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LIFE AFTER DEPORTATION TO MEXICO

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COVER ART: Families separated by the two countries chat along the U.S.-Mexico border fence at Border Field State Park, California, U.S., November 19, 2016. REUTERS/Mike Blake.

ONE IN THE SHADOW OF DUE PROCESS

> In the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens.
> —*Fiallo v. Bell* (1977)

The first time she was deported, Gina was apprehended after a traffic stop. She was taken to jail and deported without setting foot in court, even though she had been a lawful permanent resident for over twenty years. Normally, a lawful permanent resident would be entitled to a court hearing to determine her deportability. However, Gina was subject to one of five major exceptions to the right to appear in immigration court—exceptions that now result in over 80 percent of the deported population being removed without a judicial hearing.[1]

She had missed a previous immigration court date, at which time she was ordered removed in absentia—in her absence. At the time, Gina had moved from Los Angeles to Colorado to join her parents because her children's father had become abusive. When she missed her court date in Los Angeles, the judge issued a removal order. She had been in the process of applying for relief from deportation based on the hardships her children would face—an option available to her because she had not been convicted of an aggravated felony. Her lawful permanent resident status was revoked. Under an administrative process called reinstatement of

removal, immigration officials were allowed to deport Gina again without allowing her to appear in court.[2] She was taken into immigration custody and dropped off in Tijuana.

Shocked and alone, she immediately tried to come back to the United States. Gina walked across the border at the port of entry and presented her Colorado driver's license. Customs and Border Protection officers realized she had previously been deported; she was detained and deported again. A few weeks later, in a state of desperation, Gina tried to run across the border. She explains,

> I knew I would get caught. But I didn't care because I just wanted to talk to a judge—to explain how this was just a mistake and that my kids need me. Everybody kept telling me that I couldn't go to court because they already deported me. But that wasn't fair because I never got to explain my problems to a judge. I thought, "I'd rather be in jail over there than be stuck over here."

Gina's instinct that she should be able to appear in court to present the hardships deportation would cause for her and her children is consistent with the procedural due process protections that would generally apply in other legal proceedings—protections most Americans expect from the legal system, like the right to a fair trial. However, she lost this right when she missed her court date. During the deportation process, Gina recalls meeting with an immigration agent who told her "that [she] had to sign the paper." Rather than sign the document, Gina asked to go to court. "You lost that right," the agent replied. Once the deportation order had been issued in absentia, it could be reinstated outside of court. The only court she was likely to get taken to was criminal court, where she could be prosecuted for the federal crime of illegal reentry. Relatively speaking, she was lucky. She was dropped off back in Tijuana rather than being sentenced to serve time in federal prison.

Gina's children were two, five, and seven years old at the time of our first interview six years ago. The two oldest were going to therapy on a weekly basis due to emotional and behavioral issues stemming from their separation from their mother. Gina was reluctant to bring them to Mexico because, she said, "I'm not even stable. I don't have money. I don't have a place, nothing. So what am I going to do with my kids over here?" Toward the end of our first interview, she asked, "Do you know how I can get to

court? They're telling me I have to wait twenty years to go back. Is that true? My kids can't wait that long."

If she had understood the serious consequences of missing her court appearance, Gina undoubtedly would have gone to court. However, under the severe stress of being embroiled in a physically abusive relationship and raising young children—one of whom had special needs—she didn't realize how crucial this court date was. Losing the opportunity to appear in court before a judge who could consider the negative toll her deportation would take on her and her children is an extreme sanction. However, in deportation cases, judicial efficiency and finality are often prioritized over people's well-being.

In addition to highlighting the human toll of legal policies that value finality over humanity, Gina's case illustrates the cost of eliminating courtroom appearances for so many people, combined with a lack of access to quality legal representation. Gina may have qualified to file a motion to reopen the original removal order that had been issued in her absence. This is essentially what she wanted to do when she said "I was asking everyone to take me to court" while in immigration custody. However, she did not have an attorney and did not know how to obtain one while in custody. She tried making phone calls but to no avail. She did not know how to file a motion to reopen, or even that such a motion existed. Thus her previous removal order was reinstated, and she was dropped off in Tijuana without seeing a judge. If she had been taken to court—even if she had not filed a motion to reopen—a judge might have advised her that this was an option and could have scheduled a future court appearance, giving her some additional time to seek the assistance of an attorney. However, without this procedural protection in place, Gina lost that opportunity.

Once deported, she dug herself deeper into a hole. Her impulsive efforts to reunite with her children made a lawful return even more unlikely. When Gina was first deported, she was barred from returning to the U.S. lawfully for a period of ten years. She might have qualified to file a waiver to request permission to return through the U.S. consulate, but she didn't realize that. Instead, she tried to walk across the border. The government asserts that when she did so, she claimed she was a U.S. citizen. Making a false claim to citizenship triggers a permanent bar, with no waiver available—ever. Gina has now been in Mexico for over seven years and might have been able to return to her children if she had not tried to walk across the border in a

state of desperation. Instead, she recently consulted an immigration attorney who told her she had no hope of ever lawfully returning because of the false claim to citizenship she made that day.

Standard constitutional protections that apply in almost every other area of the law systematically underprotect people in immigration cases. Due process protections that Americans expect in the legal system—hearings before judges, access to attorneys, and the right to appeal—are frequently unavailable to people facing deportation. Lawyers who are unfamiliar with immigration law are often shocked when they hear about the practices courts allow in the immigration realm because the rules deviate so sharply from the standards that exist in the rest of the legal system. History explains how this has come to be.

HISTORICAL CONTEXT OF EXCLUSION

The systematic lack of protection for noncitizens facing deportation is the current manifestation of a long history of demonizing and excluding racialized "others" in the United States. Citizenship has been an exclusive category in the U.S. since its inception.[3] In the past, the terms employed were more explicit—African Americans, Native Americans, Asians, anyone else courts categorized as nonwhite, and women were excluded from full citizenship. The United States exterminated and isolated Native Americans onto reservations. African American slaves were so dehumanized and excluded from membership in U.S. society that they did not even qualify as people under the law.[4] Now, although overt racial restrictions are no longer a part of the law, this exclusionary framework continues to govern both legal and social constructions of citizenship and membership in society. Deportation is the most overt manifestation of these roots.

The United States has historically employed its immigration laws specifically to exclude people of color. The 1790 Uniform Rule of Naturalization specified that only "free white men" could naturalize to become U.S. citizens. The Chinese Exclusion Act—which was in effect from 1882 until 1943—explicitly prohibited Chinese people from migrating to the United States. In 1924, the United States passed its first comprehensive immigration bill, which further institutionalized white privilege by specifically barring immigrants deemed nonwhite, such as people of Chinese, Japanese, and Indian descent, from becoming citizens.[5] The Supreme Court maintained the whiteness requirements in immigration law throughout the 1920s.[6]

Chinese Exclusion and Plenary Power

The roots of modern deportation law can be traced back to two cases that upheld the government's decision to exclude or deport long-term residents because they were Chinese.[7] In the 1889 case of *Chae Chan Ping v. United States*, a long-term Chinese resident of the United States traveled to China. While he was there, Congress changed the law. Previously, Chinese residents had been allowed to reenter the country as long as they had a residency certificate, but the Scott Act of 1888 barred reentry for Chinese residents even if they had this certificate. Chae Chan Ping argued that he should be able to return because the change in the law violated his constitutional rights.

The Supreme Court's decision focused on the larger question of whether the judicial branch had authority to review acts of Congress that regulate immigration. It decided that it did not have such authority, justifying its deference to Congress's plenary power to regulate immigration as "an incident of sovereignty" essential to the country's ability "to preserve its independence, and give security against foreign aggression and encroachment." It concluded that foreign aggression can come not only in the form of a "foreign nation acting in its national character" but also "from vast hordes of its people crowding in upon us."[8] Therefore, the Court found that excluding Chinese migrants because they were Chinese was perfectly constitutional.[9] This rule of judicial deference to congressional authority in immigration matters became known as the plenary power doctrine. In the 1893 case of *Fong Yue Ting*, the Supreme Court extended the plenary power doctrine to apply to people facing deportation from within the United States.[10] It held that the right to deport people "is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country."[11]

The decision to exempt long-term residents facing exclusion or deportation from standard constitutional protections was not clear cut. Vehement dissents argued that noncitizen residents "are within the protection of the Constitution, and secured by its guarantees against oppression and wrong," and that "arbitrary and despotic power can no more be exercised over [foreign resident] persons and property than over the persons and property of native-born citizens. . . . As men having our common humanity, they are protected by all the guaranties of the Constitution."[12] However, the majority's exclusionary approach won out because the residents in question were perceived as "vast hordes of . . . people crowding in upon us."[13] At the

time, President Theodore Roosevelt praised the United States for acting "with the clear instinct of race selfishness" when it "kept out the dangerous alien"—the Chinese—whom he also called "the race foe."[14]

Limited Protections in Deportation Cases

Paradoxically, around the same time that the Supreme Court decided to allow overt racial discrimination in immigration cases, it held that racial discrimination against people who were not citizens violated the Constitution in non-immigration-related cases. In *Yick Wo v. Hopkins*, the Court held that noncitizen Chinese laundry owners were entitled to equal protection under the Fourteenth Amendment. The city of San Francisco had passed an ordinance that had a disparate impact on the operation of Chinese-owned laundries. The Court ruled that the Constitution protected citizens and noncitizens alike from racial discrimination.[15] Combined, the *Yick Wo*, *Chae Chan Ping*, and *Fong Yue Ting* cases set up a contradictory legal framework that imbues noncitizens with constitutional protections in some cases but not in others.[16]

In 1903, the Supreme Court narrowed its decision in *Fong Yue Ting* by holding that noncitizens facing deportation from the United States were at least entitled to procedural due process protections.[17] Yet despite the fact that procedural due process limits formally apply to deportation proceedings, courts have generally been "unwilling[] to give the procedural due process requirement any real content."[18] As the Supreme Court stated in the 1977 case *Fiallo v. Bell*, "In the exercise of its broad power over immigration and national security, Congress regularly makes rules that would be unacceptable if applied to citizens."[19] Deportees do not have the right to a jury trial in removal proceedings, the right to appointed counsel, the right to bail, the right to standard Fourth Amendment protections preventing the use of illegally obtained evidence, and the right to protection from ex post facto laws.[20] In the words of deportation scholars Daniel Kanstroom and M. Brinton Lykes, "Indeed, much of the late twentieth and early twenty-first century story of deportation is a story of de-formalization in which even certain very basic procedural rights recognized by courts—such as the right to be heard by a judge—have been severely restricted."[21]

Given the underprotection of people's rights in immigration-related cases that has emerged from this history, the Constitution has not functioned

as a shield against the harsh immigration laws that have emerged in the past quarter century, driven in large part by anti-Mexican sentiment.

