The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965

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In January 1930 officials of the Bureau of Immigration testified about the Border Patrol before a closed session of the House Immigration Committee. Henry Hull, the commissioner general of immigration, explained that the Border Patrol did not operate "on the border line" but as far as one hundred miles "back of the line." The Border Patrol, he said, was "a scouting organization and a pursuit organization. . . . [Officers] operate on roads

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without warrants and wherever they find an alien they stop him. If he is illegally in the country, they take him to unit headquarters."[1]

George Harris, the assistant commissioner general, added that Congress had authorized the Border Patrol to arrest aliens without warrant in 1925. It is true, Harris said, that the law provided for arrest without warrant when an alien "enters in the presence or view . . . of the officer, but this does not necessarily mean that the officer must see the alien at the exact moment that he crosses the border into the United States. Entry is a continuing offense and is not completed . . . until the alien reaches his interior destination."[2]

Members of the House committee expressed concern that the Border Patrol, which was not a criminal law enforcement agency and had no statutory authority to execute search warrants, had defined its jurisdiction not just at the border but far into the nation's interior. This might extend not only one or two hundred miles but, theoretically, throughout the entire interior. If, as Hull said, "wherever [officers] find an alien, they stop him," how did the officers know the difference between an alien and a citizen? Indeed, what did it mean that Border Patrol officers could stop, interrogate, and search without a warrant anyone, anywhere, in the United States?

Yet if Congress was uneasy about the Border Patrol's reach, it had nearly assured such an outcome when it passed the Immigration Acts of 1921 and 1924, which for the first time imposed numerical restrictions on immigration. Because illegal entry is a concomitant of restrictive immigration policy, the quota laws stimulated the production of illegal aliens and introduced that problem into the internal spaces of the nation. Although unlawful entry had always resulted from exclusion, in the 1920s illegal immigration achieved mass proportions and deportation assumed a central place in immigration policy. The nature and demands of restriction raised a range

1. In 1891 Congress created the Immigration Bureau as part of the Department of Commerce and Labor (which became the Department of Labor in 1913). The Immigration Service was the Bureau's field organization; the Border Patrol was a division of the Service. In 1932 the Immigration Bureau and Naturalization Bureau merged to form the Immigration and Naturalization Service (INS). In 1940 Congress moved the INS to the Department of Justice.

Transcript, testimony before Executive Session of the House Committee on Immigration and Naturalization (hereafter "House Immigration Committee"), Jan. 15, 1930, file 55688/876–1, entry 9, Records of the Immigration and Naturalization Service, Record Group 85, National Archives (Washington) (hereafter "INS").

2. Ibid.; Act of Feb. 27, 1925 (43 Stat. 1049). The bureau's policy was an expansive interpretation of a 1916 federal court ruling, *Lew Moy et al. v. United States* (237 Fed. 50). In that case the court upheld the arrest of Chinese aliens two hundred miles north of the Mexican border on the grounds that the alleged act of conspiracy to smuggle had not yet been completed. Commissioner General of Immigration to the Secretary of Labor, *Annual Report* (hereafter *INS Annual Report*), fiscal year ending June 30, 1930, p. 36; "Immigration Border Patrol" (preliminary hearing, unrevised), March 5, 1928, Hearings before the House Immigration Committee, 70th Congress, First Session (Washington, D.C.: GPO, 1930), 5.

of problems for the modern state, which were at once administrative (how should restriction be enforced?), juridical (how is sovereignty defined?), and constitutional (do illegal aliens have rights?).

These questions had been answered with relative ease in the late nineteenth century, when illegal aliens comprised Chinese and other marginalized persons (such as criminals, the insane, and prostitutes) who could be summarily expelled from the United States. Upholding Chinese exclusion, the Supreme Court in the 1880s and 1890s located Congress's power to regulate immigration outside of the Constitution, in the nation's sovereignty, which power it deemed was absolute. The Court considered this necessary to protect the nation from foreign invasion, whether from armies during wartime or from foreign migrants during peacetime. The doctrine of plenary power privileged the nation's sovereignty absolutely over the rights of individual persons. Thus the Court declared that aliens have no right "to be and remain in this country, except by the license, permission, and sufferance of congress." In the era of numerical restriction, the exercise of this sovereign power over immigrants, especially those illegally present, gave rise to complex and troubling issues.[3]

This essay examines the advent of mass illegal immigration and deportation policy under the Immigration Act of 1924 and how these trends altered meanings of inclusion in and exclusion from the nation. It argues that numerical restriction created a new class of persons within the national body—illegal aliens—whose inclusion in the nation was at once a social reality and a legal impossibility. This contradiction challenged received notions of sovereignty and democracy in several ways. First, the increase in the number of illegal entries created a new emphasis on control of the nation's contiguous land borders, which emphasis had not existed before. This new articulation of state territoriality reconstructed national borders and national space in ways that were both highly visible and problematic. At the same time, the notion of border control obscured the policy's unavoidable slippage into the interior.

Second, the application of the deportation laws gave rise to an oppositional political and legal discourse, which imagined deserving and undeserving illegal immigrants and, concomitantly, just and unjust deportations. These categories were constructed out of modern ideas about social desirability, in particular with regard to crime and sexual morality, and values that esteemed family preservation. Critics argued that deportation was unjust in cases where it separated families or exacted other hardships that were

3. *Chae Chan Ping v. U.S.,* 130 U.S. 581 (1889); *Nishimura Eiku v. U.S.,* 142 U.S. 652, 659 (1892); *Fong Yue Ting v. U.S.,* 149 U.S. 698, 706, 723 (1893). See also Linda S. Bosniak, "Membership, Equality, and the Difference That Alienage Makes," *New York University Law Review* 69 (Dec. 1994): 1047–1149.

out of proportion to the offense committed. As a result, during the 1930s deportation policy became the object of legal reform to allow for administrative discretion in deportation cases. Just as restriction and deportation "made" illegal aliens, administrative discretion "unmade" illegal aliens.

Taken together, these trends redefined the normative basis of social desirability and inclusion in the nation. That process had an important racial dimension because the application and reform of deportation policy had disparate effects on Europeans and Canadians, on the one hand, and Mexicans, on the other hand. But, the disparity was not simply the result of existing racism. Rather, the processes of territorial redefinition and administrative enforcement informed divergent paths of immigrant racialization. Europeans and Canadians tended to be disassociated from the real and imagined category of illegal alien, which facilitated their national and racial assimilation as white American citizens. In contrast, Mexicans emerged as iconic illegal aliens. Illegal status became constitutive of a racialized Mexican identity and of Mexicans' exclusion from the national community and polity.

Deportation Policy and the Making of Illegal Aliens

The illegal immigrant cannot be constituted without deportation—the possibility or threat of deportation, if not the fact. The possibility derives from the actual existence of state machinery to apprehend and deport illegal aliens. The threat remains in the temporal and spatial "lag" that exists between the act of unlawful entry and apprehension or deportation (if, in fact, the illegal alien is ever caught). The many effects of the lag include the psychological and cultural problems associated with "passing" or "living a lie," community vulnerability and isolation, and the use of undocumented workers as a highly exploited or reserve labor force. Examining the policy and practice of deportation provides us not only with an understanding of how illegal immigration is constituted but also a point of entry into the experience of illegal immigrants, which, by its nature, remains largely invisible to the mainstream of society.[4]

Deportation was not invented in the 1920s, but it was then that it came of age. In a sense, legal provisions for the deportation of unwanted immi-

4. The official record is not without problems. Data on apprehensions and deportations do not represent all unlawful entries and are further skewed by policy decisions to police certain areas or populations and not others. On methodologies employed, see "Illegal Alien Resident Population," *INS Statistical Yearbook* (1998); see also Barry Edmonston, Jeffrey Passel, and Frank Bean, *Undocumented Migration to the United States: IRCA and the Experience of the 1980s* (Santa Monica, Ca.: Rand Corporation, 1990), 16–18, 27. I thank Neil Gotanda for suggesting that the racial concept of "passing" may be applied to illegal immigrants.

grants existed in America since colonial times, the principle having been derived from the English poor laws. A 1794 Massachusetts law, for example, called for the return of paupers to their original towns or "to any other State, or to any place beyond sea, where he belongs." The expense of transatlantic removal, however, meant that deportations to Europe rarely took place, if at all. The Alien and Sedition Laws (1798–1801) provided for the exclusion and expulsion of aliens on political grounds. But Americans quickly rejected the principle of political removal during peacetime and the nation operated without federal regulation of immigration for the better part of the nineteenth century. Unfettered migration was crucial for the settlement and industrialization of America, even if the laboring migrants themselves were not always free.[5]

In 1875 Congress legislated the first federal restrictions on entry when it banned persons convicted of "crimes involving moral turpitude" and prostitutes (a provision aimed at barring Chinese women from entry). During the 1880s the number of excludable classes grew to comprise the mentally retarded, contract laborers, persons with "dangerous and loathsome contagious disease," paupers, polygamists, and the "feebleminded" and "insane," as well as Chinese laborers. The litany of excludable classes articulated concern over the admission of real and potential public charges as well as late nineteenth-century beliefs, derived from Social Darwinism and criminal anthropology, that the national body had to be protected from the contaminants of social degeneracy.[6]

Still, the nation's border were soft and, for the most part, unguarded. Inspection at arrival sought to identify excludable persons and to deny them admission, but little could be done if they evaded detection and entered the

5. Gerald L. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* (Princeton: Princeton University Press, 1996), 19–43; Kunal Parker, "From Poor Law to Immigration Law: Changing Visions of Territorial Community in Antebellum Massachusetts," *Historical Geography* 28 (2000): 61–85. On migration and nineteenth-century economic development, see David Montgomery, *The Fall of the House of Labor* (New York: Cambridge University Press, 1987), 70–74; John Bodnar, *The Transplanted: A History of Immigrants in Urban America* (Bloomington: Indiana University Press, 1985), xviii–xix; Aristide Zolberg, "Global Movements, Global Walls: Responses to Migration, 1885–1925," in *Global History and Migrations,* ed. Wang Gungwu (Boulder, Col.: Westview, 1997), 279. On the transition from state to federal regulation of immigration, see Mary Sarah Bilder, "The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce," *Missouri Law Review* 61 (1996): 744–824.

6. Edward Hutchinson, *Legislative History of American Immigration Law, 1798–1965* (Philadelphia: University of Pennsylvania Press, 1981), 163–68. 22 Stat. 58 (first Chinese exclusion law, 1882); 22 Stat. 214 (Immigration Act of 1882); 23 Stat. 332 (Alien Contract Labor Law, 1885). On criminal anthropology, anti-Chinese coolieism, and late nineteenth-century anti-modernism, see Colleen Lye, "Model Modernity: The Making of Asiatic Racial Form, 1882–1943" (Ph.D. diss., Columbia University, 1999).

country. Subsequent discovery was commonly the result of being hospitalized or imprisoned, yet no federal law existed mandating the removal of alien public charges from the country. It was not until 1891 that Congress authorized the deportation of aliens who within one year of arrival became public charges from causes existing prior to landing, at the expense of the steamship company that originally brought them. Congress otherwise established no mechanism and appropriated no funds for deportation.[7]

Congress gradually extended the statute of limitation on deportation. The Immigration Act of 1917 added six excludable categories and harsher sanctions, extended the period of deportability to five years, removed all time limits for aliens in certain classes, and for the first time appropriated funds for the enforcement. The new harsh law was applied to immigrant anarchists and communists in a sweep of postwar vengeance against radicalism and labor militancy, culminating in the Palmer Raids in the winter of 1919–1920 when authorities arrested 10,000 alleged anarchists and ultimately deported some five hundred.[8]

The Red Scare notwithstanding, few people were actually excluded or deported before the 1920s. Between 1892 and 1907 the Immigration Service deported only a few hundred aliens a year and between 1908 and 1920 an average of two or three thousand a year—mostly aliens removed from asylums, hospitals, and jails. Deportation appears even less significant when one considers that some one million people a year entered the country in the decade preceding World War I. Congress and the Immigration Service conceived of and executed deportation as an adjunct to the process of exclusion, a correction to the improper admission of excludable aliens.[9] Perhaps most important, mere entry without inspection was insufficient grounds for deportation. The statute of limitation on deportation was consistent with the general philosophy of the melting pot: it seemed unconscionable to expel immigrants after they had settled in the country and had begun to assimilate.

