Undocumented Immigration to the United States:
Historical and Contemporary Perspectives

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Migration is as old as human history. It is a human response to the conditions of life, whether an aspiration for economic improvement; a quest for refuge from persecution, war, or disaster; a longing to be with loved ones; or a restlessness of the spirit. As such, it has always been difficult for states to control.

Only in the modern era did it become standard practice for states to impose restrictions on immigration. In the early modern period, long-distance migration was integral to the trading networks and settlements that accompanied the expansion of "core" societies: Europe to the Americas and China to Southeast Asia, for example. These migrations may be understood as part of the building of Old World empires. Restrictions mostly pertained to domestic mobility and exit; freedom of movement was a right acquired in Europe with the emergence of capitalism, as peasants became unshackled from their places of birth and servants from the authority of their masters. By the nineteenth century the nation-state had become the dominant mode of political organization, especially in Europe and the Americas. National states began to regulate immigration as part of their efforts to control their labor markets and the ethno-religious composition of their populations. Although many states relaxed restrictions on exit, they erected barriers to admission. It is a paradox of modern history and law that liberal nation-states the world over recognize the individual right to exit yet uphold the right of nations to refuse entry to anyone who may come knocking at the door.

Undocumented migration is a corollary to restrictive policies; in this sense, it is a common feature of modern immigration. The assumption in public discourse that unauthorized entry is anomalous and exceptional creates a logic whereby undocumented migration is deeply misunderstood. It is seen as a problem caused by the migrants themselves, who are imagined as suffering from individual character defects (lawbreakers). The solution to the problem is seen as greater law enforcement (stop them from entering; remove those who are unlawfully present). Left unexamined is the law itself, which is not fixed or timeless, but the product of historical contingencies and political alignments. This paper reviews how American immigration policy shifted from one that was normatively open (i.e., open with some exceptions) to one that is normatively closed (closed with some exceptions) and in the process created the problem of undocumented immigration.

The Open Door

In the United States immigration was unregulated until the late nineteenth century and numerically unrestricted until the 1920s. Until that time there were no visas, green cards, or

passports; no quotas or queues; no border patrol. With a few exceptions, there were no illegal aliens.

Indeed, it may be argued that before the 1820s the people who came to America were not "immigrants"—that is, they did not come with the intention of joining an existing society. They are better understood as colonists and settlers (and the dependent laborers—indentured servants and slaves—that they brought with them or purchased upon arrival). The colonists who came to North America in the seventeenth and eighteenth centuries sought not to "assimilate" with natives (whom they characterized as savages), but to establish, in place of native societies, replicas of the Old World; hence the names New Spain, New France, New Netherland, and New England.

After the United States was founded, immigration continued to be important for the peopling of the new nation. But there were no federal laws regulating it. The U.S. Constitution was written without mention of immigration. It only called upon the Congress to enact a uniform law for naturalization. The Alien and Sedition Acts, passed in 1798 as a reaction to the French Revolution, extended the waiting period for naturalization from five to fourteen years and allowed for the detention of subjects of enemy nations and the deportation of persons considered by the president to be dangerous. These acts were the first U.S. internal security laws; they were extremely controversial at the time, and Congress allowed them to expire within a few years. For present purposes it is notable that the alien and sedition laws did not seek to regulate or curtail immigration itself. Congress's reluctance to do so—and the absence of federal regulation over immigration in general—reflected the nation's division between free and slave states. Slaveholders opposed any federal authority over the mobility of their slaves. The only federal legislation pertaining to immigration was a series of Passenger Acts, passed from 1819 to 1855, which set standards for merchant vessels carrying passengers to American ports.

The territories of the old Northwest (present-day Mid-West) encouraged immigration to spur settlement, offering new arrivals easy access to land and voting. Yet during this period newcomers from Europe, like the colonists who came before them, considered themselves to be not immigrants, but pioneers and settlers who came to build a new nation. They tended to call themselves emigrants, emphasizing their continued identification with their countries of origin (Gabaccia 2006).[1)]

European emigrants faced growing nativism in the antebellum period, particularly Irish and German Catholics. Refugees from Ireland, which was devastated by the great potato famine (1845–1852), concentrated in cities, where they drew criticism for their poverty and religious difference. The xenophobic and anti-Catholic Native American Party (also known as the Know Nothings) made a splash in the 1850s, but its momentum was short lived. The

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[1)] Donna Gabaccia, "Great Debates: Keywords in Historical Perspective" in Border Battles: The U.S. Immigration Debate, Social Science Research Council, accessed March 20, 2013, borderbattles.ssrc.org/Gabaccia/.

slavery question and the Civil War quickly superseded the immigration issue.