THE SOCIAL CONSTRUCTION OF MEXICANS AS "THE OTHER"

Like the Chinese, Mexicans were framed as "the other" in the nineteenth and early twentieth centuries. The rhetoric of Manifest Destiny was employed to frame Native Americans and Mexicans as inferior "savages" and "imbeciles" in order to justify taking their land.[22] Between 1880 and 1930, Mexicans were widely depicted as "inferior beings" in popular publications, and Mexico was presented as a "social problem."[23] In the early 1800s, a politician asserted that Texas was "redeemed by Anglo-American blood and enterprise" from Mexicans, whom he characterized as "savages . . . benighted by . . . ignorance and superstition."[24] A widely read 1845 publication reported that Mexico's "incorporation into the Union was not only inevitable, but the most natural, right and proper thing in the world. . . . Imbecile and distracted, Mexico never can exert any real governmental authority over such a country."[25] Mexicans continued to be characterized as "underdeveloped," "unambitious," and "uncivilized" in popular discourse in the United States at the beginning of the twentieth century.[26]

At the same time that these racist and derogatory attitudes were directed toward them, Mexicans were privileged under U.S. immigration law because they were largely exempt from the whiteness requirement governing access to citizenship in the late 1800s and early 1900s. They occupied a unique position because the Treaty of Guadalupe Hidalgo authorized Mexicans to obtain citizenship after the U.S. took over much of Mexico's land. Despite several notable exceptions wherein Mexicans were barred from naturalizing because they had "a strain of Indian blood," federal law generally allowed Mexicans to become citizens during a time when other immigrants of color—Asians and Native Americans—were not.[27] Notably, people of African descent were also exempted from the whiteness requirement as a result of the legal reforms that abolished slavery.

Despite the fact that they were allowed to naturalize, Mexican Americans were quite clearly treated as racialized "others" in the social sphere. They were subject to Jim Crow segregation across the Southwest and attended segregated schools; children were routinely beaten if they were heard speaking Spanish in school. Texas Rangers killed migrants at the border

with legal impunity, and hundreds of Mexicans and Mexican Americans were publicly lynched across the Southwest between 1850 and 1935.[28] The discrimination and marginalization Mexican Americans experienced during this period contributed to the social construction of Mexican as a subordinated racial group in the United States.[29]

Large-scale deportation campaigns targeting people of Mexican descent demonstrate the extent to which Mexicans—and Mexican Americans—have been treated as socially expendable "others" in the United States. During the Depression era, when the need for Mexican labor shrank due to the country's struggling economy, an estimated one million people were removed to Mexico. Historian Mae Ngai refers to these "repatriations" as "a racial expulsion program exceeded in scale only by the Native American Indian removals of the nineteenth century."[30] Local police conducted raids of Mexican communities, workplaces, and public parks where people of Mexican origin were indiscriminately rounded up and detained without bail. Twenty years later, the United States embarked on another wave of mass deportations targeting people of Mexican descent. Between 1954 and 1959, an estimated 3.7 million Latinos were deported, the majority to Mexico.[31] Over a million were deported through Operation Wetback at that time, a program that was explicitly labeled with racially derogatory language.

Now, Mexican immigrants continue to be framed as "the other." Latinos occupy such a marginalized status that scholars have developed the term "citizen aliens"—citizens who are treated as aliens because they are perceived as "different than the 'typical' American" based on their Latino origins.[32] Anthropologist Leo Chavez attributes anti-immigrant laws and policies to the "Latino Threat Narrative," which he argues is "pervasive when not explicitly mentioned."[33] According to Chavez, this dominant depiction of Latinos as a threat is "the cultural dark matter filling space with taken-for-granted truths in debates over immigration on radio and TV talk shows."[34]

Two major myths about Mexican immigrants have gained traction in the popular consciousness and have influenced immigration law: (1) immigrants as invaders, and (2) immigrants as criminal aliens.[35]

Invasion Rhetoric

As of 2015, more Mexicans were leaving the United States than were coming into the country.[36] Yet rhetoric expressing fear that Mexicans are invading the United States continues to be pervasive.[37] In 2000, political

scientist Samuel P. Huntington alleged that "the invasion of over one million Mexican civilians" was "a comparable threat" to an invasion by one million Mexican soldiers. According to Huntington, "Mexican immigration looms as a unique and disturbing challenge to our cultural integrity, national identity, and potentially to our future as a country."[38] Ann Coulter's 2014 best seller *¡Adios, America!* argues that Americans should "fear immigrants" from Mexico "more than 1515."[39] And similar rhetoric drives support for President Donald Trump's plans to build an "impenetrable wall" to keep Mexican migrants from "pouring through our borders."[40]

The Supreme Court has incorporated the fear of invasion from Mexico into its reasoning as well. In 1975, the Court wrote of the "silent invasion of illegal aliens from Mexico," and in 2000, an opinion expressed concern about the "northbound tide of illegal entrants into the United States."[41] When migration from Mexico is framed as a threat, harsher laws and more militarized enforcement practices seem more legitimate. Similar rhetoric was used to justify mass deportation efforts in the 1950s, which one government official argued were necessary because Mexican migration amounted to "an actual invasion of the United States."[42] Comparing Mexicans to threatening invaders is reminiscent of the reasoning the Supreme Court used to uphold the Chinese Exclusion Act, a parallel that demonstrates how invasion rhetoric is employed to perpetuate racial subordination.

Criminal Alien Rhetoric

The term "criminal alien" evokes images of dangerous "others"—inhuman monsters or violent predators. It also serves as a proxy for race. Policies are designed to discriminate against this population, but they appear legitimate (rather than racially discriminatory) because the "criminal alien" label implies that these people deserve to be treated more harshly than the rest of the population. The term manipulates the public's understanding of immigrants—particularly immigrants from Mexico—by framing them as dangerous threats when in fact most are not.

Language informs subconscious beliefs, and labels applied to immigrants shape how people are treated. Referring to an "immigrant" corresponds to a more inclusive approach to immigration, while using terminology like "illegal," "alien," and "criminal alien" evokes the politics of exclusion that characterize much of U.S. immigration law.[43] D. Carolina Nuñez conducted a content analysis of the use of "alien," "immigrant," and "citizen" in

mainstream media and academic writings, concluding that the term "alien" corresponds to "non-human invaders or, at best, criminals" who are lowest on the hierarchy of societal membership, while "immigrants are persons, but they are still outside the majority," and "citizens" are "upstanding and law abiding members of the community."[44] Once people have been framed as aliens, and especially criminal aliens, harsh deportation practices appear more legitimate. Equating Mexicans with criminals dates back to the U.S.-Mexican war, when Mexicans attempting to defend their land were commonly depicted as lawless bandits.[45] The image of a Mexican bandito—bandit—is a racialized trope that has now become a familiar U.S. stereotype of Mexicans. The institutionalization of "criminal aliens" as a category of people combines the historical racialized depictions of Mexicans as violent and as invaders.

The "criminal alien" label specifically manipulates the public's perception of Mexican immigrants by (1) expanding the definition of who qualifies as a "criminal alien" to include many who have not been convicted for activities that would typically be understood as crime, (2) conflating the existence of a criminal conviction with dangerousness, and (3) erasing empathy for people categorized under this label.

Expanding Definitions

The "criminal alien" construct first emerged in 1956 as part of an effort to shift public sympathies away from Mexican migrants. The Border Patrol's chief enforcement officer for the Southwest Region informed his officers that they should no longer refer to migrants as "wetbacks" because the term "'creates a picture in the minds of the public and the courts of a poor, emaciated, Mexican worker, entering the United States illegally to feed a starving family at home.'"[46] Instead, he advised, "whenever a criminal record exists, we use the words, 'criminal alien,' and when no criminal record exists, the words, 'deportable alien.' I feel this change will have a psychological effect on the public and courts that will benefit the Service."[47] Following this announcement, the Border Patrol deliberately inserted this new terminology into popular discourse through a concerted effort using public information officers.[48] Then, much like now, the number of Mexican immigrants who were engaged in crime was grossly inflated for political purposes. In 1957, only three people who were apprehended each day qualified to be prosecuted for crimes. However, the next year, Immigration and

Naturalization Service Commissioner Joseph Swing argued in the House of Representatives that "of the aliens currently apprehended, over 50 percent have been previously arrested for various crimes." Before making these remarks, he specified, "I am still talking about Mexicans, Mr. Chairman."[49]

U.S. immigration law has included exclusions for people with criminal convictions for hundreds of years, but the exclusion (and ejection) of people with criminal records now affects much broader segments of the population, and the label carries harsher consequences. What began as a narrow exception has evolved into the norm. The expansion of the "criminal alien" category threatens to remove protections that apply to other immigrants from a sizeable segment of the immigrant population—primarily Latinos. In the 1980s and '90s, punitive deportation policies were enacted alongside the criminal laws that fueled mass incarceration. Fears of immigrants as violent criminals gained traction despite widely accepted social science research documenting that immigrants in the United States are less likely to engage in crime than nonimmigrants.[50] This unsubstantiated fear of immigrants as criminals was then incorporated into the law.

The largest category of "criminal aliens" deported in 2015—33 percent—were defined as "criminal aliens" because they had been convicted of an immigration-related crime.[51] The most common crimes were entering or reentering the country.[52] Prosecutions for these offenses have skyrocketed in the past fifteen years, increasing by 1,420 percent between 1993 and 2013. Notably, this greater focus on prosecuting immigration transgressions as crimes has come about during a time when migration to the United States has actually decreased. In recent years, around 30 percent of all federal criminal convictions are for immigration-related offenses.[53] According to law professor Ingrid Eagly, "Not since the Prohibition has a single category of crime been prosecuted in such record numbers by the federal government."[54] These prosecutions mostly target Latino immigrants. According to the U.S. Sentencing Commission, 95.7 percent of the people convicted of these crimes were Hispanic in 2015.[55] Labeling immigrants criminal aliens based on convictions for immigration offenses renders all immigrants who entered without permission vulnerable to being defined as criminals and treated accordingly.

The definitions ICE employs further demonstrate how the label has expanded.[56] Forty-six percent of the "criminal aliens" deported in 2015 had only been convicted of immigration or traffic offenses. The most serious convictions of another 17.3 percent were drug related. Most of the people

deported through ICE's Criminal Alien Program (CAP)—a specialized enforcement program—either have no criminal convictions or have been convicted only of nonviolent offenses.[57] In contrast, 0.5 percent of the people deported through CAP had been convicted of a homicide offense.[58] While the rhetoric surrounding "criminal aliens" focuses on murderers and rapists, 98 percent of the people who are treated as "criminal aliens" are neither.[59] Lumping more and more people into the category reinforces the myth that most immigrants are criminals and expands the population of noncitizens who are excluded from basic protections under immigration law.