A new regime in immigration policy, that of numerical restriction, commenced in the 1920s. This ended the historical policy of open immigra-

7. Hutchinson, *Legislative History,* 447.

8. Congress extended the statute of limitation for deportation to two years from time of entry in 1903 (32 Stat. 1213) and to three years in 1907 (34 Stat. 898). On the Palmer Raids, see William Preston, Jr., *Aliens and Dissenters: Federal Suppression of Radicals, 1903–1933* (Cambridge: Harvard University Press, 1963).

9. *Historical Statistics of the United States from Colonial Times to 1970* (Washington, D. C.: GPO, 1975), 105, 113; *INS Annual Report,* 1921, pp. 14–15; William Van Vleck, *Administrative Control of Aliens* (New York: Commonwealth Fund, 1932), 20. See also Jane Perry Clark, *Deportation of Aliens from the United States to Europe* (New York: Columbia University Press, 1931), 275.

tion from Europe. Political and economic developments, both national and global, influenced this shift. Anti-alien sentiment in the United States had grown since the mid-1880s, mostly in response to the social problems associated with mass migration from southern and eastern Europe—urban slums, disease, poverty, class conflict. More immediately, World War I had raised nationalism and anti-foreign sentiment to a high pitch. Immigration restriction was a core component of the politics of wartime nationalism and postwar reaction. There were structural influences, as well. By 1920 the system of mass industrial production had matured to a point where increased output derived from technological improvement, not continually increasing inputs of unskilled labor. More broadly, immigration restriction was part of a new global age. World War I marked the consolidation of the international nation-state system, based on Westphalian sovereignty, hardened borders, state citizenship, and passport controls.[10]

In 1921 Congress restricted immigration into the United States to 350,000 a year. The Immigration Act of 1924 further restricted immigration to 150,000 a year, less than 15 percent of the average annual immigration of one million before World War I.[11] Quotas were allocated to countries in proportion to the numbers that the American people traced their "national origin" to those countries, through immigration or the immigration of their forebears. I have discussed the racial dimensions of the national origin quota system elsewhere.[12] Relevant to this discussion is the law's other core feature, numerical restriction, and its concomitants, illegal immigration and deportation.

The passage of the quota laws marked a turn in both the volume and nature of unlawful entry and in the philosophy and practice of deportation.

10. John Higham, *Strangers in the Land: Patterns of American Nativism, 1860–1925,* 2d ed. (1955; New Brunswick, N.J.: Rutgers University Press, 1985), 204–7, 301; Montgomery, *Fall of the House of Labor,* 457–58; Saskia Sassen, *Guests and Aliens* (New York: New Press, 1999), 83–84; John Torpey, *The Invention of the Passport* (New York: Cambridge University Press, 2000), 111–21; Aristide Zolberg, "The Great Wall against China," in *Migration, Migration History, History: Old Paradigms and New Perspectives,* ed. Jan Lucassen and Leo Lucassen (Bern and New York: Peter Lang, 1997).

11. Act of May 19, 1921 (41 Stat. 5); Act of May 26, 1924 (43 Stat, 153); *Historical Statistics,* 105. Not all immigration was subject to numerical quota. Immediate family members of U.S. citizens could immigrate outside the quota limit, as "non-quota immigrants." Natives of the countries of the Western Hemisphere were not subject to quotas. At the same time, all Asians were excluded as "persons ineligible to citizenship." The quotas, then, were directly principally at European countries.

12. Mae M. Ngai, "The Architecture of Race in American Immigration Law: A Re-examination of the Immigration Act of 1924," *Journal of American History* 86 (June 1999): 67–92. See also Robert A. Divine, *American Immigration Policy* (New Haven: Yale University Press, 1957); Higham, *Strangers in the Land;* Desmond King, *Making Americans* (Cambridge: Harvard University Press, 2000).

In general, of course, legislators write laws to include sanctions against their violation. But in the Act of 1924 Congress evinced a wholly different approach toward deportation. The new law eliminated the statute of limitation on deportation for nearly all forms of unlawful entry and provided for the deportation at any time of any person entering after July 1, 1924, without a valid visa or without inspection.[13]

In addition, Congress for the first time legislated a serious enforcement mechanism against unlawful entry by creating a land Border Patrol. In 1929 Congress made unlawful entry a misdemeanor, punishable by one year of imprisonment or a $1,000 fine or both; and made a second unlawful entry a felony, punishable by two years imprisonment or a $2,000 fine or both. Deportation thus amounted to permanent banishment under threat of felony prosecution.[14]

The criminalization of unauthorized entry signaled a radical departure from previous immigration policy, which deemed deportation to be a civil, or administrative, procedure. That policy deprived aliens in deportation proceedings rights protected by the Fourth and Fifth Amendments, but it also protected deportees from criminal punishment.[15] The 1929 law made illegal entry a separate criminal offense; in effect, illegal immigrants inherited the worst of both propositions by making them subject to deportation, under which proceedings they still lacked Constitutional protections, and separate criminal prosecution and punishment. Criminal conviction also made future reentry impossible.[16]

The Immigration Act of 1924 and its attendant enforcement mechanisms spurred a dramatic increase in the number of deportations. A contemporary observed that the "extensive use of the power to expel" began in 1925 and that deportation quickly became "one of the chief activities of the Immigration Service in some districts." By 1928 the bureau was exhausting its funds for deportations long before the fiscal year ended. Carl Robe White, the assistant secretary of labor, told the House Immigration Committee that the department needed an annual budget of ten million dollars for deportations, more than ten times the appropriation for the previous year.[17]

13. Act of May 26, 1924, sec. 14. Those who entered before 1924 continued to be subject to deportation according to the terms of the Immigration Act of 1917.

14. Act of Feb. 27, 1925 (43 Stat. 1049); Act of March 4, 1929 (45 Stat. 1551).

15. *Fong Yue Ting v. U.S.,* at 708; *Wong Wing v. U.S.,* 163 U.S. 228 (1896); *Flora v. Rustad,* 8 Fed. (2nd) 335.

16. Between 1930 and 1936 the service brought over 40,000 criminal cases against unlawful entrants, winning convictions in some 36,000, or 90 percent, of them. Secretary of Labor, *Annual Report,* 1933, p. 45; *INS Annual Reports,* 1929–32; Secretary of Labor, *Annual Reports,* 1933–36.

17. Van Vleck, *Administrative Control,* 21; *INS Annual Report,* 1925, p. 9; White testimony in "Lack of Funds for Deportations," Hearings before the House Immigration Committee,

In 1927, in order to make expulsion more efficient, the Immigration Service allowed illegal aliens without criminal records to depart voluntarily, thereby avoiding the time and expense of instituting formal deportation proceedings. The number of aliens expelled from the country rose from 2,762 in 1920 to 9,495 in 1925 and to 38,795 in 1930.[18] The Immigration Service continued to deport public charges delivered to it by state institutions. But "aliens without proper visa" rapidly became the largest single class of deportees, representing over half the total number of formal deportations and the overwhelming majority of voluntary departures by the late 1920s.[19]

This shift in the principal categories of deportation engendered new ways of thinking about illegal immigration. First, legal and illegal status became, in effect, abstract constructions, having less to do with experience than with numbers and paper. Legal status now rested on being in the right place in the queue—if a country has a quota of *N,* immigrant *N* is legal but immigrant *N+1* is illegal[20]—and having the proper documentation, the prized "proper visa." These were not absolute, of course, as preference categories privileged certain family relations and qualitative indices for exclusion remained in force. However, the qualitative aspects of admission were rendered less visible as they were absorbed by the visa application process, which after 1924 took place at United States consular offices abroad. In addition to overseeing the distribution of quota slots, U.S. consuls determined the desirability of both quota and non-quota prospective migrants according to the submission of a "dossier," questionnaire and interview, and medical certification.[21] In 1924 the Immigration Service terminated medical line inspection at Ellis Island because medical exclusions were determined abroad. Thus, upon arrival, immigrants' visas were inspected, not their bodies. The system shifted to a different, more abstract register, which privileged formal status over all else. It is this system that created what we today call the "undocumented immigrant."

The illegal alien that is abstractly defined is thus something of a specter, a body stripped of individual personage, whose very presence is troubling, wrong. Moreover, this body stripped of personage has no rights. It is no coincidence that the regime of immigration restriction emerged with World War I. The war, by simultaneously destroying the geopolitical stability of Europe and solidifying the nation-state system, also created mil-

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70th Congress, First Session, on HR 3, HR 5673, HR 6069; Jan. 5, 1928, Hearing no. 70.1.1. (Washington, D.C.: GPO, 1928), 10.

18. Historical Statistics, 114. Figures include deportation under formal warrant and voluntary departures.

19. *INS Annual Report,* 1931, pp. 255–56.

20. I am grateful to Kunal Parker for suggesting this illustrative formulation.

21. Act of May 24, 1924, Sec 7(b), (d).

lions of refugees and stateless persons, as well as denationalized and denaturalized persons during the postwar period.[22] Recalling Hannah Arendt, philosopher Giorgio Agamben tells us, "In the system of the nation-state, the so-called sacred and inalienable rights of man show themselves to lack every protection and reality at the moment in which they can no longer take the form of rights belonging to citizens of a state." Certainly the illegal alien appears in the same historical moment and in the same juridical no-man's-land that was created when the war loosened the links between birth and nation, human being and citizen.[23]

Second, the mere idea that persons without formal legal status resided in the nation engendered images of great danger. In 1925 the Immigration Service reported with some alarm that 1.4 million immigrants—20 percent of those who had entered the country before 1921—might already be living illegally in the United States. The service conceded that these immigrants had lawfully entered the country, but because it had no record of their admission, it considered them illegal. It warned,

> (I)t is quite possible that there is an even greater number of aliens in the country whose legal presence here could not be established. No estimate could be made as to the number of smuggled aliens who have been unlawfully introduced into the country since the quota restrictions of 1921, or of those who may have entered under the guise of seamen. The figures presented are worthy of very serious thought, especially when it is considered that there is such a great percentage of our population . . . *whose first act upon reaching our shores* was to break our laws by entering in a clandestine manner—all of which serves to emphasize the potential source of trouble, not to say menace, that such a situation suggests.[24]

Positive law thus constituted undocumented immigrants as criminals, both fulfilling and fueling nativist discourse. Once nativism succeeded in legislating restriction, anti-alien animus shifted its focus to the interior of the

22. Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998), 130–31. See also Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt Brace, 1979, 1951), 267–302. According to Agamben, refugees and stateless persons created by World War I included 1.5 million White Russians, 700,000 Armenians, 1 million Greeks, 500,000 Bulgarians, and hundreds of thousands of Germans, Hungarians, and Rumanians. France (1915), Belgium (1922), Italy (1926), and Austria (1933) denationalized persons of "enemy origin" and others deemed unfit for citizenship by reasons of birth, culminating of course in the Nuremberg citizenship laws and the Nazi concentration camps. Agamben points out, "One of the few rules to which the Nazis consistently adhered during the course of the "Final Solution" was that Jews could be sent to the extermination camps only after they had been fully denationalized (stripped even of the residual citizenship left to them after the Nuremberg laws)."

23. Agamben, *Homo Sacer,* 126.

24. *INS Annual Report,* 1925, pp. 12–13 (emphasis added).

nation and the goal of expelling immigrants living illegally in the country. The Los Angeles *Evening Express* alleged that there were "several million foreigners" in the country who had "no right to be here." Nativists like Madison Grant, recognizing that deportation was "of great importance," also advocated alien registration "as a necessary prelude to deport on a large scale." Critics of nativism predicted that "if every man who wears a beard and reads a foreign newspaper is to be suspected unless he can produce either an identification card or naturalization papers, we shall have more confusion and bungling than ever." [25]

Prohibition supplied an important cache of criminal tropes, the language of smuggling directly yoking illegal immigration to liquor-running. The California Joint Immigration Committee described illegal aliens as "vicious and criminal," comprising "bootleggers, gangsters, and racketeers of large cities."[26] Similarly, Edwin Reeves, a Border Patrol officer in El Paso during the 1920s, recalled, "Every fellow you caught with a load of liquor on his back . . . was a wetback." The *National Republic* claimed that two million aliens intent upon illegally entering the United States were massed in Canada, Mexico, and Cuba, on the "waiting lists" of smugglers.[27]

In this story, aliens were not only subjects—that is, the smugglers—they were also the objects, the human goods illegally trafficked across the border. In 1927 the Immigration Bureau reported that the "bootlegging of aliens" was "a lucrative industry second only to smuggling of liquor." It emphasized, "The bootlegged alien is by all odds the *least* desirable. Whatever else may be said of him: whether he be diseased or not, whether he holds views inimical to our institutions, *he at best is a law violator from the outset.*"[28] This view that the undocumented immigrant was the least desirable alien of all denotes a new imagining of the nation, which situated the principle of national sovereignty in the foreground. It made state

25. *Evening Express* (Los Angeles), Dec. 6, 1930, HR 71A-F16.2, in Records of the U.S. House of Representatives, RG 155, National Archives (Washington)(hereafter "House records"); Madison Grant, "America for the Americans," *Forum,* Sept. 1925, p. 354; *Survey,* March 15, 1929, p. 796.