Federal Regulation and Chinese Exclusion

In 1875 the U.S. Supreme Court ruled that regulation of immigration was a matter for the federal government, not the states (*Chy Lung v. Freeman* 1875). Soon Congress began to pass laws that sought to regulate immigration in ways that reached far beyond the scope of the Passenger Acts. These new laws targeted designated classes of immigrants as undesirable and excluded them from admission. The previous laws had held the steamship companies responsible for the conditions of passage, but the principle and practice of exclusion targeted the individual migrant. In doing so, the first restrictive laws constituted the grounds for creating the nation's first illegal immigrants.

The first exclusion laws aimed at the Chinese. An anti-Chinese movement had emerged in California in the 1850s among Euro-Americans, who opposed foreign competition in the gold-mining districts. Local and state laws barred Chinese from first ownership of mining claims, testifying in court against whites, and other rights. During the long recessionary period of the 1870s anti-Chinese agitation assumed new urgency as an urban labor movement. Under the banner "the Chinese must go!" the California Workingmen's Party blamed Chinese labor for undercutting the wages and standard of living of white Americans. They asserted the falsehood that Chinese workers were "coolies," held by indenture or debt peonage, a condition of servility that was imagined to be an inherent racial trait. Using the potent and familiar language of "free labor" against "slavery," the anti-Chinese movement succeeded in gaining passage of myriad local and state measures that harassed and discriminated against the Chinese, but California could not exclude them from entering. Only the federal government could do that.

The first restrictive U.S. immigration law, the Page Act of 1875, sought to curtail Chinese immigration by forbidding the admission of contract labor and "Mongolian" prostitutes. In this way it skirted the terms of the U.S.-China Burlingame Treaty (1868), which protected "free immigration." The Page Act sought to exclude the Chinese, imagined as an unfree race of coolies and prostitutes. It was successful in deterring Chinese female immigration—not because all Chinese women were prostitutes, but because Chinese women would not submit to the offensive interrogation procedures. The Page Act was not able to keep out male laborers because they were not, in fact, contracted or indentured. Further agitation on the part of the anti-Chinese movement pressured Washington to renegotiate the Burlingame Treaty in 1880 to allow for a temporary suspension of immigration. Congress passed the first Chinese exclusion act, barring from admission all Chinese laborers for ten years, in 1882. The act also barred Chinese from naturalization. It was renewed in 1892 and made permanent in 1902. The Chinese exclusion laws were the first, and only, immigration laws in the United States that explicitly named a group for exclusion on grounds of racial difference. They remained in force until 1943, with grave and long-term consequences for Chinese and other Asians (Japanese, Koreans, and South Asians were also excluded by various laws in the early twentieth

century).[2)]

The Chinese exclusion laws produced America's first illegal aliens. Strictly speaking, Chinese who entered the country in violation of the exclusion laws were not "undocumented." Rather, they used false identities that were certified by documentation created by the immigration bureau or the courts. Some men gained admission as merchants, purchasing a partnership in a mercantile firm and gaining a certificate attesting to their exempt status. Their status also enabled them to bring their wives and children. Many more entered as the sons of Chinese who claimed they were born in the United States and hence citizens. Conveniently, the San Francisco earthquake and fire of 1906 destroyed the city's birth records, making these claims difficult to disprove. A son was born in China but claimed citizenship by derivation from his father, who was said to have sired him while on a visit from California. All this would be explained to a judge in federal district court, who without contravening evidence more often than not discharged the son with papers certifying his status as a U.S. citizen. In turn such men enabled the admission of more sons, and so on, creating several generations of "paper sons." It has been estimated that half the Chinese population in America by the mid-twentieth century was paper sons and their families, living with false identities in the shadows of a community already marginalized by legal, occupational, and residential discrimination.

The Chinese exclusion laws also had a lasting influence on the philosophy and structure of American immigration and naturalization policy. Chinese exclusion occasioned the doctrine of national sovereignty as the foundation of immigration law and Congress's plenary (absolute) power over its regulation. The U.S. Supreme Court, ruling in a series of test cases brought before it protesting the constitutionality of the exclusion laws, established that aliens had no rights in matters of admission and removal. It considered the regulation of immigration to be incident to the nation's sovereignty and part of its conduct of foreign relations, along with declaring war, making treaties, and repelling foreign invasion.