Equating Criminal Convictions with Dangerousness

Popular discourse frames "criminal aliens" as dangerous, but the fact that one has been convicted of a crime—even a violent crime—does not mean that the individual poses a present danger to society. Crime-based deportations can be based on very old convictions. Many deportees' convictions occurred over twenty years ago. Some U.S. veterans reported being deported on the basis of convictions they obtained before they enlisted. They were not deportable when they entered the military, but the law later changed, rendering them deportable based on their previous conduct. The fact that someone committed a crime years ago—even a violent crime—does not mean that the individual is currently dangerous. Laws governing parole from prison recognize that the facts surrounding an old conviction—even in the most heinous cases—cannot by themeselves demonstrate current dangerousness.[60] For instance, in California, the recidivism rate for people who have been convicted of murder and have been released on parole is 1 percent, including convictions of any crimes—even minor ones—in the calculation of recidivism.[61]

In addition, given that racial bias pervades the criminal justice system, the fact that one has been convicted of a crime often has more to do with race than criminality. Communities of color are more heavily policed, making people in these areas more likely to be arrested for violations of the law that go undetected in areas that are less monitored. As Michelle Alexander explores in *The New Jim Crow*, "Although the majority of illegal drug users and dealers nationwide are white, three-fourths of all people imprisoned for drug offenses have been Black or Latino."[62]

Border regions are also more heavily policed, resulting in more arrests of immigrants because of the higher levels of enforcement in areas that

tend to have higher concentrations of immigrants. In a study that compared prosecution practices among different federal districts, Mona Lynch documented how people charged with drug offenses along the southern border of the United States are treated differently than drug offenders in other areas of the country. She found that in a federal district court in the northeastern U.S., "a paternalistic logic undergirds drug prosecutions" whereby a defendant is typically perceived as "a troublemaker . . . but also vulnerable because of his lifetime exposure to the impoverished, degraded conditions" that characterize "neighborhoods targeted for enforcement." This contrasted sharply with her observations in a federal district court located near the U.S-Mexico border in the Southwest. There, 80 percent of those convicted were not U.S. citizens, and "those worthy of prosecution were less likely to be constructed as broken or damaged and more simply as dangerous people who had no respect for the law." Targeted border enforcement in the region increased the likelihood of arrest and prosecution of noncitizens; 83 percent of the federal drug possession cases during the time of this study occurred in the southernmost region of the southwestern district Lynch observed.[63]

Immigration enforcement efforts directed toward "criminal" aliens reinforce the racial inequality that permeates the criminal justice system. A study of CAP concluded that the program "appears to be biased against Mexican and Central American nationals" given that people from these countries "accounted for 92.5 percent of all CAP removals between FY 2010 and FY 2013, even though, collectively, nationals of said countries account for 48 percent of the noncitizen population in the United States."[64]

Erasing Context and Empathy

Perhaps most perniciously, the "criminal alien" label dehumanizes people by obscuring the complex details that generally surround participation in crime. People tend to be more forgiving—and less punitive—when they hear more details about the circumstances surrounding the commission of an offense.[65] The popularization of the "criminal alien" construct strips away the potential for promoting empathy or understanding and helps to legitimize deportation practices that contradict fundamental notions of fairness. Juliet Stumpf explains, "This extraordinary focus on the moment of the crime conflicts with the fundamental notion of the individual as a collection of many moments composing our experiences, relationships,

and circumstances. It frames our circumstances, conduct, experiences, or relationships that tell a different story about the individual, closing off the potential for redemption and disregarding the collective effects on the people and communities with ties to the noncitizen."[66] In the words of a U.S. veteran facing deportation, "I am not a national security threat. What I am is a son, a father, a friend, and a brother." However, the law erases these other aspects of his identity, including the fact that he served in the U.S. military in Afghanistan, earning commendations and, in his words, "defend[ing] democracy, our people, and our American way of life."

Over time and in various societies, deportation has been employed as a mechanism for excluding people deemed socially undesirable, a tool for "dividing insiders from outsiders, the wanted from the unwanted, the deserving from the undeserving."[67] "Criminal aliens" are perhaps the most demonized socially undesirable group in the United States today. This perception has driven the massive increase of deportation efforts in the past decade, to the extent that legal scholar Ingrid Eagly observes, "The deportation of 'criminal aliens' is now the driving force in American immigration enforcement."[68]

During the late nineteenth and early twentieth centuries, "states increasingly used deportation as a way of governing the welfare of their populations, both by excluding the socially 'undesirable' (paupers, prostitutes, anarchists, criminals, the insane, excludable races, etc.) and by removing foreign labor . . . during periods of economic recession."[69] Contemporary U.S. deportation policy similarly targets those who are deemed "socially undesirable" by targeting Latinos and Blacks from less economically prosperous countries and calling them criminal aliens even when they have not been convicted of crimes.[70] Policies directed at deporting so-called criminal aliens receive bipartisan support. According to President Obama, his administration targeted "criminals, gang bangers, people who are hurting the community, not . . . folks who are here just because they're trying to figure out how to feed their families." In another speech, Obama pledged to continue to focus immigration enforcement "on actual threats to our security. Felons, not families. Criminals, not children. Gang members, not a mom who's working hard to provide for her kids." Trump appropriated this rhetoric and escalated it, going so far as to describe immigrant gang members as "animals" who target "young, beautiful girls" and "slice them and dice them with a knife because they want them to go through excruciating pain before they die."[71]

The widespread exclusion of people with criminal convictions from proposals for immigration reform, even in progressive circles, points to the possibility that people deemed "criminal aliens" will become solidified into a permanently marginalized category. Nowhere is this more apparent than in the laws that apply to people who have been convicted of crimes categorized as aggravated felonies, whose rights were severely limited by reforms Congress passed in 1996.

1996 IMMIGRATION REFORMS

In 1996, Congress passed two sweeping bills that dramatically restricted the rights of noncitizens facing removal. At the time, Lucas Guttentag criticized "the provisions in the Senate and House bills that abrogate procedural protections and deny meaningful judicial review" as a "thinly-veiled attack on the courts themselves" that "attempt[ed] to prohibit the courts from enforcing individual rights and civil liberties guaranteed by the Constitution and our laws."[72] The 1996 reforms were far-reaching, limiting refugees' access to protection, authorizing state and local officials to participate in enforcing immigration laws, and limiting access to public benefits for immigrants.[73] The reforms were so broad that Professor Anil Kalhan describes them as "a far-reaching experiment in what may be described as comprehensive immigration severity."[74] The harshest reforms apply to people convicted of crimes defined as aggravated felonies, a term that is misleading because it includes misdemeanors as well as felonies, nonviolent as well as violent offenses. Under the 1996 reforms, even lawful permanent residents are subject to virtually automatic deportation (after they complete their criminal sentences) if they are convicted of a qualifying crime.

The aggravated felony category initially applied only to a handful of crimes: murder, drug trafficking, and firearms trafficking cases. It was created in the Anti–Drug Abuse Act of 1988, which was a cornerstone of the Reagan administration's War on Drugs. Although the deportation consequences were severe at the time, courts still had the authority to stay deportations in cases where the individual had strong connections to the United States.[75] A series of bills in the early 1990s expanded the list of crimes that qualified as aggravated felonies and stripped those labeled as aggravated felons of more and more rights.[76] The Immigration Act of 1990 expanded the list to include "crimes of violence" punished by at least five years in

prison. In 1994, an administrative removal process was created for those without lawful permanent resident status who were convicted of aggravated felonies—they no longer had the right to contest their removal in immigration court.

Then, in 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA) greatly expanded the list of crimes defined as aggravated felonies. Whereas in 1988 only five crimes qualified, after 1996 over twenty crimes were defined as aggravated felonies, including nonviolent offenses such as failure to appear in court (under some circumstances), fraud, receiving stolen property, and drug offenses.[77] The IIRIRA also eliminated judges' discretion to balance the harm an individual's deportation would cause against the government's interest in deportation.

What began as a narrow exception is now widely used to deport people—especially people with long-term ties to the United States.[78] Most people deported under the aggravated felony provisions have lived in the U.S. for extended periods of time. Between 1997 and 2006, a quarter of all those deported for aggravated felonies had lived in the U.S. for twenty years or more.[79] On average, they had been in the U.S. for fifteen years.[80]

Taken together, the underprotection of constitutional rights that has characterized immigration law since its inception and the restriction of rights brought about by the 1996 reforms contribute to a legal regime that routinely violates people's fundamental rights. The remainder of this chapter explores three key areas in U.S. deportation law where due process protections are particularly lacking: (1) out-of-court removal orders, (2) lack of judicial discretion, and (3) absence of appointed counsel.

NO DAY IN COURT

Jose was deported through an administrative process with no right to appear in immigration court. He had lived in the U.S. since he was four years old and had acquired lawful status before his criminal conviction. He was not entitled to a hearing because people with conditional permanent resident status (as opposed to lawful permanent resident status) may be deported through the administrative removal process. His father had acquired a green card in the 1986 amnesty and had applied for lawful status for his children. Jose was on track to become a lawful permanent resident,

but he had not yet become one. As a teenager, he had been able to work lawfully as a conditional resident, taking after-school jobs to help his family financially. Although he had lawful status and had spent most of his life in the United States, he did not qualify to appear before a judge to dispute his removal.

"It didn't feel right," he recalls, "that they could just stamp a paper and say you're banned for the rest of your life without even taking me to court. I feel like if they're going to take people to court before making them pay a fine or putting them in jail for a few days, they should at least take me to court before they tell me I can never come back. They just took me into an office and gave me a paper that said I'm banned for life."

Similarly, Luis was lawfully in the United States but was not a citizen. He recalls, "I was already kicked out before I even got a chance to speak up to the judge. I never got a chance to see the judge." He thought he had requested asylum, but that claim was either denied or lost. "I had put in some paperwork . . . for a political asylum [because] I don't think at the time it was safe for me to go over there [to Nicaragua]." However, he continues, "When I got deported in '08, it was never mentioned or anything. I never got to see a judge. I just had an automatic deportation." Court appearances can provide an important check in the system—a chance to make sure legitimate legal claims are appropriately processed and considered. In Luis's case, a judge might have looked into whether his asylum claim had been considered and rejected or merely fell through the cracks. Instead, Luis had to flee Nicaragua to escape from the death threats he had anticipated.

Now, most people the United States deports are not entitled to appear in court to contest their deportation.[81] Whereas only 3 percent of removals prior to 1996 occurred through such procedures, 75 percent of removals post-1996 have occurred outside the judicial process.[82] These out-of-court removal procedures include expedited removal, administrative removal for people with aggravated felony convictions, reinstatement of a prior removal order, and stipulated removal, where people sign away their rights and agree to their deportation—though often under confusing or coercive circumstances. In addition, judges may order people deported in absentia—in their absence—if they miss a court hearing. And, even for people who are entitled to court hearings, these proceedings are increasingly conducted using videoconferencing.

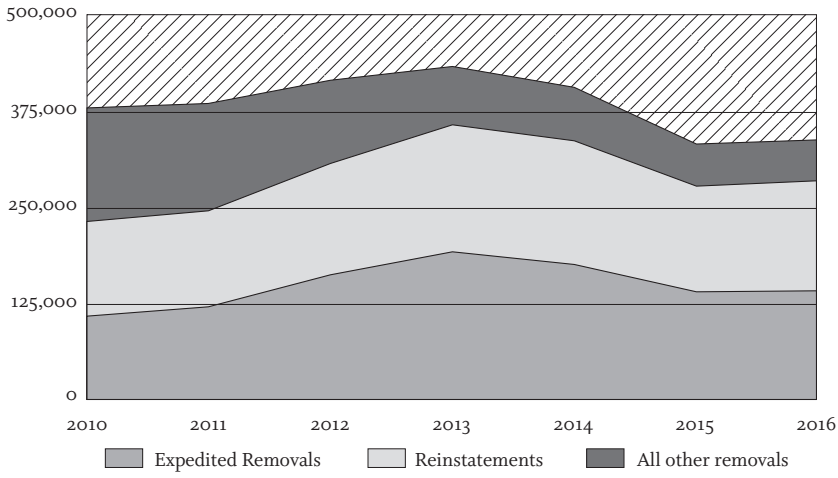

FIGURE 1.1. Expedited Removals and Reinstatements, 2010–16. Source: Department of Homeland Security, *Immigration Enforcement Actions: 2016* (Washington, DC: U.S. Department of Homeland Security, 2017), table 6.

In 2016, 83.6 percent of the 340,056 people removed from the United States were deported via expedited removal or reinstatement (see figure 1.1).[83] This does not include others who were deported through administrative or stipulated removal, or those whose removal orders were issued in absentia when they missed their court appearances. According to the Executive Office for Immigration Review, 25 percent of all cases completed in immigration court were terminated through in absentia orders in 2016.[84]

Gina's case involved several of these procedures. She was initially ordered deported in absentia when she missed her court date. When she was apprehended by police, she never set foot in court because the order that had been issued when she missed her court date was administratively reinstated. After she tried to reenter the U.S. by walking across the border, she was deported through the expedited removal process that applies to people apprehended near the border.