26. Dept. of Labor Solicitor, "In re whether aliens who violate any of the provisions of the prohibition laws are subject to deportation," Sept. 17, 1924, file 54933/351–10 [entry 9], INS; McClatchy and Fisk to Johnson, Dec. 4, 1930, HR71A-F16.4, House records. It is worth noting that bootlegging itself was not a deportable offense. As vague as the term "crimes of moral turpitude" was, the Labor Department did not so classify violation of the Volstead Act.

27. Interview of Edwin M. Reeves by Robert H. Novak, June 25, 1971, transcript, tape no. 135, p. 5, Institute of Oral History, University of Texas, El Paso (microfilm); California Joint Immigration Committee, "Deportable Aliens," release #251, Jan. 24, 1930, Press releases and statements, CJIC Papers, Bancroft Library, University of California, Berkeley.

28. *INS Annual Report,* 1927, pp. 15–16 (emphasis added).

territoriality—not labor needs, not family unification, not freedom from persecution, not assimilation—the engine of immigration policy.

Territoriality was highly unstable, however, precisely because restriction had created illegal immigrants *within* the national body. This was not an entirely new phenomenon, but important consequences resulted from the different nature and scale of illegal immigration in the late 1920s. Illegal immigrants now comprised all nationality and ethnic groups. They were numerous, perhaps even innumerable, and were diffused throughout the nation, particularly in large cities. An illegal immigrant might now be anyone's neighbor or coworker, even one's spouse or parent. Her illegal status might not be known to her social acquaintances and personal intimates. She might not even be aware of it herself, particularly if it resulted from a technical violation of the law. She might, in fact, be a responsible member of society (employed, tax paying, and, notwithstanding her illegal status, law-abiding). Even if she were indigent or uneducated, she might have a family, social ties in a community, and interact with others in ways that arguably established her as a member of society.

The problem of differentiating illegal immigrants from citizens and legal immigrants signified the danger that restrictionists had imagined—to them, illegal aliens were an invisible enemy in America's midst. Yet their proposed solutions, such as compulsory alien registration and mass deportations, were problematic exactly because undocumented immigrants *were* so like other Americans. During the interwar period a majority of political opinion opposed alien registration on grounds that it threatened Americans' perceived rights of free movement, association, and privacy.[29] The Immigration Service had traditionally "never made any considerable attempt . . . to go out and look for aliens unlawfully in the country" and through the late 1920s remained reluctant to conduct mass raids, particularly in the north.[30] The problem of differentiation revealed a discontinuity between illegal immigration as an abstract general problem, a "scare" discourse used at times to great political effect, and illegal immigrants who were real people known in the community, people who had committed no substantive wrongs.

Yet, if illegal aliens were so like other Americans, the racial and ethnic diversity of the American population further complicated the problem of differentiation. We might anticipate that illegal aliens from Europe and Canada were perceived and treated differently from those of Mexican or

29. Organized labor, which was generally restrictionist, opposed alien registration on grounds that such information could be used against union activists. See sundry correspondence from union leaders to Congressmen in file HR69A-H3.5, House records.

30. I. F. Wixon, "Lack of Funds for Deportations," Hearings before the House Immigration Committee on H.R. 3, H.R. 5673, H.R. 6069, 70th Cong., 1st sess., 5 January 1928, 22–23.

Asian origin.[31] In fact, the racial dimensions of deportation policy were not merely expressions of existing racial prejudice. Rather, they derived from processes of territoriality and administrative enforcement that were not in the first instance motivated or defined by race.

We might approach this problem by considering the question of defining and controlling the border and by returning to Commissioner Hull's testimony that the Border Patrol did not operate "on the border line" but "back of the line." Contemporaries understood the distinction, if not the full implications. Writing about the Border Patrol in the Southwest, one author described apprehending aliens "at some distance back from the International Line" a "man-sized job." She explained, "To capture an alien who is in the act of crawling through a hole in the fence between Arizona and Mexico is easy compared with apprehending and deporting him after he is hidden in the interior, among others of his own race who are legally in this country."[32] The Border Patrol's capacious definition of its jurisdiction suggests that the nation's borders (the point of exclusion) collapsed into and became indistinguishable from the interior (the space of inclusion). But, this is not to say that the border was eliminated. Policies of restriction and deportation reconstructed and raised the borders, even as they destabilized them. History and policy also constructed the U.S.-Mexican and U.S.-Canadian borders differently. The processes of defining and policing the border both encoded and generated racial ideas and practices that, in turn, produced different racialized spaces internal to the nation.

The Border and the Border Patrol

Before the 1920s the Immigration Service paid little attention to the nation's land borders because the overwhelming majority of immigrants landed at Ellis Island and other seaports. The flow of immigrants into the country had been not only welcome but had been focused at fixed points that rendered

31. Chinese were the first illegal aliens and continued to be racially constructed as unalterably foreign. But they do not appear in deportation statistics or discourse because Chinese illegal immigrants mostly comprised persons who claimed to be U.S. citizens by native birth or descendants of those citizens. Deportation was exceedingly difficult because the fraudulent papers were actually official documents issued by the Immigration Service. See Madeline Y. Hsu, *Dreaming of Gold, Dreaming of Home: Transnationalism and Migration between the United States and South China, 1882–1943* (Stanford: Stanford University Press, 2000), chap. 3; Erika Lee, "Enforcing and Challenging Exclusion in San Francisco: U.S. Immigration Officers and Chinese Immigrant, 1882–1905," *Chinese America: History and Perspectives* 11 (1997): 1–15; Mae M. Ngai, "Legacies of Exclusion: Illegal Chinese Immigration during the Cold War Years," *Journal of American Ethnic History* 18 (Fall 1998): 3–35.

32. Mary Kidder Rak, *Border Patrol* (Boston: Houghton Mifflin, 1938), 17.

land borders invisible. One immigration director described the situation as the "equivalent to a circle with locked doors with no connecting wall between them."[33] A small force of the Customs Service and the Chinese Division of the Immigration Service jointly patrolled the Mexican and Canadian borders against illegal entry by Chinese. The Chinese patrol inspector, assigned to horseback detail or inspecting freight cars, occupied the loneliest and bottommost position in the hierarchy of the service.[34]

Immigration inspectors ignored Mexicans coming into the southwestern United States during the 1900s and 1910s to work in railroad construction, mining, and agriculture. The Immigration Bureau did not seriously consider Mexican immigration within its purview, but rather as something that was "regulated by labor market demands in [the southwestern] border states." The Bureau also described the Southwest as the "natural habitat" of Mexicans, acknowledging, albeit strangely, Mexicans' claims of belonging in an area that had once been part of Mexico. The Immigration Act of 1917 doubled the head tax and imposed a literacy test, erecting the first barriers to entry. But unlawful entry was limited, as the Labor Department exempted Mexicans from the requirements during the war. It was not until 1919 that Mexicans entering the United States were required to apply for admission at lawfully designated ports of entry.[35]

Before World War I, the U.S.-Canada border was also soft. In some ways it resembled the Mexican border: vast stretches were sparsely populated, economically undeveloped, and intemperate for many months of the year. As with the Mexican border, the first inspection policies instituted along the Canadian border in the 1890s aimed not to restrict Canadians but to deter Chinese and Europeans of the excludable classes who sought entry into the United States through the unguarded back door.[36] Throughout the nineteenth century, Canadians moved freely into the United States: Canadian farmers participated in the settlement of the American West, which movement preceded expansion to the Canadian West; and industry and manufacturing in Michigan and New England drew labor from Canada as

33. I. F. Wixon, "Mission of the Border Patrol," Lecture no. 7, March 19, 1934 (Washington, 1934), 2.

34. The Chinese Division was also called the Outside Division because it operated separately from the main Immigration Service. In general the Outside Division was understaffed and "not overloaded with talent." Clifford Perkins, *Border Patrol: With the U.S. Immigration Service on the Mexican Boundary, 1910–1954* (El Paso: Texas Western Press, 1978), 9, 75.

35. George Sánchez, *Becoming Mexican American* (New York: Oxford University Press, 1993), 52–53; *INS Annual Report,* 1919, pp. 24–25, 61; *INS Annual Report,* 1923, p. 16.

36. Marian Smith, "The INS at the U.S.-Canadian Border, 1893–1933: An Overview of Issues and Topics" (paper presented at the annual meeting of the Organization of American Historians, Toronto, April 23, 1999).

well as from Europe.[37] But Canadians assumed a different economic relationship to the United States than did Mexicans. In general Canadians did not comprise a major source of unskilled labor for American industry, largely because Canada itself suffered a labor shortage and relied on immigrant labor for its own economic development. For example, in the early twentieth century the sugar beet industry on both sides of the border—in Michigan, Wisconsin, and southern Ontario—recruited European agricultural laborers. After 1924, when European immigration to the United States declined, American sugar beet growers resorted not to Canadian labor but to Mexican and, secondarily, to Filipino labor.[38]

If both the Mexican and Canadian borders were soft until World War I, the passage of the quota laws in 1921 and 1924 threw the nation's contiguous land borders into sharp relief for immigration authorities. Although most European immigrants continued to land at seaports, contemporaries imagined that illegal aliens would overrun the land borders. One writer, believing that "the tide of immigration now beats upon the land borders—not upon the sea coasts—of the United States," asked, "can these long borders ever be adequately patrolled?"[39]

Indeed, illegal European immigrants entered the United States across both borders. Belgian, Dutch, Swiss, Russian, Bulgarian, Italian, and Polish immigrants enlisted in agricultural labor programs in the Canadian west, only to arrive in Canada and immediately attempt entry into the United States, at points from Ontario to Manitoba. An investigation by the Federal Bureau of Investigation in 1925 reported that "thousands" of immigrants, "mostly late arrivals from Europe," were "coming [into Canada] as fast as they can get the money to pay the smugglers." The most heavily traveled route for illegal European immigration was through Mexico. The commissioner general of immigration noted, "Long established routes from southern Europe to Mexican ports and overland to the Texas border, formerly patronized almost exclusively by diseased and criminal aliens, are now

37. *INS Annual Report,* 1934, p. 96; see also Bruno Ramirez, *Crossing the 49th Parallel: Migration from Canada to the United States, 1900–1930* (Ithaca: Cornell University Press, 2001), chaps. 1–3; Thomas A. Klug, "The Detroit Labor Movement and the United States-Canada Border, 1885–1930," *Mid-America* 80 (Fall 1998): 209–34; Gary Gerstle, *Working Class Americanism: The Politics of Labor in a Textile City* (New York: Cambridge University Press, 1989).

38. Testimony of T. G. Gallagher, Continental Sugar Co., Toledo, in "Immigration from Countries of the Western Hemisphere," Hearings before House Immigration Committee, 70th Congress, First Session, Feb 21–April 5, 1928, at 555–57; oral history interview with Rudolfo M. Andres by Helen Hatcher, June 27, 1981, file BA/NC81–Fil-004–HMH-1, Demonstration Project for Asian Americans (Seattle).