By establishing national sovereignty as the doctrinal basis for unchecked state power over Chinese immigration, the Court created a general policy. For that reason Justice David Brewer dissented in the *Fong Yue Ting v. U.S.* (1893) deportation case, acknowledging that the absolute power of the state to expel unwanted aliens was "directed only against the obnoxious Chinese, but if the power exists, who shall say it will not be exercised tomorrow against other classes and other people?"

The Chinese exclusion cases carved out a discrete legal domain for immigration matters, creating two different realms of rights: those in the Constitution, enjoyed by all persons territorially present, including aliens, and those in the area of immigration, in which aliens have no rights. For immigrants these two realms exist in tension with each other, one promoting inclusion, the other exclusion. Indeed, they invariably overlap.[3)] Aliens' lack of

2) Bill Ong Hing, *Making and Unmaking Asian America through Immigration Policy 1850-1990* (Stanford: Stanford University Press, 1993).

3) Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton, NJ: Princeton University Press, 2008).

rights in immigration matters arguably undermines their constitutional rights. One can easily imagine, for example, that one's freedom of speech is compromised if one can be deported for expressing views considered inimical to the state's interest. The tensions and contradictions between these two different realms of individual rights underlay racially differential treatment of different groups: Europeans tended to be treated in terms of inclusion and Chinese in terms of exclusion.

In the same year in which Congress passed the Chinese exclusion act, 1882, it also passed the country's first general immigration law. It established certain classes of persons deemed excludable, but unlike the Chinese exclusion laws, these were aimed at individual attributes: convicts, lunatics, idiots, and those liable to become a public charge. It also levied a 50 cent head tax on all aliens landing at U.S. ports to defray the cost of inspection. Over the course of the next several decades the list of excludable categories grew to include paupers, prostitutes, persons with loathsome and contagious diseases, the feebleminded and insane, persons involved with narcotics, polygamists, and anarchists. The excludable categories reflected concern over admitting people who would be unable to work and could become public charges, as well as the late nineteenth-century belief, derived from Social Darwinism and criminal anthropology, that the national body had to be protected from the contaminants of social degeneracy.

Enforcement was extremely weak. Inspection upon arrival sought to identify excludable persons and to deny them admission, but little could be done if they evaded detection and entered the country. Subsequent discovery was commonly the result of hospitalization or imprisonment, yet no federal law existed mandating the removal of alien public charges. 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 had transported them. Congress otherwise established no mechanism and appropriated no funds for deportation.

It is noteworthy that the law specified a one-year statute of limitations on deportation. Congress gradually expanded that period over the next several decades. The Immigration Act of 1917 established 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 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. Some ten thousand alleged anarchists were arrested, with roughly five hundred ultimately deported.

Asiatic exclusion and the Red Scare notwithstanding, the American immigration system was still an open one. There were no numerical limits on immigration, and Europeans were governed by a system that contemporaries called "individual selection." The Immigration Service deported only a few hundred aliens a year and between 1908 and 1920 an average of two or three thousand per year, mostly aliens removed from asylums, hospitals, and jails. Less than 1 percent of the twenty-five million arrivals from Europe between 1880 and World

War I were turned away. Notably, mere entry without inspection was insufficient grounds for deportation. The statute of limitations 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, acquired families and property, and become members of the community.

From Regulation to Restriction

The unskilled workers who emigrated from eastern and southern Europe to the United States at the turn of the twentieth century comprised a vast army of labor for the nation's industrialization and for building the infrastructure of its cities. They shoveled pig iron in steel mills, sewed shirtwaists in factories, and dug tunnels for sewer and subway lines. At the same time, however, demands for restricting immigration emerged among native-born white Americans, who associated immigrants with the spread of urban slums and class conflict. New England elites as well as native-born craft workers considered the new immigrants to be unassimilable, backward peasants from the "degraded races" of Europe, incapable of self-government. The American Protective Association, formed in 1887, was anti-immigration and anti-Catholic, and boasted 2.5 million members at its peak in the mid-1890s.

The restrictionists' efforts to curtail immigration were largely unsuccessful before World War I. But during and immediately after the war a confluence of political and economic trends impelled the legislation of immigration restriction. These included wartime nationalism; declining need for unskilled labor in industry; and an emergent international system that gave primacy to the territorial integrity of the nation-state.