The expedited removal process was created to quickly process people who are apprehended while trying to enter the United States and has generally been used to remove people who have been in the country fourteen days or less. In expedited removal, immigration officers may issue a removal order with no formal hearing if an individual either lacks proper documents or has fraudulent documents. The order is not subject to judicial review unless the person (1) alleges she is actually a citizen; (2) is

a returning lawful permanent resident, asylee, or refugee; or (3) asserts a credible fear of persecution, thus triggering the process of submitting an asylum petition. In recent years, over 40 percent of all removals have occurred through the expedited removal process, with 75 percent to Mexico.[85]

In contrast to expedited removal, which applies to people who have been in the U.S. for short periods of time, the Immigration Act of 1990 created an out-of-court administrative removal process for those convicted of aggravated felonies, many of whom have lived in the U.S. for many years. The 1996 reforms expanded the scope of this administrative removal procedure.[86] Under current law, the attorney general may "issue an order of removal" against those who are not lawful permanent residents if the individual has been convicted of an aggravated felony offense.[87] Thus, people who have lived in the U.S. for many years—including people who had permission to be in the country, like Jose and Luis—can be summarily deported with no right to appear in court. Lawful permanent residents maintain the right to challenge their removal in front of an immigration judge, but others with lawful status do not. This mechanism is now widely used to deport people with criminal convictions.

Still others are deported via stipulated removal, wherein people purportedly agree that they should be deported. However, many deportees report being pressured into agreeing to their deportation through stipulated removal orders. A survey of deported people in Mexico found that 33 percent of those who had signed a removal order reported feeling pressured into signing the order.[88] Twenty-seven percent reported they did not know what they had signed.[89] This does not surprise me, given the general confusion many deportees expressed in their interviews regarding the deportation process. Under the stress of being detained and facing removal, the experience is a blur for many. Some people reported that they were willing to sign anything in order to be released, not realizing that they were signing away their rights to challenge their deportation in the process.

Finally, through the reinstatement of removal process, people like Gina who have been previously deported are kept out of court. Over 40 percent of all people deported from the United States are deported via reinstatements of previous removal orders.[90] But it hasn't always been this way. Deportation expert Daniel Kanstroom explains, "Prior to 1996, most recidivists were placed in deportation proceedings before an immigration judge. They had the opportunity to explain why a previous order was erroneous" and could potentially apply for discretionary relief.[91] The 1996 reforms greatly

expanded the scope of people who would be subject to reinstatement orders. Now, more people are deported under reinstatement of removal orders than by immigration judges.

Gina did not know it, but she could have appealed the reinstatement order. However, she had limited access to legal counsel because she was in custody and then was in Mexico. She missed the deadline to file an appeal in circuit court because there is a thirty-day time limit.[92] She also could have challenged the initial order that had been issued in absentia. Generally, removal orders issued in absentia are final and may not be revisited. However, it is possible to file a motion to reopen the case either (1) within 180 days of the order, if one can show "exceptional circumstances" such as "serious illness of the alien or death of an immediate relative of the alien"; or (2) at any time if the person can establish he did not receive notice or was in custody and therefore was not at fault for failing to appear.[93] Notably, eligibility for discretionary relief is not subject to judicial review after an order in absentia is issued. This means that Gina lost the opportunity to apply for cancellation of removal—to argue that she should be able to stay in the U.S. because deporting her would result in extreme hardship to her U.S. citizen children—when she missed her court date. As her story highlights, these procedures overlap and intersect to create a web that keeps noncitizens from the possibility of obtaining judicial relief from deportation.

When people are kept out of court, they lose the opportunity to mount a defense, and people with legitimate defenses fall through the cracks.[94] Keeping people out of court also obscures the pain and harm people experience as a result of deportation—it sanitizes the process by hiding the suffering in administrative offices rather than public courtrooms. The public nature of courtrooms is a fundamental aspect of U.S. democracy, meant to promote transparency and accountability in the adminstration of justice. Making the bulk of these decisions behind closed doors contradicts the country's democratic ideals.

THE LACK OF JUDICIAL DISCRETION

Frank might have qualified to remain in the United States under the pre-1996 standards. A veteran of the U.S. Marines who had been diagnosed with posttraumatic stress, he was deported based on a conviction for cashing a fraudulent check after leaving the military. While in the Marines,

he deployed to Kosovo. Upon his return, he was honorably discharged, got married, and had a baby. He got his contractor's license and started a business. To his son, he was Daddy. To his fellow soldiers, he had been a brother. But to the U.S. government he once served, he became a "criminal alien" when he was convicted. His green card was revoked, and he was ordered deported—permanently—because the conviction qualified as an aggravated felony.

When he was deported, he left behind his U.S.-citizen wife and son. He had struggled with an alcohol problem, receiving a disciplinary write-up for alcohol use while he was enlisted, and was convicted on two occasions for driving under the influence. Nonetheless, his service in the U.S. military, coupled with his family ties to the United States, might have convinced a judge to allow him to stay in the country. He could have become a citizen while in the military if he had filled out the proper paperwork, but since he didn't, he was deportable. He says, "Ultimately it was the failure to fill out a form and get a couple of signatures that had the powers that be kicking me out of the U.S." But his aggravated felony conviction rendered him ineligible for relief; the judge who heard his case had no lawful authority to allow him to stay. Frank reports that his son's performance in school has suffered greatly since his deportation. When they speak on the phone, his son begs him to come home.

Although appearing in court gives people access to the possibility of mounting a defense, even those who are entitled to go before a judge face limited options. Lawful permanent residents like Frank who have been convicted of aggravated felonies, while entitled to court hearings, face extremely limited prospects for relief. The 1996 reforms stripped judges of the power to consider individual circumstances such as ties to the United States and the length of time the individual has spent in the country in these cases. Judges must order deportation if they conclude that the individual was convicted of an aggravated felony unless they are convinced the person subject to deportation will be tortured once removed. The bar for establishing torture is set very high. For example, one court found that "indefinite detention in a Haitian prison, under inhumane conditions" does not amount to torture.[95]

People who have not been convicted of an aggravated felony and who are entitled to court hearings may qualify for cancellation of removal—a judge can decide to allow the individual to stay in the United States. The rules are different depending on the noncitizen's immigration status. Lawful

permanent residents—green card holders—who have been in the U.S. for seven years and have had green cards for five years can qualify for relief if a judge decides that the humanitarian concerns their deportation would raise outweigh the negative factors in the case. Judges engage in balancing tests on a case-by-case basis to determine whether an individual qualifies to stay. People who are not permanent residents may qualify for relief if they have been residing in the U.S. for ten years, have not been convicted of certain crimes, have "good moral character," and can establish that their removal would cause "exceptional and extremely unusual hardship" for specific citizen or lawful permanent resident relatives. This form of relief may only be granted to four thousand people per year, so even people who qualify must often wait quite a while for an opportunity to become available. People with aggravated felony convictions are excluded from applying for cancellation of removal.

Excluding people convicted of aggravated felonies from this kind of relief marks a dramatic change from the past. From 1976 to 1996, judges could weigh the danger an individual posed to society against the potential harm that would be caused by deporting him or her even if the individual had been convicted of an aggravated felony, with some limits.[96] The noncitizen facing deportation had to establish that, on balance, it would be "in the best interests of this country" to allow him to stay, based on the following factors:

- Family ties to the United States
- Long duration of residence in the United States, "particularly when the inception of residence occurred while the respondent was of young age"
- Hardship to the individual and his or her family if the deportation occurred
- Military service
- Employment history
- Business or property ties
- Community service or other evidence of value to the community
- Evidence of "genuine rehabilitation if a criminal record exists"
- Other evidence of good character[97]

These factors were to be balanced against "the presence of additional significant violations of this country's immigration laws," evidence of poor moral character, and "the existence of a criminal record." When weighing

an individual's criminal record, however, "its nature, recency and seriousness" were considered.[98]

Allowing judges to exercise their discretion in this way did not prevent all deportations. In fact, many people were ordered deported after judges balanced these factors in individual cases. For example, Byron Paredes-Urrestarazu was removed although he had lived in the U.S. since he was twelve years old and had an American wife and children. His participation in gang-related robberies, misconduct while in the military, false testimony, a history of drug abuse, and an arrest for drug possession convinced judges that his deportation would be in the best interest of the country.[99] However, judges could waive deportation in cases where the harm the individual's deportation would cause outweighed the government's interest in deporting the individual, as in the case of Benedictor Diaz-Resendez. He was convicted for possession of a large quantity of marijuana with intent to distribute, had been a lawful resident for twenty-nine years, and had an American wife and children who were dependent on him.[100] He was allowed to stay. Bill Ong Hing, an immigration law professor with an extensive practice background, explains that prior to 1996, "the immigration judge would pay close attention to the testimony or statements from family members, friends, employers, parole or probation officers, counselors in or outside prison, and psychiatrists" in order to "discern whether the applicant would engage in criminal activity again."[101]

In contrast, the current law allows judges to consider only two issues: (1) whether the criminal conviction qualifies as a deportable offense (for example, a Supreme Court case examined whether hiding drugs in a sock qualified as an aggravated felony), and (2) whether a defense against deportation is available (which, in aggravated felony cases, would be limited to cases where people can prove they would be tortured if deported).[102] As Justice John Paul Stevens explained in *Padilla v. Kentucky*, "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 number of noncitizens convicted of crimes."[103]

Immigration judges express concerns with a legal system that does not allow them to make individualized determinations about whether people should be deported. Retired immigration court judge Paul Grussendorf has

been a vocal advocate for restoring judicial discretion "to grant relief from deportation in deserving cases" by "revisit[ing] these harsh provisions and restor[ing] fairness and flexibility . . . by expanding the authority of immigration judges."[104] In the midst of immigration reform debates in 2013, Judge Dana Leigh Marks, then president of the National Association of Immigration Judges, publicly criticized the 1996 reforms that "curtailed the discretion of immigration judges," lamenting that "judges are no longer allowed to grant most forms of relief for individuals with an aggravated felony on their record, no matter how minor or old the conviction."[105] Judge Zsa Zsa DePaolo echoed this sentiment, explaining that she often has to tell people who appear before her, "If I had the authority to do that, I would. But I don't. . . . The law doesn't give me any other option."[106] Similarly, according to Judge James P. Vandello, "Each case I hear is a life story. . . . I have been able to unite or re-unite families. On the other hand, in many cases I have had to deal with the frustration of not being able to grant relief to someone because of the precise requirements of the statute, even though on a personal level he appears to be worthy of some immigration benefit."[107]

Only three years after the 1996 reforms went into effect, legal scholar Nancy Morawetz concluded that the reforms devalued family unity: "By eliminating (in most cases) the system of relief hearings that allowed family members to testify about the consequences of family separation, the laws operate as a statement that the effects of deportation on family members do not matter. This result is highly incongruous with both existing immigration laws and general values that permeate our legal system."[108] As Morawetz predicted, eliminating judicial discretion in cases involving aggravated felonies has undercut the possibility of deportation relief based on family unity in many cases. Eighty-six percent of the parents of U.S. citizen children removed in 2013 were deported due to criminal convictions, meaning that the harms U.S. citizen children face as a result of a parent's deportation are legally irrelevant most of the time.[109]

The Inter-American Commission on Human Rights has found that the lack of judicial discretion available in aggravated felony cases violates multiple articles contained in the American Declaration of Human Rights, including the rights to family unity and the best interest of the child.[110] The Inter-American Commission determined that even in cases involving aggravated felonies, the government should use a balancing test to weigh its right to deport against an individual's right to remain in the country,

considering (1) the person's age of entry and length of time in the United States; (2) family, social, and other ties to the U.S.; (3) the severity of the crime, the time elapsed, and evidence of rehabilitation; and (4) possible hardship for U.S. citizen children, spouse, and other family members.