39. "The Eclipse of Ellis Island" (n.a.), *Survey,* Jan. 19, 1929, p. 480.

resorted to by large numbers of Europeans who cannot gain legal admission because of passport difficulties, illiteracy, or the quota law."[40]

By the late 1920s the surreptitious entry of Europeans into the United States declined. The threat of apprehension and deportation deterred some, but also alternate legal methods existed for circumventing the quota laws. Europeans could go to Canada and be admitted to United States legally after they had resided in Canada for five years. The evidence suggests that this was a popular strategy: the proportion of lawful admissions from Canada of persons not born in Canada increased from 20 percent in 1925 to over 50 percent in the early 1930s.[41] And, as European immigrants in the United States became naturalized citizens, they could bring relatives over legally as non-quota immigrants. In 1927 over 60 percent of the non-quota immigrants admitted to the U.S. were from Italy, with the next largest groups coming from Poland, Czechoslovakia, and Greece.[42]

This is not to say that illegal immigration of Europeans and Canadians stopped. The Immigration Service continued to deport illegal aliens to Europe and to Canada—deportations remained fairly constant at 6,000 to 8,000 a year through the early thirties. But the number of persons deported for surreptitious entry declined whereas the number deported for overstaying temporary visas increased.[43] In general, the Immigration Service was more concerned with the bureaucratic burden of processing the high volume of legal traffic crossing the U.S.-Canada border in both directions. It also relied on the 1894 agreement between the United States and Canada, which made Canadian rail carriers responsible for checking the status of passengers traveling to the United States, for deterring illegal entry from Canada.[44]

The service's work on the Canadian border was in sharp contrast to what the commissioner general described as the "high pitch" of its work along the U.S.-Mexico border.[45] During the late 1920s the number of illegal Mexican immigrants deported across the southern border skyrocketed—from 1,751 expulsions in 1925 to over 15,000 in 1929.[46] Deportations for

40. Walter Elcarr to Commissioner General, January 11, 1924; W. J. Egan to John H. Clark, March 25, 1924; John Clark to Commissioner General, March 27, 1924; file 53990/160A, box 792, accession 60A600, INS; W. F. Blackman, "Smuggling of aliens across the Canadian border," Jan. 21, 1925, file 53990/160C, ibid.; *INS Annual Report,* 1923, p. 16.

41. *INS Annual Report,* 1925, pp. 9, 18; *INS Annual Report,* 1929, p. 7; *INS Annual Report,* 1930, p. 13; *INS Annual Report,* 1931, p. 24; *INS Annual Report,* 1932, p. 17.

42. *INS Annual Report,* 1927, p. 12.

43. *INS Annual Reports,* 1924–1932.

44. *INS Annual Report,* 1925, p. 18. See also Smith, "The INS at the U.S.-Canadian Border."

45. *INS Annual Report,* 1925, p. 19.

46. After 1927, expulsions include both formal deportations under warrant and voluntary departures. *INS Annual Report,* 1928–1932; Secretary of Labor, *Annual Report,* 1933–1938.

entry without a proper visa accounted for most of the increase. Although Mexicans did not face quota restrictions, they nevertheless were confronted by myriad entry requirements, such as the head tax and visa fee, which impelled many to avoid formal admission and inspection.

Mexicans coming to the United States encountered a new kind of border. Notwithstanding the lax immigration procedures before World War I, the United States-Mexican border had had a long history of dispute. Born of war and annexation, it was contested literally from its first imagination, by the Mexican and American surveyors charged with drawing the boundary after the Mexican American war. Consolidating American sovereignty in the conquered territory was a protracted process, as armed skirmishes and rebellion along the border attended the appropriation of property and the imposition of American political institutions. After a decade of instability wrought by the Mexican Revolution and World War I, the border as a political marker became basically settled.[47]

During the 1920s immigration policy rearticulated the U.S.-Mexican border as a cultural and racial boundary, as a creator of illegal immigration. Federal officials self-consciously understood their task as creating a barrier where, in a practical sense, none had existed before. The service instituted new policies—new inspection procedures and the formation of the Border Patrol—that accentuated the difference between the two countries. As historian George Sánchez described, crossing the border became "a momentous occasion, a break from the past . . . a painful and abrupt event permeated by an atmosphere of racism and control—an event that clearly demarcated one society from another."[48]

Inspection at the Mexican border involved a degrading procedure of bathing, delousing, medical line inspection, and interrogation. The baths were new and unique to Mexican immigrants, requiring them to be inspected while naked, have their hair shorn, and have their clothing and baggage fumigated. Medical line inspection, modeled after the practice formerly used at Ellis Island, required immigrants to walk in single file past a medical officer.[49] These procedures were particularly humiliating, even gratu-

47. Leon Metz, *Border: The U.S.-Mexico Line* (El Paso, Tex.: Mangan Books, 1989), 20–40; Oscar Martínez, *Troublesome Border* (Tucson: University of Arizona Press, 1988), 17–21, 87.

48. Speech of John Farr Simmons, Chief of Visa Office, State Department, at Conference on Immigration, Williamstown, Mass. [1930], 7–9, file Sen71A-F11, box 93, Records of the U.S. Senate, Record Group 46, National Archives (Washington); Sánchez, *Becoming Mexican American,* 60–61.

49. Irving McNeil to J. W. Tappan, U.S. Public Health Service, Dec. 22, 1923; Inspector in charge to Supervising Inspector, El Paso, Dec. 13, 1923, file 52903/29, entry 9, INS. See also "Immigration Border Patrol," 31–32. Chinese immigrants landing at Angel Island were subjected to rigorous medical inspection and prolonged interrogation, but not mass bathing

itous, in light of the fact that the Immigration Act of 1924 required prospective immigrants to present a medical certificate to the U.S. consul when applying for a visa, that is, before travel to the United States. Medical line inspection at Ellis Island was eliminated after 1924, and at El Paso the service exempted all Europeans and Mexicans arriving by first class rail from medical line inspection, the baths, and the literacy test. Racial presumptions about Mexican laborers, not law, dictated the procedures at the Mexican border.

More than anything else, the formation of the Border Patrol raised the border. In the Mexican border district, the service first recruited patrol officers from the civil service railway postal clerk registers, but that proved to be a mistake, as they were generally unqualified and the service quickly exhausted the register.[50] Receiving a temporary reprieve from civil service requirements, the service hired former cowboys, skilled workers, and small ranchers as its first patrol officers. Almost all were young, many had military experience, and not a few associated with the Ku Klux Klan. "Dogie" Wright was a typical recruit. The son of a Texas Ranger, Wright had also been a ranger and a deputy United States marshal before he joined the Border Patrol in 1925.[51] Some patrolmen, according to Clifford Perkins, the first Border Patrol inspector in charge in El Paso, "were a little too quick with a gun, or given to drinking too much, too often"; many emulated the "rough but effective methods of the Texas Rangers."[52] Of thirty-four patrol inspectors in the El Paso district in 1927, only one was Mexican American. Pedro (Pete) Torres, a native of New Mexico, had a reputation as an "extremely valuable man on the river, for he thought like a Mexican and looked like one" and could "roam through Mexican neighborhoods without arousing suspicion." Torres had "no nerves at all," according to Perkins. "He may have been a little quick on the trigger, but his actions in every shooting match during which smugglers were killed always proved justified by the circumstances."[53]

Officials labored to create a professional enforcement arm of the Immigration Service out of such material. Perkins recalled a training program

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and delousing. On Chinese inspection procedures, see Erika Lee, "At America's Gates: Chinese Immigration during the Exclusion Era" (Ph.D. diss., University of California, Berkeley, 1999).

50. *INS Annual Report,* 1925, p. 15.

51. Ibid.; Sánchez, *Becoming Mexican American,* 59; David Blackwell to SW Regional Commissioner, "Border Patrol 50th Anniversary," Jan. 19, 1954, in Edwin Reeves oral history file, Institute of Oral History, University of Texas, El Paso.

52. Perkins, *Border Patrol,* 95, 102.

53. Nick Collaer, Serial No. 58, Feb. 14, 1927, file 55494/25, box 3, accession 58A734, INS; Perkins, *Border Patrol,* 96.

comprising weekly lectures on investigative procedures, but training mostly took place on the job. Edwin Reeves said, "they just give you a .45 single action revolver with a web belt—and that was it." A civil service exam was soon instituted, which included math, writing an English essay, and demonstrating knowledge of Spanish "as spoken along the Mexican border." During the late 1920s turnover continued to average 25 percent within the first six months. A lack of professionalism plagued the force. In the El Paso district, drinking on the job, reading and socializing with friends while on duty, reckless driving, rumor mongering, and accepting gratuities from aliens were common problems.[54]

More important than unprofessional behavior, the Border Patrol's work assumed the character of criminal pursuit and apprehension, although officially it was charged with enforcing civil and not criminal laws and was not trained as a criminal enforcement agency. As discussed above, the service interpreted its authorization to apprehend illegal aliens without warrant to apply to anywhere within the interior of the nation. It also seized goods it believed were "obviously contraband or smuggled," a practice that the commissioner general acknowledged had dubious legal sanction.[55] During the Border Patrol's first five years of service, fifteen officers were killed in the line of duty, twelve in the Mexican border districts.[56]

As Border Patrol officers zealously pursued illegal aliens, smugglers, and criminals, the Immigration Service received complaints from white Americans who were interrogated by discourteous patrolmen or arrested without warrant. One citizen protested that the Border Patrol "enacted the role of Jesse James" on public highways. In 1929, in response to such adverse criticism, the service discontinued the "promiscuous halting of traffic" in the border area, acknowledging that it was "dangerous and probably illegal." A national conference of immigration commissioners and district directors held the same year devoted considerable attention to the conduct of Border Patrol officers and inspectors, including the lack of civility toward immigrants, bribery, and covering up misconduct. Official policy deemed "courtesy and consideration"—"good morning and a smile"

54. Perkins, *Border Patrol,* 96; Edwin Reeves interview, 5; David Blackwell to SW Regional Commissioner, "Border Patrol 50th Anniversary"; *INS Annual Report,* 1930, p. 37. El Paso district circulars by G. C. Wilmoth, on going to Mexico to drink alcohol, on and off duty, serial no. 2274, Sept. 2, 1924, reissued Feb. 16, 1928; on careless and reckless driving and failure to maintain vehicles, serial no. 4073, April 3, 1929; on reading or "entertaining friends by relating stories or jokes" while on duty, serial no. 4136, Nov. 21, 1929; on engaging in "useless and harmful talk to outsiders," serial no. 4133, Nov. 19, 1929; on taking gratuities from aliens, serial no. 4127, Oct. 1, 1929, file 55494/25–A, box 3, accession 58A734, INS.

55. Testimony of Henry Hull, Jan. 15, 1930, House Immigration Committee, INS.

56. *INS Annual Report,* 1930, p. 41.

and "I'm sorry"—as the "least expensive and perhaps the most useful" of the service's tools.[57]

Thus patrolmen were trained to act with civility, courtesy, and formality when dealing with Anglo citizens, ranch owners, immigrants arriving from Europe, and "high class tourists" from Canada.[58] But the quasi- and extralegal practices associated with rancher vigilantism and Texas Rangers suited the needs of the Border Patrol in the Southwest, particularly when it involved patrolling large expanses of uninhabited territory far removed from Washington's bureaucratic oversight.[59] The Border Patrol functioned within an environment of increased racial hostility against Mexicans; indeed, its activities helped constitute that environment by aggressively apprehending and deporting increasing numbers of Mexicans. The Border Patrol interrogated Mexican laborers on roads and in towns, and it was not uncommon for "sweeps" to apprehend several hundred immigrants at a time. By the early 1930s the service was apprehending nearly five times as many suspected illegal aliens in the Mexican border area as it did in the Canadian border area. The Los Angeles newspaper *La Opinión* believed the aggressive deportation policy would result in a "de-Mexicanization of southern California."[60]

Moreover, many Mexicans entered the United States through a variety of means that were not illegal but comprised irregular, unstable categories of lawful admission, making it more difficult to distinguish between those who were lawfully in the country and those who were not. Mexicans living in Mexican border towns who commuted into the United States to work on a daily or weekly basis constituted one category of irregular entry. The service counted these commuters as immigrants and collected a one-time head tax from them. It also required them to report to the immigration station once a week for bathing, a hated requirement that gave rise to a local black market in bathing certificates.[61]

57. Bisbee (Arizona) *Review,* Feb. 1, 1927; G. C. Wilmoth to Chief Patrol Inspectors, June 7, 1929, file 55494/25–A, box 3, accession 58A734, INS; D. W. MacCormack, "The Spirit of the Service," in U.S. Dept. of Labor, Bureau of Immigration, *Problems of the Immigration Service: Papers presented at a Conference of Commissioners and District Directors of Immigration, January 1929* (Washington, D.C.: GPO, 1929), 4.