After passing an emergency measure to restrict immigration in 1921, Congress passed the Immigration Act of 1924 (also known as the Johnson-Reed Act), which represented a seminal break in American immigration policy. The era of the open door emphatically ended, replaced with a regime of quantitative and qualitative restrictions that were unprecedented in their scope and ambition. Most important, the law established a numerical ceiling on admissions, set at 155,000 per year. Adjusting for population, this number has barely risen over time. Although the manner in which the total is distributed among countries has been subject to controversy over the years, most Americans remain committed to the principle of numerical restriction. In addition, the new system generated various instruments of enforcement, including the requirement of a visa for entry, inspection at a designated port of entry, and the formation of a land border patrol. It is from this combination of numerical restriction, documentation, inspection, and border surveillance that the "undocumented migrant" was born.[4)]

The qualitative nature of the new regime may be understood as a three-pronged border policy: one directed at European immigration, the second directed at Asia, and a third for countries of the Western Hemisphere.

[4)] Unless otherwise noted, the following discussion is drawn from Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton, NJ: Princeton University Press, 2004).

The policy for Europe was *restriction*. The method for allocating the total number of visas for entry was based on a hierarchy of racial desirability. Although nativists often spoke in the language of race to disparage immigrants from eastern and southern Europe (called, variously, the "lesser white races," "degraded races of Europe," etc.), the quotas were written in the race-neutral language of "countries" and "national origins." Quotas were distributed among countries in proportion to the number of white Americans who could trace their ancestry to each country in the 1920 census. This not only reflected a conservative impulse—to freeze, as it were, the national-origin composition of the population as it existed in 1920—it was also deeply flawed on its own terms, conceptually and methodologically. A long history of intra-European mixing made it impossible to determine the "national origin" of the white population. A "quota board" mandated by Congress to allocate the quotas used statistical alchemy to grant 65 percent of the total to Great Britain, Ireland, western Europe, and Scandinavia. The remaining 35 percent went to the countries of southern, eastern, and central Europe, from which had come the most recent wave of mass migration. So, for example, Great Britain and Northern Ireland's quota was 65,721; Germany's was 25,957; and Ireland's was 17,853. In contrast, Italy's quota was 5,802; Poland's was 6,523; Hungary's was 869; and Greece's was 307.

The policy for Asia was *exclusion*. After Congress passed the Chinese exclusion laws, various measures excluded other Asians, but these were piecemeal, and in the case of the Japanese, part of a diplomatic agreement that exclusionists thought was weak. The 1924 act perfected Asiatic exclusion with comprehensive, statutory exclusion. Like the "national origin" concept, this was done by euphemism, excluding from entry all "aliens ineligible to citizenship." That concept was not explicitly elaborated in the 1924 law; it derived from two rulings made by the U.S. Supreme Court in the early 1920s, in *Takao Ozawa v. U.S.* (1922) and *U.S. v. Baghat Thind* (1923), which determined that Japanese, South Asian Indians, and all Asians were not "white" and therefore not eligible for naturalization under existing naturalization law, which held out that privilege to "white persons" and "persons of African nativity and descent." The requirement that one must be "white" to naturalize dated to the first U.S. naturalization law of 1790 (specifically, "free white persons of good moral character"). The law was amended to include persons of "African nativity and descent" after the Civil War as a gesture to the former slaves (whose own citizenship was affirmed by the Fourteenth Amendment). No one seriously believed that the "Negroes of Africa" would immigrate, explained a federal judge in 1880, "while the Indian and the Chinaman were in our midst, and at our doors and only too willing to assume the mantle of American sovereignty." Armed with the Supreme Court's rulings that Asians were not "white," Congress legislated a comprehensive Asiatic exclusion policy that did not have to speak its name.

The policy for the countries of the Western Hemisphere was both open and closed. These countries were exempted from numerical restriction. Congress was reluctant to place quotas on Canada and Mexico, because it considered an open immigration policy important for its relations with its neighbors. It wished to protect American business interests in Canada,

Mexico, and Latin America, which might be jeopardized by retaliatory quotas on American travelers. In the Southwest agricultural interests relied on Mexican labor, and policy makers believed Mexican immigration was seasonal and hence of little long-term demographic consequence.

While exempting countries in the Western Hemisphere from numerical quotas, the 1924 act did impose upon all immigrants, regardless of origin, the same general requirements for admission: a visa and inspection at a formal port of entry. The visa fee and head tax were burdensome for many migrants, especially Mexicans, who also hated the inspection regimen for laborers at U.S.-Mexico immigration stations, which required mass bathing, delousing, medical-line inspection, and interrogation. Many Mexicans chose to avoid the expense and humiliation of inspection by informally crossing the border, as they had done for decades. But their presence in the United States was now considered unlawful, for they had entered without a visa and without inspection. They were the iconic undocumented migrants.