It is no surprise that families are routinely separated by a system that does not allow judges to balance whether deporting people will cause more harm than good. Although he signed the AEDPA, President Clinton expressed concern that "this bill . . . makes a number of major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism. These provisions eliminate most remedial relief for long-term legal residents."[111] The human toll of these policies is high.

Under the old standards, Edgar—a father of two U.S. citizen teenagers who was deported for making verbal threats—may well have qualified to stay in the United States with his wife and children. Under the current law, however, he was permanently deported with no hope of lawfully returning. Edgar had been a green card holder but was deported for a conviction arising out of an incident that occurred nearly twenty years ago. According to Edgar, he and his wife were at a carnival; she was six months pregnant at the time.

> I was with a group of people and they got into a fight with some other people. So then with my wife being pregnant I told her, let's go. And we were leaving but there was this guy who followed us to the parking lot. . . . He pulled out his gun, and he told us to lay on the floor. And I told him I would, but my wife can't because she's pregnant . . . and me and him got into a—not a physical confrontation at all, but we just started arguing.

Edgar was eighteen or nineteen years old when this incident occurred; he is in his forties now. "I ended up doing about six months for it, but I took a deal. That's another thing that gets me is I should have fought it." The crime is an aggravated felony because it is categorized as a crime of violence under federal law.

Before 1996, Edgar would have had a strong argument that he should stay. His mother brought him to the U.S. when he was a young child, and he grew up attending public school in Southern California. All of his immediate family members lived in the United States, and none in Mexico. Further, his U.S. citizen wife and children would be negatively affected by his deportation. However, the law prohibited the judge from balancing

these factors. In a sentencing motion filed when Edgar was charged in criminal court with illegal reentry after returning to the U.S. to reunite with his family five years after he was deported, his lawyer made the case for a sentencing reduction:

> When [Edgar] married his wife of 16 years, he underwent a remarkable transformation. He left behind his friends from the violent public housing project that he lived in for 14 years; and instead went to work every day to provide for his wife and children. He became a dedicated father, driving his children to and from school, helping with homework, and coaching sports teams. He also became a supportive husband, encouraging his wife to attend college and financially supporting her while she attended college.[112]

However, none of this was relevant in immigration court. The judge's authority was limited to analyzing whether Edgar's offense qualified as an aggravated felony.

Edgar and Frank are the kind of people who may have qualified to stay in the United States with their families before the 1996 reforms. In fact, the reforms were motivated by concerns among some members of Congress that over half of those with criminal convictions who applied for discretionary relief from deportation were allowed to stay. However, deportation has become virtually automatic for people convicted of crimes categorized as aggravated felonies.[113] Once deported, most are permanently barred from legally returning to the United States.[114]

LACK OF APPOINTED COUNSEL

Only a handful of the people I interviewed were represented by immigration attorneys before they were deported, partly because many were expelled through administrative proceedings. Others reported their families had consulted with attorneys but were told they had no chance of obtaining relief. Some had hoped to hire attorneys but could not afford to do so. Although people have the right to hire attorneys to represent them in deportation proceedings, the government does not provide a lawyer to those who cannot afford to hire one. Thus, only 14 percent of detained people in immigration proceedings (and 37 percent of all people who appeared in immigration courts) had attorneys between 2007 and 2012.[115]

Legal representation greatly impacts one's chances of success in immigration court. A study of deportation proceedings in Northern California found that detained people prevailed in their immigration cases 33 percent of the time if they had a lawyer, compared with a success rate of 11 percent for those without an attorney.[116] A national study similarly found that those represented by attorneys fared better in immigration court. For example, 21 percent of detained migrants represented by attorneys had successful outcomes, in contrast to only 2 percent of those without attorneys.[117] Nonetheless, courts have held that the government is not obligated to provide appointed counsel for indigent noncitizens because legal representation is not necessary for "fundamental fairness."[118]

For years, advocates, scholars, and judges have argued that fairness requires government-appointed counsel in deportation proceedings. In 1975, Judge DeMascio argued in a dissenting opinion that "a resident alien has an unqualified right to the appointed counsel" because "it is unconscionable for the government to unilaterally terminate" one's lawful permanent resident status without legal representation.[119] According to the judge, "Expulsion is such lasting punishment that meaningful due process can require no less," and "our country's constitutional dedication to freedom is thwarted by a watered-down version of due process on a case-by-case basis." If Gina had been provided with an attorney before she was deported, she might have been able to reopen her case to continue with the claim for cancellation of removal she had initiated, or she might have discussed strategies for petitioning to return after she was deported. Her conviction was not an aggravated felony, so she had some options for lawfully returning. Those options evaporated when she walked across the border and claimed to be a citizen. A consultation with an attorney might have helped her to understand this before it was too late.[120]

THE CURRENT DEPORTATION WAVE

The year after the 1996 reforms, removal numbers began to increase. Now, the United States deports significantly more people than it did in the past—six to seven times the number of people it deported just twenty years ago. Whereas the United States deported 50,924 people in 1995, it deported 333,341 in 2015.[121] The differences in these numbers cannot be attributed to migration patterns. While only half the number of unauthorized migrants

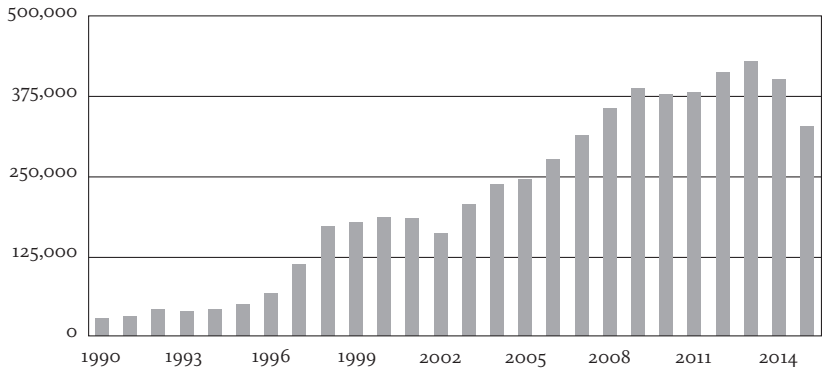

FIGURE 1.2. Removals from the United States, 1990–2015. Source: Department of Homeland Security, *Yearbook of Immigration Statistics 2016* (Washington, DC: U.S. Department of Homeland Security, 2017), table 39.

entered the United States in 2015 compared to 1995, six times the number of people were deported that year. President Donald Trump's efforts to deport more immigrants began at a time when deportation numbers had already reached unprecedented heights (see figure 1.2).[122] Between 1997 and 2012, the United States removed or returned 127 immigrants for every 100 immigrants who were granted admission, up from three deportations per 100 admissions in 1920.[123]

The United States now deports so many people that scholars characterize the current policy as a mass deportation campaign. Over three million people were removed during Barack Obama's presidency alone. In the past decade, Mexican nationals have consistently constituted over 70 percent of the population the United States deports. Mexican nationals have historically been—and will likely continue to be—the population most affected by U.S. deportation policies.[124]

The United States breaks actions to eject people from its territorial boundaries into two categories: removals and returns. When I use the term "deportation," I am referring to removals. Returns occur when people apprehended at the border are processed informally and are essentially turned around. When people are returned, they generally are not barred from coming into the United States, nor are they subject to enhanced punishments if they are apprehended in the future. In contrast, removals occur through formal processes—both in and out of court, as previously described. The crucial distinction is that removals trigger more serious consequences, such

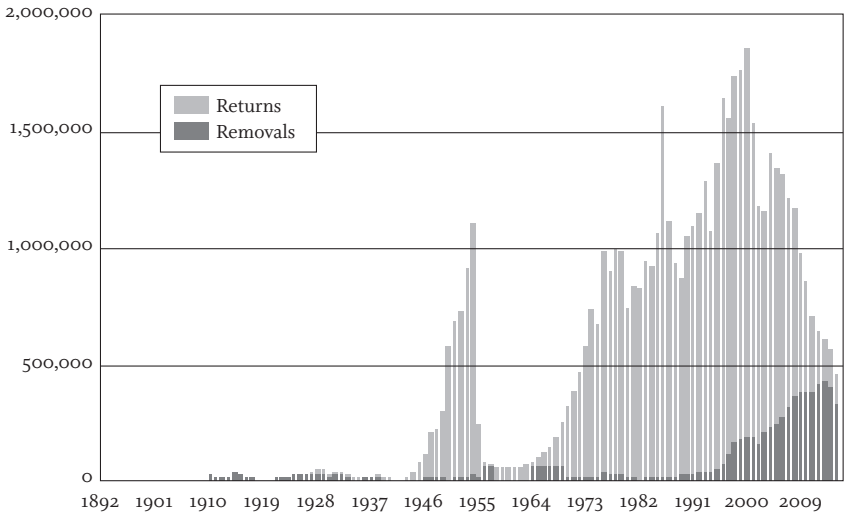

FIGURE 1.3. Removals and Returns, 1892–2015. Source: Department of Homeland Security, *Yearbook of Immigration Statistics 2016* (Washington, DC: U.S. Department of Homeland Security, 2017), table 39.

as prohibitions against returning to the country, ranging from three years to lifetime bars, and enhanced criminal sentences if people are apprehended returning without official authorization. The proportion of removals—formal deportations—has increased markedly from the past (see figure 1.3).

While returns primarily affect migrants entering the country for the first time, removals often target people with longer ties to the United States. Under President Obama, the U.S. increased its immigration enforcement efforts directed at people residing within the United States (as opposed to entering at the border). By expanding federal cooperation with local law enforcement agencies in order to identify people who could be deported, Obama's administration shifted the focus of deportation onto people living in the country; more resources were thus directed toward deporting people who had lived in the U.S. for long periods of time and whose lives were therefore deeply tied to the United States.[125]

Some deportees previously lived in the United States without lawful status—they were part of the population of 11.3 million people referred to as undocumented, irregular, or unauthorized. Despite their lack of legal status, this population is deeply tied to the United States. Two-thirds have lived in the country for more than ten years, and around half have U.S.

citizen children.[126] But, surprisingly to many, not all deportees were undocumented in the United States. A sizeable population had lawful status, including lawful permanent resident status; many had been green card holders. More than thirteen million lawful permanent residents reside in the United States.[127] Over 60 percent of this population is eligible to become citizens, which would free them from the specter of deportability. But until they go through the naturalization process, they too face the prospect of being deported if they are convicted of breaking the law.

The move toward enhanced immigration enforcement within the country has changed the population of deportees the United States sends to Mexico. Whereas in the past, most deportees had only recently migrated and had families or homes to return to in Mexico, there is a growing segment of the deported population with nowhere to go because their extended families now live in the United States. Approximately one-third of the people deported to Mexico consider the U.S. their home. This marks a dramatic change from the deported population in the past. In 2000, only 4.4 percent of deportees surveyed in Tijuana reported that the United States was their country of residence. A decade later, that number increased to 33.15 percent.[128] Another study of deportees in Mexico similarly found that 28 percent "stated their current home is located in the United States."[129] For people with long-term ties to the United States, deportation is experienced as an ejection from home, rather than a return to it.