58. "Immigration Border Patrol," 30.

59. According to Douglas Foley, the federal government "left [the] southern labor force to work out their own problems with local Texas Rangers, the Border Patrol, and hostile Anglos." Foley, *From Peones to Politicos: Class and Ethnicity in a South Texas Town, 1900–1987* (1977; Austin: University of Texas Press, 1988), 18.

60. Perkins, *Border Patrol,* 116; *La Opinión,* Jan 29, 1929, p. 1 (trans. from Spanish). In 1932 the INS counted 3,812 apprehensions along the Canadian border and 19,072 along the Mexican border. *INS Annual Report,* 1932, p. 44. The INS did not report comparable data in other years.

61. R. M. Cousar, Inspector in Charge at Nogales, circular, May 19, 1928, HR70A-F14.3, box 236, House records; on commuter classification, see *Karnuth v. US,* 279 U.S. 231 (1929);

Many other Mexicans entered legally as "temporary visitors" to work for an agricultural season and then returned to Mexico. According to one estimate, 20 to 30 percent of legal Mexican entrants during the 1920s and 1930s were classified as nonimmigrants—that is, as nonresident aliens intending to stay from six months to a year. The service did not require a passport or visa for such entry from Canada, Mexico, or Cuba, as part of a reciprocal arrangement with those countries. That policy served Americans with business in neighboring countries but was also available to seasonal laborers working in the United States. They had only to pay a refundable head tax. If they failed to depart within the time limit, they became illegal.[62] Immigration policy had thus constructed classifications of entry that supported local and regional labor markets but that were also perceived as opportunities for illegal immigration. The instability of these immigration categories made officials increasingly suspicious of Mexican immigrants.

It was ironic that Mexicans became so associated with illegal immigration because, unlike Europeans, they were not subject to numerical quotas and, unlike Asiatics, they were not excluded as racially ineligible to citizenship. But as numerical restriction assumed primacy in immigration policy, its enforcement aspects—inspection procedures, deportation, the Border Patrol, criminal prosecution, and irregular categories of immigration—created many thousands of illegal Mexican immigrants. The undocumented Mexican laborer who crossed the border to work in the burgeoning industry of commercial agriculture emerged as the prototypical illegal alien.

Administrative Law Reform and the Unmaking of Illegal Aliens

The illegal aliens deported during the late 1920s and early 1930s comprised both unauthorized border crossers and visa violators and those who entered lawfully but committed a deportable offense subsequent to entry. Each category included immigrants who had already settled in the country and acquired jobs, property, and families. These illegal immigrants had in ef-

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INS Annual Report, 1930, p. 16; Lawrence Herzog, "Border Commuter Workers and Transfrontier Metropolitan Structure along the U.S.-Mexico Border," in *U.S.-Mexico Borderlands: Historical and Contemporary Perspectives,* ed. Oscar Martínez (Wilmington, Del: Scholarly Resources, 1996), 179; on the bath requirement, see José Cruz Burciaga interview by Oscar Martínez, Feb. 16, 1972, transcript of tape 148, Institute of Oral History, University of Texas-El Paso, 20–22.

62. "Immigration Border Patrol," 18; Lawrence Cardoso, *Mexican Emigration to the United States, 1897–1931* (Tucson: University of Arizona Press, 1980), 94; Paul Taylor, "Mexican Labor in the U.S.: Migration Statistics," *University of California Publications in Economics* 6.3 (July 31, 1929): 244.

fect become members of American society. But if their inclusion in the nation was a social reality, it was also a legal impossibility. Resolving that contradiction by means of deportation caused hardship and suffering to these immigrants and their families. It struck many as simply unjust.

Testifying before Congress in 1934, Nicholas Grisanti of the Federation of Italian Societies in Buffalo, New York, cited a typical case of an unjust deportation. An Italian immigrant had lived most of his life in Buffalo. He was married with three small children and was gainfully employed. But, Grisanti explained, "at some previous year he had taken as a boy a half bag of coal from the railroad tracks to help keep his family warm," for which crime he was convicted and given a suspended sentence. Years later, he went to Canada for a summer vacation. The Immigration Service considered his return a "new entry" and ordered him deported, on grounds that he had been convicted of a crime involving moral turpitude before "time of entry." His deportation was thwarted after a public outcry led acting New York Governor Herbert Lehman to pardon the "little offensive."[63]

In a sense, the protest against unjust deportations stemmed from the fact that European and Canadian immigrants had come face-to-face with a system that had historically evolved to justify arbitrary and summary treatment of Chinese and other Asian immigrants. It seemed that the warning sounded by Justice Brewer's dissent in *Fong Yue Ting* had come true. Justice Brewer had acknowledged that the absolute power of the state to expel unwanted aliens was "directed only against the obnoxious Chinese, but," he asked, "if the power exists, who shall say it will not be exercised tomorrow against other classes and other people?"[64]

Indeed, as early as 1920, in the aftermath of the Palmer Raids, legal scholars noted that alleged anarchists in deportation proceedings were deprived of their civil liberties according to the "methods applied in the Chinese deportation cases."[65] After 1924, not only anarchists but also Europeans who unlawfully entered the country were caught in the legal machinery designed for the "obnoxious Chinese."

Thus during the late 1920s and early 1930s a critique of deportation policy emerged among social welfare advocates and legal reformers. They did not directly challenge deportation as a prerogative of the nation's sovereign power, but they did search for ways to reconcile conflicting imperatives of national sovereignty and individual rights. During the early 1930s several legal studies called for administrative law reform in deportation.

63. U.S. Congress, Senate, Committee on Immigration, "Deportation of Criminals, Preservation of Family Units, Permit Noncriminal Aliens to Legalize their Status," 74th Congress, Second Session, Feb. 29, 1934, p. 122.

64. *Fong Yue Ting v. U.S.,* at 743, 737.

65. "Deportation of Aliens (Notes)," *Columbia Law Review* 20 (June 1920): 683.

These included *Deportation of Aliens from the United States to Europe,* by Jane Perry Clark, a Barnard political scientist; a report on deportation by the National Commission on Law Observance and Enforcement (Wickersham Commission); and *Administrative Control of Aliens: A Study in Administrative Law and Procedures,* by William Van Vleck, dean of George Washington University Law School. All three studies based their findings on an examination of actual deportation cases and other administrative records of the Immigration Service.[66]

Clark, Van Vleck, and the Wickersham Commission reached essentially the same two general conclusions. First, they believed deportation policy was applied in arbitrary and unnecessarily harsh ways, resulting in great personal hardship on individuals and in the separation of families, with no social benefit. Second, in terms of procedure, they concluded that deportation policy frequently operated in the breach of established traditions of Anglo American jurisprudence, especially those concerning judicial review and due process. As Lucy Salyer has shown, during the late nineteenth and early twentieth century the federal courts generally upheld the summary character of immigration proceedings. This was despite the principle established by the Supreme Court in 1903 in the *Japanese Immigrant Case* that aliens in immigration proceedings had rights derived from "fundamental principles that inhere in due process of law." By the 1920s aliens had won only a few procedural rights, among them the right to an administrative hearing and the right to counsel.[67] But critics found even these gravely lacking, or undermined by the lack of other procedural safeguards, and cited a broad range of abuses. The Wickersham Commission noted the danger at hand: "The very investigations to see whether suspected persons are subject to deportation, by their nature, involve possible interference of the gravest kind with the rights of personal liberty . . . These investigations are not public, and they often involve American citizens."[68]

Specifically, critics charged, aliens were often "forcibly detained." The boards of special inquiry, which conducted formal deportation hearings, were often one-man tribunals, with the immigration inspector often appearing simultaneously as arresting officer, prosecutor, and judge.[69] The boards

66. Clark, *Deportation of Aliens;* U.S. National Commission on Law Observance and Enforcement, *Report on the Enforcement of the Deportation Laws of the United States* (Washington, D.C.: GPO, 1931) (hereafter "Wickersham Report"); Van Vleck, *Administrative Control.*

67. Lucy Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill: University of North Carolina Press, 1995), 172–83; *Japanese Immigrant Case* (*Yamata v. Fisher*), 189 U.S. 86 (1903).

68. Wickersham Report, 29.

69. Van Vleck, *Administrative Control,* 26, 90–95; Wickersham Report, 65, 157–58, 170–71.

operated without rules of evidence, readily admitting hearsay, opinion, anonymous letters, and "confidential information." The alien also bore the burden of proof "to show cause . . . why he should not be deported." One study found that only one-sixth of aliens in deportation proceedings had legal representation, ranging from 1 or 2 percent along the Mexican border to 20 percent in New York City.[70]

Moreover, the service interpreted the statute in ways that grossly stretched the law's meaning in order to justify grounds for deportation. For example, it interpreted "entry without proper inspection" to cover not only aliens who circumvented inspection but also instances where the examining inspector had failed to ask a question that would have revealed the alien's excludability.[71] The greatest abuse surrounded the application of the provision "liable to become a public charge at time of entry," or "LPC," which, Clark said, was "shaken on deportation cases as though with a large pepper shaker." The service deported immigrants who committed minor crimes or violated norms of sexual morality, such as bearing children out of wedlock, which were not deportable offenses, on grounds that they were "LPC before entry." In other words, the Immigration Service considered lapses or misfortune subsequent to entry to be the teleological outcome of a prior condition, which it adduced by way of retroactive judgment.[72]

Finally, immigrants under warrants of deportation had few avenues of appeal. The Labor Department's board of review, which made recommendations to the secretary of labor, had no statutory authority. Judicial review was extremely rare because the federal courts historically practiced great restraint in immigration cases, having progressively narrowed the grounds for judicial review in Chinese exclusion cases over the years. During the late 1920s and 1930s the courts heard fewer than three hundred writs of habeas corpus in deportation cases and found nearly 70 percent of them in favor of the Immigration Service.[73]

The legal critique of deportation policy evinced the preoccupations of legal realism during the years between the two world wars: a rejection of categorical thinking and a desire to transform differences of kind into differences of degree; the privileging of experience over formal logic; and, consequently, a belief in the need for administrative discretion in the emerging regulatory state.[74] According to the legal critics, deportation policy

70. Van Vleck, *Administrative Control,* 99–100, 107; Clark, *Deportation of Aliens,* 324; Kohler, *Immigration and Aliens,* 413; Wickersham Report, 107–8.

71. Van Vleck, *Administrative Control,* 237.

72. Clark, *Deportation of Aliens,* 309; Van Vleck, *Administrative Control,* 97–98, 119–25.

73. *INS Annual Report,* 1928–1932; Secretary of Labor, *Annual Report,* 1933–1936.

74. Morton Horwitz, *The Transformation of American Law: The Critique of Legal Orthodoxy, 1870–1960* (New York: Oxford University Press, 1992), 189, 199.

seemed to be law gone amok. They believed that the problem perhaps came less from politics than from the administration of law based on rigid categories without room for discretion or experience. Because the main thrust of the criticisms concerned problems in procedure and enforcement, administrative law reform provided an alternative, less contentious route for reforming deportation policy than the more overtly political tack taken by liberal social welfare and immigration advocates. The latter had few friends in Congress during the Depression, when work was scarce and there were renewed calls for restriction and deportations. In fact, the gaze of administrative law reformers was aimed not so much at Congress as it was toward the judiciary, where they believed progress might be made in more clearly defining the limits of executive power in matters of deportation.[75]

Yet embedded in the arguments for administrative law reform was a powerful political critique. That critique challenged the eugenical premises of immigration policy, that is, the idea that social undesirability derived from innate character deficiencies, which were perceived to be rooted biologically in race, gender, or "bad blood." In a sense, administrative law reform was a stalking horse for a broader cultural challenge to nativist politics, challenging, in particular, late nineteenth- and early twentieth-century theories about social degeneracy and, more specifically, ideas about gender roles, sexual morality, and crime. These normative standards of social desirability and moral fitness for citizenship continued to define the qualitative standards for immigrant admission and deportation in the Immigration Act of 1924, even as they were eclipsed by the law's new emphasis on numerical restriction. In the late 1920s and 1930s legal critics challenged the application of these qualitative standards in deportation cases.

