Once passed, the two main mechanisms for IRCA’s legalization program were a general legalization program for individuals who had been present in the United States since January 1, 1982 and a program for Special Agricultural Workers who could demonstrate that they had performed at least 90 days of agricultural work in the previous year. IRCA resulted in the legalization of the status of approximately 2.7 million immigrants; however, it did not increase in the number of available visas or other legal avenues for people to come to the U.S. and the employer sanctions were ineffective due to the limited number of immigration inspectors, for instance, in the first year of the law the Immigration and Naturalization Service (“INS”) inspected only 12,000 of the 7 million employers subject to the law (Zolberg 2006: 373). Given the low likelihood that an employer would be subject to an INS inspection, the employer sanction provisions of IRCA had little deterrent effect. Additionally, because the law requires employers to knowingly hire someone who is undocumented, employers have a good faith defense if they are relying on documents, even false ones and thus have largely escaped liability for hiring undocumented workers (Coutin 2003: 64). Also, because of the lack of resources devoted to enforcement of employer sanctions, the number of inspections, investigations, and

sanction cases all continued to decrease in the years following IRCA's passage. By 2003, the number of fines imposed on employers had dropped to 124 (Brownell 2005). As a result, U.S. employers were able to continue to use of undocumented workers, or rather falsely documented workers, and the undocumented population continued to grow despite the reform efforts of IRCA. At the same time, effects that are often termed "push-factors" increased as pressure to leave Mexico in search of greater financial security. Neoliberal regimes of currency devaluation, termination of agricultural protections, privatization of state owned industries, and downsizing of government services all made migration, even undocumented migration, to the United States seem relatively appealing (Massey, Durand, and Malone 2002: 50; Zolberg 2006).

Even though provisions to prevent the hiring and benefiting from undocumented labor floundered, the passage of IRCA in 1986 signaled the beginning of an escalating security presence along the U.S.–Mexico border which had become an increasing focus of U.S. immigration policy. This took the form of large budget expenditures on border enforcement, an eight-fold increase in the number of border patrol agents since 1986, the erection of fences and walls, and even the use of National Guard troops to patrol the border. Pressure to increase border controls also came in 1992, when conservative republican presidential candidate Patrick Buchanan gained some support from the far right of his party on a platform that included limiting immigration and building what he called a "Buchanan fence" along the border. Beginning in 1993, the Clinton administration began to dramatically increase the amount of resources directed to the policing of the U.S.–Mexico border in what was called the Southwest Border Strategy and which included Operation Gatekeeper in California, Operation Hold-the-Line and Operation Rio Grand in Texas, and Operation Safeguard in Arizona. The Violent Crime Control and Law Enforcement Act of 1994 increased funding to the Border Patrol, and between 1994 and 2005 the

number of Border Patrol agents tripled and they began using military-style equipment such as motion sensors, stadium lighting, surveillance devices, and night vision equipment. Between 1986 and 2002, the Border Patrol budget increased 519 percent to \$1.6 billion and the 2009 budget for border enforcement was \$11.3 billion. Additionally, the extensive use of fencing along the border, which began in 1995 as part of the Southwest Border Strategy, is being expanded into the Secured Border Initiative which will dramatically increase the use of fencing and surveillance technology at a planned cost of over \$7 billion (Salyer 2011: 775).

In 1994 the State of California passed the broadly sweeping anti-immigrant Proposition 187, also call the “Save our State” initiative, which was designed to both deny undocumented immigrants access to government benefits and social services as well as to require state employees to cooperate with federal immigration officials and to verify immigration status and enforce immigration laws. Proposition 187 was a public ballot measure that would have required individuals seeking public benefits to prove their immigration status and would have denied all non-emergency medical care to undocumented individuals. Additionally, Proposition 187 proponents hoped to challenge the holding from the 1982 Supreme Court case *Plyler v. Doe* by including a provision that would have denied public schooling to undocumented children – a violation of the Court’s ruling in *Plyler* that held such a ban was unconstitutional. The law also required state employees to report suspected immigration violations to federal immigration enforcement.

Calavita (1996) argued that the anti-immigrant sentiment motivating Proposition 187 stemmed from political-economic transformations that occurred with the “crisis of Fordism” in advanced capitalist economies. Drawing on David Harvey (1982), Francis Fox Piven and Richard Cloward (1993), among others, Calavita notes that the shift to globalized production and

the deindustrialization within the United States lead to increased unemployment, decreases in real wages, and a restructuring of employment practices that turned more and more employment into flexible, temporary, and part-time labor (Calavita 1996: 293). Additionally, the unraveling of the Fordist structure lead to the unlinking of corporate profits from wages and social welfare and the movement of capital into global financial markets meant that corporate profits could grow independent of real wages, resulting in a “jobless economic recovery” and increased economic inequality (Calavita 1996: 292, 294). According to Calavita, the anti-immigrant sentiment represented by the passage of Proposition 187 was a form of what Sidney Plotkin and William Scheuerman (1994) termed “balanced budget conservatism” which shifts responsibility for economic uncertainty to the welfare state, the poor, taxation, and government spending. Thus, Calavita argues that as “economic insecurity and anger intensify with the continued globalization of the economy and the displacement of domestic labor, Proposition 187 simultaneously channels that anger into anti-immigrant nativism and legitimates the backlash” (Calavita 1996: 300).

Although Proposition 187 was blocked from going into effect by a federal court on the grounds that the federal government rather than the states has the power to regulate immigration, its passage had become a focal point for anti-immigrant arguments, particularly those aimed at those perceived to be undeserving immigrants who come to the U.S. to obtain taxpayer-supported public benefits. Additionally, the fact that the incumbent governor, Republican Pete Wilson, was seen as having won reelection, in part, because of his strong support for Proposition 187 raised the profile of such anti-immigrant sentiments in national politics as a whole.

### *Immigration Legislation of 1996*

When the 104<sup>th</sup> U.S. Congress convened following the “Republican Revolution” lead by Newt Gingrich in the 1994 election, they brought an agenda that focused on reducing welfare, limiting the size of government, reducing capital gains and estate taxes, and law and order issues. When this Congress turned to the subject of immigration, it adopted the assumptions similar to those that motivated Proposition 187 but the reach of the legislation that was passed went much further and effected lawful permanent resident immigrants as well as undocumented immigrants. In 1996 Congress passed a series of laws that had severe consequences for migrants in the United States: the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”), the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), and the Personal Responsibility and Work Opportunity Act (“Welfare Reform Act”). The AEDPA and the IIRIRA radically changed immigration law by expanding the reasons for which a person could be deported, significantly limiting the discretionary relief that an immigration judge could grant, and limiting the power of the federal courts to review deportation decisions. The 1996 laws were not just motivated by economic concerns but also fully embraced the narrative that undocumented immigration was inextricably linked to crime and threats to public safety. For instance, the AEDPA was in part motivated by the 1995 Oklahoma City bombing with the provisions targeting immigrants included in the initial drafts when the assumption had been that the attack had been carried out by foreign terrorists. Even though it was subsequently learned that the perpetrators were U.S. citizens, the laws making it easier to deport non-citizens and limiting their ability to contest those deportations remained in the statute (Reyes 2012: 662-63; Morawetz 2005: 279). As a result the

number of deportations has increased steadily from 69,680 in 1996 to 419,384 in 2012 (see Table 1).<sup>13</sup>

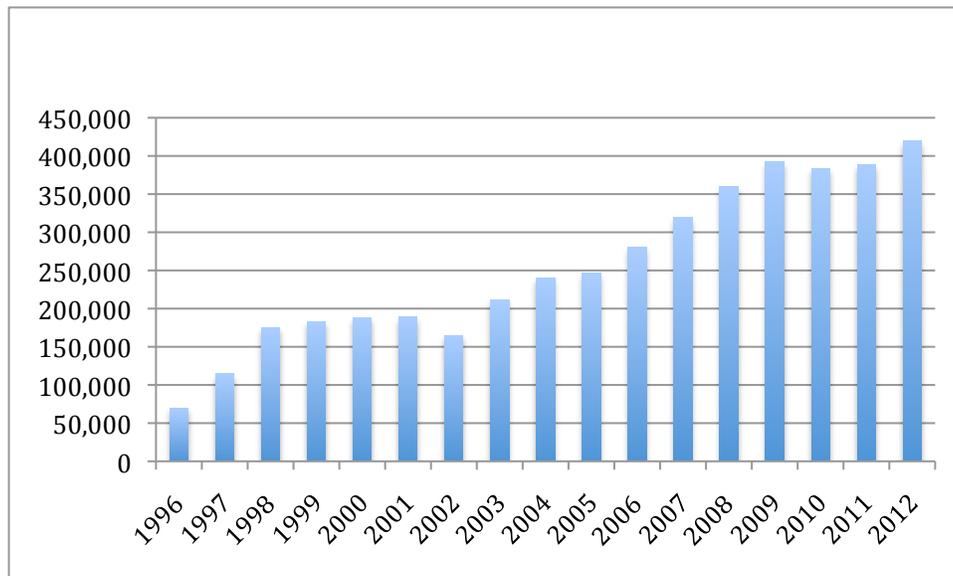


TABLE 1. Number of Deportations from 1996 to 2012

The term “aggravated felony” penalty was introduced in the Omnibus Anti-Drug Abuse Act of 1988 and only covered individuals who had committed the most severe types of crimes, such as murder and serious drug and weapons trafficking offenses. In 1990 the term was expanded to include drug offenses or crimes of violence that carried prison sentences longer than five years. The 1996 laws radically expand the category of deportable offenses known as “aggravated felonies” from the most serious criminal offenses to a broad list that included crimes that were not necessarily felonies and included cases where people had not even been sentenced to time in prison, such as where an individual was given probation or a fine. For instance, IRRIRA defined any theft offense for which a sentence of one year or more is imposed as an aggravated felony, even though many state laws allow for a sentence of one year or less to be

<sup>13</sup> Department of Homeland Security. *Immigration Enforcement Actions: 2012*. Available at [https://www.dhs.gov/sites/default/files/publications/ois\\_enforcement\\_ar\\_2012\\_1.pdf](https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf)

imposed for misdemeanor offenses. One court reviewing the law held that even though Congress “might be breaking the time-honored line between felonies and misdemeanors” the term aggravated felonies could be applied to misdemeanors.<sup>14</sup> In that case, the court was reviewing the claim of Alexander Christopher who had been convicted of shoplifting and sentenced to twelve months in prison with the sentence suspended. Even though the shoplifting charge was a misdemeanor and even though the one-year sentence had been suspended, the court held that it meet the definition of an aggravated felony.

The 1996 laws are also expansive in that they even apply retroactively, that is, they apply to criminal convictions that had occurred before 1996. In addition, the 1996 laws removed most of the discretion that immigration judges previously had had to take the individual circumstances of an immigrant into account when deciding if she should be deported. Prior to 1996, immigrants who had been found deportable were entitled to present evidence that they should be given discretionary relief based on various factors. The 1996 laws made these avenues of relief more difficult to obtain and in the case of immigrants who had committed aggravated felonies these forms of discretionary relief were eliminated altogether. For instance, prior to the 1996 laws, there was a provision under section 212(c) of the INA which waived inadmissibility or deportability for certain lawful permanent residents who had been convicted of certain crimes if they could prove the equities of their case entitled them to relief (generally called “212(c) relief”). The 1996 laws eliminated 212(c) relief leaving many greencard holders, who could have proven that they and their families would suffer genuine hardship if they were deported, with no possible form on relief.

---

<sup>14</sup> U.S. v. Christopher, 239 F.3d 1191 (11th Cir. 2001)

Another consequence of the 1996 laws has been the increase in the number of immigrants being held in detention. Individuals being detained for immigration purposes are the fastest growing population of people in custody in the U.S. In 1996, the U.S. Immigration and Customs Enforcement held 20,000 people in detention. By 2008, that number had increased to 378,582 people in detention (Warner 2010:78). By 2012, the number had reached approximately 478,000.<sup>15</sup> These increases began with the passage of the AEDPA and IIRIRA in 1996, which had provisions that both expanded the grounds on which an immigrant was subject to deportation as well as expanded the categories of immigrants subject to mandatory detention. This legislation resulted in a 42 percent increase in the number of detainees from 1996 to 1997, the year the changes took effect (Clary and McDonnell 1998). These mandatory detention provisions require that immigrants in certain categories must be held without bond during their immigration cases regardless of whether the individuals have been determined to be dangerous or a risk of flight. Under the mandatory detention provisions, detainees are not even entitled to ask for a bond hearing before an immigration judge. In addition to requiring mandatory detention for individuals subject to removal based on the aggravated felony provisions, many immigration detainees are denied bond and held in jails even though they have no criminal records at all. For instance, a study in 2009 found that the majority of immigration detainees did not have criminal convictions. The 1996 laws have lead to immigrants, including asylum seekers, being detained for long periods while their immigration cases proceed. For instance, Mohammad Azam Hussain was in detention for three years while he contested his deportation before ultimately winning his case by proving he was entitled to remain in the United States under a form of relief based on the U.N. Convention Against Torture (Heeren 2010).

---

<sup>15</sup> Department of Homeland Security. *Immigration Enforcement Actions: 2012*. Available at [https://www.dhs.gov/sites/default/files/publications/ois\\_enforcement\\_ar\\_2012\\_1.pdf](https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf)

A separate piece of legislation, also passed in 1996, which was aimed broadly at reforming social welfare programs, singled out migrants by denying certain public benefits. The Welfare Reform Act restricted access to federally funded programs to many legal permanent resident immigrants as well as undocumented immigrants. Under the Welfare Reform Act, legal immigrants were barred from receiving means-tested federally funded benefits such as Temporary Assistance to Needy Families, Medicaid, Supplemental Security Income, or Food Stamps for the five years after their admission into the U.S. While subsequent laws have loosened these restrictions for the elderly and disabled, many immigrants are ineligible for most of these benefits and access to these benefits by low-income immigrant families has been sharply reduced. Additionally, it appears that welfare restrictions have resulted in people not seeking the benefits to which they are entitled, in particular many immigrants who were not themselves eligible for benefits have forgone applying for benefits for their U.S. citizen children because they do not understand the scope of the law.

#### *Post-September 11 Laws and Policy*

I have now been in solitary confinement for three and a half months and by the time of the next hearing I will have been here for four months. If it hadn't been for the Koran and prayer, I would have lost my mind or had a nervous breakdown.... Why am I imprisoned? Why in solitary confinement? And why under maximum security measures? I have many questions and no answers. What are they accusing me of? Nobody knows.

From a letter sent by a detainee held after September 11 for an immigration violation (reprinted in Amnesty International 2002: 27)

Far from being exceptional, the treatment of Arab, Muslim, and South Asian immigrants after the September 11<sup>th</sup> terrorist attacks on the World Trade Center and the Pentagon was predicated on the historical disempowerment of immigrants under U.S. law. Following the attacks, the Department of Justice targeted noncitizen Muslim, Middle Eastern, and South Asian

males for its dragnet of investigation, arrest, and detention. In the process, the government used selective, and unorthodox, enforcement of the nation's immigration laws as a pretext to arrest individuals, detain them without charges, hold them incommunicado, question them without access to legal counsel, and try them in secret immigration court proceedings.

As Zechariah Chafee Jr. had predicted with reference to the Palmer Raids after World War I, the nation after 9/11 again scapegoated immigrants in response to what was perceived as a national emergency. What is more, the abuses of noncitizens that took place after September 11 were made easier by decades of attacks on immigrants that undercut their claims to fair and equal treatment. In particular, the 1996 laws stigmatized noncitizens by considering them potential threats to national security and national economic prosperity. The independent "watchdog" organization of the Justice Department, the Office of the Inspector General (OIG), in a 2003 report on the treatment of detainees, detailed widespread abuses of the rights of immigrants. According to the OIG, after 9/11 the FBI made little attempt to distinguish between aliens thought to have a connection to the attacks and aliens who were simply out of immigration status (OIG Report 2003: chapter 4). The government violated its own rules by incarcerating individuals without issuing charges, in some cases for over a month (*id.*: chapter 3). The government "clearance" process, requiring the FBI to clear individuals of terrorist suspicion before the immigration service was allowed to release or deport the individual, resulted in individuals being held for even longer than what the immigration service needed to investigate their status, with an average added delay of eighty days (*id.*: 51). Some detainees were held in restrictive conditions, confined to cell blocks, and severely limited in their access to legal or family visits and phone calls (*id.* chapter 7; Amnesty International 2002).

Also in response to the 9/11 attacks, Congress passed the USA PATRIOT Act of 2001, which contained a number of provisions that affected immigrants. It allowed for immigrants to be detained for up to 7 days without charge if the Attorney General determined there were reasonable grounds to suspect that they have engaged in terrorist activity. The Act also gave the government broader powers to detain and deport immigrants suspected of terrorism and also further expanded the definition of what is considered terrorist activity. This has caused criticism of the Act for causing some people to be punished for innocent charitable donations or for expressing ideas that should be protected free speech.

Perhaps the most lasting impact of the 9/11 attacks on immigration policy came from the fact that they halted nascent attempts at reforming immigration laws and retrenched notions that immigration and migrants were a source of uncertainty and danger. One area where this shift is apparent is in how the Supreme Court viewed the 1996 laws' detention provisions. Prior to the 9/11 attacks, the Supreme Court had begun to ameliorate the harshness of these provisions. In the case *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court reviewed a provision that purported to allow indefinite detention of an individual who had a deportation order but could not be removed for some reason, such as her country of origin's refusal to allow her return. The Court held that such indefinite detention without procedural safeguards, such as an individualized hearing, would raise serious constitutional concerns and interpreted the statute to require such protections if detention continued for more than six months. In a case brought after the 9/11 attacks, *Demore v. Kim*, 538 U.S. 510 (2003), the Court rejected the argument that an individual subject to mandatory detention while his immigration case proceeded was entitled to an individualized bond hearing if his detention continued longer than six months. Despite the similarity of the cases, both challenging the government's authority to incarcerate individuals without individual

determinations by a judge that such action was necessary, the Court held that the mandatory detention provisions were permissible because, "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Demore v. Kim*, 538 U.S. at 521. If the decision in *Zadvydas* represented the rarely exercised ability of the Court to impose basic and reasonable due process requirements on the most severe aspects of the immigration system, the decision in *Demore* represents a return to the *status quo ante* of deferral and abdication.

### Conclusion

This history of immigration legislation can be seen as having three different but intertwined effects. First, it has led to a structure that views the rights of migrants as less than that of citizens and the courts have repeatedly allowed the political branches of government wide latitude in how they treat non-citizens. Because of this latitude and subsequent changes in legislation, immigration law has taken on a regulatory character much different than areas of law that allow for greater judicial review. Similarly, the strictures of immigration law sweep a broad range of conduct within their ambit and immigration judges are often without authority to differentiate between cases that have serious malfeasance and those where offenses may be quite minor, such as the holding that a shoplifting conviction with a suspended sentence is an aggravated felony. Finally, neither immigration law and policy nor individual immigration proceedings take account of the responsibility that U.S. policy and U.S. actors have in promoting, facilitating, and benefiting from undocumented migrant labor, both historically and through to the present day. These three aspects of the history combine to create a system of harsh and punitive laws enforced in immigration courts, who are often unable to consider the

equities of the individuals before them, in a legal system where judicial review is limited or not available. The following chapters will examine the consequences of these laws in practice.

## Chapter 3

### **Law without Recognition: Excluded Equities and Judges without Discretion**

Someone's immigration status is not innate, it is not inborn, and often, it is not immutable. It stems from what lawyers and judges might call legally relevant facts, aspects of people's lives that may give rise to legal consequences. In the immigration context such facts may include overstaying a visa, having certain relatives who are U.S. citizens, coming into the United States without inspection, or being convicted of certain crimes. Which of these facts make someone deportable from the United States or not is generally determined by Congress and, for the most part, the determination of whether these facts exist in an individual case is determined by an immigration judge. Since the 1990s the laws Congress has created in this regard have broadened the list of circumstances under which an individual can be considered inadmissible or deportable, while limiting the facts that an immigration judge can consider when deciding if an individual should be spared deportation. This chapter will examine how the drawing of these lines, which has changed in recent decades, affects individuals who face deportation in immigration court.

Early on a weekday morning, the line in front of the Jacob K. Javits Federal Office Building at 26 Federal Plaza in New York City can feel like a large, inefficient TSA security line at a busy airport. Unlike people waiting at an airport, however, the people waiting in this line are not anxious to get through security so they can catch a plane to some far off destination – quite the opposite actually. Inside 26 Federal Plaza is one of the 59 immigration courts located around the country where roughly 260 immigration judges hear over 300,000 removal proceedings a

year in as many as 276 languages (Executive Office of Immigration Review 2012).<sup>16</sup> For many of the people who wind their way through this and similar lines every year, the trips they ultimately take will be one-way and might result in separation from their spouses, children, and friends. Their trips will be virtual banishment from the United States and the communities where they often have spent years, even decades, building their lives and their homes. In addition to those waiting in security lines to enter immigration courts, such as the one at 26 Federal Plaza, there are many on their way to immigration court from the 250 immigration detention facilities that house as many as 34,000 immigration detainees on a given day (Urbina and Rentz 2013). Those detained individuals having their cases heard in New York will be transported to the immigration courts at the Varick Street Detention Center which is located less than a mile northwest of 26 Federal Plaza, basically where the Greenwich Village and SOHO neighborhoods of New York City meet. The detained immigrants facing removal proceedings at Varick Street are held in one of three New Jersey county jails (Bergen County Jail, Hudson County Jail, or Monmouth County Jail), or in one New York county jail, the Orange County Jail. Since court hearings can be scheduled as early as eight in the morning, some of these detained immigrants will have a morning commute from the New Jersey suburbs that is almost a parody of the morning commute made by the hundreds of thousands of other commuters who live in New Jersey, during which they will be cuffed, shackled, and loaded onto a jail transport bus. At least seventy percent of the cases heard in immigration court will result in a removal order (Executive Office of Immigration Review 2012: C3).

Many of the individuals who end up in immigration court are there because of the “Secure Communities” program. According to the Immigrations and Customs Enforcement

---

<sup>16</sup> Executive Office of Immigration Review website accessed on April 30, 2013 at <http://www.justice.gov/eoir/ocijinfo.htm>.