Soon it became impossible for Mexican workers to obtain a visa, even if they wanted one. In 1929 the U.S. State Department issued administrative rules to deny visas to Mexican laborers, save for those with prior residence in the United States. This administrative restriction enabled the United States to maintain an official posture of friendship to Mexico, while practicing restriction on the ground. However, the demand for labor in the lower Rio Grande Valley of Texas and in southern California continued to draw Mexican workers across the border. In general the growers of the Southwest found that they could benefit from undocumented migration: it helped keep wages low and labor militancy at bay. Rather than exclude Mexicans, immigration policy welcomed them, but only as an inexpensive, disposable labor force, desired for work in the fields but undesirable for inclusion in the polity. The policy for the countries of the Western Hemisphere might be summarized thus: *an open border, easy to cross, but only without documents*.

Deportation and the Making and Unmaking of Illegal Aliens

Though differently conceived, the European, Asian, and Western Hemisphere policies each generated undocumented migration: any European who entered in excess of his or her country's quota, any Asian, and any Mexican who failed to go through inspection. In addition, individual grounds for exclusion, such as disease and the infamous "LPC" (liable to become a public charge), remained in force. Illegal immigration, a relatively minor problem before World War I, was now a mass phenomenon and spurred the development of deportation machinery.

The number of aliens expelled from the United States rose from 2,762 in 1920 to 9,495 in 1925 to 38,796 in 1929. "Aliens without proper visa" was the single largest class of deportees, representing one-half of the total number of formal deportations and the overwhelming majority of voluntary departures by the late 1920s. This shift in the principal categories of deportation engendered new ways of thinking about illegal immigration. Legal and illegal status became, in effect, abstract constructions, having less to do with experience than with

numbers and paper. One's 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—and having the right documentation, the prized "proper visa." The qualitative aspects of admission were rendered less visible after 1924, when the visa application process took place at U.S. consular offices abroad. In 1924 the Immigration Service terminated line inspection at Ellis Island because medical exclusions were determined abroad. Thus, upon arrival immigrants' passports and visas were inspected, not their bodies. The system shifted to a different, more abstract register, which privileged formal status over all else.

The illegal alien who is abstractly defined is something of a specter, a body stripped of individual personage. The mere idea that persons without formal legal status resided in the nation engendered images of great danger. 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." In 1927 the Immigration Bureau reported that the "bootlegging of aliens" was a "lucratively attractive field of endeavor for the lawlessly inclined," emphasizing that "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." (Commissioner General of Immigration 1927, 15-16) This view that the undocumented migrant 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 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—it had existed since Chinese exclusion—but in the late 1920s illegal immigration assumed a different nature and scale. Undocumented migrants now comprised all nationalities and ethnic groups. They were numerous, perhaps even innumerable, and were diffused throughout the nation, particularly in large cities. An undocumented migrant might be anyone's neighbor or coworker, possibly one's spouse or parent. She might, in fact, be a responsible member of society: employed, taxpaying, and, notwithstanding her illegal status, law abiding. Even if she were poor or uneducated, she might have a family and community ties and interactions with others in ways that arguably established her as a member of society.

If it was difficult to differentiate undocumented migrants from citizens and legal immigrants, that difficulty signaled the danger that restrictionists had imagined—in their view, the undocumented 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 migrants 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. 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 undocumented migrants who were real people known in the community, people who had committed no substantive wrongs.

Yet if the undocumented were so like other Americans, the racial and ethnic diversity of the population further complicated the problem of differentiation. We might anticipate that undocumented migrants from Europe and Canada were perceived and treated differently from those of Mexican or Asian origin. In fact, the racial dimensions of deportation policy were not merely expressions of existing prejudice. Rather, they derived from differences in restrictive policy and from the processes of territoriality and administrative enforcement that were not in the first instance motivated or defined by race.

During the 1920s growing numbers of undocumented Europeans entered surreptitiously over both the Canadian and Mexican borders. Belgian, Dutch, Swiss, Russian, Bulgarian, Italian, and Polish migrants 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. The Federal Bureau of Investigation reported in 1925 “thousands” of immigrants, “most late arrivals from Europe . . . coming [in from Canada] as fast as they can get the money to pay the smugglers.” [5)]

By the late 1920s, however, surreptitious entry by Europeans had declined. The threat of apprehension and deportation was one factor. Europeans also found alternate means of legal entry. They could go to Canada (which had no quota laws) and be admitted legally from there into the United States after five years. Increasingly, European immigrants already legally residing in the United States acquired naturalized citizenship, which enabled them to bring over relatives as nonquota immigrants. In 1927 more than 60 percent of the nonquota immigrants admitted to the United States were from Italy, with the next largest groups coming from Poland, Czechoslovakia, and Greece. By 1930 the onset of the Great Depression curtailed immigration from Europe, both legal and illegal.