The trend may be discerned from a reading of William Van Vleck's treatise, *Administrative Control of Aliens,* published in 1932. *Administrative Control* followed several lines of criticism that challenged traditional ideas about female dependency and sexual morality. Van Vleck cited several cases in which the Immigration Service had ordered women deported as LPC because they were without male support, even though the women were employed and self-supporting. In one case, the service deported a woman whose husband became ill with tuberculosis fourteen months after they arrived in the U.S., on grounds that she was dependent on her husband—even though she was employed. Van Vleck cited other cases of single mothers supporting their children or living with other relatives. He recognized that the family was a diverse institution that included female-headed households and extended families.[76]

75. *The Nation,* April 29, 1931, p. 463; Note, "Statutory Construction in Deportation Cases," *Yale Law Journal* 40 (1931): 1283.

76. Van Vleck, *Administrative Control,* 126–27, 136–37.

Van Vleck also opposed the state assuming the role of sex police, stating, "[T]here appears from time to time evidence of a tendency on the part of some of the immigration officers to regard themselves as charged with the duty and the authority of exercising a general supervision of conduct and morals over our alien population." He evinced unease at the deportation of aliens on grounds of fornication, adultery, lewd and lascivious carriage, and other sexual activities. In some of these cases aliens were deported because state laws considered their transgressions to be crimes of moral turpitude; others were judged as LPC at time of entry.[77]

In line with modern thinking that considered crime environmentally, Van Vleck judged adultery and other moral transgressions to be social problems, not indications of deficiencies in character. He criticized as flawed reasoning the conclusion that "violations of the moral code by young men and women" were "evidence of 'criminal tendencies' or of a 'weak moral nature,'" which rendered them LPC at time of entry. He cited as an example the case of a young immigrant woman who had two illegitimate children during the first two years of residence in the United States. He said, "Evidence in the record tend[s] to show that before her entry . . . she had been well behaved and had lived quietly with her mother. . . . In fact, her morals were entirely controlled by outside forces."[78]

At another level, the issue of sexual morality was linked to notions about family privacy. Deportation cases involving adultery and other crimes of immorality were almost always connected to angry relatives or jealous suitors who had contacted authorities.[79] In a turn from Progressive-era thinking that advocated state intervention in the family, Van Vleck deplored the use of LPC in cases of "family rows leading to unproved accusations by angry spouses, parents, or relatives."[80] (These cases also indicate the heightened sensitivity among immigrants that individuals could use the power of the state to intervene in personal disputes—"calling Immigration," as it were.)

The idea of the family's privacy was connected to its sanctity. One of the most tragic consequences of deportation, Van Vleck argued, was the separation of families. He pointed out, "If [the deported alien] is a poor man his wife and children have not the money to follow him. Even if they have the money and do follow him, this may mean the expatriation of American citizens."[81] Similarly, Max Kohler, a former assistant attorney

77. Ibid., 119, 125, 236.

78. Ibid., 124–25.

79. A district immigration director told Clark that a majority of deportation cases stemmed from so-called "grudge reports." Clark, *Deportation of Aliens,* 324.

80. Van Vleck, *Administrative Control,* 124.

81. Ibid., 29.

general who represented many immigrants, invoked the Supreme Court's 1923 ruling *Meyer v. Nebraska* to oppose the separation of family by immigration restrictions. In *Meyer* the court claimed that the scope of individual liberty included the right of individuals "to marry, establish a home and bring up children . . . without interference from the state," anticipating the Supreme Court's decision decades later that located in *Meyer* the precedent for defining privacy to be a fundamental right.[82]

While Kohler posited family unity in fundamental terms of personal liberty, most reformers constructed a more conditional context for family rights. They utilized a cost-benefit analysis, which weighed violations of the immigration law that were technical or not substantively harmful to the public good against family separation that resulted either in the forced expatriation of dependents (often United States citizens) or in leaving them without support, making them public charges. The proverbial poor man's theft of a loaf of bread or sack of coal became a favorite of reform discourse. In this telling, family trumped both the original crime and the looming deportation. The family here was cast in the traditional patriarchal mode, in which the male head of the household is heroic because he breaks the law and risks imprisonment for his family's welfare. But Van Vleck's narrative also depicted unmarried women with children as legitimate families that were worthy of preservation. The trope of stealing to feed one's family ranked loyalty to one's family above one's obligation to the state. Van Vleck extended this idea of loyalty to protect family members who suffered from moral lapses.

Van Vleck's views were not isolated but articulated a trend among legal scholars and in the federal courts as well. In 1931 *Yale Law Journal* noted a trend in the federal circuit courts of appeal that recognized the "severe consequences" of restricting judicial review in matters of exclusion and expulsion. These cases suggested the need for "a more exacting construction of the due process rights of an alien and a more restricted construction of the statutory grounds upon which deportation orders may be based." The journal noted that courts were throwing out LPC cases that were "obviously grotesque." In one case the court overturned an order to deport a self-supporting Swedish woman living in California on grounds of a mis-

82. Kohler, *Immigration and Aliens,* 38; *Meyer v. Nebraska,* 262 U.S. 390 (1923); *Griswold v. Connecticut,* 381 U.S. 479 (1965). In *Immigration Commissioner of Port of N.Y. v. Gottleib,* 265 U.S. 310 (1924), the Court rejected the argument that family unification could override the quota law. However, Congress acknowledged the primacy of family unity by giving non-quota status to the wives and minor children of U.S. citizens in the Immigration Act of 1924. On the Supreme Court's use of *Meyer* to invent a tradition in support of family rights, see Martha Minow, "We the Family: Constitutional Rights and American Families," *Journal of American History* 74 (Dec. 1987): 959–83.

demeanor involving moral turpitude (cohabitation) and LPC. In a remarkable recognition of gender equality, the court said that, "as to her lapses [from virtue], not amounting to prostitution, the petitioner stands exactly in the same position before the court as would a man who was similarly charged. . . . [The] petitioner then may not be excluded on this ground, unless the paramour, if an alien, could be excluded under the same circumstances." By the early 1930s the Immigration Service tempered its use of LPC. The trend benefited Europeans and Canadians, who had comprised the vast majority of LPC deportation cases. The deportation of Europeans and Canadians as LPC dropped from a high of nearly 2,000 in 1924 to fewer than 500 in 1932.[83]

During this period the courts made other refinements in deportation law. They clarified that conviction of a crime "before entry" referred to crimes committed outside the United States before the immigrant's first entry into the country. Other cases eliminated criminal misconduct from the public charge category according to Judge Learned Hand's reasoning that public charge suggested "dependency not delinquency" and that LPC should not be used to deport people for petty crimes that were not deportable offenses. Echoing Justice Brewer's dissent in *Fong Yue Ting,* Judge Hand likened deportation to exile, "a dreadful punishment, abandoned by the common consent of all civilized people."[84]

The appeal to prevent family separation was particularly effective in areas where European immigrants were numerous and had some political influence. In New York many convicted felons received executive pardons after they served their prison terms, in order to prevent their deportation, including the Italian man in Buffalo who stole a half sack of coal when he was a boy. Governor Herbert Lehman granted 110 such pardons during his tenure.[85]

Although executive pardons and federal court rulings addressed some of the problems in deportation policy, these fell short of clarifying a uniform national policy. In the early 1930s the Immigration Service remained resistant to the idea that it should relieve aliens' families of hardship, citing its "plain duty of ridding the country of those uninvited guests who have 'crashed the gate.'" As for the "alleged hardship to the alien . . . or to his family," the

83. "Statutory Construction in Deportation Cases," 1236–37; Emma Wold, "Alien Women vs. the Immigration Bureau," *Survey,* Nov. 15, 1927, p. 217; *INS Annual Reports,* 1925–1932.

84. *Browne v. Zubrick,* 45 F. 2d 931 (CAA 6th 1930); *Iorio v. Day,* 34 F. 2d 920 (CAA 2d 1929); see also *Lisotta v. U.S.,* 3 F. 2d 108 (CAA 5th 1924); *U.S. ex rel. Klonis v. Davis,* 13 F. 2d 630 (CAA 2d 1926).

85. "Pardons and Commutations," *Public Papers of Governor Herbert S. Lehman,* 1933–1942.

service pointed out the primacy of "the hardships inflicted upon the American citizen and lawfully resident and law-abiding alien in their exposure to the competition in employment of opportunities of bootlegged aliens."[86]

In 1933 and 1934 liberals adopted a new legislative strategy for immigration reform, which proceeded simultaneously along two tracks: one that proposed to impose yet harsher sanctions on criminals and one that proposed to prevent family separation in cases that were "exceptionally meritorious." Legislation introduced in 1933 and 1934 linked the two issues within a single bill. This strategy gave reformers political cover by demonstrating their commitment to restriction and against criminals while arguing for compassion for "relatively harmless and deserving people."[87]

Just who were the criminals and who were the deserving, however, was under realignment. Since the Progressive era relativism and environmentalism had grown increasingly influential in thinking about criminal and moral deviance. There was also broader social support for the idea that people who made mistakes could be reformed. Speaking against the 1929 law that forever barred readmission after deportation, Jane Addams pointed out, "To make an old mistake indelible—to lay a dead hand on the future, is always of doubtful value." Thus petty crimes and sexual transgressions, once deemed evidence of innate character deficiency, could now be considered "more or less innocent [offenses] against the immigration law," falling below the bar set for deportation. Deportation for minor offenses was now considered punitive and unjust.[88]

The discourse on unjust deportation referred mostly to European immigrants and only occasionally to Mexicans. Ethnic Mexicans in the United States voiced the same concerns as did Europeans; for example, the Los Angeles Spanish-language newspaper *La Opinión* criticized the deportation of Mexicans who had ten years of residence in the U.S., businesses, and family.[89] But Mexicans remained marginalized from the mainstream of immigration discourse. Among Euro-American reformers, references to immigrants of good moral character were usually not racially explicit, but by definition such immigrants were unlikely to be Mexican because "Mexican" had been constructed as a negative racial category. More important, reformers did not call for leniency in cases of unlawful entry, because this was a core component of the system based on numerical restriction, *which*

86. *INS Annual Report,* 1931, pp. 13–14.

87. Secretary of Labor, *Annual Report,* 1934, p. 53.

88. Morton Keller, *Regulating a New Society: Public Policy and Social Change in America, 1900–1933* (Cambridge, Mass.: Harvard University Press, 1994), chaps. 3–4; Addams quoted in *Survey,* July 15, 1930, p. 347; *Interpreter,* April 1929, p. 76.

89. "Frequent Deportation of Mexicans," *La Opinión,* Jan. 30, 1929, p. 2 (translated from Spanish).

none of them directly opposed. In contrast to environmentalist and relativist notions of crime, the idea of transgressing the nation's sovereign space stood out as an absolute offense. Thus, while European immigrants with criminal records could be constructed as "deserving," Mexicans who were apprehended without proper documents had little chance of escaping either the stigma of criminalization or the fate of deportation.

Legislative and administrative reforms operated in ways that fueled racial disparity in deportation practices. In 1929 Congress passed the Registry Act, which legalized the status of "honest law-abiding alien[s] who may be in the country under some merely technical irregularity." The law allowed immigrants to register as permanent residents for a fee of twenty dollars if they could show that they had resided in the country continuously since 1921 and were of good moral character.[90] The law did not formally favor Europeans over Mexicans. But, of the 115,000 immigrants who registered their prior entries into the country between 1930 and 1940, eighty percent were European or Canadian. According to Berkeley economist Paul S. Taylor, many Mexicans qualified for an adjustment of status under the Registry Act but few knew about it, understood it, or could afford the fee.[91]

During the 1930s and 1940s the Labor Department instituted a series of reforms that addressed, albeit in limited ways, questions of due process in deportation proceedings and established administrative mechanisms whereby certain illegal aliens—mostly Europeans—could legalize their status. Immigration and administrative law reformers welcomed the administration of Franklin D. Roosevelt in 1933. Roosevelt's secretary of labor, Frances Perkins, was a New York Progressive-era reformer and the new head of the INS, Daniel W. MacCormack, was the first immigration commissioner who did not come directly from organized labor.[92] Perkins and MacCormack took seriously the criticisms that had been mounting against the Immigration Service's practices. The secretary noted that "much odium attached to the Service due to [its] policies and methods" in deportations.[93]

Perkins also appointed a civilian panel to investigate the practices of the INS. The Ellis Island Committee included northern urban elites noted for their charitable work among immigrants, like Mrs. E. Marshall Field and

90. *INS Annual Report,* 1925, pp. 12–13; Act of March 2, 1929 (45 Stat. 1551).