“ICE” website, the Secure Communities program has the stated policy of “prioritizing the removal of individuals who present the most significant threats to public safety as determined by the severity of their crime, their criminal history, and other factors – as well as those who have repeatedly violated immigration laws.” Secure Communities, and policies claiming to focus enforcement efforts on “criminal aliens,” have been a significant part of the increase in immigration deportations in recent years and illustrate how immigrants who have encounters with the criminal justice system receive the harshest treatment and are seen as undeserving of sympathy. The breadth of this enforcement, however, means that individuals who are scarcely “significant threats to public safety” end up being swept up by the program. Immigration advocates have criticized the program because it results in a large number of detentions and removals of individuals who are not convicted of any crimes or only very minor offenses. For instance, in 2011, 29% of individuals deported under Secure Communities only had misdemeanor convictions, and 26% of the individuals deported as a result of Secure Communities only had immigration violations and no criminal convictions (Waslin 2011:3).

One such example is that of Abdul who arrived in the U.S. about a decade and a half ago and overstayed his visa authorization. Abdul came to my office because he had a court summons but was afraid to appear in court because of his undocumented status. After about a year, he was married and he and his wife applied for him to receive a greencard but before his case was completed he became ill and during that period of illness, his wife divorced him. Because he was no longer married to a U.S. citizen, he no longer had any claim to be eligible for a greencard and was placed in removal proceedings. About five years ago, his case ended with the court ordering that Abdul be deported. Even though the deportation order was not carried out, because Abdul had not been in court the day he was ordered removed, the fact that he had a deportation

order and no documentation, prevented him from obtaining regular employment, so he worked as a street vendor. Recently, he was arrested for selling a bottle of water without a vendor's license, taken to the police station, fingerprinted, and given a summons to appear in criminal court. Under the Secured Communities program, Abdul's fingerprints would be checked against the ICE database to determine his immigration status. While the avowed goal of secure communities is to "prioritizing the removal of individuals who present the most significant threats to public safety," the way in which that is defined includes what ICE calls "absconders," that is individuals who have unexecuted deportation orders. Even though selling a bottle of water without a license probably does not constitute a serious threat to public safety, if Abdul were to go to answer his court summons, there is a good chance that there would be ICE officers waiting to arrest him. I contacted a lawyer who has worked extensively on the intersection of immigration law and criminal law and he warned that it is now not unusual to have ICE officers present at New York Criminal Court, which is the lowest level criminal court that hears misdemeanor offenses and minor violations, such as vending water without a license. While Abdul is obviously not a danger to the public or a "criminal alien," his case is typical of how the current enforcement regime has increased the number of individuals with long standing ties to the U.S. who are deported even though they do not have serious criminal convictions.

On the other hand, given that Abdul does have a deportation order and appears to have no claim under existing immigration law to obtain a legal status, it is fair to ask: What is the problem with executing an existing deportation order and removing someone if the order was issued by an immigration judge in accordance with immigration law? By way of answering that question this chapter will examine how the law and the process by which such deportation orders are produced to better understand what they represent. Specifically, by drawing on examples

from interviews and discussions with other immigration lawyers as well as my own experience, it will examine what factors and aspects of a person's life are considered in determining if someone should be ordered deported and what aspects are ignored or held to be irrelevant to the process. Additionally, this chapter will identify structural aspects of the immigration system, such as limitations on access to legal representation and imprisonment of immigrants while their cases are being heard, that limit the ability of individuals to demonstrate why they should be entitled to remain in the United States. By considering the specific provisions of immigration law that dictate how deportation orders are produced, this chapter will complicate the answer to the question "What is wrong with enforcing a deportation order?" As importantly, considering the specifics of how the immigration system produces deportation orders, this chapter will identify alternatives to the manner in which the immigration system operates.

### **Rule of Law Without Recognition**

One of the paradoxes of immigration enforcement is that immigration, both legal and irregular immigration, is the result of historical, economic, social, and political forces that take place across vast stretches of time and space, even as the enforcement of immigration laws presumes that individual immigrants have simply chosen to break immigration law and therefore should be punished accordingly. For instance, the growth of the undocumented population involves a long history of acceptance, encouragement, and dependence on migrant labor. The social reality is a complex and contradictory equation that entails the tacit acceptance of the benefits of migrant labor, sympathy and empathy for immigrants, anxiety over the loss of "American jobs," and resentment at having to share dwindling social benefits from the vanishing welfare state (see Chapter 1). This situation is made more complicated by the fact that, as circumstances change, attitudes and policy regarding immigration change, so that behavior that

was once accepted, or even encouraged, is now prohibited and punished, and additionally, enforcement tactics have ebbed and flowed with changing attitudes towards immigrants. Two laws passed in 1996, the Antiterrorism and Effective Death Penalty Act (“AEDPA”) and the Illegal Immigration Reform and Immigration Responsibility Act (“IIRIRA”), both stemmed from the culmination of the growing anti-immigrant sentiment in the 1990s and radically changed immigration law for both documented and undocumented immigrants. Among the changes that these laws put into place were punitive provisions that made it much harder for undocumented immigrants to regularize their status and which severely limited the opportunity to regularize status based on hardship or family relationships. Another 1996 law that represented this shifting attitude was the Personal Responsibility and Work Opportunity Act—the so-called welfare reform act passed during the Clinton Administration—that essentially withdrew the social safety net for all undocumented immigrants and severely limited its availability for other non-citizens, even those with legal status.

Currently, U.S. immigration law does not contain a great deal of room to consider individual circumstances—to take the measure of a person beyond her immigration status or some infraction that makes her deportable. Many of the requirements are set out in strict terms, which leave immigration judges little room to exercise discretion, even in cases where the results seem disproportionate or unduly harsh. In law in general, the courts defer to legislative line drawing on the theory that when a decision needs to be made as to who will benefit and who will suffer from a given legislative action, the legislature is better equipped to make such distinctions and more responsive to the public should they strike the balance incorrectly. Even with this deference, however, there is recognition in many areas of law that there is a need for judicial discretion. In criminal law, for instance, one generally expects that those with greater culpability

and who do the greatest harm will be punished with the most severe sentences and one expects that individuals whose conduct is the most understandable and excusable to be extended the greatest leniency.<sup>17</sup> The U.S. Supreme Court ruled in *United States v. Booker*, 543 U.S. 220 (2005), that the criminal Federal Sentencing Guidelines were merely advisory and that judges retain discretion in determining the length of sentences based on multiple factors, including the specifics of the offense and history and characteristics of the defendant.

In immigration cases, the discretion of immigration judges has been shapely circumscribed resulting in stricter rules with harsher consequences than in other areas of the law. The system of immigration law lacks this sort of graduated recognition of culpability and much of the flexibility to extend leniency. Rather, many of the rules and requirements are absolutes and apply to situations where one might find the harsh results surprising. In many cases people who would seem to have significant equities that should weigh in their favor, such as families and long-term residency in the United States, are deportable and there is no mechanism to balance the equities involved. This is particularly the case after the changes that occurred to immigration law in recent decades. The Supreme Court recognized this in a case discussing the need for noncitizen criminal defendants to be informed of the immigration consequences of pleading guilty to certain crimes explaining,

The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The “drastic measure” of deportation or removal is now virtually inevitable for a vast

---

<sup>17</sup> While it is well documented that these principles are often subverted in the criminal justice context by invidious considerations of race and by the material inequities of class (*see Alexander 2010*), it still provides a basis by which to measure the inequities that arise due to race and class as opposed to the situation in immigration court where the failure to consider the equities of the individual is simply standard procedure.

number of noncitizens convicted of crimes.” *Padilla v. Kentucky*, 559 U.S. 356 (2010).

Of course, a legal system is, in part, an exercise in line drawing. In the case of immigration there are always going to be people who are excluded or removed based on where lawmakers decide to draw the lines. Almost all of the immigration lawyers I spoke with expressed their belief that some people should be excluded for violating immigration laws but felt there were many people who deserved a chance to regularize their status but had no way to do so. Tariq, a lawyer who has his own small law firm that focuses on immigration law but also works in other areas of law such as real estate, explained, “I am real big on this compromise idea. I don’t think they should let people into the country illegally, I think they should control the borders,” but at the same time said he felt “horrible” for the millions who “are just sitting and waiting for immigration reform,” but are helpless because, “They can’t vote. They have no voice.” Another lawyer, Eric, expressed similar sentiment saying it there should be a process to legalize the millions of individuals who are currently out of status:

I am in favor of another sort of amnesty type program. I think the one that was proposed a couple of years ago would have been pretty good. I think its really bad policy to have all these people here and make it impossible to legalize. Certainly you can have criteria and people with significant criminal histories, its reasonable to prevent them from doing it. But I mean if you been here a while and you have significant ties and you have a job I think they need to legalize these people.

While most immigration lawyers felt there had to be control of the borders and limits on migration, such as individuals with significant criminal histories, they also expressed the feeling that how the lines were drawn and who they excluded was often unfair and unreasonable. Thus, the issue is complicated by the fact that, for many immigration lawyers, the question is not whether there should be limits ("lines") but what those limits should be, who should decide, and what factors should be considered. As things stand now, the answer is that Congress decides on

a very general, abstract level and the number of factors that are considered when deciding where the line falls in a given case are sharply circumscribed. Moreover, as Tariq noted, those most affected by those decisions are without a vote or a voice in the process.

### Excluding Equities

Under the current system, it could be said that the immediate relatives of U.S. citizens arguably hold the most favored place in immigration law. Like everything in immigration law, the definition of immediate relative differs somewhat from what might be a common perception; for immigration purposes, immediate relatives refers to the spouses of U.S. citizens, their children who are under the age of 21, and the parents of U.S. citizens if the citizen is over 21 years of age. The latter requirement prevents an undocumented individual from obtaining any immigration benefit by simply giving birth to a child in the U.S. For those who are immediate relatives, the advantages are significant. For instance, there is no limit on the number of immigrant visas made available each year to the immediate relatives of U.S. citizens, which means that there is no backlog of eligible people waiting to receive permission to immigrate. Individuals who are attempting to immigrate based on family relationships other than immediate relatives of U.S. citizens, such as the spouse and children of greencard holders or adult children of U.S. citizens, are often subject to delays because only a limited number of visas are available in a given year for each category. If the number of relative petitions of people hoping to immigrate to the United States exceeds the number of visas available in a given year a backlog begins to form. In some cases the wait for an available visa is measured in years, for instance, as of February 2014, the unmarried adult children of U.S. citizens can expect to wait approximately seven years for a visa and the unmarried adult children from a country with high demand for

visas, such as Mexico, can expect to wait almost 21 years.<sup>18</sup> In addition to avoiding lengthy delays, the immediate relatives of U.S. citizens who violated certain immigration laws, such as overstaying their visa or working without authorization, are still allowed to regularize their status and receive a greencard. This contrasts with the situation of non-immediate relatives for whom violating immigration law presents serious, and sometimes permanent obstacles to obtaining a lawful status. At the other end of the spectrum, individuals who cross into the United States without being inspected by immigration officers are especially disfavored and someone who has entered the United States without inspection, even the immediate relative of a U.S. citizen, faces a set of laws that often mean they are barred from regularizing their status indefinitely.

In the immigration system, the line drawing is primarily done by the legislature at the highest level of abstraction and the laws do not have flexibility to take individual circumstances into account. Thus, if someone has entered without inspection, the law draws a bright line and other aspect of the person's life and circumstances are legally irrelevant. It is this aspect of immigration law that necessitated the policy of non-enforcement of the law embodied by the Deferred Action for Childhood Arrivals program ("DACA"), which essentially promises to not deport certain undocumented individuals who were brought to the United States as children. Even with the seemingly sympathetic character of the young people who are covered by the DACA program, or who would have been covered had DREAM ACT legislation passed, there are many who believe that anything but the full enforcement of immigration law violates rule of law principles. For instance, a small group of ICE officers filed a lawsuit claiming that the DACA program would cause them to violate the law which they interpret as requiring them to

---

<sup>18</sup> *National Visa Bulletin*, Number 65, Volume IX. U.S. Department of State, Washington, D.C.

put any individual who entered the United States without inspection into removal proceedings.<sup>19</sup> Arguably, however, adherence to such an interpretation of rule of law would put an additional onus on lawmakers to assure that the actual results of the laws were desirable and fair. In law school one is often warned that “hard cases make bad law” as a way of explaining that maintaining the coherent consistent interpretation of law may sometimes result in outcomes that seem harsh to a sympathetic party in a case; that the compassionate extension of clemency in a case will set the precedent for unforeseeably monstrous extensions down the road. However, this formulation has been criticized because it could be equally true that bad law makes hard cases and what is needed is law that is flexible enough to fairly address the variability of actual cases. As the Supreme Court noted in the quote from *Padilla v. Kentucky*, cited above, the harsh inflexible nature of the “rule of law” that occurs in current immigration law is the result of a series of legislative changes that have continually expanded the grounds by which a person can be deported and continually limited avenues for discretionary relief. It is a cynical tautology to say that the undesirable results of these punitive laws must be allowed to continue by refusing to amend the laws so that the integrity of the rule of law can be preserved. This is particularly the case where the laws have the particularly undemocratic quality of being passed to regulate noncitizens for the benefit of citizens.

It is not an aberration for equally sympathetic individuals to experience drastically different results for seemingly arbitrary reasons: it is a daily occurrence. For instance, as an immigration attorney, it is not unusual for me to meet with two clients with equally compelling stories and equities, but find myself powerless to help one because of the strictures of immigration laws. For instance, I can meet in the morning with Robert who arrived in the

---

<sup>19</sup> *Crane v. Napolitano*, Civ. Action No. 3:12-cv-03247-O (N.D. Tx. Jan. 4, 2013).

United States over a decade ago on a visitor's visa and overstayed his period of authorized stay and worked off-the-books until recently when he fell in love with and married a U.S. citizen. Under current immigration law, as the spouse of a U.S. citizen, the years spent out of status and working without authorization are overlooked and Robert is eligible to obtain a greencard based on the marriage. Then in the afternoon, I can meet with a woman, Alana, who also arrived decades ago on a visitor's visa but who married a U.S. citizen soon after arriving and immediately applied for a greencard. However, because of Alana's husband had a drug addiction and she did not feel safe at home, she was forced to move out and separate from her husband before her immigration case was complete. As a result, her greencard application was eventually denied and she was placed in removal proceedings. In the meantime, Alana was diagnosed as HIV positive and began receiving treatment. In immigration court, she had no basis to argue against being deported because generally the only avenues open to a person without an immigration status fighting deportation, other than asylum, require having a U.S. citizen or lawful permanent resident relative. Since her marriage had ended, she had no further basis to fight deportation and received a deportation order. This all occurred a number of years ago and while she still has the outstanding deportation order she has not left the country. She has, however, been notified that since she can not establish that she has a legal status she is not eligible to continue receiving medical care, without which, according to her doctor, she will die. Similarly, her country of origin, where she has not lived for decades, does not have a health system that can meet her medical needs and if she returns home, according to her doctor, she will die. Here, the law could not be clearer, Alana is not entitled to a legal status or medical care but at the same time the facts could not be clearer – the consequences of this may very well be death. It is very hard to see how the conduct of the man who visited my office in the morning, and is on

his way to becoming a legal permanent resident, is significantly different or less blameworthy than the conduct of the woman I met in the afternoon; nevertheless, the disparity in consequences could not be starker.

While in recent years the headline aspects of the debate regarding U.S. immigration policy have focused on the existence of large numbers of undocumented migrants living in the United States, this is only one aspect of the problems that stem from current immigration policy. Current immigration laws have expanded the reasons a lawful permanent resident could be deported, limited the power of immigration judges to grant discretionary relief, and limited the power of the federal courts to review deportation decisions. As a result, a significant number of the cases in immigration court involve people who have lived for years, even decades, in the United States, sometimes as lawful permanent residents, subject to deportation for seemingly minor offenses where immigration judges lack the discretion to balance equities and consider mitigating factors. Emily, who has a private practice focusing on deportation defense in cases involving individuals with criminal convictions, gave an example of how these equities are treated in the current system:

People have been here a long time, they are married to a citizen usually they always have children for the most part; I can't think of any clients who don't. It's usually the children. It's that and then also sometimes there is a major distance between the offence that makes them deportable from the United States and where they are now.

Like this guy ten years ago committed a drug offense and hasn't done anything since and has a wife and kids. There's no reason. We've lived with him for ten years; we have to deport him now? That kind of stuff doesn't make sense to me. It's not like he is a murderer who just came out of jail. They went and invited him to come in and discuss his immigration situation, foolishly for him he didn't think to maybe talk to an immigration lawyer beforehand, and so he went in and they arrested him like that. That's not necessary. That's not necessary. The guy is coming in. He is not going anywhere; he's got a family. Do you really need to detain him? That kind of stuff is unfair to me but that is not ICE, that's our law. Mandatory detention is what it is. I don't think they like it anymore than we do. When you talk to ICE guys, most of them are Hispanic, a

lot of them are, and they feel the pain that these people are going through. But they have no choice.

In the above example the individual being subject to deportation has a U.S. citizen wife and U.S. citizen children and has lived in the United States for over a decade. Examples such as this are representative of many people's situations; non-citizens in the United States are not monadic individuals separate from the rest of society. Nine and a half million people live in mixed-status families and 5.5 million children have at least one parent who is undocumented (Preston 2011). While in certain circumstances these factors may be taken into account, in others there is no mechanism under the law to consider these equities. In a case such as this, for instance, an individual convicted of any drug offense other than "a single offense involving possession for one's own use of 30 grams or less of marijuana" is deportable."<sup>20</sup> Given that this law makes any drug conviction other than having roughly one ounce of marijuana a deportable offence, immigration lawyers, such as Emily, find that "there are a lot of people who have done stupid things and just that one stupid thing has destroyed their life in this country and it is quite often that you see it" in practice. Additionally, even though this individual is married to a U.S. citizen and has U.S. citizen children, virtually any drug conviction renders a person inadmissible to the U.S., which means they may not adjust their status to receive a greencard based on their family relationships. Here, his attorney expresses her frustration with the immigration system's rigidity in that an individual who has committed one offense, something as small as simple drug possession, over a decade ago is essentially barred from any relief regardless of his personal family equities, the amount of time he has been in the United States, or the sort of life he has lead in the last ten years. The above quote also expresses the arbitrary and harsh nature of the immigration enforcement process itself. The individual in question has done nothing wrong

---

<sup>20</sup> INA §237(a)(2)(B)(i).

since his one drug offense, as the lawyer says, “We’ve lived with him for ten years, we have to deport him now?” and is only arrested by ICE and put in detention because he is trying to talk to USCIS about regularizing his immigration status. What is more, despite there being no reason to believe that he is a danger to the community or a flight risk, the fact that he has a drug conviction means that he is subject to mandatory detention and is not entitled to a bail hearing. Indeed, the current system is so inflexible that even some of the ICE officers who are charged with enforcing it find it to be unduly strict. As Emily also explained, “I think that we’re all, both sides, dealing with a broken system and so, people hate ICE, I don’t. I happen to think they are probably the best agency we have. People would shoot me if I say that. We are all stuck with a broken system and we are trying to do the best we can with a broken system.”

#### Complex, Harsh, and Arbitrary Laws

While it is a common refrain in the immigration debate for all sides to decry the current state of affairs as the result of a broken system, it is fair less common to here people discuss the complexity that arises when you consider the feelings, actions, and decisions of the people working within that broken system. What emerges from examining specific inner workings of the immigration enforcement system is a map of some of the areas where inflexibility leads to harsh and, in the opinion of many immigration lawyers, unjust results. Additionally, such an examination reveals the areas where lawyers, government officials, and immigration judges work the edges of the inflexible system to sometimes ameliorate some of that harsh injustice. This picture presents a more complex and conflicted picture of U.S. immigration law than may be gleaned from some of the literature that presents the law and legal process as an ideologically driven functionalist monolith.

As illustrated in the above quote, it is common to hear immigration lawyers complain that certain aspects of immigration law created essentially immigration benefit “death penalties” for which an individual could never be forgiven or granted clemency. Again, regarding the issue of people with drug convictions, a different attorney, Eric, recounted that plight of a client whose case seems hopeless because of a minor drug conviction:

I have a client now who is a successful guy, is married to a U.S. citizen and he actually doesn't have a greencard but has been here legally on work visas and stuff and he wanted to adjust status through his wife, so he actually applied before he came to me and it was denied because he actually has a conviction for possession of ecstasy from about six years ago. And we're trying a 440 motion [a motion to vacate a criminal judgment] but they're very tough to win and I think it is really extremely harsh and I would change that law if I could. I think there has got to be more flexibility. There is no reason that drug offenses should be singled out as being completely unforgivable, permanently. I think that's very harsh.

As with the first example, this individual was unaware of the nature of U.S. immigration law. Many individuals simply do not understand that a simple drug conviction could render them deportable and believe that they will receive some mercy based on either their length of time in the United States or for being the spouse or parent of a U.S. citizen. In both of these examples, the individuals went to speak with immigration officials voluntarily because they simply could not anticipate that the law would be so harsh and unforgiving. Many people think that something that is not treated as a “big deal” in any other area of life<sup>21</sup>, or even the criminal justice system, could have such dire and life changing consequences in the context of immigration and thus, they fail to consult an immigration lawyer before applying for an immigration benefit or talking to an immigration official. Perhaps the most surprising aspect of

---

<sup>21</sup> Regardless of how one feels about the appropriateness or inappropriateness of the current criminal justice approach to drug use, it is clear that in other areas of life, past drug use does not disqualify individuals from holding positions of trust and authority such as becoming an FBI agent or even president of the United States (see Morawetz 2008). While there are other serious consequences that flow from drug convictions, such as limits on the ability to obtain financial aid for college, the immigration consequences are among the harshest.

some cases is that people can be subject to immigration detention while their case runs its course; Eric also decried the use of this mandatory detention as “an incredibly harsh thing,”

...the idea that you could be here for twenty, thirty years and suddenly they decide to put you in proceeding for a drug offense, a single isolated drug offense you committed twenty years ago. And you’re subject to mandatory detention, you have a family, you have kids, everything, you have a greencard, and you have a job and they are like, “No, we are going to detain you for the next, could be a year, could be two years, could be more.” So it’s really, that’s pretty horrible.