During the 1920s the Immigration Service deployed more and more of the Border Patrol to the U.S.-Mexico border to deal with European, Chinese, and Mexican illegal entries. The active agricultural labor markets in Texas and California drew Mexicans in large numbers, and as mentioned previously, many preferred to avoid formal inspection. During the late 1920s the number of undocumented Mexicans deported skyrocketed—from 1,751 expulsions in 1925 to more than 15,000 in 1929—mostly for entry without a proper visa.

In the Southwest the Border Patrol functioned in an environment of increased racial hostility against Mexicans; indeed, it helped constitute that environment by aggressively apprehending and deporting increasing numbers of Mexicans. Patrol officers interrogated Mexican laborers on roads and in towns, and it was not uncommon for “sweeps” to detain several hundred immigrants at a time. By the early 1930s the Immigration Service was

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[5)] W. F. Blackman, “Smuggling of Aliens across the Canadian Border,” (1925), File 53990/160C, entry 9, Records of the Immigration and Naturalization Service, Record Group 85, National Archives and Records Administration, Washington, DC.

apprehending nearly five times as many suspected illegal aliens in the Mexican border area as it did in the Canadian border area.

Mexican immigration abated during the 1930s, owing to the policies of deportation and administrative exclusion, as well as a lack of employment caused by the Depression. As economic insecurities among Euro-Americans inflamed racial hostility toward Mexicans, efforts to deport and repatriate the latter to Mexico grew. The movement did not distinguish among legal immigrants, the undocumented, and American citizens. Mexican Americans and immigrants alike reaped the consequences of racialized foreignness that had been constructed throughout the 1920s. In addition to deportation, local and state authorities sought to restrict the movement of Mexicans and Mexican Americans. Los Angeles and other California cities and towns erected "bum blockades" to keep indigent migrants from entering. In Texas Anglos demanded that the International Bridge be closed from 6:00 p.m. to 10:00 a.m. to keep local commuters from Juárez from coming to work in El Paso.

The most common method used to expel Mexicans from the country was "voluntary" repatriation, sponsored by local and state governments. Led by Los Angeles county relief agencies, local authorities throughout the Southwest and Midwest repatriated more than 400,000 ethnic Mexicans in the early 1930s. Calculating that it cost less to transport a Mexican family across the border than to keep it on relief, county welfare bureaus sent trainloads of Mexicans to the border, where Mexican government officials received them. An estimated 60 percent were children or American citizens by native birth; many spoke English and had been in the United States for ten years or more. Some agencies tried to depict repatriation as an act of benevolence, and a number of the first repatriates took the opportunity of free transportation to return to Mexico. But increasingly the repatriates departed with anger and bitterness as welfare officials resorted to abuse and harassment to push people to accept repatriation. Mexican repatriation during the Depression was a racial expulsion program exceeded in scale only by the Native American removals of the nineteenth century. But with a population of 1.4 million, Mexicans were too numerous to be completely removed; moreover, their labor was still needed for farming, mining, and railway maintenance work throughout the Southwest.

At the same time that Mexicans and Mexican Americans were being deported and repatriated during the late 1920s and early 1930s, the volume of deportations of European immigrants also increased. These illegal aliens comprised unauthorized border crossers, visa violators, and those who had entered lawfully but later committed a deportable offense. Many had already settled in the country and acquired jobs, property, and families. Unlike Mexicans, these Europeans were accepted as members of mainstream white 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 struck many as simply unjust. 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. Justice Brewer's warning in *Fong Yue Ting* had come true. During the 1930s a movement of legal and social advocates sought to reform

deportation policy to allow for administrative discretion in deportation cases. Just as restrictive immigration policy and deportation had "made" illegal aliens, reformers sought to "unmake" illegal aliens by suspending orders of deportation and legalizing their status.