The history of racial exclusion within the United States shaped a legal framework that has allowed discrimination under immigration law that would be prohibited in virtually all other contexts.[130] The decision to exclude deportation cases from the same constitutional protections that normally apply was highly contested in 1893, when the Supreme Court ruled in the case of *Fong Yue Ting* that courts should defer to Congress's plenary power. At the time, Justice Field's dissent expressed concern that exempting deportation cases from judicial review would bring "brutality, inhumanity and cruelty" into deportation cases.[131] This is precisely why the United Nations Office of the High Commissioner for Human Rights recommends an immigration system imbued with due process protections "of all migrants regardless of their status, including: the right to an individual examination, the right to a judicial and effective remedy, and the right to appeal."[132] The current deportation regime in the United States stands in stark contrast to this model, as evidenced by the U.S. Commission on Civil Rights' 2015 critique of the immigration detention system—the deportation

pipeline—for violating due process protections and "threatening American values."[133] The "brutality, inhumanity and cruelty" Justice Field worried about in 1893 now characterize the U.S. deportation system.

The United States Supreme Court has been more willing to apply constitutional protections to immigration cases recently, but immigrants' rights continue to be underprotected in deportation cases.[134] The historical evolution of deportation law has undermined the Constitution's ability to protect immigrants and their family members from harsh policies enacted due to unfounded racialized fears. Courts' systemic underprotection of noncitizens' rights in deportation cases corresponds to a more widespread devaluation of immigrants—particularly immigrants of color. The persistence over two decades of the reforms enacted in 1996—laws that have been criticized by international human rights bodies as violations of fundamental human rights—is a strong indication of the depth to which (Mexican) immigrants have been socially excluded from becoming full members of U.S. society.[135] Even lawful residents who migrated as children and have lived in the country for decades—people who are integral members of American families and communities—can be permanently ejected with virtually no legal recourse.

Although many deportees perceive themselves to be American, the law treats them as outsiders by withholding standard constitutional protections in removal cases. Absent these protections, the law then converts them from members of U.S. society to outsiders by physically ejecting them from the boundaries of the country. The consequences of removing people from the place they consider home are quite severe. Although the law renders them irrelevant in many cases, these consequences are essential to understanding the true nature of U.S. deportation practices.

in the media. In some cases, I have changed other minor details in order to protect people's identities. My understanding of people's stories has been enhanced by reviewing court records and speaking with their family members. For the sake of clarity, I frequently omit the names of people I only reference once in the book, reserving names for the key characters whose stories I return to.

21. Mark Hugo Lopez and Susan Minushkin, *Hispanics See Their Situation in U.S. Deteriorating, Oppose Key Immigration Enforcement Measures* (Washington, DC: Pew Research Center, 2008).

22. Ines Hasselberg, *Enduring Uncertainty: Deportation, Punishment and Everyday Life* (New York: Berghahn, 2016).

23. Deborah Boehm, *Returned: Going and Coming in an Age of Deportation* (Oakland: University of California Press, 2016), 4.

24. United States Customs and Border Protection, "U.S. Border Patrol Fiscal Year Budget Statistics," December 12, 2017, https://www.cbp.gov/document/stats/us-border-patrol-fiscal-year-budget-statistics-fy-1990-fy-2017; United States Department of Homeland Security, *Budget in Brief*, FY 2005–14, https://www.dhs.gov/publication/dhs-budget.

25. Craig Whitlock, "U.S. Surveillance Drones Largely Ineffective along Border, Report Says," *Washington Post*, January 6, 2015, https://www.washingtonpost.com/world/national-security/us-surveillance-drones-largely-ineffective-along-border-report-says/2015/01/06/5243abea-95bc-11e4-aabd-d0b93ff613d5_story.html.

26. Kanstroom, *Deportation Nation*, 18.

ONE. IN THE SHADOW OF DUE PROCESS

1. These exceptions are discussed in more detail in this chapter. They are reinstatement of removal, expedited removal, administrative removal for aggravated felony convictions, removal in absentia, and stipulated removal.

2. Immigration and Nationality Act § 241(a)(5).

3. One history of citizenship studies argues that citizenship was "a limited and discriminatory institution" for at least a century after the American Revolution. Peter Riesenberg and Henry S. Matteo, *Denationalization v. "the Right to Have Rights": The Standard of Intent in Citizenship Loss* (Lanham, MD: University Press of America, 1997), 2. The claim that immigration law is actively employed to keep people out may sound jarring. After all, the United States is a nation of immigrants. However, as this chapter explores, U.S. immigration law has always privileged some groups, welcoming wealthier, whiter migrants, while excluding others. See Ediberto Roman, *Citizenship and Its Exclusions: A Classical, Constitutional, and Critical Race Critique* (New York: New York University Press, 2010), 12 ("Western societies have uniformly accepted the aspects of citizenship discourse that have championed equality and inclusion; but at the same time, these same societies have repeatedly denied disfavored groups full social, civil, and political citizenship rights").

4. Dred Scott v. Sandford, 60 U.S. 393 (1856).

5. Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton, NJ: Princeton University Press, 2004), 7; Natalia Molina, *How Race Is Made*

in America: Immigration, Citizenship, and the Historical Power of Racial Scripts (Berkeley: University of California Press, 2014), 2.

6. See United States v. Thind, 261 U.S. 204 (1923) (concluding people from India were not white), and Ozawa v. United States, 260 U.S. 178 (1922) (barring Japanese people from naturalizing because they were not white).

7. According to Daniel Kanstroom, *Fong Yue Ting* has "been cited by the Supreme Court more than eighty times." Daniel Kanstroom, *Deportation Nation: Outsiders in American History* (Cambridge, MA: Harvard University Press, 2010), 17; Gabriel J. Chin, "Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration," *UCLA Law Review* 46 (1998): 6 ("*Plessy*, *Lockwood*, *Davis*, and other disgraceful cases of that era are not just dead but dishonored, usually discussed if at all as evidence of a lamentable history of bigotry in American law. The cases that created the plenary power doctrine, by contrast, not only continue to be cited but, in the words of one distinguished authority, 'said nearly everything the modern lawyer needs to know about the source and extent of Congress's power to regulate immigration'") quoting T. Alexander Aleinikoff, "Federal Regulation of Aliens and the Constitution," *American Journal of International Law* 83 (1989): 862; Kevin R. Johnson, *The Huddled Masses Myth* (Philadelphia: Temple University Press, 2004), 14 (discussing the racist origins of the plenary power doctrine and the fact that it remains the law of the land).

8. Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).

9. *Chae Chan Ping*, 130 U.S. at 609; Hiroshi Motomura, *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States* (New York: Oxford University Press, 2006), 29 (arguing the case was "premised on Anglo-Saxon racial superiority").

10. Fong Yue Ting v. United States, 149 U.S. 698, 706 (1893).

11. *Fong Yue Ting*, 149 U.S. at 706.

12. *Fong Yue Ting*, 149 U.S. at 733 (Brewer, J., dissenting) and 149 U.S. at 738.

13. *Chae Chan Ping*, 130 U.S. at 606.

14. David Scott FitzGerald and David Cook-Martin, *Culling the Masses: The Democratic Origins of Racist Immigration Policy in the Americas* (Cambridge, MA: Harvard University Press, 2014), 1.

15. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

16. In 1903, the Supreme Court held that noncitizens facing deportation from the interior of the United States were entitled to procedural due process protections, such as the right to appear in court prior to being deported. Yamataya v. Fisher, 189 U.S. 86 (1903). In 1982, the Court expanded procedural due process protections to lawful permanent residents facing exclusion from reentering the country after a brief absence. Landon v. Plasencia, 459 U.S. 21 (1982); Hiroshi Motomura, "The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights," *Columbia Law Review* 92 (1992): 1652 (arguing that although courts were historically "unwilling[] to give the procedural due process requirement any real content," they have been moving toward imbuing immigration law with greater substantive protections through the guise of procedural due process).

17. *Yamataya v. Fisher*, 189 U.S.

18. Motomura, "The Curious Evolution," 1646.

19. Fiallo v. Bell, 430 U.S. 787 (1977).

20. Daniel Kanstroom and M. Brinton Lykes, "Migration, Detention, and Deportation: Dilemmas and Responses," in *Deportations Delirium: Interdisciplinary Responses*, ed. Daniel Kanstroom and M. Brinton Lykes (New York: New York University Press, 2015), 12.

21. Kanstroom and Lykes, "Migration, Detention, and Deportation," 11.

22. The term Manifest Destiny was coined by John L. O'Sullivan in 1845, who described it as "the right of our manifest destiny to over spread and to possess the whole of the continent which Providence has given us for the development of the great experiment of liberty and federaltive [*sic*] development of self government entrusted to us. It is right such as that of the tree to the space of air and the earth suitable for the full expansion of its principle and destiny of growth." Alan Brinkley, *American History: A Survey*, vol. 1, 9th ed. (New York: McGraw-Hill, 1995), 352.

23. Gilbert G. Gonzalez, *Culture of Empire: American Writers, Mexico, and Mexican Immigrants, 1880–1930* (Austin: University of Texas Press, 2004), 9.

24. Gloria E. Anzaldúa, *Borderlands/La Frontera: The New Mestiza*, 2nd ed. (San Francisco: Aunt Lute, 1999), 29.

25. John Morton Blum, William S. McFeely, Edmund S. Morgan, Arthur M. Schlesinger, and Kenneth M. Stampp, *The National Experience: A History of the United States to 1877*, 8th ed. (Belmont, CA: Wadsworth, 1993).

26. Leticia Saucedo, "Mexicans, Immigrants, Cultural Narratives, and National Origin," *Arizona State Law Journal* 44 (2012): 307–8.

27. See, e.g., *In re* Rodriguez, 81 F. 337 (1897).

28. Ken Gonzalez Day, *Lynching in the West: 1850–1935* (Durham, NC: Duke University Press, 2006).

29. Laura E. Gomez argues that Mexicans were treated as "off-white" during this time period because they were legally defined as white under naturalization laws, but they were socially treated as nonwhite. Laura Gomez, *Manifest Destinies: The Making of the Mexican American Race* (New York: New York University Press, 2008), 84–85. Natalia Molina refers to the period between 1924 and 1965 as "an immigration regime that remade racial categories that still think the way we think about race, and specifically about Mexicans," whom, she argues, "are still not deemed fully American and are largely equated with illegality." Molina, *How Race Is Made in America*, 16.

30. Ngai, *Impossible Subjects*, 75.

31. Stephen W. Bender, *Run for the Border: Vice and Virtue in U.S.-Mexico Border Crossings* (New York: New York University Press, 2012), 125.

32. Roman, *Citizenship and Its Exclusions*, xi.

33. Leo R. Chavez, *The Latino Threat: Constructing Immigrants, Citizens, and the Nation*, 2nd ed. (Palo Alto, CA: Stanford University Press, 2013).

34. Chavez, *The Latino Threat*, 4.

35. The depiction of Mexicans as diseased has also played an important role in the history of excluding and deporting Mexicans from the United States. Molina, *How Race Is Made in America*, 94.

36. Ana Gonzalez-Barrera, "More Mexicans Leaving Than Coming to the U.S.," Pew Research Center, November 19, 2015, http://www.pewhispanic.org/2015/11/19/more-mexicans-leaving-than-coming-to-the-u-s/.

37. Peter Brimelow's 1995 best seller *Alien Nation* clearly articulates this fear that the "white majority" will be overridden by Latino immigrants, particularly from Mexico. He argues that "the American nation has always had a specific ethnic core. And that core has been white." Brimelow presents a multiracial, multiethnic society, and specifically a growing population of people of Mexican origin, as threatening to the very foundation of American culture. Peter Brimelow, *Alien Nation: Common Sense about America's Immigration Disaster* (New York: Harper Perennial, 1996), 10. Invasion rhetoric has been employed in political campaigns as well. In 1994, California governor Pete Wilson's reelection campaign featured commercials showing migrants from Mexico flooding across the border into the United States coupled with the words "they keep coming." FitzGerald and Cook-Martin, *Culling the Masses*, 134.