This was not always the case. Beginning with the Reagan era “war on drugs,” drug related conduct became more broadly a basis for inadmissibility and the opportunities to have equities considered and have inadmissibility waived were sharply circumscribed (Morawetz 2008). Additionally, the immigration laws were changed in 1996, most notably by AEDPA and IIRIRA, to further expand the grounds for deportation and limit the avenues of relief available to individuals in immigration court. Additionally, the 1996 laws expanded the use of mandatory detention for individuals facing deportation so that it applies to many individuals even when there is no reason to believe they are a danger to the community or a risk of flight. Eric, who has represented many people facing removal due to criminal convictions, feels that these changes have resulted in a lot of the unfair results he sees: “I think the criminal scheme should go back to the way it was before IIRIRA and, what was the other one, AEDPA, these are very harsh. It does seem to be a trend and obviously, it’s not just what crimes make you deportable also they’ve narrowed the discretionary relief available, you know, abolished 212(c).”

The loss of the discretionary relief that Eric is referring to in the above quote, known as 212(c), is illustrative of the changes that have taken place in U.S. immigration law more generally and how the ability to consider individual equities in a case have been striped out of much of the system. The forerunner of 212(c) relief goes back to section 3 of the Immigration Act of 1917 and section 212(c) itself dates from the Immigration and Nationality Act of 1952.

Both of these versions of section 212(c) relief had been interpreted to allow certain lawful permanent residents facing deportation based on a criminal conviction to apply for discretionary relief from deportation. To qualify for relief, the individual would have had to maintain a lawful domicile in the United States for at least seven consecutive years immediately prior to the filing of this application for relief. Additionally, under 212(c), an applicant was required to demonstrate to an immigration judge that she warranted a waiver by essentially showing that positive factors, such as family ties to the United States; long duration of residency in the United States; economic ties to the United States; rehabilitation; service or benefit to the community; or other evidence of good character, outweigh the negative factors, such as seriousness and severity of exclusion grounds; other immigration violations; having a criminal record; or other evidence of bad character. Such a balancing of equities vested immigration judges with the authority to decide cases based on individual circumstance by considering a broad array of factors. Given that to be considered for 212(c) relief an individual would have to already have lived in the U.S. for at least seven years in a lawful immigration status and had to convince an immigration judge that they warranted a favorable exercise of the judge's discretion to grant the waiver, it hardly constituted a blanket waiver of exclusion or deportation. Nevertheless, in the 1990s, a growing anti-immigrant sentiment caused the limiting and eventual abolishment of 212(c) relief. In the Immigration Act of 1990, 212(c) was amended make it unavailable to individuals who were considered "aggravated felons" and who had served five or more years in prison. The much more severe 1996 laws first limited availability even further, in the AEDPA, and a few months later, in IIRIRA, abolished it completely.

Even after IIRIRA some individuals remain eligible for 212(c) relief because in 2001, the Supreme Court ruled in *INS v. St. Cyr*, 533 U.S. 289, 326 (2001) that lawful permanent residents

must be allowed to seek a waiver if their “convictions were obtained through plea agreements [prior to the repeal of 212(c)] and who, notwithstanding those convictions, would have been eligible for 212(c) relief at the time of their plea under the law then in effect.” *INS v. St. Cyr*, 533 U.S. at 326. In essence, the Court held that if individuals took guilty pleas with the expectation that they would possibly not be deported because they could later seek a 212(c) waiver, then those expectations must be protected. As a result, there are still a (rapidly diminishing) number of cases where individuals are put in immigration proceedings based on a pre-IIRIRA conviction, who can still seek a waiver based on the Supreme Court’s ruling in *St. Cyr*. An examination of a case, where an individual was still able to seek such a waiver, shows with stark clarity the harsh and unforgiving nature of our current immigration system, represented by the above two examples of individuals whose lives and families have been shattered by minor drug possession convictions because no waiver or consideration of personal equities is available.

### Weighing Equities

Anna was clearly moved and proud to tell me about her client Jane, a real immigration law success story. It embodied all the reasons many people go into law: an ability to use intellectual acuity, personal tenacity, and mastery of a complex specialty to help someone truly deserving achieve the justice they deserve. The story, unfolding over the course of decades, also embodies many of the changes and trends both within immigration and in society at large. It is the kind of story that promises that good results can be wrestled out of an imperfect system, even a broken system, at least sometimes.

Jane immigrated to the United States legally along with her family when she was just six years old. By the time her parents naturalized, she was already too old to derive citizenship automatically from them, so she would remain a lawful permanent resident until she could

herself naturalize. As a young woman Jane had a couple of relationships with abusive boyfriends—one of whom sold drugs. Jane was present at a buy and bust with her boyfriend and was charged, pleaded guilty, and was sentenced to a lengthy prison term. While in prison, she took advantage of every opportunity made available to her and ultimately was able to earn a masters degree while still in prison. By the time she was released, IIRIRA had already been passed and Jane was put into deportation proceedings as a “criminal alien.” Although she had pled guilty to a serious drug charge, it was her first and only criminal offense, and there were extenuating circumstances given that she was the victim of an abusive relationship. Moreover, she had virtually no ties to her country of birth, which she had left when she was six and which she had only visited on a couple of holidays and she did not have relatives there as all of her family lived in the United States. Finally, Jane was a poster child for rehabilitation having obtained an education, received an advanced degree, and landed a job working in higher education upon being released from prison. At this time Anna was in law school and working at an immigration clinical program where law students represent people in immigration court under the supervision of a professor. Anna, through the clinic, represented Jane and explained, “She had something like forty witnesses from the postman, to priests and nuns, to the person who had mentored her for her masters degree. She had a stellar number of witnesses available but the judge could not entertain the case because she had been striped of jurisdiction and had no discretion to hear it.” Anna had wanted to show that Jane was rehabilitated and had many mitigating and positive factors and hoped to present that to the immigration judge but because the law had been changed in 1996, “she went to her individual hearing and the judge had no discretion because of IRRIRA.” Ultimately, Anna “had managed to get her deferred action for a criminal conviction even though she was considered an aggravated felon. It was through

congressional support.” Deferred action is a state of limbo where an individual, who is facing deportation and has no avenue of legal relief available, is able to convince the government’s lawyer that they should have their deportation case put on hold in an act of benevolent procrastination. In Jane’s case it was achieved by convincing a member of Congress to express support for granting her deferred action. Deferred action can be indefinite or can allow time for the individual to seek legal relief that may be available in the future. While deferred action is certainly better than being deported, it does not grant a legal status and the individual is still subject to deportation at any time the government chooses to resume “action.” As Anna explained, for Jane “that meant that she could be picked up at anytime. When 9/11 happened she was suddenly called down to the deport unit, the deportation unit, and every month she had to report.” In terms of her career, Jane had achieved great success and was important member of the administration of a community college and was pursuing her Ph.D., but she was still required to check-in with her deportation officer once a month and had to live with the uncertainty of her lack of immigration status.

Years after Jane had been released from prison and received deferred action, the Supreme Court ruled in *St. Cyr* that people, like Jane, who had plead guilty when 212(c) relief was still available, should still be allowed to apply for it and in September 2004, the Department of Justice issued its final rule establishing a process for people facing deportation to apply for 212(c) and set a deadline of April 25, 2005 for applications. By this time Anna had long since finished law school and had her own immigration law practice. While attending an American Immigration Lawyers Association conference, she saw in the program that there was a presentation regarding the new process for filing for 212(c) relief and realized that it would apply

to the case she handled back when she was in law school. However, her husband had been ill and before she was able to contact Jane, her husband's prognosis worsened.

My husband's oncologist rang and I got off track. I shut up my shop a couple of days later to take care of him and he died shortly thereafter and I came back to work, with literally a foot and a half stack of paper and in that paper something like three and a half weeks before the deadline, I find this piece of paper. And remembered, oh yes, that relief, oh my god. And we filed it, we got it in the day before. And a couple years later applied successfully for 212(c) relief. But there's an example too of somebody who's been in the system. She was in deportation, in the deportation unit. She'd been through the top tiers and there is no accountability by immigration officials to notify her about eligibility. I swear it was my dead husband's ghost because he had helped me with her case actually, it was a long story but it was fortuitous that I had found out about it. I wasn't even her attorney anymore.

As this story illustrates, there are indeed cases that have the positive outcomes they deserve but there is nothing about the system itself that mandates that that be the case or that would make it possible to claim that, in general, or even more often than not, a just result is reached. Here, Anna points out that Jane was in the immigration system and required to check-in with the deportation office on a monthly basis but there was no effort to notify her, and those similarly situated to her, that relief may be available. She was fortunate that Anna decided to pursue immigration law after law school, that Anna kept current with legal developments, and had the presence of mind, despite her personal tragedy, to reach out to a former client she worked with back in a law school clinic. This is an immigration success story but one that required a major holding from the Supreme Court, congressional intervention, dogged determination by an immigration lawyer over many years, and a lot of fortuitous circumstances. Additionally, Anna's use of 212(c) to regain her lawful permanent resident status highlights the both how severe the results in the first two examples where families are destroyed because of minor drug offenses that were committed many years ago and shows that such results are not the only way that "rule of law" can be interpreted. The current law has created a system that no

longer trusts immigration judges to be able to evaluate individuals and their conduct as a whole, balance equities, and render a just decision.

What is more, even though Jane's story is extraordinary, it is not exceptional for individuals with strong equities to have to face rigid, unforgiving immigration laws. In 2010, at the end of his term in office, then New York Governor David Paterson issued dozens of pardons to individuals who would be subject to deportation based on criminal convictions. In his statement accompanying the pardons, Paterson said, "...it became abundantly clear that the Federal government's immigration laws are often excessively harsh and in need of modernization," and explained that "[t]he individuals pardoned today committed past offenses but paid their debt to society. They now make positive contributions to our State and nation, and I believe they should be protected from inflexible and misguided immigration statutes" (Paterson Press Release 2010). Accompanying the announcement were summaries of the cases that illustrate the inflexibility that Paterson decried. For instance, the following examples taken from the press release are typical stories of individuals who have complex personal stories and personal equities that current immigration law does not have the capacity to take into account:

- Carol Hamilton, now a Reverend, was convicted of two class A misdemeanors of Criminal Possession of Marijuana in the Fourth Degree in 1995 and 1986, for which he was sentenced to a conditional discharge and a fine, respectively. He has now earned a Bachelors and a Masters Degree and works as an ordained minister, counseling youth, ex-offenders and people living with HIV/AIDS. A pardon should assist him in fighting his deportation, allowing him to remain in the United States with his wife and three young children.

- Juan P. Ramirez, who was then the owner of a bodega, was convicted in 2003 of two misdemeanors. Since these convictions, he has been gainfully employed, supporting his wife and children. He has been an active member of his community who has devoted himself to helping others. The pardon should remove all grounds of deportability and allow him to have his green card restored.

- Laurenton Rhodon has been a lawful permanent resident of the United States for twenty years, but now faces removal as a result of a 1995 conviction for

Attempted Criminal Possession of a Controlled Substance in the Third Degree, for which he was sentenced to five years probation. Rhodon has sole custody of his 12-year-old daughter. The pardon will make him eligible to seek cancellation of removal, but because he was convicted of a controlled substance offense, there is no guarantee that he will be permitted to remain in the United States.

- Fredy C. Rojas, a veteran of the U.S. Army and after having served our country for 8 years, is deportable as a result of a single misdemeanor drug possession conviction in 1995. Since that time, he has completed drug treatment and, together with his wife, who is a citizen, he is raising his 7-year-old daughter and working as a truck driver.

- Jose Sanchez was granted lawful permanent resident status in 1998, even though he disclosed to immigration officials that he had been convicted in 1989 of fifth-degree criminal possession of a controlled substance and sentenced to five years on probation. Eleven years later, after Sanchez has built a stable life in New York, Immigration and Customs Enforcement is seeking to deport him for that same conviction.

- Melbourne Sinclair has been a lawful permanent resident of the United States since 1986. He was convicted in 1990 of the misdemeanor offense of fourth-degree criminal sale of marijuana and sentenced to a fine. As many permanent residents do, he applied for naturalization, unaware that he was ineligible as a result of his conviction, and he now faces the likelihood of being placed in deportation proceedings. If removed, he would be torn from his wife, who is a citizen, and sons, who would likely be unable to continue their college attendance without their father's support and assistance. If he is placed in proceedings, the pardon will make Sinclair eligible seek cancellation of removal, but will not guarantee that he will be permitted to remain in the United States. (Paterson Press Release 2010).

These cases also underscore how a significant front in the “war on drugs” has been waged against noncitizens. Since 1917 there had been some provisions to allow for the deportation of noncitizens convicted of committing a crime in the United States, however in the 1980s and 1990s, immigration law begins to focus on “criminal aliens” and the sorts of convictions for which an individual could be deported began to expand dramatically and opportunities to contest such deportation began to diminish. The Omnibus Anti-Drug Abuse Act of 1988 established the category “aggravated felons,” which was limited to murder and trafficking in drugs or weapons. The aggravated felon category was expanded in the

Immigration Act of 1990 and various forms of relief, including 212(c) relief, began to be limited. The AEDPA and IIRIRA, both passed in 1996, brought the most drastic changes and expanded the aggravated felon category even further along with other grounds that a noncitizen can be deported and eliminated much of the relief that had been available previously. In the case of controlled substances offense, any drug conviction is grounds for deportation, with the only exception being a waiver that is available for a single possession of marijuana of less than 30 grams. The inflexibility of these provisions is apparent in the cases where Governor Paterson granted pardons, such as the case of Reverend Carol Hamilton. In Hamilton's case, two misdemeanor convictions for possession of marijuana from 1995 and 1986 rendered Hamilton deportable. Even though he has many impressive equities and considerations that weigh in favor of allowing him to stay in the United States, such as having a wife and three children and having established a ministry in the community that works with youth, ex-offenders and people living with HIV/AIDS, current law brands him a "criminal alien" and the individual facts of his life are simply not relevant.

### Practicing Law in a Broken System

For many immigration lawyers, the loss of judicial discretion after the 1996 laws is the largest obstacle to reaching fair and just results in cases like the ones described above. As one lawyer put it, "Judges need to have discretion again, if you are not going to do that, don't call them judges, okay, because there's no point. You have to trust them and the government can appeal." The result is that, rather than judges being able to balance the facts of a case, lawyers find it very difficult, or sometimes impossible, to find a legal argument that can help a client, even if they have sympathetic or compelling equities. Rachael, a lawyer who oversees a law school immigration clinic and has practiced immigration law since before the 1996 laws went

into effect, explained how the loss of judicial discretion has changed the approach lawyers have to take and what sorts of evidence is even considered relevant:

I think the law is designed now, in a way where it is very hard to have what most people, at a common sense level, would think would be the relevant facts, to have them be in some way relevant to the case. So one winds up having to litigate over a lot of technical legal issues and a lot of – you know – sort of more complicated arguments. Our clinic we often take cases where we feel there's a glimmer of something there, we don't know what it looks like and it's sort of like a problem and we will ultimately try to come up with something that is a hook for the judge but often the judge has thought, "Jeez, this is a sympathetic case but I don't know what I can do with that." And I think that is sort of the fundamental problem after '96. I think that there aren't the obvious discretionary relief mechanisms that would allow for consideration of facts and so what has happened is that this new structure has legalized all of these questions so one ultimately has to make a very technical legal argument in order to prevail in a case.

The case of Reverend Hamilton illustrates the point Rachael is making about current law not considering the aspects of a person's life that "most people, at a common sense level, would think would be the relevant facts." This comment also reflects how the loss of avenues for relief, such as §212(c), and the expansion of the grounds of deportation, have left many individuals without obvious forms of relief and have necessitated that immigration lawyers make complex arguments to circumvent the narrow technical readings of statutes that may prevent an individual from even being able to present their personal equities and to request relief in the first instance. This is true even where the lawyer and immigration judge feel that justice would best be served by providing some form of relief. As Rachael explained, this is particularly an issue for individuals who are being threatened with deportation based on having been convicted of a crime:

You know, if you have someone who is a fairly minor character in a conviction, it's their only conviction, they have a whole lot of other things they can say about their life, you would want to sort of know, well how bad was the crime and what does the rest of their life look like but instead, you usually can't do that. You usually have to argue all kinds of very technical issues about what the New York

law looks like, what federal law looks like, what was in the jury instructions in this particular case and all sorts of other things like that.

While not all criminal offenses are considered deportable, many seemingly minor criminal convictions can be the basis to deport someone. Since the 1990s, a broader and broader array of crimes have been designated “aggravated felonies,” which are deportable offenses over which an immigration judge has no authority to grant relief. In cases where an individual is charged with being deportable as an aggravated felon, their only chance is to argue that the conviction they have does not meet the legal definition of an aggravated felony. Since the list of aggravated felonies in the INA often defines them generally or by reference to conduct that is illegal under federal or state criminal laws, it is not always clear if a given conviction can be considered an aggravated felony. In such cases, the person’s fate often rests in comparing criminal statutes to the specific aggravated felony definition in the INA or comparing the particular conduct that an individual was convicted of committing to the statute. Rachael provided an example of a case handled by her clinic that illustrates how these technical statutory issues have totally replaced considerations of the character of the individual facing deportation or a balancing of equities:

We had one person who had come here and gotten asylum and become a permanent resident and had one conviction and we moved to terminate proceedings saying that the conviction did not fit the requirements of the [aggravated felony definition in the] statute. We thought this was completely clear from the plea agreement in the [criminal] case. The judge didn’t really understand how to read the plea agreement. Ultimately, he was willing to keep the issue open but only if we went to the U.S. Attorney and got the U.S. Attorney, the prosecutor in the case to say that he agreed with us. So meanwhile we were forced to put together an extremely difficult case, proving asylum 20 years after the fact, very old facts, very difficult with the client in detention with a language barrier. It was very difficult to get interpreters. And under a very tight time schedule that is applied for detained cases. We, ultimately, got the U.S. Attorney to find time in his busy schedule to write the document we needed, which led to the whole case being thrown out. And that only happened because one of the students at the clinic called up the U.S. Attorney, who has for months been telling

us he agreed with us but just didn't have time to write a letter, and said, "I've cleared my calendar and I am coming down to Virginia to meet with you." At which point he said, "don't come down, I will send you something." You know, most people – we had three students working on this case, working incredible hours on this case, for one person.

In this case an individual, who was granted asylum and lived in the U.S. for decades, had a conviction for buying and selling cigarettes without tax stamps on them and was charged with being an aggravated felon. Because criminal indictments, plea colloquies, and other documents in criminal cases are not prepared with the immigration law consequences in mind, it is often unclear whether a given individual's crime should be considered an aggravated felony or not. Under the INA, a fraud that results in a loss to the victim of more than \$10,000 is considered an aggravated felony but under criminal law the \$10,000 threshold has no particular significance, so the criminal records may contain no clear statement of what the size of the loss was. Here, the individual's offense did not rise to the level of an aggravated felony and thus he was not deportable but it took an extraordinary effort and exertion of resources to terminate a case that should have never been brought in the first place. What is more concerning is that under our current system, this extraordinary effort and expenditure of resources by an experienced law professor and three law students was absolutely necessary to unravel the nature of the conviction and convince the immigration judge that it was not a deportable offense. There is simply no way that a non-lawyer would have known where to begin looking to determine if he really was deportable, much less know how to go about proving that he was not. An example such as this is particularly salient when one considers that over the last five years more than half of the individuals who have had their cases decided in immigration court have been *pro se*, that is without legal representation.

A Structure of Unrepresented and Incarcerated People: “That’s a Pretty Crazy Kind of System.”

According to the Executive Office for Immigration Review, the branch of the Department of Justice responsible for overseeing the immigration courts system, in fiscal year 2011, 51% of individuals whose cases were completed in immigration court were represented, in 2010 only 49% were represented, in 2009 and 2008 only 45% were represented, and in 2007 48% were represented (Executive Office for Immigration Review 2012). A study of legal representation in New York City immigration courts showed that, 60% of detained immigrants and 27% of non-detained immigrants are unrepresented (New York Immigrant Representation Study 2011:3). This situation is compounded by the fact that individuals accused of being aggravated felons are subject to mandatory detention, which magnifies the difficulties in locating legal assistance or trying to marshal evidence to support one’s case. According to the study of immigration court outcomes in New York, the two biggest factors in determining whether a case had a successful outcome, defined as receiving relief or having the case terminated, are whether an immigrant is represented and whether she is detained. The study found that of those who were represented and not detained, 74% had successful outcomes; of those who were represented but detained, 18% had successful outcomes; of those who were unrepresented but were not detained, 13% had successful outcomes; and of those who were unrepresented and detained, only 3% had successful outcomes. Thus, the result of expanding the grounds of deportability, limiting immigration judges’ discretion, instituting mandatory detention, and increasing the technical complexity of immigration law is not simply that, as a policy matter, immigration law makes more people deportable but that even people who should not be deportable, even under those harsher laws, are unable to contest their deportability. As Rachael, the lawyer who runs the immigration clinic explained:

I feel that in pre-1996 days, that a person could have been on his own, in front of a judge, could have said, “Judge, I’m really sorry. It’s the only conviction I have ever had. I’ve never done anything else wrong.” And could have had a hearing and it all might have been disposed of that way. But, instead, it became this complicated legal point with extensive briefs, where the judge had to, sort of, sort out these different questions with the documents. And meanwhile this client could have been sent back to a place where the U.S. government had previously determined he would be persecuted.