91. *INS Annual Report,* 1930–1932; Secretary of Labor, *Annual Report,* 1933–1940; Paul S. Taylor, "Mexican Labor in the U.S.: Dimmit County, Winter Garden District, South Texas," *University of California Publications in Economics* 6 (1930): 322.

92. On Perkins, see George Martin, *Madam Secretary: Frances Perkins* (Boston: Houghton Mifflin, 1976). MacCormack came from an elite New York family. He was a cousin of Eleanor Roosevelt, a banker, and former diplomat. I am grateful to Marian Smith for biographical information on MacCormack.

93. Secretary of Labor, *Annual Report,* 1934, p. 50.

Mrs. Vincent Astor, and immigrant advocates such as Max Kohler and Read Lewis of the Foreign Language Information Service. The committee's report, issued in March 1934, echoed the criticisms made by Van Vleck and the Wickersham Commission. In particular, it emphasized the need for administrative discretion to not deport in cases "deemed to involve extraordinary hardship, such as where deportation would involve the disruption of a family."[94]

In 1934 Perkins and MacCormack instituted a series of administrative reforms at the INS. One line of reform concerned procedures and due process. The INS discontinued the practice of arresting suspected aliens without warrant at places removed from the actual time and place of entry. It also mandated that the same officer could not conduct the preliminary examination and the final hearing.[95]

A second type of reform concerned the use of administrative discretion to grant relief from deportation for aliens for whom deportation would cause hardship. At one level, MacCormack undertook an intense effort to lobby Congress to pass legislation that provided for discretionary relief from deportation in "meritorious" cases. He stated, the "[immigration laws] are so rigid that at times they defeat their purpose and . . . sometimes result in extreme hardship and injustice both to the alien and to the innocent relatives of the alien." Giving discretionary relief was not a question of "sentimentality," MacCormack said, but necessary to prevent the creation of public charges.[96] MacCormack believed, moreover, that "illegal entry in itself is not a criterion on character." To the contrary, he said, "the mother who braces the hardship and danger frequently involved in an illegal entry for purpose of rejoining her children cannot be held by that sole act to be a person of bad character."[97]

But Congressional action would be slow in coming. Although Democrats now controlled Congress, the party's southern wing served as a conservative block against reform in immigration matters. In the context of economic emergency posed by the Depression, immigration reform was not high on Roosevelt's list of legislative priorities. Without statutory reform, Perkins and

94. *Report of the Ellis Island Committee* (New York [n.p.], 1934), 77, 87.

95. Secretary of Labor, *Annual Report,* 1934, pp. 50–52.

96. D. W. MacCormack, "Memorandum of the Commissioner of Immigration and Naturalization to the Committee on Immigration of the Senate and the Committee of Immigration and Naturalization of the House of Representatives, Relative to Certain Proposed Changes in the Immigration Law," April 24, 1934, p. 2; U.S. Senate, Committee on Immigration, "Deportation of Criminals, Preservation of Family Units, Permit Noncriminal Aliens to Legalize their Status," 74th Congress, Second Session, Feb. 24, 29, March 3, 11, 1934, pp. 16, 198.

97. "Deportation of Criminals," 218–19.

MacCormack creatively used provisions of existing law to suspend deportations and to legalize the status of certain illegal immigrants in hardship cases. This involved a two-step procedure whereby the secretary of labor granted the illegal alien a waiver from deportation and allowed him or her to depart to Canada and to reenter the U.S. as a legal permanent resident.

The secretary granted waivers by invoking an obscure clause of the Immigration Act of 1917, the Seventh Proviso to Section 3, which stipulated that "aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Attorney General and under such conditions as he may prescribe." Congress intended the Seventh Proviso as a hardship measure for aliens who were temporarily out of the country when the Immigration Act of 1917 was passed and who, for reasons often technical in nature, were excludable upon their return.[98] Perkins's innovation was to use the concept "returning after a temporary absence" to apply to aliens who had not yet departed and to include in its scope illegal aliens who "have lived here a long time." By invoking the Seventh Proviso to waive deportations Perkins reverted to the central principle of pre-1924 immigration policy inherent in the statute of limitation on deportation, the idea that immigrants who have settled in the country should not be expelled.[99]

The process of readjustment of status was known as the "pre-examination" procedure. Since 1933 the INS had granted letters to legal aliens going to Canada for short visits assuring them of reentry, providing that they were first examined and found admissible by immigration inspectors. It began as a gesture of courtesy that allowed legal aliens departing temporarily to avoid the necessity of applying for a formal reentry permit. The Canadian authorities also required written assurance that the visitors would not remain in Canada. The practice became known in INS parlance as "pre-examination"—that is, inspection for readmission before departure.[100]

In 1935 pre-examination was extended to illegal immigrants to facilitate

98. Immigration Act of 1917 (39 Stat. 874). The 1917 act included twelve provisos, or exceptions, to the law's rules of exclusion. See Senate Report 352, 64th Congress, First Session, p. 6, on the Seventh Proviso as a hardship clause. See also Letter, Frances Perkins to Rep. Dave Batterfield, Jr., Sept. 17, 1940, file Immigration, General, 1940, box 66, Secretary's General Subject Files, Records of the Dept. of Labor, RG 174, National Archives (College Park) (hereafter "Perkins papers").

99. Perkins to Batterfield; Memorandum, Attorney General to Rufus Holman, Jan. 4, 1943, p. 4, file 55819/402D, box 75, accession 58A734, INS.

100. Memoranda, A. M. Doig, Acting District Director Detroit to Commissioner General, Sept. 7, 1933; MacCormack to District Directors, Newport [VT], Buffalo, NY, Detroit, Grand Forks [ND], and Seattle, Dec. 18, 1933, file 55819/402, box 75, accession 58A734, INS. Pre-examination as described here is distinguished from the INS policy of "pre-inspection," which refers to inspection abroad before emigration.

their legalization. A formal agreement between the U.S. Department of State and Immigration Service and their Canadian counterparts detailed procedures whereby an immigrant in the U.S. without a visa could be "pre-examined" for legal admission, leave the country as a "voluntary departure," proceed to the nearest American consul in Canada, obtain a visa for permanent residence, and reenter the United States formally as a legal admission.[101]

The INS thus suspended state territoriality in order to unmake the illegal status of certain immigrants. Although the whole procedure was a bureaucratic arrangement, the INS and State Department would not simply issue new documents granting an alien's legal status. The alien had to cooperate by physically leaving and reentering the country, to enact a voluntary departure and a legal admission. Some aliens failed to understand the necessity of the performance (or could not afford to make the trip to Canada) and wondered why, if it was willing to adjust their status, the INS would not simply leave them alone.[102]

The pre-examination program was an ad-hoc procedure, which officials made up as they went along, both broadening and narrowing its scope. Eventually it was routinized and written into the Code of Federal Regulations.[103] It was initially meant for immigrants who had a U.S.-citizen spouse or children and whose illegal status resulted from technical error. This was an uncontroversial political calculus in which preventing hardship for citizens easily trumped deportation for trivial causes. But "hardship" proved to be an elastic concept, another version of the notion of "deserving." It was quickly extended to certain types of criminal cases, or, more precisely, to certain criminals. A typical case involved Mrs. Lillian Joann Flake, who was charged with theft in 1918 and 1922 and larceny (shoplifting) in 1930. A native Canadian, she lived in the U.S. for more than seventeen years and had a husband and daughter in Chicago. In another case, the INS argued on behalf of Carlos Reali, an Italian, "in view of the fact that the alien is married to a native of the United States and that there are three American-born children." His record, added the INS, was good, notwithstanding his acquiring a visa by fraud and perjury in 1924. The INS vacated Flake's, Reali's, and hundreds of others' orders of deportation, allowing them to depart the country voluntarily and obtain a legal visa for readmission.[104]

101. Dept. of Immigration and Colonization [Canada], Official Circular no. 31, Feb. 23, 1935; MacCormack to A. L. Jolliffee, Commissioner of Immigration [Canada], Oct. 21, 1935, file 55819/402, INS.

102. Letter, Perkins to Mrs. Roosevelt, Jan. 27, 1939, file "Immigration-Deportations 1939," box 69, Perkins papers.

103. 8 CFR pt. 142.

104. Letter, James Houghterling to Sen. James Lewis, April 20, 1938, file 55819/402B, box 75, accession 58A734, INS; I. F. Wixon to Secretary of State, Nov. 8, 1937, file 55819/402A, ibid.

Restrictionists in Congress criticized the secretary for "granting waivers to lawbreakers" and "exerting unusual efforts to protect and keep without our borders hundreds of deportable foreigners branded as criminals." One angry senator counted 119 such cases in 1937 and a congressman cited nearly seven hundred cases in 1940. Perkins defended the practice, stating that in most cases the crimes committed "amounted only to violations of law committed many years ago and were counterbalanced by long periods of good moral conduct and useful service in the community."[105]

In 1940, when Congress moved the INS from the Department of Labor to the Department of Justice, the INS continued the pre-examination program. In 1943, defending the use of the Seventh Proviso, the attorney general stated that the "American sense of justice and fair play" ought to "respect [the alien's] rehabilitation and not to brand and treat him as a criminal perpetually."[106] Although the attorney general claimed that the INS did not grant waivers to criminals convicted of serious offenses, in fact Seventh Proviso and pre-examination cases included those involving fraudulent naturalization, larceny, bigamy, rape, even manslaughter. The only cases that were denied relief appear to be those involving alleged anarchists and smugglers.[107]

"Hardship" also extended beyond cases involving aliens with a U.S.-citizen spouse or child. By the early 1940s suspension of deportation and pre-examination were available to aliens with a legally resident alien relative, those with long-term residence in the U.S., and "exceptionally meritorious" cases, the latter constituting a general loophole.[108] The expanding grounds for eligibility suggest a policy grounded in the idea that what mattered most was not the immigrant's formal status but his or her presence and ties in the community. This was a remarkable acknowledgment that undercut the premises of restriction and territoriality.

Significantly, however, the privilege of pre-examination became restricted to European immigrants. Asiatics did not qualify, because they were categorically excluded from immigration on grounds of racial ineligibili-

105. Sen. Robert Reynolds to James Houghterling, April 4, 1938, file 55819/402B, box 75, accession 58A734, INS; "Seven Hundred Deportable Aliens Sheltered by U.S. Labor Department," *Congressional Record,* Oct. 10, 1940, pp. 20424–28; Perkins to Batterfield, Sept. 17, 1940.

106. Attorney General to Sen. Rufus C. Holman, Jan. 4, 1943, file 55819/402D, INS.

107. I. F. Wixon to Secretary of State, Nov. 8, 1937; "Summary of cases listed on page 47 of the State Dept. Appropriation Bill, 1939, with particular reference to the nature of the crimes involving moral turpitude in connection with which the Seventh Proviso to Section 3 of the 1917 Act was invoked by the Secretary of Labor," file 55819/402A, INS; "Seven Hundred Deportable Aliens Sheltered by U.S. Labor Department."