38. Samuel Huntington, "The Special Case of Mexican Immigration: Why Mexico Is a Problem," *American Enterprise* (December 2000): 20, 22. Similarly, in 2009, Pat Buchanan questioned "whether we're going to survive as a country" because of a projected growth in the Hispanic population in the United States. Chavez, *The Latino Threat*, 1.

39. Ann Coulter, *¡Adios, America! The Left's Plan to Turn Our Country into a Third World Hellhole* (Washington, DC: Regnery, 2015).

40. Ron Nixon, "Border Wall Could Cost 3 Times Estimates, Senate Democrats' Report Says," *New York Times*, April 18, 2017.

41. United States v. Ortiz, 422 U.S. 891, 904 (1975); City of Indianapolis v. Edmond, 531 U.S. 32, 38 (2000).

42. Ngai, *Impossible Subjects*, 154–55.

43. Judith Warner studied the use of this terminology in public discourse and found that "the term 'immigrant' has positive connotations in relation to the development and operation of democracy and U.S. history while 'illegal aliens' are vilified." Judith Ann Warner, "The Social Construction of the Criminal Alien in Immigration Law, Enforcement Practice and Enumeration: Consequences for Immigrant Stereotyping," *Journal of Social and Ecological Boundaries* 1, no. 2 (2005–6): 56.

44. D. Carolina Nuñez, "War of the Words: Aliens, Immigrants, Citizens, and the Language of Exclusion," *Brigham Young University Law Review* 2013 (2014): 1517, 1520.

45. Alfredo Mirandé, *Gringo Justice* (Notre Dame, IN: University of Notre Dame Press, 1987), 17.

46. Kelly Lytle Hernandez, *Migra! A History of the U.S. Border Patrol* (Berkeley: University of California Press, 2010), 205–6.

47. Hernandez, *Migra!*, 206.

48. Hernandez, *Migra!*, 206.

49. Hernandez, *Migra!*, 209.

50. Graham C. Ousey and Charis E. Kubrin, "Immigration and Crime: Assessing a Contentious Issue," *Annual Review of Criminology* 1 (June 27, 2017), https://doi.org/10.1146/annurev-criminol-032317-092026; Bianca E. Bersani, "An Examination of First

and Second Generation Immigrant Offending Trajectories," *Justice Quarterly* 31 (February 16, 2012), http://dx.doi.org/10.1080/07418825.2012.659200; Robert J. Sampson, "Rethinking Crime and Immigration," *Contexts* 7 (2008): 28–33.

51. Department of Homeland Security, *Immigration Enforcement Actions: 2015* (Washington, DC: U.S. Department of Homeland Security, Office of Immigration Statistics, 2017), table 8, https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2015.pdf.

52. False claims to citizenship and alien smuggling are less common but are also included in the category of immigration crimes.

53. U.S. Sentencing Commission, "Figure A: Offenders in Each Primary Offense Category, Fiscal Year 2015," http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/FigureA.pdf; U.S. Sentencing Commission, "Table 3: Change in Guideline Offenders in Each Primary Offense Category, Fiscal Year 2014–2015," http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table03.pdf; Michael Light, Mark Hugo Lopez, and Ana Gonzalez-Barrera, "The Rise of Federal Immigration Crimes," Pew Research Center, March 18, 2014, http://www.pewhispanic.org/2014/03/18/the-rise-of-federal-immigration-crimes/.

54. Ingrid V. Eagly, "Prosecuting Immigration," *Northwestern University Law Review* 104, no. 4 (2010): 1281.

55. U.S. Sentencing Commission, "Table 4: Race of Offenders in Each Offense Category, Fiscal Year 2015," http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table04.pdf.

56. Judith Ann Warner found that the mechanisms the government uses to track deportation skew the statistics by including people with criminal convictions from many years prior to their deportation and by including people whose convictions are based on immigration offenses. She warns that "Office of Immigration statistics which imply a rapidly increasing immigrant crime wave will promote stereotyping on a very dubious basis in a nation already suffering a xenophobic reaction to the new immigration and the threat of terrorism." Warner, "The Social Construction of the Criminal Alien," 71.

57. Guillermo Cantor, Mark Noferi, and Daniel E. Martinez, *Enforcement Overdrive: A Comprehensive Assessment of ICE's Criminal Alien Program* (Washington, DC: American Immigration Council, 2015), 14–15, http://immigrationpolicy.org/special-reports/enforcement-overdrive-comprehensive-assessment-criminal-alien-program.

58. Cantor, Noferi, and Martinez, *Enforcement Overdrive*, 14–15.

59. Cantor, Noferi, and Martinez, *Enforcement Overdrive*, appendix 1 (1.5 percent of the people deported through the Criminal Alien Program had most serious convictions of sexual assault, and 0.5 percent of homicide).

60. *In re Lawrence*, 190 P.3d 535 (2008).

61. Nancy Mullane, *Life after Murder: Five Men in Search of Redemption* (New York: Public Affairs, 2012).

62. Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: New Press, 2010).

63. Mona Lynch, "Backpacking the Border: The Intersection of Drug and Immigration Prosecutions in a High-Volume US Court," *British Journal of Criminology* 57, no. 1 (2015): 112–31, https://doi.org/10.1093/bjc/azv105.

64. Cantor, Noferi, and Martinez, *Enforcement Overdrive*. Similar racial profiling occurred in Secure Communities, where 93 percent of the people identified through the program were Latino. Launched in 2008, Secure Communities was a federal program that required local police to run fingerprints of those arrested through federal databases to identify immigration issues. If a potential immigration problem was found, the local agency would keep the person in custody until he or she could be transferred to ICE custody, frequently holding people for days longer than they otherwise would have been detained in order to facilitate this transfer. Aarti Kohli, Peter Markowitz, and Lisa Chavez, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process* (Berkeley, CA: Warren Institute, 2011), 5–6.

65. Narina Nuñez, Minday J. Dahl, Connie M. Tang, and Brittney L. Jensen, "Trial Venue Decisions in Juvenile Cases: Mitigating and Extralegal Factors Matter," *Legal and Criminological Psychology* 12 (2007): 21, 37.

66. Juliet Stumpf, "Doing Time: Crimmigration Law and the Perils of Haste," *UCLA Law Review* 58, no. 1705 (2011): 26.

67. Heike Drotbohm and Ines Hasselberg, "Deportation, Anxiety, Justice: New Ethnographic Perspectives," *Journal of Ethnic and Migration Studies* 41, no. 4 (2014): 551–62.

68. Ingrid V. Eagly, "Criminal Justice for Noncitizens: An Analysis of Local Enforcement," *New York University Law Review* 99 (2013): 1126, 1128.

69. Nathalie Peutz and Nicholas De Genova, *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement* (Durham, NC: Duke University Press, 2010), 10.

70. Daniel Kanstroom frames contemporary U.S. deportation policy as a social cleansing apparatus aimed at removing "those with undesirable qualities, especially criminal behavior." Daniel Kanstroom, "Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases," *Harvard Law Review* 11 (2000): 1892. Similarly, anthropologist Susan Bibler Coutin argues that American law "constitute[s] certain noncitizens as expendable others," whom it then deports. Susan Bibler Coutin, "Exiled by Law: Deportation and the Inviability of Life," in *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement*, ed. Nathalie Peutz and Nicholas de Genova (Durham, NC: Duke University Press, 2010), 357.

71. Barack Obama, Second Presidential Debate, October 16, 2012; "Remarks by the President in Address to the Nation on Immigration," The White House, November 20, 2014, https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration; Graham Lanktree, "Trump Says Immigrant Gang Members 'Slice and Dice' Young, Beautiful Girls," *Newsweek*, July 26, 2017, http://www.newsweek.com/trump-says-immigrant-gang-members-slice-and-dice-young-beautiful-girls-642046.

72. Lucas Guttentag, "Immigration Legislation and Due Process: The Forgotten Issue," *International Migration Review* 19 (1996): 33–34.

73. Anil Kalhan, "Revisiting the 1996 Experiment in Comprehensive Immigration Severity in the Age of Trump," *Drexel Law Review* 9 (2017): 263.

74. Kalhan, "Revisiting the 1996 Experiment," 263.

75. Anti–Drug Abuse Act of 1988, Pub. L. No. 100–690, § 7342, 102 Stat. 4181, 4469–70.

76. César Cuahtémoc García Hernández, "Creating Crimmigration," *Brigham Young University Law Review* 2013 (2014): 1469–70.

77. American Immigration Council, "Aggravated Felonies: An Overview," December 16, 2016, https://www.americanimmigrationcouncil.org/research/aggravated-felonies-overview ("Today, the definition of 'aggravated felony' covers more than thirty types of offenses, including simple battery, theft, filing a false tax return, and failing to appear in court").

78. Three hundred thousand people were deported from the United States for aggravated felony convictions between fiscal years 1992 and 2006. In recent years, somewhere in the neighborhood of forty thousand people per year with aggravated felony convictions have been deported annually. Transactional Records Access Clearinghouse (TRAC), "New Data on the Processing of Aggravated Felons," January 5, 2007, http://trac.syr.edu/immigration/reports/175/; TRAC, "How Often Is the Aggravated Felony Statute Used?," 2006, http://trac.syr.edu/immigration/reports/158/.

79. TRAC, "How Often Is the Aggravated Felony Statute Used?"

80. TRAC, "How Often Is the Aggravated Felony Statute Used?"

81. Department of Homeland Security, *Immigration Enforcement Actions: 2013* (Washington, DC: U.S. Department of Homeland Security, Office of Immigration Studies, 2014), table 7, https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2013.pdf.

82. Marc R. Rosenblum and Doris Meissner, *The Deportation Dilemma: Reconciling Tough and Humane Enforcement* (Washington, DC: Migration Policy Institute, 2014), 3–4, http://www.migrationpolicy.org/research/deportation-dilemma-reconciling-tough-humane-enforcement.

83. Department of Homeland Security, *Immigration Enforcement Actions: 2015*, table 6.

84. Executive Office for Immigration Review, *FY 2016 Statistics Yearbook*, 1.

85. Department of Homeland Security, *Immigration Enforcement Actions: 2013*, 6; Department of Homeland Security, *Immigration Enforcement Actions: 2015*.

86. Immigration and Nationality Act § 238.

87. Immigration and Nationality Act § 238(b).

88. Jeremy Slack, Daniel E. Martínez, and Scott Whiteford, eds., *In the Shadow of the Wall* (Tucson: University of Arizona Press, 2013), 121.

89. Slack, Martínez, and Whiteford, *In the Shadow of the Wall*.

90. Department of Homeland Security, *Immigration Enforcement Actions: 2015*, table 6; TRAC, "ICE Bypassing Immigration Courts? Deportations Rise as Deportation Orders Fall," August 13, 2012, http://trac.syr.edu/immigration/reports/291/.

91. Daniel Kanstroom, *Aftermath: Deportation Law and the New American Diaspora* (New York: Oxford University Press, 2012), 66.

92. Trina Realmuto, "Practice Advisories: Reinstatement of Removal," Legal Action Center, April 29, 2013, http://www.legalactioncenter.org/sites/default/files/reinstatement_of_removal_4-29-13_fin.pdf ("Every circuit has held that the court of appeals has jurisdiction over petitions for review of reinstatement orders").

93. Immigration and Nationalization Act § 240(e)(1).

94. For example, one study "found that asylum seekers in expedited removal proceedings were at risk of being returned to countries where they may face persecution." Denise Noonan Slavin and Dana Leigh Marks, "Who Should Preside Over Immigration Cases," in *Deportations Delirium: Interdisciplinary Responses*, ed. Daniel Kanstroom and M. Brinton Lykes, 89–112 (New York: New York University Press, 2015), 104.