At present there is a confluence of factors that have made it difficult for individuals who want to contest their deportability in immigration court. There has been a broadening of the grounds on which someone can be made deportable; there are drastic limitations on an immigration judges ability to grant relief; there is a need to be able to make complex legal arguments to qualify for what relief is available; and there is an increase in individuals being detained while they are in immigration proceedings. Because immigration proceedings are considered civil, and not criminal, migrants are not provided with legal representation if they cannot afford to hire an attorney or find *pro bono* assistance. Many people who the government considers “criminal aliens” are subject to detention while their immigration cases proceed and this further limits their ability to find an attorney or to be able to work so that they can pay an attorney. It is often individuals accused of being deportable based on a past conviction, like the asylee who was accused of being an aggravated felon because he sold untaxed cigarettes, whose case turns on complex legal issues that can only be unraveled by an attorney. According to a recent report by the New York State Bar Association, “[t]he increase in immigration enforcement, coupled with the acute shortage of competent immigration attorneys, has resulted in a crisis in immigration representation” (New York State Bar Association 2012: 3). As noted above, the outcome of these policies is a huge disparity in the number of successful outcomes based on whether an individual is represented and not detained (73% success rate) and individuals who are not represented and detained (3% success rate). In part, the problem is due

to the breadth of mandatory detention policy which requires detention for certain classes of immigrants facing deportation regardless of whether there is an actual determination that they pose a danger to the community or risk of flight. For instance, the asylee who sold cigarettes without tax stamps was subject to mandatory detention despite the fact that no one considered him to be dangerous or likely to abscond. As his lawyer explained, the current system is costly to society as well as individuals facing deportation:

And ultimately it turned out, our client should have never been detained, everyone agreed our client should never have been detained, the judge threw out the case but our client had been detained for over six months at a facility that was costing about \$200 a day<sup>22</sup> and, you know, do the math, you know 180 days at \$200 a day that's over \$35,000 in tax payers' money that's been spent on something that never should have happened, not to mention the hardship to the individual.

The success this individual ultimately obtained in having his case dismissed was based on the happenstance that an other inmate where he was detained was represented by me, and he was able explain his situation to me, and I was able to recognize that he had a defense to deportation and to put him in touch with Rachael at the law school clinic, which was able to represent him *pro bono*. Under the current structure of immigration law there is no reason to believe that other individuals in his situation would have had the same luck.

In discussing the treatment of migrants facing deportation due to a criminal conviction with Rachael, she highlighted the unprecedented nature of the current system.

The power to detain people doesn't exist in any other civil system. It does exist in the criminal system but the criminal system you then have the right to a lawyer. So the power to detain without a lawyer is a pretty extraordinary thing and that has never been exercised on the mass scale that is happening today. I mean it is unprecedented in the history of the United States to have those two things going

---

<sup>22</sup> In its report to Congress on the cost of detention the Department of Homeland Security estimated the daily cost of detention to be \$122 per bed. A report by the National Immigration Forum estimates that the cost would be \$166 per detainee if ICE's payroll and operational cost were included in the calculation (National Immigration Forum 2011).

together. Even if the courts have upheld the power to detain and upheld the right not to have a lawyer, the mixing of those two is a huge, huge fact.

Thus, it is a confluence of factors at work that deny people the opportunity to have their individual circumstances and histories heard and considered. Moreover, even where it is conceivable possible to make a legal argument that may entitle a person to have her individual equities considered, economic constraints may be determinative of whether those arguments are made. Rachael pointed out that because someone in immigration proceeding has no right to an attorney unless she can afford to hire one or is able to find *pro bono* representation, the outcome of many people's cases is dependent on the kind of lawyer they are able to afford:

And going along with that is the huge number of people who are not represented or are represented by the kinds of lawyers you can get for a few thousand dollars, which is often no better than no lawyer at all. Or are represented by so-called accredited representatives, some of whom are good but some of them are appalling. So I think when somebody's liberty is at stake that's a pretty crazy kind of system.

## **Conclusion**

An unrepresented person facing deportation may enter an immigration court believing that the immigration judge holds his fate in her hands and that he must convince the judge of why she should let him remain in the United States, in his community, with his family. In many cases, however, this perception of the court and the judge as an authority is a mirage. Before the proceedings ever begin, the outcome is a *fait accompli* based on determinations that have little to do with him as an individual. Of course, if there is going to be a system of rule regarding immigration, some individuals are going to run afoul the lines that have been drawn even if, in individual cases, it seems unjust. This chapter has demonstrated, however, that for many immigration practitioners, the current state of immigration law is too harsh and inflexible to

consider relevant equities and results in unjust and unequal treatment of people, based more on a lack of flexibility in the law than on rational or consistent policy goals. The next chapter will explore the extent to which the current system allows for the amelioration of this inequality that stems from legal line drawing, particularly the extent to which discretion is available to reach a more just outcome.

## **Chapter 4**

### **The Role of Lawyers and Judges in U.S. Immigration Law**

The examples from the preceding chapter point to some of the structural deficiencies of the current system, such as expanded grounds for deporting someone under the 1996 laws, the loss of discretion to provide relief, and the increasingly harsh procedures such as mandatory detention, which have limited the ability of the immigration system to consider equities and provide fair results in many cases. However, this chapter will show that many immigration lawyers in New York also express confidence in their abilities to reach positive results for their clients, are laudatory of the immigration judges in New York, and are satisfied with the treatment most of their clients receive. This chapter will examine the immigration lawyers' opinions and views regarding immigration judges. It will do this by considering two areas where immigration judges still retain some discretion to determine the outcome of cases in the immigration system, specifically cases where individuals are seeking asylum and cases where individuals seek to avoid deportation through a process known as cancelation of removal. The chapter will examine the place of immigration judges in the immigration law system and the extent to which they can and cannot exercise discretion in favor of sympathetic or otherwise deserving individuals. Finally, the chapter will examine instances where discretion is exercised not as part of immigration proceedings but unequally on behalf of particular individuals and groups and asks how this selective application of grace can be applied more uniformly to sympathetic individuals who have no recourse under the existing law both because of the structure of the system but also because of how immigration judges have interpreted their role within the system.

## **The (Limited) Power of the Lawyer**

For those who practice immigration law, there is often an experience when you meet with clients for the first time, in what is called intake. Lawyers are often in the same position as the immigration judges when someone comes to them for help and they are forced to explain that immigration law does not have any compassion for them, their family, or the millions of similarly situated people and families. In my own practice, before I meet potential clients, my assistant has often spoken to them, obtained copies of whatever legal documents they have, and gotten a basic understanding of the nature of their problem. In many cases the strictures of immigration law, as they apply to a given case, are clear. A person will have arrived on a visitor's visa, overstayed their period of authorized stay, and have no basis to regularize their status. Maybe this person will have already received a deportation order at some point. Before even meeting with this person, or her relatives, it is clear that there is nothing that I can do to help. The law is clear that they have no options and my job is to simply explain their situation to them and warn them not to give money to an unscrupulous lawyer or notario who will take their money in exchange for false hope. This simple task is made far less simple when you hear the many other facts of their lives that are, unfortunately, irrelevant to their legal case. Having young children in the United States, even children who are U.S. citizens, does not necessarily provide any basis for obtaining lawful status, nor does having spent many years in the United States, even perhaps since childhood. Serious medical issues or family tragedy are often not considered germane. For individuals who entered the United States without inspection, the options are even more limited. As a lawyer who understands immigration law, it may be obvious to me that nothing can be done for a woman who overstayed her visa, started a family, and lived in the United States until she was arrested and removed by immigration officials based on an old

deportation order. Despite this obvious clarity of the law, it is virtually impossible to have these laws, and their lack of options, make sense to the woman's crying sixteen-year-old son. Such situations are so common for immigration lawyers that, as Emily explained, they may feel that they can not focus on them too much:

We had one guy now and he committed a drug offense ten years ago and there is nothing I can do for him. He has a wife, two kids, and he's locked up. And my associate is, like, distraught and I am like, you know what, we didn't make the law and you'll kill yourself if you worry about it. You'll die in this field if you think about it too much.

By the same token, however, this exposure to the personal effects of the current form of immigration law and its consequences for real people is very much why many immigration lawyers find their job satisfying and rewarding. Mathew who has worked almost his entire career in public interest law explained how he viewed his role as an immigration lawyer:

We are stuck with having to meet people. That's the worst part of this job, it's the best part of the job, it's meeting people and it's why I do this because I find Thursdays, when I do intake, are the most exhausting day but the most exciting. I have the most amount of fun because I just meet people. It's like, my gosh, life is so rich and so interesting but yet I wish I hadn't met them because now I have to go research all of this [gesturing to a desk stacked high with legal files] because I can't say no. Because there is something I can do, there is a way I can help and perhaps just one at a time. Every story is a life and so as a lawyer I feel I have power now, power to help this person, and I should use it. That's why I'm here, I have power. Not completely and unadulterated... [laughs].

For immigration lawyers, the biggest challenge is to get the system based on immigration laws, which are at times very strict and inflexible, to recognize the importance of individual stories and lives. At times, it is very much a process of first making elaborate technical arguments, such as dissecting the elements of a state criminal conviction to show that it should not be considered a deportable offense, at other times, it may be trying to put overwhelming equities forward and hope that the government's lawyer and the immigration judge might be persuaded to not insist on deporting a particular person. For instance, Tariq recounted a case

where the client had no legal argument for relief but was able to get the case administratively closed based on the strength of the equities:

I've got a Bengali woman who just had a hysterectomy, she was suffering from cancer. No formal relief whatsoever, because her husband filed a CSS/LULAC<sup>23</sup> case for her, that was filed wrong but the judge said, "There's no way I'm deporting you." And they just admin closed the case and said, "Whenever you have a chance to do something do it." I think if you present the case the right way, things generally turn out properly.

An "admin close," or administrative closure, is not so much a remedy as it is the absence of a bad result. In rare cases where there are strong equities but no legal remedy available, an immigration judge, with the consent of the government's attorney, will essentially agree to do nothing. While administrative closure of a case is not a perfect result – it does not provide any immigration status – it is the best result that was available under the circumstance and, even with its imperfection, it is an extraordinary result under our current system. Virtually no immigration lawyer is happy with the current state of immigration law but they are actively trying to work within it to achieve the best possible outcomes for their clients and even sometimes find that immigration judges are willing to assist them in those efforts.

Many lawyers feel that, in New York City at least, immigration judges are fair. Grace, a lawyer with her own practice that focuses on asylum cases and who has been practicing immigration law since 1990 feels that, "[i]n New York we are pretty lucky, we're pretty lucky. We have a pretty open-minded corps of immigration judges." Another lawyer, Tariq, estimated that "90% of the time the clients get treated extremely well and the 10% of the time they don't it just happens to be that IJ [immigration judge]. The judge who will just give you a hard time. But I'm surprised at how easy going the courts are." Indeed, this same attorney recognized that

---

<sup>23</sup> CSS/LULAC refers to a settlement in a lawsuit whereby the USCIS agreed to allow certain classes of people to apply for legalization under the 1986 IRCA "amnesty" after the original deadline because earlier government policy had inappropriately stated they were not eligible.

it might be considered impolitic for an immigration attorney to acknowledge that he felt the immigration courts were fair but nonetheless felt the need to praise the immigration courts:

I know this is going to sound terrible, I think they are incredibly open-minded. Maybe to a fault. I think they are very few judges who have negative preconceived notions about the case and know what they are going to do. And I think with the majority of judges, if they have a preconceived idea, it's positive. It's like, "Okay, you're going to win your case by doing this, this, and this. I don't see this in the file. We're going to grant a continuance, go bring me this and we'll take care of your client." So I think its fine. The court's fantastic.

This is certainly a different perspective of immigration courts than is generally presented, and certainly is not represented in the social science literature that examines the U.S. immigration system (see Chapter 1). Indeed, it is quite different from the situation that was reported after 2002, when then Attorney General John Ashcroft implemented procedural changes that created a system that reduced scrutiny of immigration court decisions by the Board of Immigration Appeals. Following those changes, there were a number of published opinions from the various circuits of the U.S. Court of Appeals criticizing and upbraided immigration judges by name (Liptak 2005; Rivera 2007). In one opinion, Judge Richard A. Posner of the Seventh Circuit Court of Appeals wrote, "The adjudication of cases at the administrative level has fallen below the minimum standards of legal justice."<sup>24</sup> In addition to many cases containing legal and factual errors, there were complaints regarding some immigration judges' attitudes and demeanor towards immigrants. One Court of Appeals decision overturned a denial of asylum noting, "the tone, the tenor, the disparagement, and the sarcasm of the [immigration judge] seem more appropriate to a court television show than a federal court proceeding,"<sup>25</sup> and another found, "the [immigration judge's] assessment of Petitioner's credibility was skewed by

---

<sup>24</sup> *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005).

<sup>25</sup> *Wang v. Attorney General*, 423 F.3d 260, 269 (3d Cir.2005).

prejudgment, personal speculation, bias, and conjecture."<sup>26</sup> Anna, who is the same attorney who represented Jane as discussed in Chapter 3, explained that she had had a similar experience while presenting an asylum case. At the time she was eight and a half months pregnant, nevertheless

The judge kept yelling, screaming at me and I was so surprised because I was so pregnant, I had the baby a few days later, and it was a very compassionate *bone fide* case and the abuse by the judge and I thought wow, if you're abusing a pregnant lawyer with a good case, my god, what if it's not such a good lawyer or *pro se*.

For Anna, the judge's conduct raised concern not only because of what it meant for her client's case, but because she realized that such abuse must be even worse for *pro se* individuals, whose lack of a lawyer not only deprives them of legal representation but also means there is no one to witness how they are treated in immigration court. While most lawyers seemed to feel there were still a few instances of immigration judges who were abusive, biased, and unprofessional, Emily, a lawyer who has been practicing since 1995 and is active in the immigration lawyers association, believes that the appellate courts, having publicly highlighted problematic immigration judges and inappropriate behavior, has improved the situation in immigration court:

I think, for the most part, the judges that we have are thoughtful, they're good and they are watching them. And, now, since you can't go into district court [on appeal], it goes into the Second Circuit [Court of Appeals], they don't want to make fools out of themselves. We had that big spurt [in 2005], where everyone was in the newspapers, the Second Circuit was slamming everybody, that scared the crap out of a lot of judges and the judges that are bad are having problems.

The question of whether immigration lawyers consider immigration judges to be fair, unbiased, and open minded, however, might not address a structural issue within the immigration court system. During a lengthy and wide ranging discussion with a long-time public interest lawyer, Mathew, he repeatedly raised the idea that there was a "culture" that results in

---

<sup>26</sup> *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1054 (9th Cir.2005).

immigration judges being enforcement-oriented and constrained in protecting the rights and interests of the immigrants before them. “[I]n a sense, the judges are just part of Customs Border Protection – in or out. Its kind of engaging the flow of people rather than the rights of people under the law and I think that’s a tension probably that exists naturally.” Mathew noted that this probably stems from the nature of the position and wondered if it was a situation where “the judges are affected by the culture of immigration judgeship or are they people who bring this to the job because of where they came from and how they are appointed and what they had to do to get those jobs?” By this, Mathew was referring to the fact that the vast majority of individuals selected to be immigration judges come from the ranks of the Office of Chief Counsel, who are the lawyers who represent Immigration and Customs Enforcement (“ICE”) in immigration court. From this point of view, Mathew saw immigration court as a system very different from a system of justice, rather,

...It is ultimately deciding who gets to stay and who gets to go and it’s not really a place where rights are – it’s not a place which is defined by the idea that it’s a place where a person gets to have their rights defended or upheld as a federal court. Its *raison d’etre* is still part of the assessment of the flow of people.

Here, Mathew is referring to his sense that because immigration judges, who are employees of the Department of Justice, are “part of this executive function of the administration of a plenary power...so in a sense the judges are just part of Customs and Border Protection” and are more concerned with regulating “the flow of people than the rights of people under the law.” This structural conflict has also been remarked on by Dana Leigh Marks, the president of the National Association of Immigration Judges, who noted that immigration judges are considered “lawyers” employed by the Department of Justice and argued, “[a]s long as we are part of the nation’s top law enforcement agency, there will continue to be tensions between there two conflicting functions” (Marks 2013).

## Relief from Deportation: Cancellation of Removal

Nevertheless, many lawyers expressed favorable views of most immigration judges, especially those in New York. Even though the 1996 amendments to the INA have limited the ability of immigration judges to provide discretionary relief, in cases where there is still relief available. Emily said, “It’s hard to lose a case in New York,” explaining, “I think, you know, most judges in New York, if they see the person is otherwise doing the right thing, does it really kill anyone to grant them cancellation, so their two American kids can live here?” Specifically, this attorney is referring to the form of relief known as cancellation of removal, which was created in 1996 to replace the more generous forms of discretionary relief that were abolished. The changes to the Immigration and Nationality Act (“INA”) created two separate forms of cancellation, one for individuals who were already lawful permanent residents (“LPRs”) subject to deportation, often called “LPR cancellation”, and one for individuals with no legal status, called “non-LPR cancellation” or “10 year cancellation.” Both forms of cancellation have statutory preconditions that limit who is able to apply for them and both are considered discretionary because once an applicant has meet those statutory preconditions, the immigration judge has the discretion to either grant cancellation of removal or not. The preconditions for LPR cancellation require that a person have been a lawful permanent resident for at least five years, that is, have been a greencard holder for at least five years, and have been living in the U.S. for at least seven years after having been lawfully admitted in any status. LPR cancellation is not available for an individual who has been convicted of certain crimes. Someone who is considered an aggravated felon is not eligible for cancellation. Additionally, individuals who commit certain other crimes or who are placed in immigration proceedings before they have been present in the United States for seven years are not eligible. Crimes that may make someone

ineligible include controlled substances offenses, even simple possession, and certain crimes involving moral turpitude if the sentence imposed was at least a year, even if the sentence was suspended. These provisions make cancellation unavailable to a great many individuals facing deportation based on a criminal conviction and explains why the individual discussed at the beginning of chapter, who has only a minor drug offense, is deportable without regard to the hardship to him or his U.S. citizen family members. Even if an LPR is not barred from seeking cancellation of removal under these statutory requirements they must convince the immigration judge that they are entitled to a favorable exercise of discretion. Eric, whose practice is primarily deportation defense, explained:

If you're talking about a cancellation case for a lawful permanent resident, I mean, if it's a serious criminal offense or if there is a pattern, it's going to be very difficult to win. And if people, in those cases, it can be difficult if someone has been here a long time but they're kind of poor, they don't pay much taxes. That's a very difficult case. So I think, in terms of types of factors judges usually look at with discretion, they tend to be the standard sorts of things: children, paying taxes, record of employment. But then again, I think that makes sense. You have to sort of look at measurable quantities and things that are subject to a certain standard.

The available relief under non-LPR cancellation is even more limited. For someone who is in the United States without a lawful immigration status, cancellation of removal is only available if they can show that they have been continuously present in the United States for ten years, have been a person of good moral character for ten years, have never been convicted of a crime that would make them inadmissible or deportable, and can show that their deportation would result in "exceptional and extremely unusual hardship" to a spouse, child, or parent who is a U.S. citizen or an LPR. That this standard was intended to be extremely difficult to meet is evidenced by the fact that the statute creating non-LPR cancellation limits the number of greencards available based on non-LPR cancellation to 4,000 per year. The result of these ridged requirements is that it is not available to most individuals in immigration court. For instance, if

someone fails to meet any of the statutory requirements, such as not having been present in the United States for ten full years, she will not be eligible for cancellation of removal regardless of any other sympathetic equities she may have. To Eric,

It's sort of arbitrary. Obviously, you have to have laws and rules but there are a lot of people who, in terms of a general kind of moral way, are arguably deserving of something and there may be nothing you can do. I mean, somebody's been here nine and a half years and they have a family and they are not eligible for cancellation, well, that's a pretty tough thing to have to tell somebody.

For individuals who have been in the United States for over ten years and have clean criminal records, there is still the enormous burden of demonstrating "exceptional and extremely unusual hardship" to a spouse, child, or parent who is a U.S. citizen or an LPR. Cancellation of removal was introduced as part of the 1996 laws to replace the more generous form of relief called suspension of deportation. Most immigration lawyers acknowledge that non-LPR cancellation of removal is an extremely difficult burden to meet but also feel that it can depend a great deal on which immigration judge one is before. Tariq explained that he felt the need to seek cancellation of removal in marginal cases because he had so many clients who had lived in the United States for long periods of time and had family but no other obvious form of relief:

There were so many cases where we had everything but the hardship and then you always want to say, "I won't be able to find a job to take care of my family." But that doesn't qualify as a hardship. You would talk about children and their education but again, the law says that's not enough but then I didn't realize that asthma or allergies for most judges do qualify as a hardship. So I guess, when you are forced into doing a case, you learn what's acceptable, what's not acceptable but then I think it really depends on the judge, on the IJ [immigration judge] you are in front of with that.

Mathew also relayed his experience of the hardship standard being unclear, inconsistent, and being subject to broad interpretations by individual judges:

I think the standards are very different from judge to judge and so what is exceptional, extreme, unusual hardship seems to change from judge to judge, I actually think it seems to change within a judge. A judge will say, "I think

cancellation cases are all about proving medical hardship.” And I will literally go in the next day with a case that doesn’t have any medical hardship and she grants it. So I don’t know, did she change her standard, too? So I do think it’s a fairly loose practice in that sense.

Many practitioners, however, see this very looseness, as a virtue because it allows the individual circumstances to be considered. Eric, however, noted the double edged nature of immigration judges having broad discretion explaining that he thought, “It’s probably good that there is a fair amount of discretion,” but because there is wide discrepancy between judges he explained that if “you get a bad judge, you often can be screwed. And especially something involving discretion, it would be very difficult to win on appeal.” This sense, that a good case can be lost if one gets an unsympathetic immigration judge, is also a particular concern for attorneys in asylum cases.