108. Five or more years of residence was required for those without citizen or legally resident alien spouse, parent, or minor child; one year of residence was required of the latter. Memorandum, Savoretti to A. R. Mackey, March 27, 1946, file 55819/402D, INS.

ty.[109] Mexicans were not initially excluded. After MacCormack formalized the pre-examination procedure, INS El Paso district director Grover Wilmoth implemented the procedure for Mexican hardship cases. But in 1938 he became stonewalled by the American consul in Juárez, William Blocker, who argued that those applying for visas at Juárez "were of the laboring class, some of them actually on relief." They should, he said, "unquestionably" be denied visas. In fact the INS Board of Special Inquiry had ruled in Canadian pre-examination cases that receipt of relief during the Depression, when no work was available, was not evidence of LPC. Blocker deliberately slowed the work of processing visas for Mexican pre-examination cases to only a handful a month in order to frustrate Wilmoth's efforts to grant relief to Mexican cases.[110]

I found no evidence that Wilmoth's higher-ups in the INS argued with the State Department for a fair application of the policy; rather, the INS seems to have quickly scuttled the program for Mexicans.[111] It clarified that the "general pre-examination procedure is limited to certain aliens—relatives of U.S. citizens—desiring to proceed to *Canada.*" Later documents conspicuously referred to the program as the "Canadian pre-examination procedure." Thus, initially, Mexicans were excluded not explicitly but by a lack of propinquity, by their distance from Canada, where physical departure and reentry were performed. In 1945 the INS explicitly restricted pre-examination to "other than a citizen of Canada, Mexico, or any of the islands adjacent to the U.S." This policy appeared to be race-neutral in that it applied to all countries with contiguous borders to the U.S., but in fact it was meant to categorically deny relief to Mexicans and Caribbean migrants. Because pre-examination involved permission for temporary entry into Canada to acquire the U.S. visa, it was irrelevant to Canadians, who did not need special permission to enter Canada.[112]

The racism of the policy was profound, for it denied, *a priori,* that de-

109. Perkins apparently wished to help Asians but the law tied her hands. For example, see the case of Ramkrishana Sakharan Jivotode, in letter, Perkins to Josephus Daniels, April 22, 1940, file Immigration-Deportation, 1940, box 67, Perkins papers.

110. Memoranda, G. C. Wilmoth to Commissioner General, Nov. 3, 1938; William Blocker to Secretary of State, Nov. 3, 1938; Wilmoth to Commissioner General, Nov. 29, 1938, file 55819/402C, box 75, accession 58A734, INS.

111. MacCormack died suddenly in 1937. It is possible that, had he lived, he would have fought for a universal application of the pre-examination program.

112. G. C. Wilmoth to all inspectors in charge and chief patrol inspectors, El Paso District (draft) [1938], file 55819/402C (emphasis in original); formal application form [1942] and Part 142 of Immigration Regulations, 1943, file 55819/402D; Ugo Carusi to Tom Clark, Oct. 15, 1945, ibid.; U.S. Senate, Report of Committee of the Judiciary, "Immigration and Naturalization Systems of the U.S.," 81st Congress, Second Session, Senate Report 1515, April 20, 1950 (hereafter "Senate Report 1515"), p. 604.

portation could cause hardship for the families of non-Europeans. In stressing family values, moreover, the policy recognized only one kind of family, the intact nuclear family residing in the United States, and ignored transnational families. It failed to recognize that many undocumented male migrants who came to the United States alone in fact maintained family households in their home country and that migration remittance was another kind of strategy for family subsistence.

For Europeans, however, the policy was clearly a boon. In fact, pre-examination became an official and routine procedure for adjusting the status of Europeans who were not legally present in the United States.[113] By the early 1940s pre-examination was used to help adjust the status of refugees from European fascism who had entered the United States in the 1930s by way of tourist or visitor visas.[114] Pre-examination continued with only two brief interruptions until the practice was terminated in 1958. The data indicate that between 1935 and 1959 the INS processed nearly 58,000 pre-examination cases and granted approval in the vast majority of them.[115]

Apart from pre-examination, the INS began to suspend orders of deportation after 1940, when Congress gave the attorney general authority to grant discretionary relief as part of the Alien Registration Act. Discretionary relief appears to be a concession granted in exchange for alien registration, which had been long opposed but passed as a wartime measure. The 1940 law allowed for the suspension of deportation in cases involving aliens of good moral character if deportation would result in "serious economic detriment" to the alien's immediate family. It excluded alien anarchists, convicted narcotics dealers, and the "immoral classes," the latter comprising prostitutes and the mentally ill. "Good moral character" did not pre-

113. The INS created special forms for applications in January 1941 (I-55, I-255, and I-155). For a description of the application procedure, see Common Council for American Unity, "An Immigration Summary: Outstanding Facts about the Admission, Exclusion, and Deportation of Aliens," June 1941, pp. 20–21.

114. Henry L. Feingold, *The Politics of Rescue: The Roosevelt Administration and the Holocaust, 1938–1945* (New Brunswick, N.J.: Rutgers University Press, 1970), 17; Divine, *American Immigration Policy,* 103–4.

115. For pre-examination data, see *INS Annual Reports* 1942–1959; see also Senate Report 1515. Pre-examination was suspended in 1940 for about one year, as a wartime "internal security" precaution. See Attorney General to Sen. Rufus C. Holman, Jan. 4, 1943. It was reinstituted but then discontinued in 1952 because the McCarran Walter Act (66 Stat. 163) provided statutory relief for illegal aliens who entered by way of fraud or misrepresentation, who were otherwise admissible, and who had immediate family in the U.S. Sec. 241(f), amended 71 Stat. 640 (1957). Pre-examination was reinstituted again in 1955 as a remedy to the flood of private legislation brought by illegal aliens whom the INS denied relief under 241(f). However, Congress imposed narrower grounds for pre-examination, limiting it to persons who had acquired eligibility for non-quota status as the spouse or child of a U.S. citizen. See *INS Annual Report* 1955. Since 1961 relief in fraud cases has been at the Attorney General's discretion. 75 Stat. 657 (Act of Sept. 26, 1961), now 8 USC 1182(i) (2000).

clude having a criminal record, but referred to "reputation which will pass muster with the average man [that] need not rise above the level of the common mass of people."[116]

The INS suspended the deportations of several thousand aliens a year from 1941 through the late 1950s.[117] An internal Justice Department study of 389 randomly selected cases conducted in 1943 revealed that 45.8 percent involved seamen, 18.3 percent involved visitors (visa overstays), and 10.5 percent involved border crossers. The overwhelming majority (73 percent) was of European origin (mostly German and Italian). Only 8 percent of the cases involved Mexicans.[118]

As for alien registration, the 1940 law required fingerprinting and yearly registration of all aliens resident in the United States. While clearly a wartime measure, the INS took pains to reassure immigrants that their loyalty was not under question, calling registration an "inventory" or a measure of prudence dictated by national security. This was, perhaps, aimed at securing the cooperation of the nation's four million foreign-born residents. But the nativism that had fueled earlier demands for compulsory alien registration was now displaced by more pluralist views. Speaking in Los Angeles in August 1940, Assistant Secretary of Labor Marshall Dimock explained alien registration as part of the nation's "defense program," but emphasized that national unity was the key to the nation's security. Americans must be vigilant "to discourage any tendency toward setting a particular group from others" based on differences of religion, color, economic status, or alien-age. The "blue-eyed, flaxen haired farmer from Wisconsin, Minnesota, and the Dakotas," he said, "who in scores of cases have lived here most of their lives but who for one reason or another are not technically Americans . . . are as good Americans as we are." And, in what was becoming a familiar rhetorical move, Dimock underscored his call to embrace these noncitizens with a call for vigilance against undesirables. "Our immigration laws are being enforced as vigilantly as possible," he said. "We are constantly tightening up our border defenses against undesirable aliens; we have strengthened our deportation machinery; and in cooperation with other designated agencies we have armed ourselves to cope with subversive activities."[119]

In general, despite various reforms, change was limited and slow. Dis-

116. Act of June 28, 1940 (54 Stat. 670). For discussion on "good moral character" in suspension of deportation cases see Senate Report 1515, p. 596.

117. Published data for 1941–1960 indicate a total of 34,632 suspensions of deportation. See *INS Annual Reports,* 1941–1960.

118. Memorandum, Helen F. Eckerson, Statistical Unit to L. Paul Winings, General Counsel, March 12, 1946, file 55819/402D.

119. Transcript of speech by Marshall Dimock, "Security Within," delivered to Veterans of Foreign Wars, Los Angeles, August 27, 1940; file "Immigration-Naturalization," box 66, Perkins papers.

cretionary relief from deportation became incorporated into immigration law in the Immigration and Naturalization Act of 1952.[120] But throughout the 1950s and early 1960s, almost no progress was made in matters of due process and judicial review. The INS exempted itself from the Administrative Procedures Act (APA), which Congress passed in 1946. The Supreme Court ruled in 1950 (*Wong Yang Sung v. McGrath*) that deportation proceedings were of a judicial character requiring a fair hearing and ordered the INS to adhere to the terms of the APA, notably the separation of functions, that is, that the investigating inspector (prosecutor) could not be the hearing officer (judge). The INS reported a drop in the number of deportations of illegal Mexican immigrants from 16,903 in 1949 to 3,319 in 1950, as a result of the *Sung* decision. But Congress acted quickly to nullify *Sung* and to restore the INS's ability to deport efficiently by granting the INS statutory exemption to the APA. Indeed, if during the New Deal and World War II immigration officials showed an interest in administrative reform in areas of due process, their successors were generally impervious to it.[121]

Conclusion

Numerical restriction legislated in the 1920s displaced qualitative reasons for inclusion and exclusion with criteria that were at once more abstract and arbitrary—the quota slot and the proper visa. Previously, territoriality had been exercised to exclude people not deemed fit to be part of the nation. In the 1920s qualitative norms of desirability remained in the law as grounds for inclusion and expulsion but, as we have seen, they were employed in deportation cases less often than was the rule of documentation and, moreover, they were applied irregularly and with considerable discretion. As qualitative norms receded in importance, territoriality—defining and policing the national space—became both the means and the ends of immigration policy.

120. The basic terms of the Seventh Proviso were incorporated into Sec. 212(c) of the Immigration and Naturalization Act of 1952, 66 Stat. 163. It remained in the law until 1996, when it was eliminated. Suspension of deportation was incorporated into Sec. 244(a) of the INA. It remains in law although the grounds for it are now very narrow.

121. Administrative Procedures Act, Act of June 11, 1946 (60 Stat. 237); *Wong Yang Sung v. McGrath,* 339 U.S. 33; Marion Bennett, *American Immigration Policies* (Washington: Public Affairs Press, 1963), 90–91; Act of Sept. 27, 1950 (64 Stat. 1044). Congress repealed the exemption in 1952 and wrote provisions into the McCarran-Walter omnibus immigration act to effect the same results. On the "unmistakable purpose to exempt immigration hearings from the procedural requirements of the APA," see President's Commission on Immigration and Naturalization, *Whom We Shall Welcome* (Washington, D.C.: GPO, 1953), 159.

However, Americans increasingly believed that deportation, initially imagined for the despised and dangerous classes, was undemocratic and unjust when applied to ordinary immigrants with homes and families in the United States. Hence during the 1930s and early 1940s statutory and administrative reforms attempted to ease the tension between sovereignty and democracy that immigration policy had created. Family values and environmentalist views of delinquency and morality paved the way for reform, while race directed its reach.

Thus it became possible to unmake the illegality of Italian, Polish, and other European illegal immigrants through the power of administrative discretion. Of course, not all illegal European immigrants were legalized, but a rough estimation suggests that between 1925 and 1965 some 200,000 illegal European immigrants, constructed as deserving, successfully legalized their status under the Registry Act, through pre-examination, or by suspension of deportation. The formal recognition of their inclusion in the nation created the requisite minimum foundation for acquiring citizenship and contributed to a broader reformation of racial identity, a process that reconstructed the "lower races of Europe" into white ethnic Americans.[122]

By contrast, walking (or wading) across the border emerged as the quintessential act of illegal immigration, the outermost point in a relativist ordering of illegal immigration. The method of Mexicans' illegal entry could thus be perceived as "criminal" and Mexican immigrants as undeserving of relief. Combined with the construction of Mexicans as migratory agricultural laborers (both legal and illegal) in the 1940s and 1950s, that perception gave powerful sway to the notion that Mexicans had no rightful presence on United States territory, no rightful claim of belonging.

The basic principle of immigration law doctrine that privileged Congress's plenary power over the individual rights of immigrants remained intact. The contradiction between sovereignty and individual rights was resolved only to the extent that the power of administrative discretion made narrow exceptions of the sovereign rule. In the context of immigration law that foregrounded territoriality and border control, and in the hands of immigration officials operating within the contingencies of contemporary politics and social prejudices, that discretion served to racialize the specter of the illegal alien.

122. See generally Matthew Jacobson, *Whiteness of a Different Color* (Cambridge, Mass.: Harvard University Press, 1998); James Barrett and David Roediger, "In-between People: Race, Nationality, and the 'New Immigrant' Working Class," *Journal of American Ethnic History* 16.3 (Spring 1997): 3–44; Ian F. Haney López, *White by Law: The Legal Construction of Race* (New York: New York University Press, 1995).