The reform movement followed a logic that distinguished deserving from undeserving illegal immigrants. This logic challenged the social norms of the late nineteenth and early twentieth centuries, which attributed social undesirability to innate character deficiencies rooted in race, gender, or "bad blood." New ideas about environmental causes of social degeneracy and crime led contemporaries to view deportations for LPC on grounds of female dependency, fornication, or theft as excessive and inappropriate. By the early 1930s the Immigration Service was tempering its use of the LPC clause to deport. This mostly benefited Europeans and Canadians, who had comprised the vast majority of LPC deportation cases. The courts also made refinements in deportation law, eliminating, for example, criminal misconduct from the public-charge category, on the logic that the LPC should not be used to deport people for petty crimes that were not themselves deportable offenses.

The administration of Franklin D. Roosevelt was sympathetic to demands for administrative discretion in deportation cases, but congressional action was slow in coming. Lacking statutory authority, Secretary of Labor Frances Perkins creatively used existing provisions in the immigration law to suspend deportations and legalize the status of certain illegal immigrants in so-called hardship cases, defined mainly in terms of family separation. The Immigration Service thus suspended state territoriality in order to unmake the illegal status of certain immigrants. By the late 1930s Perkins had regularized the status of thousands undocumented immigrants with longtime residence and a citizen spouse or children, including criminal aliens, defending the practice on grounds that 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."[6)]

But even while expanding the program to criminal aliens, the Labor Department restricted the privilege of legalization to Europeans. The racism of the policy was profound, because it denied, a priori, that deportation could cause hardship for families of non-Europeans. In stressing family values, moreover, the policy recognized only 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 countries, and that deportation would cause hardship for their families.

For Europeans, however, the policy was clearly a boon. A rough estimation suggests that between 1925 and 1965 some 200,000 illegal European immigrants successfully regularized their status through various administrative measures. The formal recognition of their inclusion in the nation created the requisite minimum foundation for acquiring citizenship

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6) Perkins to Satterfield, September 17, 1940, File Immigration, General, box 66, Records of the Secretary of Labor, Record Group 46, National Archives and Records Administration, College Park MD.

and contributed to a broader reformation of racial identities taking place, a process that reconstructed the "lower races of Europe" into white ethnic Americans.

At the same time, 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' unlawful entry could thus be perceived as "criminal" and Mexicans as undeserving of relief, even as Europeans with criminal convictions were receiving suspensions of deportation and legalizing their status. 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 place on U.S. 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 to the sovereign rule. That European and Canadian immigrants had far greater access to discretionary relief meant that they could, as legal aliens, more readily enjoy the rights that the Constitution afforded all persons. The improbability that Mexicans would receive relief tended to confine them to the domain of immigration law, where sovereignty, not the Constitution, ruled. Indeed, 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, enforcement and its exceptions served to racialize the specter of the illegal alien.

Civil Rights and Global Restriction

After World War II criticism of the national origin quotas grew. The United States had fought a war against fascism and racism, and the blatant discrimination of the quota system offended European ethnic communities in the United States as well as America's Cold War allies around the world. It would take some twenty years to repeal the national origin quotas, although some important reforms were made in the late 1940s and 1950s. These included the first laws allowing for the special admission of refugees and the end of Asiatic exclusion. With regard to exclusions and deportation, the Immigration and Naturalization Act of 1952 (McCarran Walter Act) enacted both harsher sanctions and more liberal grounds for regularization. The law, which was conceived as a Cold War and internal security measure, added six excludable classes (making a total of thirty-one) and facilitated the removal of aliens with views that were "prejudicial to the public interest."

At the same time, the 1952 law conceded some elements of due process to aliens in deportation hearings: notice, representation by counsel, and the right of cross-examination. It also established new conditions for relief from deportation, providing statutory (i.e., mandatory) relief for aliens who entered with fraudulent documents or by lying to inspectors, if they had long-term residence and immediate family in the United States, although it narrowed the grounds for suspension of deportation in other ways. But creating statutory grounds for

relief gave Mexicans meaningful access to legalization. Many Mexicans who had come to the United States as temporary agricultural workers under the so-called Bracero Program and had skipped their contracts were able to legalize their status.

In the late 1950s the INS tried to end the China paper son illegal immigration scheme, because it thought that Communist China was using the system to sneak spies into the United States. It created a "Chinese confession program," by which Chinese paper sons could "confess" their false identities and relations in exchange for permanent residency and naturalization. Confessions revealed some thirty thousand Chinese paper sons and daughters. The program also closed fifty-eight hundred slots, that is, paper son identities available for use. Although the confession program benefited most Chinese Americans who applied for relief, the naming of names also enabled authorities to deport paper sons with radical politics.