#### Relief for Deportation: Asylum

Asylum law is the area of immigration law that cleaves closest to international human rights norms. The Refugee Act of 1980 implemented aspects of the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 United Nations Convention and Protocol on the Status of Refugees and adopted the international law definition of who would be considered a refugee. U.S. asylum law also recognizes, to some extent, the international law principle of *non-refoulement*, which is meant to protect refugees from being returned to a nation where they could be killed or persecuted. Even with this broader incorporation of human rights principles, many lawyers are troubled by the extent to which the immigration process can result in grants or denials of asylum based on factors other than the merits of a given case. Asylum is by far the most common form of relief from deportation requested in immigration court and requires an applicant to demonstrate, among other things, past persecution or a well-founded fear of future persecution based on the her race, religion, nationality, political beliefs, or membership

in a particular social group. Because there is often not clear documentation of such persecution, cases are often decided on the basis of whether the immigration judge credits the applicant's testimony. In discussing the issue of how lawyers prepared for asylum cases, it was clear that finding out which immigration judge would hear the case was seen as the most important factor. Mathew said that, while he believed most judges began cases without preconceptions and were fair, with the few judges who are seen as hostile to asylum applications, "I try to encourage the client to move, quite frankly, because it's a waste of time for them. I say, 'If you are serious about your case, you internally displace yourself within the United States'" so that they can bring their case in a different jurisdiction and, hopefully, draw a more favorable immigration judge. Anna recounted how when she was just starting out, she had an asylum case which she was sure should be granted because her client had been politically active in his home country and bore 150 scars that a doctor had been able to verify came from torture. When she spoke to a colleague, he warned her that the immigration judge hearing the case denied virtually all of the asylum cases he heard.

I was stunned and I said, "How could he deny this, we have a psychological report, we have scars, he has a visa, we have documentation he was in university, we have the transcripts, clearly he's so bright he had to have been in university, he would have been politically active," and he said "Jane, it doesn't matter if Anne Frank were in Nazi Germany in 1933, this judge would tell her to go to the south of Germany to escape the Nazis in the north." And I told that client to move because he would be denied.

Similarly, at least one study has shown that perhaps the single largest factor in an asylum case is who is assigned to decide it (Ramji-Nogales, Schoenholtz, and Schrag 2007). For instance, while New York immigration courts as a whole have one of the highest rates of granting asylum, the rate of grants can vary widely from judge to judge. One immigration judge granted only 7% of asylum applications and another granted only 8%, while at the other end of

the spectrum, one judge granted 89% of applications and another 91% (Ramji-Nogales et al. 2007: 334). However, not all attorneys believe that which judge hears a case is entirely determinative. When I asked Grace, who specializes in asylum, if she advises clients to move if they draw a difficult immigration judge, she said,

I don't always do that. You know, when you have a bad judge, you have to make sure your evidence is perfect and it's more of a burden on you to make sure the case is extremely well put together. I mean they all are, but you have to hit home with the client how important because it's likely they are going to be doing an appeal. So they have to have a good record for appeal.

She explained that in her cases she is able to provide corroborating evidence for all of her claims and she uses expert witnesses in all of her cases to provide evidence on country conditions and to provide medical evidence. While she recognized the importance of individual immigration judges because “with asylum cases, there has always been discretion,” she said that in her experience, “I can't think of any time where I've ever had a case that was statutorily eligible for asylum and not granted on discretion, ever.” While at first glance Grace's experience may seem to be at odds with statistics that show particular immigration judges grant asylum applications at significantly different rates, in fact, Grace said she generally does not do cases of detained asylum seekers and statistics show that the immigration judges who handle detained asylum cases have significantly lower grant rates. For instance, from 2007 to 2012, the three immigration judges who heard detained asylum cases had the lowest asylum grant rates in New York City. The rest of the immigration judges in New York City have asylum grant rates significantly higher than in the country as a whole.<sup>27</sup>

---

<sup>27</sup> “Immigration Judge Reports — Asylum,” from Transactional Records Access Clearinghouse (TRAC) at Syracuse University. Available at <http://trac.syr.edu/immigration/reports/judgereports/>

According to Grace, the biggest issue facing asylum seekers is whether they receive adequate legal representation because there is simply no way for a *pro se* applicant to know what information is important. She recounted how she had a client whom she had worked with extensively, having met with him, prepared his asylum application, and had him recount his ordeal but it wasn't until they were preparing to go to his interview with the asylum office that she asked him if he had any physical marks or scars. When he showed her a huge scar that he had not mentioned previously, she asked him why he had not mentioned it before and he told her that he simply did not know that it was important. From her point of view, a qualified lawyer with adequate resources should be able to win a meritorious asylum case in front of just about any immigration judge, or at least on appeal, but *pro se* applicants and people with incompetent or under-resourced legal representation are unable to have their case adequately presented or considered.

Additionally, Emily felt that the number of non-meritorious cases filed has damaged immigration courts' receptiveness to asylum cases. She explained that she felt some judges were more open minded than others in terms of hearing cases but also felt that "all the judges in New York are sort of jaded when it comes to political asylum" because "this is probably the most abused court system when it comes to political asylum, here and California, and maybe Miami, but in terms of frivolous – a lot of Chinese asylum that sort of makes the whole system a joke and people were tired of it." In a 2008 survey of immigration judges, which received anonymous responses from 98 of the 215 immigration judges then working, provides unique insight into how immigration judges view their job, including deciding asylum cases (Lustig et al. 2008). One judge stated, "The most frustrating thing for me is the high incidence of fraud in asylum cases that makes it all the harder for legitimate asylum seekers to prevail" and another stated, "It

makes me feel ill to grant asylum to someone who I believe is probably lying, but it also makes me sick to think that I have denied protection to someone who really needs it” (Lustig et al. 2008: 76, 77).

A memoir by a former immigration judge, Paul Grussendorf, echoes this sense that immigration judges have developed skepticism towards, at least some, asylum seekers. Grussendorf likewise singles out Chinese asylum seekers as making fraudulent claims and being able to gain assistance to make such claims. For instance, he recounts how he was baffled by numerous young female Chinese asylum seekers presenting nearly identical claims of having been kidnapped by the village headman and held hostage to marry him or his son. In each story, she was able to escape and make her way to a large city where she hired a smuggler to bring her to the United States. Eventually, when he mentioned the phenomena to a Chinese friend, he was told, “Oh, that is the plot of a very popular soap opera in China!” (Grussendorf 2011:173). Grussendorf, however, places much of the blame for the large number of questionable Chinese asylum claims with Congress for passing specific laws that granted special rights to individuals claiming persecution by the Chinese government. First, Congress passed the Chinese Student Protection Act of 1992 after the Tiananmen Square massacre and then in 1996 Congress amended the asylum law to specifically protect anyone forcibly aborted or sterilized. Grussendorf claims, “It was a terrible mistake to tinker with the asylum law this way” because until then, the asylum law had tracked the language of international law on refugees (id. at 171). Grussendorf’s claim is not that individuals persecuted by the Chinese government should not be protected, but rather, that such protection should be allocated based on the generally applicable rules of asylum law rather than political considerations. If these general laws are inadequate to protect people fleeing persecution, they should be changed for the benefit of all asylum seekers,

not by carving out special protections for a particular group. Grussendorf feels that immigration judges should have the authority to address the exigencies of individual cases rather than have the outcome predetermined by legislation executed at a level of total abstraction.

As in other areas of immigration law, the 1996 amendments imposed strict procedural barriers that limited individuals' ability to seek asylum. Chief among these changes was the imposition of a one-year statute of limitations, which requires an individual to seek asylum within one year of arriving in the United States or within a reasonable time if changed or extraordinary circumstance prevented her from seeking asylum within the one-year period. Under this provision a person is barred from receiving asylum if she did not file within this one-year deadline regardless of the merits of her case. As Mathew said, regarding some of the absolute statutory bars to relief, such as the one-year statute of limitation, "I think those very dry, terse, pithy legal provisions are pretty devastating." While the law establishing this one-year bar contains exceptions for changed or extraordinary circumstances, many asylum practitioners find that these bars can still provide barriers to individuals seeking protection from persecution. While most immigration practitioners feel that it is common for an asylum seeker to be suffering from post-traumatic stress disorder or other psychological disorders as a result of the very persecution they are seeking asylum from, it can be difficult to provide sufficient evidence to immigration judges to convince them that this should excuse failing to meet the one-year deadline. The experience of Grace, who specializes in asylum cases, illustrates how difficult it can be to overcome this bar:

The change that affected my practice was when they, I guess it was in '97<sup>28</sup> they instituted the one-year bar. And that's really very unfair. I have people who come to me and they really just didn't know or they were traumatized to a point but they have waited so long at that point that it's really difficult. You know, you

---

<sup>28</sup> The one-year bar was passed in 1996 as part of IIRIRA and went into effect on April 1, 1997.

have to get psychological forensic exams done to see whether or not the individual is suffering trauma so much that he would have been prevented from filing on time. And then you have to get to the next step, which is given that trauma, is it reasonable that he waited twelve years or one year or beyond that one year, whatever. It's almost impossible to overcome. I won a case a few years back with a judge and he said, "This is the very first case I am granting with a one-year issue based on a psychological." And I was like, "Wow." I couldn't – he's a good judge, I mean he's fair, I think he's fair. He wasn't one of the best judges by any means but I was shocked. He's been on the bench for twenty years and he's never granted an exception to the one-year bar based on psychological trauma.

A recent study of affirmative<sup>29</sup> claims for asylum bears out the anecdotal claims regarding the toll that the one-year bar is taking on asylum applicants (Shrag, Schoenholtz, Ramji-Nogales & Dombach 2010). The study looked at all applications for affirmative asylum filed from April 16, 1998 to June 8, 2009 and concluded that of the affirmative cases filed with DHS, 54,141 applications, or 17.8 percent, were rejected because of failure to meet the one-year deadline or one of its exceptions (Shrag et al. 2010: 716-17). The authors of the study estimated that absent the one-year bar, 15,000 more genuine refugees would have had their asylum cases granted and that this number would have increased to 21,000 individuals if one includes dependent relatives of asylum seekers who would have also been entitled to asylee status as derivative beneficiaries (Shrag et al. 2010: 754).

The above-mentioned study only examined data from affirmative cases filed with DHS asylum officers and did not look at defensive cases or cases that were referred to immigration removal hearings after being rejected by asylum officers. However, according to some asylum lawyers, immigration judges are often suspicious of asylum seekers who assert defensive claims to asylum and can be unsympathetic to claims that people delay filing for asylum because of

---

<sup>29</sup> "Affirmative" asylum seekers are individuals who come forward voluntarily and apply to the Department of Homeland Security ("DHS") for asylum as opposed to "defensive" asylum seekers who are individuals who apply only after being placed in removal proceedings.

emotional scars from persecution. Grace, whose client was granted an exception to the one-year bar, explained:

If they have suffered in their country, there's an element where they don't really want to deal with the case. It's an avoidance... The government, and the judges also, usually don't see that. Especially, when someone is picked up after they have been ordered deported and then your trying to ... you know, they'll make the argument, "Oh well, now they're applying because they were picked up." As if it would go against the credibility of the case. My argument is, of course, now they are applying because now there is a real danger of returned to where they would be persecuted.

Individuals who are barred from seeking asylum because of either the one-year statute of limitations or an other statutory bar to receiving immigration, such as certain criminal convictions, but who can nevertheless demonstrate that they would be harmed or persecuted if they were returned to the nation of origin may be eligible for either withholding of removal under the INA, or withholding of removal or deferral of removal under the United Nations Convention Against Torture ("CAT"). Both these forms of relief have different requirements than asylum and do not have the same benefits as asylum. Most importantly, certain relatives of asylees are eligible to receive the same status as derivative beneficiaries, while the relatives of those who receive a grant of withholding or relief under CAT do not. Additionally, asylees are eligible to become greencard holders and eventually may apply to naturalize and become U.S. citizens. Those with withholding or CAT relief do not receive any status other than the right not to be put in harms way. Indeed, under certain circumstances, recipients of withholding or CAT relief could be held in detention in the United States, could be sent to a third country, or returned to their nation of origin if circumstances change. Because when someone applies for asylum, immigration courts also consider the propriety of granting these other forms of relief, some immigration lawyers worry that immigration judges may sometimes "compromise" by awarding one of these lesser forms of relief rather than adopting more generous interpretations of asylum

eligibility. Mathew explained that in his practice sometimes a client may simply be unwilling to remain in the United States without her family and, in those cases, it may be worth taking the risk of receiving no relief at all rather than accepting withholding of removal but not having any prospect of being reunited with her family:

Let's say you have a weak one-year case, you have a decent asylum case, I would be tempted, in some instances to say, arguably even back-off from the withholding and put the judge in a box on the one-year and just engage her sense of guilt around that question, because I think she feels that, well, I can always compromise out, then that makes everyone feel better except for the client and his family. So there is something to be said about that, in a sense, in playing that game but it's kind of high stakes. And it has backfired and it's also not backfired.  
[MR]

Here, Mathew is hoping to blur the issue of the one-year bar by forcing the immigration judge to focus on the merits and consequences of the asylum claim itself. In essence, the “high stakes” game that he is playing is to force the immigration judge to eschew some of the harshest aspects of the INA, barring someone from relief based on a late filing, in favor of the individual equities of the case, providing a victim of persecution and their family with protection. Asylum is by nature more amenable to this sort of brinksmanship because of the inherently sympathetic nature of many of the cases and because immigration judges in asylum cases still have relatively broad discretion. In other types of cases immigration judges may be more willing to except the harsh consequences of strict interpretations of the law. As Rachael, the law professor who runs the immigration clinic, put it, “I think a lot of judges would really like to do the right thing in some cases and I think they have developed this sort of thinking that, ‘Well there’s a problem but it’s not my fault, it’s Congress’ fault.’”

### **Immigration Judges View of the Immigration Law System**

The 2008 study of immigration judges shows that, in general, immigration judges share the view that they have the expertise and experience to provide the best results but are

undermined by the political branches of government which control the operation of the immigration courts. The judges feel that they are doing difficult but vital work. The judges stated, “While it is emotionally very difficult to listen to the testimony of individuals who have experienced persecution and even tortured emotionally, I consider it a great privilege to have been given the authority to extend the protection of the U.S. government to such individuals” but that “it is very frustrating to cope with such a large caseload. IJs should not be pressured to do more than two cases a day. Can headquarters understand that we are dealing with issues that affect real people, that we are deciding their fate?” (Lustig et al. 2008: 74, 66). The judges feel they are simply under resourced to do the job they are asked to do one saying, “We are told to keep producing—to get the cases done, without regard to the fact that we have insufficient support staff, insufficient time to deliberate and to complete cases, and outdated equipment” and another lamenting that “this job is supposed to be about doing justice. The conditions under which we work make it more and more challenging to ensure that justice is done” (Lustig et al. 2008: 64, 73). It is not surprising that the immigration judges feel under resourced and unsupported, currently the roughly 260 immigration judges hear over 300,000 a year, some hearing 1,500 cases a year and the immigration court system has a back log of 350,000 cases (Saslow 2014). The average wait time for an immigration case to be resolved is well over a year, with a national average of about 555 days and an average wait in New York of around 740 days (Marks 2013; Chavkin 2012). While immigration judges acknowledge that they make errors, some blame the size of their workload, lack of resources, and bad work environment—“Those who provide our oversight and those who provide commentary and criticism from the circuit courts of appeal have no clue or concern about the conditions and pressures under which we work” and some of them believe there is a “lack of judicial (or even administrative) respect for

the efforts of the majority of immigration judges giving their all to support the immigration policies of Congress” (Lustig et al. 2008: 72). One judge explained that immigration judges are given an important job, with control over people’s lives but are not given the power to do that job:

Knowing that as an Immigration Judge we have the burden and the responsibility of being the first line judicial body and probably the only judicial body which many aliens will ever deal with or render due process of law regarding them, and yet, in spite of this heavy responsibility, neither Congress or the President has delegated the necessary authority to Immigration Judges to execute that responsibility (Lustig et al. 2008: 73).

Thus, the apparent contradiction between the opinions of immigration lawyers that say immigration judges are generally trying to reach a fair result and Mathew’s argument that immigration judges are primarily managing people within a system and in a manner that is quite different than would occur in a regular court of law are not mutually exclusive. If the immigration judges’ statements are to be credited, many of them seem to strive to achieve “justice” but find themselves constrained by both material limits on resources and by limits on the authority they are able to bring to bear in a given case.

### **Recognition Without Rule of Law**

The examples discussed here are representative, in that compelling equities are sometimes considered and a fair and just result is achieved. More often, however, equities cannot be considered and the immigration law dictates harsh and inflexible results (see Chapter 3). Ironically, one of the problems with the current immigration system, which stems directly from the lack of flexibility within the law, is a practice of simply ignoring the mandates of immigration law in the most high profile sympathetic cases. For instance in 2007, when a house fire in the Bronx killed nine children and one adult, including the wife and four children of Mamadou Soumare, an undocumented taxi driver, the tragedy received significant media

coverage. For days New Yorkers were collectively stunned by the scale of the loss and read daily coverage of the scope of the tragedy and its effects on the survivors. Mayor Bloomberg and the Governor Spitzer both paid their respects and visited the surviving family members. Numerous people and organizations made donations to aid the families including a \$21,000 check from the office of the Bronx borough president, Adolfo Carrión Jr., an offer to pay the funeral expenses from the New York Yankees, and a donation of the air travel to transport the bodies and family members to Mali for the funeral from Air France (Alpert 2007; Santos 2007; Fernandez 2007a and 2012b). The public reaction was understandably sympathetic, particularly when it came to light that Soumare was undocumented and the if he returned to Mali with his family members' bodies for the funerals, he would be unable to return to the United States. As it turned out, the man had applied for asylum in 1992 but when the case was not approved he continued to live in the United States without documentation. Pressure mounted to allow the man to return home to bury his family, including from Bronx congressperson Jose Serrano and both of the senators for New York, Charles Schumer and Hilary Clinton, all of whom requested that Soumare be given a reentry permit on humanitarian grounds. (Dobnik 2007). In the face of this pressure, the U.S. Citizenship and Immigration Service ("USCIS") announced that they would reopen his decade-and-a-half-old asylum case and grant him a travel document based on that case. One immigration official stated she could not comment on the specifics of the case but noted that it was "heart wrenching" and the USCIS spokesperson commenting on the issuance of the travel document said, "We're happy we're able to do it" (Dobnik 2007).

There is no reason to think that the immigration officials in the story were insincere or any less moved by Soumare's plight than any other New Yorkers had been. Indeed, it is almost assured that they found the situation heart wrenching and were happy to provide some assistance

to him. Nor is the result problematic. Obviously, it hurt no one for Soumare to have been afforded what little solace could be had by being present to lay his family to rest. What is problematic about this story is that the result was achieved by ignoring laws and procedures that strictly limit immigrants ability to have their cases reopened, and by ignoring the material contradiction of reopening an asylum case (which is in essence a claim that the man could not safely return to his home country), so that the man could be provided with travel documents to temporarily return to his home country. It was only through having the public's attention turned to the immigration system and through pressure exerted by political figures that the strict unyielding immigration system was transformed, momentarily, into a *deus ex machina* that resolves the seemingly insoluble. Sadly, such solutions are rarely and unevenly deployed and are no solution for having a process that allows officials to address specific hardships as a matter of course. Moreover, cases such as Soumare's leave the misimpression that immigration law is a flexible system with the ability to achieve common sense solutions. It should also be noted that this magnanimous behavior, in this and similarly sympathetic cases, is not solely the result of human compassion, rather the government will often ignore or bend the harsh mandates of immigration law, when a particularly sympathetic case garners public attention as a matter of strategic self-interest. The ICE guidelines on when to use prosecutorial discretion to not pursue deportation in a given case, also called "deferred action," states that deferred action may be appropriate in sympathetic cases because of "[t]he presence of sympathetic factors which, because of a desire on the part of administrative or judicial authorities to reach a favorable decision, could result in a distortion of the law with unfavorable implications for future cases."<sup>30</sup> Thus, ICE's own policies recognize that current law often lacks the flexibility to achieve a

---

<sup>30</sup> ICE Detention and Removal Operations Policy and Procedure §20.8(b) (2006).

“favorable decision” and that, in the most extreme cases, immigration officials, and immigration judges, and federal judges might balk at imposing unreasonably harsh results on particularly sympathetic individuals and will avoid this result by creating rationalizations that might undermine the general application of the law. While this is fine for the minute number of universally acknowledged sympathetic cases, it leaves the inflexible system in place for the vast majority of individuals who also deserve a chance to have their equities considered.

An even more striking example of this phenomena is a recent policy called Parole in Place (“PIP”) for spouses, children, and parents of members of the U.S. military, which provides a mechanism for these family members to adjust status and receive a greencard in the United States, even though they entered the United States without inspection. As discussed in Chapter 3, one of the least advantageous positions to be in, in terms of immigration status, is that of someone who entered the United States without inspections. People who entered without inspection (commonly called “EWI”) are generally prohibited from adjusting status to obtain a greencard, regardless of the fact that they may be close relatives of a U.S. citizen, such as a spouse, who can petition for them. This stems from the INA §245(a) that states that a person cannot adjust status in the United States to become a lawful permanent resident if they were not “admitted or paroled” into the United States. While theoretically, such a person could travel to their country of origin while their U.S. citizen relative petitions for them to receive an immigrant visa to return to the United States, in reality, however, most people in this situation will run afoul of a separate law that is meant to punish people who are present in the United States without authorization by barring them from returning to the United States for ten years once they

depart.<sup>31</sup> While it is possible to obtain a waiver of this bar if the would-be-immigrant can show that their U.S. citizen or lawful permanent resident spouse or parent will suffer extreme hardship if they are barred from returning to the United States, this “extreme hardship” standard can be difficult to meet and hardship to the immigrant or to a U.S. citizen or lawful permanent resident child cannot be the basis of a waive. While the meaning of extreme hardship is somewhat vague, it certainly requires a showing of hardship greater than what could normally be expected as the result of family separation due to enforcement of immigration laws and mere financial hardship would be inadequate because these are seen as the normal and expected consequences of deportation. As a result of these two provisions, many individuals in mixed status families have a U.S. citizen relative who can file a relative petition on their behalf but have no way to take advantage of the petition because they cannot adjust status because they entered without inspection and they can not leave the United States to obtain a visa at a U.S. consulate because they have been present without authorization and would be subject to a ten-year bar to their return. Of these individuals, there are a number who are family members of people serving in the U.S. Armed Forces.