95. Maritza I. Reyes, "Constitutionalizing Immigration Law: The Vital Role of Judicial Discretion in the Removal of Lawful Permanent Residents," *Temple Law Review* 84 (2012): 646 (citing Theagene v. Gonzales, 411 F.3d 1107, 1113 (9th Cir 2005)).

96. See Bill Ong Hing, *Deporting Our Souls: Values, Morality, and Immigration Policy* (New York: Cambridge University Press, 2006).

97. Hing, *Deporting Our Souls*, 60.

98. Hing, *Deporting Our Souls*, 60.

99. Paredes-Urrestarazu v. INS, 36 F.3d 801 (9th Cir. 1994).

100. Diaz-Resendez v. INS, 960 F.2d 493 (5th Cir. 1992).

101. Hing, *Deporting Our Souls*, 63.

102. Mellouli v. Lynch, 135 S. Ct. 1980 (2015).

103. Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

104. Paul Grussendorf, "Immigration Judges Need Discretion," *SF Gate*, April 11, 2013, https://www.sfgate.com/opinion/openforum/article/Immigration-judges-need-discretion-4428406.php.

105. Dana Leigh Marks, "Let Immigration Judges Be Judges," *The Hill*, May 9, 2013, http://thehill.com/blogs/congress-blog/judicial/298875-let-immigration-judges-be-judges.

106. Judge Zsa Zsa DePaolo was speaking at a public event that I attended.

107. James P. Vandello, "Perspective of an Immigration Judge," *Denver University Law Review* 80, no. 4 (2003): 780.

108. Nancy Morawetz, "Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms," *Harvard Law Review* 113 (2000): 1950.

109. Randy Capps, Heather Koball, Andrea Campetella, Krista Perreira, Sarah Hooker, and Juan Manuel Pedroza, *Implications of Immigration Enforcement Activities for the Well-Being of Children in Immigrant Families: A Review of the Literature* (Washington, DC: Urban Institute and Migration Policy Institute, 2015), 5.

110. Report No. 81/10, Case 12.562, Wayne Smith, Hugo Armendariz et al. (July 12, 2010).

111. Presidential Statement of Signing of the AEDPA, 32 Weekly Comp. Pres. Doc. 720 (April 24, 1996).

112. Court documents. It is worth noting that this framework is based on traditional notions of family. People whose lives do not correspond to these norms—gay couples, people without children, or people who embrace more nontraditional lifestyles—would likely face even greater challenges convincing a judge to exercise discretion to allow them to stay. I return to this issue in the conclusion, where I discuss an approach employed by the European Court of Human Rights that uses expansive definitions of family and also considers an individual's right to private life.

113. Immigration and Nationality Act (INA) of 1952 § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) (2012). There are some very narrow exceptions. For example, an individual may be eligible for protection under the Convention against Torture.

114. See 8 U.S.C. § 1182(a)(9)(A)(ii) (2012) (stating that a noncitizen who has been convicted of an "aggravated felony" and has been previously ordered removed is inadmissible "at any time"). For people who did not enter as lawful permanent residents, INA 212(h) provides an avenue to apply for a waiver from this lifetime bar. However, it is extremely difficult for people with aggravated felonies to qualify for this waiver.

115. Ingrid V. Eagly and Steven Shafer, "A National Study of Access to Counsel in Immigration Court," *University of Pennsylvania Law Review* 164, no. 1 (2015): 1–91.

116. Jayashri Srikantiah and Lisa Weissman-Ward, *Access to Justice for Immigrant Families and Communities: Study of Legal Representation of Detained Immigrants in Northern California* (Northern California Collaborative for Immigrant Justice, 2014), https://www.lccr.com/wp-content/uploads/NCCIJ-Access-to-Justice-Report-Oct.-2014.pdf, 18.

117. Eagly and Shafer, "A National Study," 9.

118. See, e.g., Aguilera-Enriquez v. INS, 516 F.2d 565 (1975).

119. *Aguilera-Enriquez*, 516 F.2d at 574 (J. DeMascio, dissenting).

120. Quality control is also a critical issue in immigration cases. Even those who can hire attorneys often receive deficient representation. Immigration judges in New York courts reported in 2011, for example, that the representation by immigration attorneys in cases they presided over "does not meet a basic level of adequacy" in almost half of the cases that appear before them. New York Immigrant Representation Study Report, "Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings," *Cardozo Law Review* 333 (2011): 357.

121. Department of Homeland Security, *2015 Yearbook of Immigration Statistics* (Washington, DC: U.S. Department of Homeland Security, 2016), table 39.

122. The United States expels people from its boundaries through two legal mechanisms: removal and return. People who are removed are ordered to leave the country, by either an immigration judge or an immigration official. The fact that they were removed subjects them to administrative and criminal penalties if they seek to return. In contrast, people who are returned are generally apprehended at the border and are sent back without an order of removal. While more people were removed under President Obama's administration, fewer people were returned.

123. Kanstroom and Lykes, "Migration, Detention, and Deportation," 4–5.

124. In 2015, Mexicans constituted 242,456 out of a total of 333,341 people deported from the United States. Department of Homeland Security, *2015 Yearbook of Immigration Statistics*, table 41.

125. Records from ICE confirm that a sizeable number of people deported from the interior have long-term ties to the country—17 percent of those apprehended in the interior of the country between 2003 and 2013 had lived in the United States for over ten years. Marc R. Rosenblum and Kristen McCabe, *Deportation and Discretion: Reviewing the Record and Options for Change* (Washington, DC: Migration Policy Institute, 2014), 24, https://www.migrationpolicy.org/research/deportation-and-discretion-reviewing-record-and-options-change.

126. Marjorie S. Zatz and Nancy Rodriguez, *Dreams and Nightmares: Immigration Policy, Youth, and Families* (Oakland: University of California Press, 2015).

127. James Lee and Bryan Baker, *Estimates of the Lawful Permanent Resident Population in the United States: January 2014* (Washington, DC: U.S. Department of Homeland Security, 2017), 3, https://www.dhs.gov/sites/default/files/publications/LPR%20Population%20Estimates%20January%202014.pdf.

128. Tonatiuh Guillén López, "Entre la convergencia y la exclusión: La deportación de mexicanos desde Estados Unidos de América" [Between convergence and exclusion: The deportation of Mexicans from the United States], *Realidad, Datos y Espacio Revista Internacional de Estadistica y Geografia* 3, no. 3 (2012): 164, 174, http://www.inegi.org.mx/RDE/RDE_07/Doctos/RDE_07_opt.pdf. People deported to Mexico in recent years have generally spent more time in the United States than people who were deported in the past. Only 3 percent of people surveyed upon their removal to Tijuana in 2004 had lived in the U.S. for three years or more, but this number jumped to 38 percent in 2011. López, "Entre la convergencia y la exclusión."

129. Slack, Martínez, and Whiteford, *In the Shadow of the Wall*, 11.

130. For example, the Supreme Court has previously held that mandatory civil detention does not violate the Constitution in the immigration realm even though the Constitution would bar the practice in other contexts. Demore v. Kim, 538 U.S. 510, 522 (2003). But see Zadvydas v. Davis, 533 U.S. 678 (2001) (applying some substantive due process limits in the immigration realm by holding that the plenary power doctrine does not allow the government to indefinitely detain immigrants subject to deportation).

131. Fong Yue Ting v. United States, 149 U.S. 698, 756 (1893) (Field, J., dissenting).

132. Office of the High Commissioner of Human Rights, *Recommended Principles and Guidelines on Human Rights at International Borders* (Geneva: UNHR, 2014), http://www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf.

133. United States Commission on Civil Rights, *With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities* (2015), 123, http://www.usccr.gov/pubs/Statutory_Enforcement_Report2015.pdf.

134. There are signs that this may be changing. For example, in 2001 the Supreme Court ruled that indefinitely detaining immigrants violates the Constitution (Zadvydas v. Davis, 533 U.S. 678), and in 2017 the Supreme Court held an immigration law to violate the Equal Protection Clause of the Constitution because it discriminated on the basis of gender (Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017)). Kevin Johnson analyzed a series of Supreme Court decisions on immigration-related issues in 2017 and concluded that "the court appears to be moving toward applying ordinary constitutional norms to immigration law." Kevin Johnson, "No Decision in Two Immigration-Enforcement Cases," *SCOTUSblog*, June 26, 2017, http://www.scotusblog.com/2017/06/no-decision-two-immigration-enforcement-cases/.

135. Jennifer Chacón argues that the 1996 immigration reforms "normalized a national discourse that positions all immigrants, and particularly those perceived as 'illegal Mexican immigrants,' as a crime and security problem that needs solving, rather

than an integral part of the national community." Jennifer M. Chacón, "The 1996 Immigration Laws Come of Age," *Drexel Law Review* 9 (2017): 299–300.

TWO. RETURN TO A FOREIGN LAND

1. In longitudinal research with undocumented young people in Los Angeles, Roberto G. Gonzales found that undocumented immigrants who came to the U.S. as children often did not realize they were undocumented until their teenage years. Roberto G. Gonzalez, *Lives in Limbo: Undocumented and Coming of Age in America* (Oakland: University of California Press, 2015). He describes adolescence as a traumatic time for his undocumented respondents when "the condition of illegality, which is temporarily suspended during childhood and early adolescence, becomes a significant part of everyday life in adulthood" as they come "into closer contact with legal exclusions" such as bars to applying for college and financial aid, getting jobs, and obtaining driver's licenses.

2. He made this statement in English. Using the term "rare" in this context sounds more natural in Spanish, where the phrase "No soy raro" would literally translate to "I'm not weird."

3. Academics point out the "othering" of referring to people as aliens. According to Gerald Neuman, the term "calls attention to their 'otherness' and even associates them with nonhuman invaders from outer space." Gerald L. Neuman, "Aliens as Outlaws, Government Services, Proposition 187, and the Structure of Equal Protection Doctrine," *UCLA Law Review* 42 (1994), 1428; Kevin R. Johnson, "Aliens and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons," *University of Miami Inter-American Law Review* 28 (1996): 272 ("The word alien immediately brings forth rich imagery. One thinks of space invaders seen on television and in movies").

4. The Migrant Border Crossing Study found that 23 percent of the deportees they surveyed reported verbal abuse during the deportation process. Daniel E. Martínez, Jeremy Slack, and Josiah Heyman, *Bordering on Criminal: The Routine Abuse of Migrants in the Removal System* (Washington, DC: American Immigration Council, 2013), 2, https://www.americanimmigrationcouncil.org/research/bordering-criminal-routine-abuse-migrants-removal-system.

5. Martínez, Slack, and Heyman, *Bordering on Criminal*, 6.

6. Jeremy Slack, Daniel E. Martínez, and Scott Whiteford, *In the Shadow of the Wall* (Tuscon: University of Arizona Press, 2013), 119.

7. Martínez, Slack, and Heyman, *Bordering on Criminal*, 5.

8. Martínez, Slack, and Heyman, *Bordering on Criminal*, 5.

9. Deborah Boehm, *Returned: Going and Coming in an Age of Deportation* (Oakland: University of California Press, 2016), 27.

10. Boehm, *Returned*, 28.

11. Cecilia Menjívar, "Liminal Legality: Salvadoran and Guatemalan Immigrants' Lives in the United States," *American Journal of Sociology* 111, no. 4 (2006): 999–1037.

12. Michael Sangiacomo and Alfredo Corchado, "Man Who Was Kidnapped after Deportation Is Freed Following Payments, 5 Days of Beatings," *Dallas News*, August 1,