In 2007, this issue came to popular attention when news stories reported that Yaderlin Hiraldo, the wife of Army Specialist Alex Jimenez, was in deportation proceedings because she had entered the country in an irregular manner when she came to the United States in 2001 (Stock 2011). The couple lived in Corona, Queens and had been married since 2004 and even though Jimenez had petitioned for her before he was deployed to Iraq, because Hiraldo’s had not been “admitted or paroled” meant she was ineligible to adjust status in the United States. When

---

<sup>31</sup> INA § 212(a)(9)(B) (stating that someone who leaves the United States after being unlawfully present in the United States for more than six months is barred from returning for three years and someone who leaves after being unlawfully present for more than a year is barred from returning for ten years).

Jimenez was reported Missing In Action, news reports of the government trying to deport the wife of an MIA soldier resulted in bipartisan demands that ICE somehow remedy the situation (Stock 2011; Simmons 2007). Ultimately, in response to a letter from Senator John Kerry of Massachusetts, the then Secretary of the Department of Homeland Security Michael Chertoff granted “discretionary parole” to Hiraldo and her greencard application was quickly approved (Stock 2011).

To reach this result, Chertoff had to repurpose a provision of immigration law that gives the Secretary of DHS authority to “parole” for “urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States.”<sup>32</sup> The purpose of the law was to provide a mechanism to allow individuals with an urgent need to enter the United States for reasons such as medical treatment or to participate in judicial proceedings to do so. While the practice of granting parole to individuals who entered the United States in an irregular manner and allowing them to adjust status has been used before (specifically in the case of Cubans who came to the U.S. by boat and were paroled into the United States when they were released from immigration custody) granting PIP to individuals who already reside in the United States so they may adjust status is not what was contemplated when the parole provision was enacted.<sup>33</sup>

Indeed, the heading under which the parole provision was enacted is entitled “Temporary admission of nonimmigrants.”<sup>34</sup> Since the time that Yaderlin Hiraldo was paroled and allowed

---

<sup>32</sup> INA § 212(d)(5)(A).

<sup>33</sup> A USCIS Policy Memorandum discusses the authority for the Parole in Place policy and cites to memorandum authorizing paroled Cuban immigrants to adjust status as the precedent for the policy. *See* “Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i),” dated November 15, 2013 (PM-602-0091).

<sup>34</sup> INA § 212(d).

to obtain a greencard, local USCIS offices have continued to grant parole in place on an *ad hoc* basis and various members of Congress have continued to express concerns about the hardships that immigration law has visited on the families of members of the Armed Forces. A recent memorandum from USCIS creates a uniform policy for PIP and provides instructions on adjudicating PIP requests. The memorandum states that the policy is needed because military families “face stress and anxiety because of the immigration status of their family members in the United States,” which adversely effects military preparedness because active duty service members have to “worry about the immigration status of their spouses, parents and children.”<sup>35</sup> Additionally, the policy extends to the family members of veterans “who have served and sacrificed for our nation” and who “can face stress and anxiety because of the immigration status of their family members in the United States.”<sup>36</sup>

My intention in discussing the PIP policy is not to claim that it as unprincipled instrumentalist interpretation of the law to reach a particular result. Indeed, the authority used by the Secretary of DHS is clearly in the language of the law that gives him or her discretion to parole “any alien applying for admission to the United States.” Ironically, being able to apply that authority to long-time residents of the U.S. who entered without inspection is made possible by one of the 1996 amendments to the INA, which created the legal fiction that any non-citizen who was not lawfully admitted into the United States remains “an applicant for admission” regardless of their physical location or length of residence in the United States.<sup>37</sup> While the intent of the law was to limit the rights afforded to individuals who had not been lawfully admitted to the United States, it also laid the groundwork to allow the use of parole authority

---

<sup>35</sup> Op. cite FN 3 at 2.

<sup>36</sup> Op. Cite FN 3 at 2.

<sup>37</sup> INA § 235(a)(1).

under the PIP policy. While the conceit that a person who has lived for years, even decades, in the United States is being paroled into the United States from outside its jurisdiction may seem to strain credulity, it is in fact a consistent application of a law that in most other cases operates to the detriment of non-citizens.

What is problematic about the PIP policy is its narrow scope and application. There is no statutory reason that PIP can be exercised on behalf of military families but not in other cases where there is an urgent humanitarian need or a significant public benefit. For instance, a recent report showed that between 2005 and 2010, 87% of the completed deportation cases in New York City involving parents of U.S. citizen children resulted in deportation, which equates to at least 7,111 parents of U.S. citizen children being deported during that period.<sup>38</sup> Similarly, another study showed that nationwide in the first six months of 2011, 46,000 parents of U.S. citizen children were deported, which shows a rise in the rate of deportations of the parents of U.S. citizen children from 8% of those deported between 1998 and 2007 to 22% of those deported in the first half of 2011 and that these deportations resulted in over 5000 children being admitted into the foster care system (Wessler 2011). Thus, while the hardships, stress, and potential harm to the national interest that has been cited in support of the use of PIP on behalf of military families are no doubt real, they are not the only hardships and harms caused by not allowing individuals who entered the U.S. without inspection to adjust their status and obtain greencards.

The outcry from members of Congress when the laws, which Congress itself created and allows to remain in place, will result in the deportation of the wife of a member of the military

---

<sup>38</sup> New York University School of Law Immigrant Rights Clinic, “Insecure Communities, Devastated Families: new Data on Immigrant Detention and Deportation Practices in New York City” (2012), available at <http://immigrantdefenseproject.org/wp-content/uploads/2012/08/NYC-FOIA-Report-2012-FINAL-Aug.pdf>.

contrast sharply with their opinion of the same law being applied to other families. For instance, when an eleven-year old girl, who is a U.S. citizen, asked Republican Congressman Scott DesJarlais what could be done to help her father who was in deportation proceedings, he responded, “We have laws, and we need to follow those laws and you know, that’s where we’re at” (Balcerzak 2013). Similarly, a majority of the House of Representatives voted for a bill that would have reversed the Deferred Action for Childhood Arrivals program (“DACA”), which suspends deportation proceedings or instituting deportation proceedings against certain individuals who have lived in the United States since they were children and meet educational and good moral character requirements (Espo 2013).

The point of raising this contradiction between how undocumented migrants who benefit from the PIP program are characterized and how other undocumented immigrants are portrayed is to show that the definition and enforcement of immigration categories is not now, nor has it ever been, based on inflexible “Rule of Law” principles. As Ngai (2004) showed, when the category of “illegal alien” was first being defined after the passage of the 1924 Quota law, not all undocumented migrants were treated the same (see Chapter 2). When “European and Canadian immigrants had come face-to-face with a system that had historically evolved to justify arbitrary and summery treatment of Chinese and other Asian immigrants,” there was public outcry that “deportation policy was applied in arbitrary and unnecessarily harsh ways, resulting in the separation of families, with no social benefit” (Ngai 2004: 76-77). As a result, hundreds of thousands of undocumented European migrants were afforded the opportunity to legalize their immigration status through waivers of deportation, pre-registration, or the Registry Act, while similar opportunities were not afforded to undocumented Mexican migrants who had come to be seen as the quintessential “illegal aliens” (see Chapter 2). It is this same sort of value judgment

regarding which undocumented migrants are worthy of a chance to legalize their status that is currently taking place with the PIP program, or more precisely with the failure to expand a similar policy beyond just military families.

One could make the argument that the spouses and other immediate family members of members of the military are a special case warranting extraordinary measures in a way that no other immigrants are. For instance, advocates of the PIP program, rightly, point to the unconscionable situation of individuals risking their lives in defense of a country that is simultaneously attempting to deport their family members as justification for the program. While this justification is both compelling and understandable, it is based on the very sorts of judgments about substantive personal equities that are deemed irrelevant under immigration law in most other cases: What is the individual's relationship to society and the nation-state? What sorts of *de facto* social membership should be recognized? What kind of recognition is an individual who has lived, worked, and/or raised a family in the United States owed by society?

Linda Bosniak, in discussing how citizenship contains both inclusionary and exclusionary aspects, notes that non-citizens pose a problem for many progressives arguing for greater social justice because defining equal membership in terms of citizenship has long been seen as “a necessary condition for preservation of the community *within which* the struggle against social subordination takes place (Bosniak 2006: 11).” She notes that, “[i]n the critical literature across the disciplines, it is common to come upon laundry lists of the vectors of subordination—such as race, ethnicity, gender, class, sexual orientation, religion, disability, and appearance—that fail to include or even acknowledge the category of alienage” (Bosniak 2006: 10). If liberal legal notions of equality and the supremacy of property rights have amounted to the “coded denial of experience” for citizens of differing socio-economic positions (Corrigan and Sayer 1981: 33), the

denial of the experiences of non-citizens in the legal realm has been all the more severe. Indeed, the subordinate relationship to society that non-citizens have is not only conditioned by their material circumstances but is defined by legal categorization. Thus, while the inability to recognize material reality and lived experience is characteristic of all impersonal formal rational legal systems (Weber 1922 [1954]), this lack is particularly acute in the area of immigration law. Both John Rawls (1971) and Michael Walzer (1981) assumed that establishing membership was a prerequisite for the discussion of social and distributional justice. The PIP program and, to a lesser extent, the DACA program and cases such as Mamadou Soumare's indicate that societal membership is not coterminous with legal citizenship and that society can value and recognize social and personal relationships, social and civic participation, physical presence, and labor and material contributions as a basis to recognize membership. These ideas are at odds with both the letter and the spirit of the 1996 immigration laws and reverse the formula that social justice always flows from citizenship and instead posit that social justice can form basis for recognition and membership. What is problematic is that these sorts of equities are only observed in the breach and not in standard practice. While it is possible to achieve a just and fair result in deserving cases, as the examples in the preceding chapters demonstrate, there is nothing about the structures or procedures of immigration law that necessarily require that just results be achieved or even that they be achieved on balance.

## Chapter 5

### The Limitations and Possibilities of U.S. Immigration Law

There are three related aspects to my criticism of U.S. immigration law, policy, and implementation. First, throughout history, immigration laws have been passed to address perceived crises to the economy, public safety, racial or cultural make-up of the United States, or some combination of these fears. Often these fears have taken the form of a moral panic in which migrants are painted in the most negative terms possible. Many of these laws, meant to address a specific perceived threat, have in practice broadly encompassed individuals who do not resemble the threat that the laws were initially enacted to address. For example, the breadth of the aggravated felony provisions of Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) can cover individuals who have merely shoplifted. This process is uniquely undemocratic, in that the legislature is expressly seeking to regulate non-citizens for the benefit of their constituents, citizens. Second, the courts have deferred to the political branches of government in the creation and implementation of these laws, thereby depriving migrants of the protection that the judicial branch is, at least in theory, supposed to afford political minorities. This history is apparent from the time that it was held that the federal government had plenary power to exclude the Chinese “hoards” in *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), to the use of immigration laws to detain Arab, Muslim, and South Asian men following the 9/11 attacks without access to council or any determination that they presented a threat to public safety, to the ratification of mandatory detention in *Demore v. Kim*, 538 U.S. 510 (2003). Finally, these two aspects of the law combine to create a situation in the application of immigration laws where the individual circumstances and equities of a person’s life are often

deemed irrelevant in determining whether that individual will be permitted to remain in the United States.

### **Legislation Creates Substantive and Procedural Effects**

Legislation creates substantive decisions, “who’s in and who’s out,” based on social, economic, political, and cultural concerns, pressures, and fears. The actual laws tend to be so broad that they sweep within their ambit noncitizens who bear no resemblance to the “abstract alien” that was identified as the threat that motivated the creation of the legislation.

At the same time, the history of legislation has progressively created a system in which the process and procedures that implement and enforce immigration law are increasingly administrative. The Chinese Exclusion Era establishes that the political branches have plenary power over immigration. Beginning with the general exclusionary turn of the quota laws of the 1920s, the category “illegal alien” was established along with the administrative structure of immigration enforcement by the executive branch. The courts have deferred to the administrative authorities in this process to the exclusion of considerations of due process and other constitutional rights.

Policy promotes certain types of lawful migration while simultaneously promoting, and exploiting, certain types of undocumented labor. Ngai (2004) shows how some undocumented immigrants, predominantly Europeans, were allowed to legalize their statuses because of humanitarian considerations at the same time that Mexican migrants become the quintessential “illegal alien” and perennial source of migrant labor. This process became legitimized and regularized through the Bracero program, which not only promoted formal temporary migrant labor but also the growth of undocumented labor by establishing expectations on both sides of

the border that such labor would continue. With the end of the Bracero program, this migration continued through a practice of benign neglect and bureaucratic blame shifting.

These elements combined to create a system whose aim was to manage the undocumented labor population in the United States. The process allowed wide discretion to the executive to enforce immigration laws with minimal judicial oversight. At the same time the stakes were, in some ways, lower since the tacitly accepted practice of circular migration allowed for an individual who had been deported to simply reenter at a later time. For instance, during the Bracero program, undocumented workers were often simply taken across the border only to be readmitted as “legal” Bracero labor. Additionally, while never an advantageous position, prior to Immigration Reform and Control Act (“IRCA”) in 1986, there was often very little by way of interior enforcement of immigration law meaning once inside the U.S. one could work and live regardless of status.

With the advent of the limits on migration from the Western Hemisphere in the Hart-Celler Act of 1965, the phenomena of undocumented migrant labor took on a new characterization as Mexican migrants were characterized as a threat to the economy and society. This coincides with the onset of globalizing economic processes of capital being invested abroad and neoliberal social austerity implemented domestically. Capital flight and foreign direct investment destabilized traditional economic practices in migrant-sending countries and created displaced mobile populations in need of work. At the same time, this process had the effect of deindustrializing developed countries leading to decreases in job security and relative wages and creating economic instability for citizens in the United States who had considered themselves middle class. The linkages created by both capital investment and military intervention where capitalist interests had created “strategic national interests” continues to promote migration to the

United States by creating both actual connections between the United States and migrant-sending countries but also by creating the perception that migrating is both possible and desirable. This “postmodern paradox” (Massey 2009) means the very processes that promote migration to the United States also promote the growth of anti-immigrant sentiment domestically. The law that was struck down in *Plyler v. Doe*, 475 U.S. 202 (1982), which would have prohibited undocumented children from attending public school, was an early example of anti-immigrant sentiment being linked to the economic concerns of U.S. citizens who were losing stability both in terms of employment and basic government services, such as quality education.

IRCA and the discussion around its implementation also highlights the view that undocumented migrants are a threat to domestic workers and the fiscal health of the nation but also began to characterize immigrants as lawbreakers for whom the solution is law enforcement. While IRCA began the growth of enforcement on the U.S.—Mexico border, the law’s employment enforcement components were thwarted by both legislative and administrative reluctance to sanction U.S. employers who used undocumented labor. Growing populations of undocumented migrants were characterized as an invasion and along with economic insecurity caused by the globalizing economy and neoliberal austerity led to broad support for California’s Proposition 187 ballot measure in which migrants were seen as both undeserving consumers of public benefits and unfair labor competition for domestic workers. The 1996 immigration laws adopted the characterization of undocumented migrants as an economic threat but expanded the theme by also raising the concern that many migrants were “criminal aliens” and threats to the safety and security of the United States. Additionally, it expanded fears of migrants being economic and security threats from just encompassing undocumented migrants to also include lawful permanent residents. The result was a set of laws that increased the grounds on which

individuals, including lawful permanent residents, could be deported and which drastically reduced the discretion immigration judges had to provide discretionary relief from deportation. The laws also increased the circumstances by which a migrant could be or in some cases had to be held in detention. The 1996 laws are a prime example of how immigration statutes aimed at addressing an abstract fear, in this case “criminal aliens,” are drafted so broadly that they also as to include significant numbers of individuals who do not present any of the dangers the law was meant to address.

### **Law, Society, and Immigration Law**

Law has had a major effect on how immigrants, particularly undocumented immigrants, are perceived and treated in society. Law is not separate and apart from society but exists as a unique institution within society both affecting social change and being directed by social change. As the history of immigration law discussed in Chapter 2 demonstrates, which immigrants were welcomed or rejected changed depending on economic, political, and social factors (such as racial attitudes) and the definitions of what sorts of immigration were permissible or excludable differed over time. Since the 1990s, hostile attitudes towards undocumented immigrants have been represented in laws to a greater and greater extent, most significantly with the 1996 amendments to the Immigration and Nationality Act (“INA”). The effects of these laws have resulted in greater numbers of individuals being detained and deported and a significant increase in the militarization of the border. These increased enforcement activities have not merely reflected legal mandates of these new laws, they have conditioned social expectations regarding what legal norms are, who is subject to immigration law enforcement, and the manner in which that enforcement should take place.

The implementation of the 1996 laws resulted in a massive increase in enforcement and

detention. The number of deportations has increased steadily from 69,680 in 1996 to 419,384 in 2012.<sup>39</sup> Of those people deported a significant number are the parents of U.S. citizen children. One study showed that in the first six months of 2011, 46,000 parents of U.S. citizen children were deported and that these deportations resulted in over 5000 children being put into the foster care system (Wessler 2011). The number of immigrants held in jails and other detention centers for violating immigration laws increased exponentially and many of those detained were held in conditions where abuse and neglect were commonplace (Dow 2004). In 1996, approximately 20,000 people were held in detention. By 2012, the number had reached approximately 478,000.<sup>40</sup> When the amendments were passed, there were 6,280 beds available for immigration detention, by 2012 the daily average number of individuals in detention had increased to 32,953, more than had been held for the entire year of 1996 (Siskin 2012).

These increases in enforcement actions are dramatic and reflect the “war on illegal immigration” approach that has existed for the last two decades. In some respects, this enforcement could be self-justifying and self-perpetuating because many people may assume that “surely the government would not go to all of the effort and expense to detain these individuals and treat them like threats to public safety if it were not necessary.” These policies have also become entrenched sources of income for both private prison companies and for county jails that contract with the federal government to detain immigration detainees and receive a significant portion of the \$2 billion that the federal government spends on immigration detention annually (Selway and Newkirk 2013).

---

<sup>39</sup> Department of Homeland Security. *Immigration Enforcement Actions: 2012*. Available at [https://www.dhs.gov/sites/default/files/publications/ois\\_enforcement\\_ar\\_2012\\_1.pdf](https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf)

<sup>40</sup> Department of Homeland Security. *Immigration Enforcement Actions: 2012*. Available at [https://www.dhs.gov/sites/default/files/publications/ois\\_enforcement\\_ar\\_2012\\_1.pdf](https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf)

In part because of these changes in law and enforcement policy, there is a tendency in some of the literature to address immigration law as a monolithic and punitive power (see Chapter 1). This view is understandable and in many respects justified and work that illustrates the real life human consequences of these laws and provides a valuable counter-narrative to the narrative embodied in current immigration law and policy. This monolithic view, however, is incomplete and thus fails to identify both the problematic and the beneficial aspects of immigration law with sufficient specificity to practically evaluate that law. The problems critiqued in immigration law stem from specific provisions and practices, which, in turn, have specific histories. These details, both the provisions of the law and their histories, are necessary to make any informed evaluations, judgments, and recommendations. The preceding chapters illustrate how there is a range of situations encountered in immigration law, from individuals who have legal avenues to present their personal circumstances and equities to those individuals who have no avenues of relief available because of the strictures of current immigration laws.

The types of difficulties people face stemming from immigration law can be divided into two types: (1) those where the problem stems from the categorical inflexibility of immigration law which makes obtaining relief impossible and (2) cases where bureaucratic strictures and structural impediments make obtaining relief difficult but not impossible. Examples of the first type are those of individuals who are deemed irredeemably excludable from U.S. society and who will be removed even if it means separating them from their families after living in the United States for decades. These include individuals with a minor drug offense, those who fall under the expanded definition of aggravated felon, or those who simply have no way to obtain a lawful status (see Chapter 3). In these cases, the difficulties arise because of specific provisions of immigration law mandate deportation and because current laws have reduced the amount of

discretion that immigration judges have to grant relief regardless of individual circumstances and equities. In the second category are cases where individuals are at risk of deportation but nonetheless have some avenue of relief open to them, such as requesting a waiver or applying for asylum. In this category, individuals still face considerable obstacles, such as the one-year statute of limitations for asylum applicants (see Chapter 4) or obtaining the necessary legal assistance to be able to present a persuasive case but they at least still have an opportunity to have their individual circumstances considered. As discussed in the preceding chapters, the burdens faced by individuals in this second category can be severe, such as the difficulties faced by detained and unrepresented individuals facing deportation when contrasted with non-detained and represented individuals. While these burdens are significant, the problems created by immigration law in the first category and in the second category are fundamentally different and they raise different critiques and invite different solutions.

Many of the sorts of cases that fall within the first category, that is individuals whose equities are pretermitted by the inflexible strictures of current law, result from the 1996 amendments to the INA. For instance, the abolishing of §212(c) relief, as discussed in Chapter 3, has left many greencard holders who have criminal convictions without any possible relief. As illustrated by Jane's case that Anna recounted, being able to apply for relief under §212(c) allowed Jane to show the immigration judge that there was more to her as a person than a single criminal offense that could have made her deportable. Under that process, Jane was able to show the judge that her arrest arose out of an abusive relationship, that it was her only offense, that she had taken every opportunity to better herself through educational and professional achievement, and that no public benefit could result from deporting her from the only country she had known since arriving as a six year old child. Under the INA as amended by the 1996 laws, all of those

factors would be irrelevant and the immigration judge would have no choice but to order Jane deported. Additionally, the 1996 amendments replaced the more generous form of relief, called suspension of deportation, for undocumented individuals who had long-standing ties to the U.S. with the much more limited cancellation of removal for non-lawful permanent residents, which requires ten-years of continual presence in the U.S., good moral character, and a showing of “exceptional and extremely unusual hardship” to a qualifying U.S. citizen or lawful permanent resident relative. The high threshold of this law means that a person with a family and good character but who has only been in the U.S. for nine and a half years would simply be ineligible for relief from deportation. For most immigration lawyers, having a system where many cases are decided without reference to the facts of the individual case and where the immigration judges do not have the power to provide relief when circumstances and equity warrant is the main flaw of the current system. As one lawyer put it, “Judges need to have discretion again, if you are not going to do that don’t call them judges, okay, because there’s no point.”

The second category of cases, where an individual may have a chance to establish a claim for relief, is in some ways more complicated. Even if the possibility for relief exists, the individual may still need to navigate the procedural complexities of the system, attempt to understand and comply with the legal requirements of the available relief, and face the possibility of having her case heard by an unsympathetic judge. Again, some of the critical problems faced by individuals seeking relief from deportation also stem from structural impediments created by the 1996 amendments. For instance, the increase in the grounds on which an individual can, or in some cases must, be detained during their case creates a significant burden for many individuals and prevents them from presenting the merits of their cases. As discussed in Chapter 3, being detained both effects an individual’s ability to obtain

and pay for legal assistance and the ultimate determination of whether someone receives a favorable outcome. One study conducted by the Study Group on Immigrant Representation, which was initiated by Judge Robert A. Katzmann of the Court of Appeals for the Second Circuit, showed that in New York 60% of detained individuals do not have legal representation and that the consequences of being unrepresented are significant. For instance, 74% of individuals with legal representation who were not detained had favorable outcomes, while only 3% of individuals who were unrepresented and in detention had favorable outcomes.<sup>41</sup> Related to this issue is the fact the nearly half of individuals in immigration court lack legal representation. Given the complexity of immigration law it is unrealistic to assume unrepresented individuals are receiving a fair opportunity to be heard. For instance, the case of the man discussed in Chapter 3, who had been previously been granted asylum and who had been living in the U.S. for decades as a lawful permanent resident but was being threatened with removal as an “aggravated felon” for having sold untaxed cigarettes illustrates the difference adequate representation can make to the outcome of a case. Once the person in question obtained legal representation, his lawyer was able to demonstrate that his conviction was not a deportable offense and he was eventually released from detention. But there is nothing in the current system that requires an individual facing deportation to receive legal assistance, and the current detention policy actually makes it less likely that individuals will be able to obtain legal assistance.

In criminal trials where a defendant faces imprisonment, the Supreme Court has held that the Constitution requires defendants to be provided with legal representation. In 1963, when the

---

<sup>41</sup> *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*. Published by Cardozo Law Review, Cardozo School of Law, Yeshiva University, New York. Available at [http://www.cardozolawreview.com/content/denovo/NYIRS\\_Report.pdf](http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf).

U.S. Supreme Court unanimously made this ruling, in *Gideon v. Wainwright*,<sup>42</sup> it stated that it was an “obvious truth” that an indigent defendant could not receive a fair trial in a criminal case without assistance of counsel. Nearly fifty years after *Gideon*, the Court continues to hold that there is no right to appointed legal counsel in immigration proceedings because they are civil rather than criminal proceedings. While the nature of the difference between criminal and immigration proceedings may formally support the distinction the Court has made – that immigration proceedings are considered civil and thus the Sixth Amendment right to counsel does not apply – as a factual matter, however, the process and the consequences are materially similar. For instance, like criminal trials, immigration hearings are adversarial proceedings brought by the government against an individual. Like in criminal trials, in immigration proceedings, a lawyer represents the government. And like in criminal trials, the consequences to the individual are dire and involve the loss of liberty. The Supreme Court has acknowledged that “deportation may result in the loss of all that makes life worth living.”<sup>43</sup> Indeed, the stakes are often much higher for someone facing deportation than for someone facing prosecution for a minor criminal offense.

An additional issue presented in cases where immigration judges have discretion to grant relief to an individual facing deportation is the manner in which some immigration judges exercise that discretion. Many lawyers expressed the opinion that while they felt most immigration judges were fair and open minded at the beginning of a case, some judges were predisposed to deny relief when it was available. This impression is supported by one study of New York immigration judges that showed that overall New York judges have a high rate of granting asylum relief but a few judges have very low rates of granting asylum relief with one

---

<sup>42</sup> 372 U.S. 335 (1963).

<sup>43</sup> *Bridges v. Wixon*, 326 U.S. 135, 147 (1945).

judge only approving 7% of cases and another only granting 8% (see Chapter 4). It may, on the surface, seem paradoxical to argue that immigration law requires immigration judges to have greater discretion but to then criticize that manner in which that discretion is exercised. Here too, however, there is an issue in how immigration law has been structured by recent amendments to the INA both by the 1996 amendments and more recently with the REAL ID Act of 2005. In reviewing immigration cases, appellate courts have less ability to review decisions made by immigration judges than courts do when reviewing other types of decisions from administrative agencies. Specifically, the scope and standard of review that an appellate court has when reviewing the factual findings made by immigration judges and how judges assess the credibility of an asylum seeker has been narrowed. Similarly, in other non-asylum cases, appellate review been even more sharply curtailed. Prior to the 1996 amendments, federal courts could review denials of discretionary relief, such as waivers, under an abuse of discretion standard of review, meaning that discretionary decisions by immigration judges could be reversed if they were arbitrary, capricious, or based on suppositions that were unsupported by the evidence. After the 1996 amendments, determinations by immigration judges regarding an exercise of discretion are not subject to judicial review. The concern is not simply that immigration judges commit errors in the exercise of their discretion, indeed, that happens in every area of law, or as one lawyer I spoke to put it: “People get upset about immigration, the [immigration] judges say, ‘Go to any court. You are going to have a crazy judge in criminal court, in matrimonial court, it doesn’t matter.’ They’re people so when people are like, immigration’s different, I think it’s pretty much the same as any other court.” The problem is that recent amendments to immigration law have curtailed the ability of appellate courts to review and correct those errors as would be possible in other areas of law when judges commit

errors.

### **Law, the Plenary Power Doctrine, and Immigration Law**

The 1996 laws are not the only constraint on appellate review of immigration laws and their application. Dating back to *The Chinese Exclusion Case*, in which the Supreme Court announced the plenary power doctrine, the courts have exercised deference to the political branches of government on matters of immigration. The history of immigration regulation in the U.S. has been particularly subject to social and political currents and a variety of social, economic, and political factors have dictated how immigrants are viewed and how they are characterized and treated by immigration law. While views regarding any issue on immigration tend to be divided, even polarized, based on recognition of the complexity of U.S. society's relationship with immigration, once one view is concretized as law that complex socio-economic history is no longer considered in the law's application. This is particularly true if the paradigmatic view of immigration that prevails in the legislature is one that characterizes migrants in negative terms as threats to societal interests, the economy, and law and order itself. For instance, the laws that currently regulate the treatment of immigrants, especially the 1996 laws, fit this description having had their origin in contested views of immigrants and radically changing how the law views and treats immigrants, and shifting societal inertia to make cracking down on "illegal immigrants" and "criminal aliens" a bureaucratic and, for some, a public objective. Laws that negatively affect immigrants are perhaps easier to pass and harder to change than legislation negatively affecting other social groups because noncitizen immigrants are axiomatically not represented politically. Ideally the courts are supposed to act as an anti-majoritarian counterbalance because meaningful limitations on the power of the legislature "can be preserved in practice no other way than through the medium of courts of justice, whose duty it

must be to declare all acts contrary to the manifest tenor of the Constitution void.”<sup>44</sup> In practice, however, courts have been reluctant to fulfill this role in the area of immigration.

In abdicating their responsibility to review the application of immigration laws in individual cases, the Supreme Court’s chief justification has been to invoke the plenary power doctrine under which a court will not engage in constitutional scrutiny of actions by the political branches of government. “The Supreme Court explains its deference to Congress and the executive in these cases by relying on the concept of sovereignty, reminding us of the government’s ultimate responsibility to protect the national interest” (Saito 2007: 5). In addition to being used in the context of immigration cases, versions of the plenary power doctrine have been used by the Court to avoid finding constitutional violations in cases involving Native Americans and colonial subjects in U.S. territories such as Puerto Rico (Saito 2007: 16). Ironically, in all of these instances the plenary power doctrine is invoked to explicitly prevent courts from reviewing the constitutionality of legislation aimed at politically disenfranchised minorities: the very groups and individuals who most need protection from unreasonable abuses from the majority.

By failing to require a justification for limiting the rights of specific individuals before enforcing immigration law against them, the courts have allowed immigration enforcement to proceed based on determinations that do not consider law in relation to facts but rather look only at the legal categories that define the individuals involved. In many immigration cases the relationship between law and fact has become compounded to the point that legal definitions, such as “aggravated felon,” are determinative to the exclusion of all other facts. The system is a dichotomy based on status, rather than a context specific analysis based on the individual. This

---

<sup>44</sup> *The Federalist Papers No. 78* (Alexander Hamilton).

has lead to anomalous results such as individuals who have been convicted of minor offenses, such as misdemeanor shoplifting and who never even served jail time for the offense, being branded aggravated felons with life altering consequences for them and their families.

The role the plenary power doctrine plays in preventing individuals from having their rights considered is made clear in a report issued by the Center for Immigration Studies (“CIS”), an organization the advocates in favor of strict immigration restrictions and enforcement, that raised concerns that pro-immigrant rights organizations were attempting to erode the application of the plenary power doctrine. In that report CIS argued that the “attempt at erasing the plenary power must not go unaddressed. Without the plenary power doctrine, the judicial branch — rather than elected members of the political branches — would be in control of much of the nation’s immigration system as courts apply constitutional or ‘constitutional-like’ standards to all exclusion and deportation cases” (Feere 2009: 2).

One could fairly argue that the plenary power doctrine, and much of immigration law, fits within what Giorgio Agamben called a “state of exception.” Agamben characterized the state of exception as “an attempt to include the exception itself within the juridical order by creating a zone of indistinction in which fact and law coincide” (Agamben 2005: 26). Looking back at the origin of the plenary power doctrine, the rational for the abdication of judicial review in the area of immigration law, as expressed in *The Chinese Exclusion Case*, was that the sovereign power of the nation can be executed to “preserve its independence, and give security against foreign aggression and encroachment.” *Chae Chan Ping v. United States*, 130 U.S. at 606. The Court’s decision not to act on Mr. Chae’s claim that his due process rights were violated by the Scott Act of 1888 retroactively revoking the reentry permits of Chinese who resided in the United States was not premised on a factual or legal determination that his rights had not been violated.

Rather, the Court's decision was based on acquiescence to that violation as an exercise of sovereign power, specifically an act of sovereign power to defend the nation from an outside threat. Paradoxically, up until the Scott Act rescinded Chae's reentry permit, he was not an outsider but someone legally entitled to enter and to reside in the United States, thus the condition that the Court relied on in upholding the Scott Act, security from foreign encroachment, did not exist at the time the law was passed because Chae's outsider status was created by the Scott Act itself. The case is a quintessential example of Agamben's "zone of indistinction in which fact and law coincide" (Agamben 2005: 26) because the Scott Act was not upheld based on reference to external facts or laws but rather because it provided its own justification for being upheld, indeed, it provided its own material facts. For Agamben, "the paradox of sovereignty consists in the fact that the sovereign is, at the same time, outside and inside the juridical order" (Agamben 1998: 15) and it is impossible to determine if necessity proceeds law or whether the necessity originates from the law because the origin of the necessity is at "a threshold where fact and law seem to become undecidable" (Agamben 2005: 29). According to Agamben, the sovereign not only has the right to act in the event of a threat but to declare whether such a threat exists because, "necessity clearly entails a subjective judgement, and that obviously the only circumstances that are necessary and objective are those that are declared to be so" (Agamben 2005: 30). Because the exercise of sovereign power is "at the same time, outside and inside the juridical order" (Agamben 1998: 15), "[o]ne of the paradoxes of the state of exception, lies in the fact that in the state of exception it is impossible to distinguish transgressions of the law from the execution of the law" (Agamben 1998: 57).

Agamben's idea that the state of exception is "a zone of indistinction between... exception and rule" where "the very concepts of subjective rights and judicial protection no

longer made sense” (Agamben 1998: 170-71) can describe much of the application of immigration law. Legislatively categories of deportable and excludable people, which bear little relationship to levels of personal culpability, determine the fates of individuals with no opportunity for them to have their individual circumstances considered. At the same time, a program like Parole in Place (“PIP”) has been created to protect military families from these severe consequences of immigration laws at the behest of the very same congress people who created those laws. Here, is a situation where the legislation as drafted is deemed too harsh to be suffered by military families so a policy to issue parole is invoked for their benefit alone. In a case such as this it is indeed difficult to determine if law is being applied (using the parole statute) or ignored (not enforcing the prohibition on entry without inspection) but what is certain is that the PIP policy is an exception outside of standard legislative or juridical process. It is an exception rooted in recognition that current immigration laws are too strict, punitive, and inflexible that allows for the reallocation of the benefits and burdens imposed by those laws without having to actually consider if and how the laws are too strict, punitive, and inflexible.

While Agamben’s formulation of the state of exception is relevant and illuminating as applied to the prerogative power that is granted to the political branches of government by the plenary power doctrine, the picture he paints is one where the sovereign is free of virtually all constraints: “[t]he normative aspect of law can ... be obliterated and contradicted with impunity by a governmental violence” (Agamben 2005: 87). Additionally, his presentation discounts the possibility that other forces having influence in the formulation or application of law and is particularly dismissive of the legal professions ability resist such states of exception. While this dissertation has in part demonstrated that in many instances lawyers are powerless to introduce the facts of their individual clients life in to the determination of whether they will be deported or

not, in other areas lawyers are able to influence the outcomes of their clients' cases. Between these two polls one is able to map those areas of law that intractable as well as those that are flexible. From this map one can chart a course that would allow for greater consideration of all of the elements and factors in a given case such that more reasonable and fair outcomes are possible.

### **Recommendations**

First, it is crucial to recognize that previous legislation has created harsh and inflexible penalties and has limited due process protections. Two laws passed in 1996, the Antiterrorism and Effective Death Penalty Act (also called "AEDPA") and IIRIRA, radically changed immigration law by expanding the reasons for which a person could be deported, by significantly limiting the discretionary relief that an immigration judge could grant, and by limiting the power of the federal courts to review deportation decisions. As a result the number of removals has increased dramatically. In many cases people who would seem to have significant factors that should weigh in their favor, such as families and long-term residency in the U.S., are rendered deportable and there is no mechanism to balance the equities involved in their individual cases.

Second, this has particularly been the case where lawful permanent residents are facing removal based on a criminal conviction. While criminal conduct has long been a focus of immigration enforcement, the passage of the 1996 laws has broadened the list of conduct that can result in deportation while severely limiting the possibility for discretionary relief. As a result, long-term legal residents of the United States have faced permanent separation from their families and, in some cases, banishment from the only country they have ever known, based on convictions for relatively minor offenses. The chief harm of the 1996 laws in this respect is the elimination of discretion on the part of immigration judges. Immigration judges should be

allowed to balance all of the factors in a case, such as severity of the crime, evidence of rehabilitation, ties to the community, and harm to family members, in arriving at a just and equitable result and those decisions should be subject to review by appellate courts to assure that they conform to both the law and constitutional standards.

Third, the 1996 laws should be reformed to eliminate detention of immigrants who have not been determined to be a flight risk or a danger to the community. The detention provisions of AEDPA and IIRIRA have resulted in excessive and costly detention of individuals facing immigration proceedings. The current detention policy creates emotional and financial hardships to families, limits access to legal representation, and costs U.S. taxpayers nearly \$2 billion a year. One recent study has shown that an individual's chance of success depends greatly on whether he or she is represented and whether he or she is detained. Individuals facing removal in immigration court who are not detained and who have legal representation prevail 74% of the time, while individuals who are detained and unrepresented prevail only 3% of the time.<sup>45</sup>

Fourth, there should be representation to indigent defendants facing removal in immigration court. Immigration laws and procedures are among the most complex in U.S. law; it has been said they are second only to the Internal Revenue Code in complexity. Nonetheless, nearly half of individuals facing removal have no legal assistance. In New York an individual who is represented has a 500% greater chance of having a successful outcome in removal proceedings compared to a person who is unrepresented.<sup>46</sup> Even though federal law does not

---

<sup>45</sup> *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*. Published by Cardozo Law Review, Cardozo School of Law, Yeshiva University, New York. Available at [http://www.cardozolawreview.com/content/denovo/NYIRS\\_Report.pdf](http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf).

<sup>46</sup> *Accessing Justice II: A Model for Providing Counsel to New York Immigrants in Removal Proceedings*. Published by Cardozo Law Review, Cardozo School of Law, Yeshiva University, New York. Available at

require it, the New York City Council has recently provided \$500,000 for a one-year pilot project, the New York Family Unity Project, to provide legal representation to indigent individuals facing deportation. The project, which is to begin in the Spring of 2014, will be the first government program to provide indigent legal defense in immigration court and was motivated primarily by the work of the Study Group on Immigrant Representation. In announcing the program, the City Council members focused on the benefit to families by preventing unnecessary deportations and the benefit to society in not separating families. In addition to providing representation to individuals, it is hoped that the pilot project will be able to document the benefits of providing representation, such as reductions in the time individuals are detained at government expense and reducing social costs, such as when children of detained or deported individuals are placed in foster care. It is indeed remarkable that a local municipality has determined it must act and allocate funding to defend residents from the harmful effects of federal immigration laws and policies.

### **Conclusion**

Surely it would be better to have laws that allowed for discretion and proportionality and that allowed for flexibility so that they can be enforced in all cases while accounting for the specific histories and personal equities of each individual case than having a set of laws that are strict, inflexible, and punitive that are only periodically enforced against a few individuals unlucky enough to be ensnared in the enforcement regime. The current system decimates the lives of a small minority of individuals who have violated immigration laws and does so in a manner that in no way assures that the individuals being punished are the most dangerous or

most culpable offenders and in a way that discounts the personal equities that should dictate whether certain individuals should be granted clemency.

In critiquing immigration law, it should be remembered that the problems that arise from the current system are not just numerous in quantity but also in kind. Critiquing immigration law as a monolith thwarts an understanding of the specific issues that arise, their specific causes, and possible avenues for addressing them. Anthropologists and other social scientists examining immigration law and its effects should continue to illustrate the lived experiences and the palpable hardships that stem from those laws. In doing so, however, they should also shoulder the burden of illustrating the nature, origins, and application of those laws with specificity and should show not just what these laws do but how they do it.

## **Appendix**

### Topics from Semi-Structured Interviews

Legal background and experience.

What sorts of law do you practice?

What areas of immigration law do you practice?

Do you think that current immigration law limits the sorts of arguments and facts that you are able to present in representing your clients?

How often have you had cases where you believed that immigration law prevented you from presenting arguments or facts that should have been considered?

What are examples of cases where immigration law limited your ability to present arguments or facts that you felt should be considered?

Do clients ever tell you stories that you find compelling or sympathetic but which you know are legally irrelevant?

What are examples of these sorts of stories?

- How people came to the U.S. (e.g. as children).
- Why people stayed in the U.S.
- How people lost immigration status (e.g. severe immigration consequences for criminal behavior).
- Hardship to individuals or families from enforcement of immigration law.
- Denials of immigration benefit, such as asylum, because of strict immigration requirements or procedures.

Do clients ever tell you stories that you think make their actions understandable or justifiable but which you know are legally irrelevant?

What are examples of these sorts of stories?

- How people came to the U.S. (e.g. as children).
- Why people stayed in the U.S.
- How people lost immigration status (e.g. severe immigration consequences for criminal behavior).
- Hardship to individuals or families from enforcement of immigration law.
- Denials of immigration benefit, such as asylum, because of strict immigration requirements or procedures.

How should immigration laws be changed to allow for more complete consideration of facts and arguments?

By what process should this legal reform happen?

How do you think public perceptions of immigration law are inaccurate?

How does this affects creation and enforcement of immigration law?

How do you think immigration law is unique as an area of law?

How does this uniqueness affects the enforcement of immigration law?

### Master List of Topics from Interviews

*3/10 Year Bar*

*1996 Laws*

*Appeal*

*Asylum*

*Cancelation of Removal*

*Case Examples*

*Culture of ICE*

*Culture of Immigration Court*

*Culture of USCIS*

*Discretion (ICE)*

*Discretion (IJs)*

*Discretion (TAs/OCC)*

*Discretion (USCIS)*

*Drug Offense*

*Equities*

*EWI*

*Intake*

*Mandatory Detention*

*Nature of Immigration Law*

*New York/New Jersey Districts*

*Obama Administration*

*Practicing Immigration Law/Being an Immigration Lawyer*

*Public Perception*

*Racism*

*Reform*

*Schlocky/Stupid/Insane/Retarded*

*TPS*

*Waiver*

## Bibliography

Agamben, Giorgio.

1998. *Homo Sacer: Sovereign Power and Bare Life*, Stanford, CA: Stanford University Press.

Agamben, Giorgio.

2005. *State of Exception*. Chicago: University of Chicago Press.

Alexander, Michelle.

2010. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: The New Press.

Allen, Garland E.

1986. "The Eugenics Records Office at Cold Spring Harbor, 1910-1940: An Essay in Institutional History." OSIRIS, 2<sup>nd</sup> Series, 2:225-264.

Alpert, Lukas I.

2007. "10YRS. of Waiting – Just to See Dad Bury Fire Family," *The New York Post*. March 14, 2007.

Amnesty International.

2002. *Amnesty International's Concerns regarding Post September 11 Detentions in the USA*. New York: Amnesty International.

Ashcroft, John.

2001. "Prepared remarks for the US Mayors Conference, Oct. 25, 2001." Available at [http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks10\\_25.htm](http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks10_25.htm).

Balcerzak, Ashely.

2013. "Scott DesJarlais, GOP Congressman, Tells 11-Year-Old Girl Her Father Should Be Deported," *Huffington Post* (08/19/2013), available at [http://www.huffingtonpost.com/2013/08/19/scott-desjarlais-father-deported\\_n\\_3780107.html](http://www.huffingtonpost.com/2013/08/19/scott-desjarlais-father-deported_n_3780107.html).

Balderrama, Francisco E. and Raymond Rodriguez.

1995. *Decade of Betrayal: Mexican Repatriation in the 1930s*. Albuquerque: University of New Mexico Press.

Barde, Robert.

1994. "An Alleged Wife: One Immigrant in the Chinese Exclusion Era," in *Prologue Magazine* 36(1).

Barrett, James R.

1992. "Americanization from the Bottom Up: Immigration and the Remaking of the Working Class in the United States, 1880-1930." *Journal of American History* Vol. 79(3): 996-1020.

Beard, Charles A., and Mary R. Beard.

1927. *The Rise of American Civilization, Volume II*. New York: MacMillan.

Block, Fred.

1987. *Revisiting the State: Essays in Politics and Post-Industrialism*. Philadelphia: Temple University Press.

Bosniak, Linda.

2006. *The Citizen and the Alien: Dilemmas of Contemporary Membership*. Princeton, NJ: Princeton University Press.

Bosworth, Allan R.

1967. *America's Concentration Camps*. New York: W. W. Norton.

Brinkley, Joel.

1994. "California's Woes on Aliens Appear Largely Self-Inflicted," in *The New York Times*. October 15, 1994.

Calavita, Kitty.

1984. *U.S. Immigration Law and the Control of Labor: 1820-1924*. London: Academic Press.

1989. "The Immigration Policy Debate: Critical Analysis and Future Options," in *Mexican Migration to the United States: Origins, Consequences, and Policy Options*. Eds. Wayne A. Cornelius & Jorge A. Bustamante. San Diego: Center for U.S.-Mexican Studies, University of California.

1992. *Inside the State: The Bracero Program, Immigration and the I.N.S.* New York: Routledge.

2007. "Immigration Law, Race, and Identity," in *The Annual Review of Law and Social Science* 3(1): 1-20.

Chavez, Leo R.

2009. "Mexicans of Mass Destruction: National Security and Mexican Immigration in a Pre- and Post-9/11 World," in *International Migration and Human Rights: The Global Repercussions of US Policy*. Samuel Martinez, Editor. Berkeley: University of California Press.

Chavez, Leo R.

2001. *Covering Immigration: Popular Images and the Politics of the Nation*. Berkeley: University of California Press.

Chavkin, Sasha.

2012. "How New York Immigration Judges Are Upending a Federal Crackdown," in Capital New York (September 27, 2012). Available at <http://www.capitalnewyork.com/article/politics/2012/09/6537566/how-new-york-immigration-judges-are-upending-federal-crackdown?page=all>

Chock, Phyllis.

1999. "'A Very Bright Line:' Kinship and Nationality in U.S. Congressional Hearings on Immigration," *Political and Legal Anthropology Review* 22(2): 42-52.

Clary, Mike and McDonnell, Patrick.

1998. "Sentenced to a Life in Limbo." *Los Angeles Times*, September 9, 1998: 1.

Coben, Stanley.

1964. "A Study in Nativism: The American Red Scare of 1919-1920." *Political Science Quarterly* 79(1): 52-75.

Colburn, David R.

1973. "Governor Alfred E. Smith and the Red Scare, 1919-1920." *Political Science Quarterly* 88(3): 423-444.

Cornelius, W.A., P. L. Martin, and J. F. Hollifield.

1994. "Introduction: The Ambivalent Quest for Immigration Control," in *Controlling Immigration: A Global Perspective*. Stanford CA: Stanford University Press.

Cornelius, W.A. and I. Salehyan.

2007. "Does border enforcement deter unauthorized immigration? The case of Mexican migration to the United States of America," in *Regulation & Governance* Vol. 1 (2): 139-153.

Corrigan, Philip and Derek Sayer.

1981. "How the Law Rules: Variations on Some Themes in Karl Marx," in *Law, State and Society*, Bob Fryer, Alan Hunt; Doreen McBarnet; Bert Moorhouse, editors. London: Croom Helm.

Coutin, Susan.

1996. "Differences within Accounts of US Immigration Law," in *POLAR* 19(1): 11-20.

2003. *Legalizing Moves: Salvadoran Immigrants' Struggle for U.S. Residency*. Ann Arbor: University of Michigan Press.

Crook, Paul.

2002. "American Eugenics and the Nazis: Recent Historiography," in *The European Legacy* 7(3):363-381.

Crenshaw, Kimberle, Neil Gotanda, Gary Peller, and Kendall Thomas.

1995. *Critical Race Theory: The Key Writings That Formed the Movement*. New York: The New Press.

De Genova, Nicholas P.

2002. "Migrant 'Illegality' and Deportability in Everyday Life," in *Annu. Rev. Anthropol.* 2002. 31: 419-47.

2005. *Working the Boundaries: Race, Space, and "Illegality" in Mexican Chicago*. Durham, NC: Duke University Press.

Dobnik, Verena.

2007. "Fire Victims' Burial in Africa on Hold," in *The Washington Post*. March 13, 2007.

Doty, Roxanne Lynn.

2009. *The Law into Their own Hands: Immigration and the Politics of Exceptionalism*. Tucson: University of Arizona Press.

Dow, Mark.

2004. *American Gulag: Inside U.S. Immigration Prisons*. Berkeley: University of California Press.

Downey, Dennis J.

1999. "From American to Multiculturalism: Political Symbols and Struggles for Cultural Diversity in Twentieth-Century American Race Relations." *Sociological Perspectives* 42(2): 249-278.

Espo, David.

2013. "House passes measure to deport young immigrants," in *The Seattle Times* (06/06/2013), available at [http://seattletimes.com/html/politics/2021131427\\_apuscongressdreamact.html](http://seattletimes.com/html/politics/2021131427_apuscongressdreamact.html).

Executive Office for Immigration Review.

2013. *FY 2012 Statistical Year Book*. Prepared by the Office of Planning, Analysis, and Technology, February 2013.

2012. *FY 2011 Statistical Year Book*. Prepared by the Office of Planning, Analysis, and Technology, February 2012.

Feere, Jon.

2009. "Plenary Power Should Judges Control U.S. Immigration Policy?" *Backgrounders* (February 2009). Washington, D.C.: Center for Immigration Studies.

Fernandez, Manny.

2007a. "Immigrant Can Return to U.S. After Burying Family in Mali," *The New York Times*. March 14, 2007.

2007b. "Fire Victims of Bronx Fire Home to West Africa," *The New York Times*. March 17, 2007.

Fitzgerald, F. Scott.

1995 [1925]. *The Great Gatsby*. New York: Scribner Paperback Fiction.

Getz, Lynne M.

2001. "Biological Determinism in the Making of Immigration Policy in the 1920s," in *International Science Review* 70(1-2): 26-33.

Gordon, Robert.

1998. "Some Critical Theories of Law and Their Critics," in *The Politics of Law: A Progressive Critique*, 3<sup>rd</sup> Edition. David Kairys, editor. New York: Basic Books.

Gould, Stephen Jay.

1981. *The Mismeasure of Man*. New York: W.W. Norton & Company.

Gravlee, Clarence C., H. Russell Bernard, and William R. Leonard.

2003. "Heredity, Environment, and Cranial Form: A Re-Analysis of Boas's Immigrant Data," in *American Anthropologist* Vol. 105(1): 123–136.

Greenhouse, Carol.

2013. *Paradoxes of Relevance: Ethnography and Citizenship in the United States*. Philadelphia: University of Pennsylvania Press.

Grussendorf, Paul.

2011. *My Trials: What I Learned in Immigration Court: Inside America's Deportation Factories* [Kindle Book]. Published by Amazon Digital Services, Inc.

Gyory, Andrew.

1998. *Closing the Gate: Race, Politics, and the Chinese Exclusion Act*. Chapel Hill: University of North Carolina.

Hall, Kermit L.

1989. *The Magic Mirror: Law in American History*. New York: Oxford University Press.

Higham, John.

1975. *Send These to Me: Jews and Other Immigrants in Urban America*. New York: Atheneum.

Higham, John.

[1955] 1988. *Strangers in the Land: Patterns of American Nativism, 1860-1925*. New Brunswick: Rutgers University Press.

Hoefler, Michael, Nancy Rytina, and Bryan Baker.

2012. *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011*. Department of Homeland Security, Office of Immigration Statistics, March 2012.

Hollifield, James.

1998. "Migration, Trade and The Nation-State: The Myth of Globalization," UCLA. *Journal of International Law and Foreign Affairs*, Vol. 3, No.2 (Fall/Winter): 595- 636.

Jacquemet, Marco.

2009. "Transcribing Refugees: the Entextualization of Asylum Seekers' Hearings in a Transidiomatic Environment," in *Text & Talk*, Vol. 29 (5): 525–546.

Joppke, Christian.

1998. "Why Liberal States Accept Unwanted Immigration," in *World Politics*, Vol. 50 (2): 266-293.

Kanstroom, Daniel.

2007. *Deportation Nation: Outsiders in American History*. Cambridge: Harvard University Press.

King, Desmond.

2000. *Making Americans: Immigration, Race, and the Origins of the Diverse Democracy*. Cambridge: Harvard University Press.

Laski, Harold J.

1948. *The American Democracy: A Commentary and Interpretation*. New York: Viking Press.

Lee, Erika.

2006. "A Nation of Immigrants and a Gatekeeping Nation: American Immigration Law and Policy," in *A Companion to American Immigration*. Ed. Reed Ueda. Malden, MA: Blackwell Publishing.

Liptak, Adam.

2005. "Courts Criticize Judges' Handling of Asylum Cases," *The New York Times*, Dec. 26, 2005 at A1.

López, Ian F. Henry.

1996. *White by Law: The Racial Construction of Race*. New York: New York University Press.

2006. *White by Law: The Legal Construction of Race (10<sup>th</sup> Anniversary Edition)*. New York: New York University Press.

Lustig, Stuart, Niranjana Karnik, Kevin Delucchi, Lakshika Tennakoon, Brent Kaul, Dana Leigh Marks, Denise Slavin.

2008. "Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey," in *Georgetown Immigration Law Journal* 23 (1):57-83.

Marks, Dana Leigh.

2013. "Let Immigration Judges be Judges," in *The Hill* (May 9, 2013). Available at <http://thehill.com/blogs/congress-blog/judicial/298875-let-immigration-judges-be-judges>

Marks, Jonathan.

1995. *Human Biodiversity: Genes, Race, and History*. Hawthorne, NY: Aldine de Gruyter.

Massey, Douglas S.

1990. "Social Structure, Household Strategies, and the Cumulative Causation of Migration," in *Population Index* Vol. 56: 3-26.

2009. "The Political Economy of Migration in an Era of Globalization," in *International Migration and Human Rights: The Global Repercussions of US Policy*. Samuel Martinez, Editor. Berkeley: University of California Press.

Massey, Douglas S., Joaquín Arango, Graeme Hugo, Ali Kouaouci, Adela Pellegrino, J. Edward Taylor.

1998. *Worlds in Motion: Understanding International Migration at the End of the Millennium*. Oxford: Clarendon Press.

Massey, Douglas S., Jorge Durand, and Nolan J. Malone.

2002. *Beyond Smoke and Mirrors: Mexican Immigration In an Era of Economic Integration*. New York: Russell Sage Foundation.

Massey, Douglas S., Luin P. Goldring, and Jorge Durand. 1994.

"Continuities in Transnational Migration: An Analysis of 19 Mexican Communities," in *American Journal of Sociology* Vol. 99: 1492-1533.

Massey, Douglas S. and Fernando Riosmena.

2010. "Undocumented Migration from Latin America in an Era of Rising U.S. Enforcement," in *Annals of the American Academy of Political and Social Science* Vol. 630:294–321.

Massey, Douglas S. and Audrey Singer.

1995. "New Estimates of Undocumented Mexican Migration and the Probability of Apprehension," in *Demography*, Vol. 32: 203-13.

Melnick, Jeffery.

2006. "Immigration and Race Relations," in *A Companion to American Immigration*. Ed. Reed Ueda. Malden, MA: Blackwell Publishing.

Merry, Sally Engle.

2001. "Women, Violence, and the Human Rights System," in *Women, Gender, and Human Rights*. Marjorie Agosin, editor. New Brunswick: Rutgers University Press.

Motel, Seth.

2014. "On Immigration, Republicans Favor Path to Legal Status, but Differ Over Citizenship," from Pew Research Center *Facttank: News in the Numbers* (January 28, 2014). Available at <http://www.pewresearch.org/fact-tank/2014/01/28/on-immigration-republicans-favor-path-to-legal-status-but-differ-over-citizenship/>

Montgomery, David.

1987. *The Fall of the House of Labor: The Workplace, the State, and American Labor Activism, 1865-1925*. New York: Cambridge University Press.

Morawetz, Nancy.

2005. "INS v. St. Cyr: The Campaign to Preserve Court Review and Stop Retroactive Application of Deportation Laws," in *Immigration Stories*. Editors, David Martin and Peter Schuck. New York: Foundation Press.

National Immigration Forum.

2011. "The Math of Immigration Detention: Runaway Costs for Immigration Detention Do Not Add Up to Sensible Policies." National Immigration Forum (August 2011).

New York Immigrant Representation Study.

2011. *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*. Published by Cardozo Law Review, Cardozo School of Law, Yeshiva University, New York. Available at [http://www.cardozolawreview.com/content/denovo/NYIRS\\_Report.pdf](http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf).

New York State Bar Association.

2012. *Report of the Special Committee on Immigration Representation*. New York State Bar Association Special Committee on Immigration Representation. June 23, 2012.

Ngai, Mae M.

2004. *Impossible Subjects: Illegal Aliens and the Making of Modern America*. Princeton, NJ: Princeton University Press.

Office of the Inspector General.

2003. *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks*. Washington, D.C.: U.S. Department of Justice.

Ong, Aihwa.

1999. *Flexible Citizenship: The Cultural Logics of Transnationality*. Durham: Duke University Press.

2006. *Neoliberalism as Exception: Mutations in Citizenship and Sovereignty*. Durham, NC: Duke University Press.

Paterson Press Release.

2010. "Governor Paterson Announces Pardons." Press Release, December 24, 2010. Available at [http://www.governor.ny.gov/archive/paterson/printable/122410-GovPatersonAnnouncesPardons\\_printable.html](http://www.governor.ny.gov/archive/paterson/printable/122410-GovPatersonAnnouncesPardons_printable.html)

Preston Jr., William.

1963. *Aliens and Dissenters: Federal Suppression of Radicals, 1903-1933*. New York: Harper and Row.

- Piore, Michael J.  
1979. *Birds of Passage: Migrant Labor and Industrial Society*. New York: Cambridge University Press.
- Preston, Julia.  
2010. "Deportations from U.S. Hit Record High," in the *New York Times*, A21, Oct. 7, 2010.  
  
2011. "Risks Seen for Children of Illegal Immigrants," *The New York Times*, A17, Sept. 21, 2011.
- Ramji-Nogales, Jaya, Andrew Schoenholtz, and Philip Schrag.  
2007. "Refugee Roulette: Disparities in Asylum Adjudication," in 60 *Stanford Law Review* 295.
- Rawls, John.  
1971. *A Theory of Justice*. Cambridge, MA.: The Belknap Press of Harvard University Press.
- Renshaw, Patrick.  
1968. "The IWW and the Red Scare 1917-1924." *Journal of Contemporary History* 3(4): 63-72.
- Reyes, Maritza.  
2012. "Constitutionalizing Immigration Law: The Vital Role of Judicial Discretion in the Removal of Lawful Permanent Residents," *Temple Law Review* Vol. 84(3): 637-700.
- Rivera, Ray.  
2007. "Court Urges Review of New York Judge's Immigration Cases That Are on Appeal," *The New York Times*, Feb. 25, 2007.
- Roediger, David R. 1992.  
*The Wages of Whiteness: Race and the Making of the American Working Class*. London: Verso.
- Ryo, Emily.  
2013. "Deciding to Cross: Norms and Economics of Unauthorized Migration," in *American Sociological Review* Vol. 78(4) 574-603.
- Sager, Alex.  
2012. "The Implications of Migration Theory for Distributive Justice," in *Global Justice: Theory, Practice, and Rhetoric* Vol. 5: 56-70.
- Saito, Natsu Taylor.  
2007. *From Chinese Exclusion to Guantánamo Bay: Plenary Power and the Prerogative State*. Boulder, CO: University of Press of Colorado.

Salyer, J.C.

2002. "Abuse of Immigration Detainees: Before and After September 11," *Criminal Justice Ethics*, Winter/Summer 2002, Published by the Institute for Criminal Justice Ethics, John Jay College of Criminal Justice.

2011. "United States Immigration Laws and Policy from 1965 to 2009," in *Anti-Immigration in the United States: A Historical Encyclopedia*. Ed. Kathleen R. Arnold. Santa Barbara, CA: Greenwood.

Salyer, Lucy.

1995. *Laws Harsh as Tigers: Chinese Immigration and the Shaping of Modern Immigration Law*. Chapel Hill, NC: University of North Carolina Press.

Sanchez, Gabriella.

2014. "On Borders, Mobility and Crime," in *Anthropology News* Vol. 55 (5-6), May/June 2014.

Santos, Fernanda.

2007. "In a Funeral Parlor in East Harlem, Nine Coffins Point Toward Mecca," in *The New York Times*, March 12, 2007.

Saslow, Eli.

2014. "In a crowded immigration court, seven minutes to decide a family's future," in *The Washington Post*, Feb. 2, 2014.

Sassen, Saskia.

1988. *The Mobility of Labor and Capital: A Study in International Investment and Labor Flow*. Cambridge: Cambridge University Press.

1998. *Globalization and Its Discontents*. New York: The New Press.

1999. "Beyond Sovereignty: Immigration Policy Making Today," in *Immigration: A Civil Rights Issue for the Americas*. Susanne Jonas and Suzie Dod Thomas, editors. Wilmington, DE: Scholarly Resources, Inc.

Saxton, Alexander.

1971. *The Indispensable Enemy: Labor and the Anti-Chinese Movement in California*. Berkeley: University of California Press.

Schuck, Peter H.

2000. "Law and the Study of Migration," in *Migration Theory: Talking Across Disciplines*. Caroline B. Brettell and James F. Hollifield, editors. New York: Routledge.

Selway, William and Margaret Newkirk.

2013. "Congress's Illegal-Immigration Detention Quota Costs \$2 Billion a Year," in *Bloomberg Business Week*, September 26, 2013. Available at

<http://www.businessweek.com/articles/2013-09-26/congresss-illegal-immigration-detention-quota-costs-2-billion-a-year>

Shipman, Pat.

1994. *The Evolution of Racism: Human Differences and the Use and Abuse of Science*. New York: Simon & Schuster.

Shrag, Philip G., Andrew I. Schoenholtz, Jaya Ramji-Nogales & James P. Dombach.

2010. *Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum*, 52 *William & Mary Law Review* 651 (2010).

Siskin, Alison.

2012. *Immigration-Related Detention: Current Legislative Issues*. Washington DC: Congressional Research Service.

Skocpol, Theda.

1985. "Brining the State Back In: Strategies of Analysis in Current Research," in *Brining the State Back In*. Peter B. Evens, Dietrich Rueschemeyer, and Theda Skocpol, editors. Cambridge: Cambridge University Press.

Simmons, G.

2007. "Feds Say Missing Soldier's Illegal Immigrant Wife Not Likely to Be Deported," *Fox News* (June 20, 2007), available at [www.foxnews.com/story/0,2933,284832,00.html](http://www.foxnews.com/story/0,2933,284832,00.html).

Smith, Neil.

2003. *American Empire: Roosevelt's Geographer and the Prelude to Globalization*. Berkeley, CA: University of California Press.

Stark, Oded.

1991. *The Migration of Labor*. Cambridge: Basil Blackwell.

Starn, Orin.

1986. "Engineering Internment: Anthropologists and the War Relocation Authority." *American Ethnologist* 13(4): 700-720.

Stock, Margaret D.

2011. "Parole in Place for Military Families," in *Immigration Practice Pointers, (2011-12 Edition)*. Washington, DC: American Immigration Lawyers Association.

Todaro, Michael P.

1976. *Internal Migration in Developing Countries*. Geneva: International Labor Office.

Torpey, John.

2000. *The Invention of the Passport: Surveillance, Citizenship, and the State*. New York: Cambridge University Press.

Turner, Bryan S.

1993. "Outline of a Theory of Human Rights," in *Sociology* Vol. 27(3): 489-512.

Tyner, James A.

1999. "The Geopolitics of Eugenics and the Exclusion of Philippine Immigrants from the United States." *Geographical Review* 89(1): 54-73.

U.S. House of Representatives.

1920. "Temporary Admission of Illiterate Mexican Laborers: Hearings before the Committee on Immigration and Naturalization," House of Representatives, Sixty-sixth Congress, second session, on H.J. res. 271, relating to the temporary admission of illiterate Mexican laborers, January 26, 27, 28, 30, and February 2, 1920. Washington : Government Printing Office.

Unger, Roberto.

1986. *The Critical Legal Studies Movement*. Cambridge, MA: Harvard University Press.

Urbina, Ian and Catherine Rentz.

2013. "Immigrants Held In Solitary Cells, Often For Weeks," *The New York Times*, March 23, 2013.

Walzer, Michael.

1983. *Spheres Of Justice: A Defense Of Pluralism And Equality*. New York: Basic Books.

Ward, Robert De Courcy.

1924. "Our New Immigration Policy," in *Foreign Affairs* Vol. III:100-110.

Waslin, Michele.

2011. "The Secure Communities Program: Unanswered Questions and Continuing Concerns," Special Report on Immigration. Washington, DC: Immigration Policy Center.

Weber, Max.

1954 [1922]. *On Law in Economy and Society*. Max Rheinstein, editor. Edward Shils and Max Rheinstei, translators. New York: Simon and Schuster.

Wessler, Seth Freed.

2011. "U.S. Deports 46k Parents with Citizen kids in Just Six Months," Colorlines (11/2/2011) available at [http://colorlines.com/archives/2011/11/shocking\\_data\\_on\\_parents\\_deported\\_with\\_citizen\\_children.html](http://colorlines.com/archives/2011/11/shocking_data_on_parents_deported_with_citizen_children.html)

Williams, David.

1981. "The Bureau of Investigation and Its Critics, 1919-1921: The Origins of Federal Political Surveillance." *Journal of American History* 68(3): 560-579.

Williams, Patricia.

1991. *The Alchemy of Race and Rights*. Cambridge, MA: Harvard University Press.

Wiebe, Robert.

1967. *The Search for Order*. New York: Hill & Wang.

Zolberg, Aristide R.

2006. *A Nation by Design: Immigration Policy in the Fashioning of America*. Cambridge: Harvard University Press.