Cold War politics merged with civil rights politics in the early 1960s to repeal the national origin quotas. A reform movement comprising American Jews, Italian Americans, and other European ethnics opposed the quotas as a badge of social inferiority and likened their struggle to the African American civil rights movement. The Immigration and Nationality Act (also known as the Hart-Celler Act), sponsored by President John F. Kennedy in 1963 and then by President Lyndon B. Johnson in 1964, was passed in 1965 by the largest Democratic Congress elected since the 1930s. It abolished the national origin quotas and replaced them with global quotas based on preferences for family relations (80 percent) and occupational skills (20 percent). It adjusted the overall numerical ceiling to 290,000 per year to account for population growth since 1924, but it also eliminated the Western Hemisphere exemption, which actually made the total more restrictive than it had been previously. Under the new rules no country could receive more than 7 percent of the total, or 20,000.

Contemporaries and historians alike hailed the Hart-Celler Act as a liberal reform because it repealed the national origin quotas. Certainly for Europeans and Asians—who had been given extremely low quotas after the repeal of exclusion—the law promoted greater inclusion in the nation. But for Mexicans and other Latinos/as, the imposition of numerical quotas where none had existed before was illiberal and regressive. In fact, the imposition of numerical quotas on countries of the Western Hemisphere had not been in the original reform bills. Since World War II sponsors of numerous immigration reform bills, as well as Presidents Truman, Eisenhower, Kennedy, and Johnson, had all continued to favor the Western Hemisphere exception on grounds of Pan-Americanism. But in the 1960s there was growing concern among moderates and conservatives that a "population explosion" loomed in Latin America, which they feared would result in too many Latino/a migrants heading to the United States. Those favoring Western Hemisphere quotas argued further on grounds that the exemption was "unfair" to other countries, which obscured the racial antipathies inherent in the first argument.

In the context of the civil rights era's emphasis on formal equality, the argument for "fairness" was formidable. In the early 1960s legal migration from Mexico was about 250,000 a year, including temporary agricultural workers entering under the Bracero Program. That program ended in 1964. But southwestern agribusiness still wanted labor from Mexico,

and poor Mexicans continued to regard emigration as a strategy for family subsistence. The 1965 act mandated the formation of a congressional commission to study the question; it recommended labor certification as a "more flexible tool" for regulating Western Hemisphere immigration, and in the event of numerical restrictions, urged a quota of 40,000 per country. Over the objections of the commission, however, a Western Hemisphere—wide quota of 120,000 went into effect in 1968, representing a 40 percent reduction from pre-1965 levels. In 1976 Congress completed the logic of formal equality by imposing country quotas of 20,000 on the Western Hemisphere. It also closed a loophole in the law that had allowed undocumented Mexican immigrants with children born in the United States to legalize their status.

It should have surprised no one that undocumented migration from Mexico and other high-sending nations like China would dramatically increase in the last decades of the twentieth century. In reality, basic "push" and "pull" factors in an unequal world have far outweighed the abstract principle of formal equality. By the late 1970s—that is, within just a few years of the imposition of country quotas on Mexico—a crisis discourse about the border being "out of control" had emerged. In 1986 Congress passed the Immigration Reform and Control Act, which legalized nearly three million undocumented migrants and established provisions aimed at stopping further unlawful entries, namely greater border enforcement sanctions against employers who hire undocumented workers. The latter were never enforced, but the United States has spent more than $187 billion on border enforcement since 1980, much of it since the 1990s and along the U.S.-Mexico border. The militarization of the border deterred but did not stop undocumented migration. In fact it had the unintended consequence that undocumented migrants from Mexico, who had previously tended to migrate seasonally, stayed in the United States rather than risk apprehension at an increasingly militarized border. By the mid-2000s there were some twelve million undocumented migrants living in the United States (decreasing to eleven million as a result of the 2008 economic recession) (Meissner et al. 2013, 2; Passel and Cohn 2012).

The accretion of the undocumented Latino/a population in the late twentieth century was one part of a general increase in the overall Latino/a population; the undocumented are estimated to be about 30 percent of the total Latino/a population. Latinos/as accounted for 16.3 percent of the total U.S. population in the 2010 census (U.S. Census Bureau 2011, 3). The increase in second and later generation Latinos/as, citizens by virtue of their birth in the United States, and a trend of naturalization among legal migrants have resulted in increased Latino/a political participation and voice. That influence, along with the "rights revolution" in law and human rights, resulted in some expansion in the rights of aliens to due process in deportation and detention matters during the 1970s and 1980s. The INS also regularized the practice of granting administrative relief in deportation cases by establishing a balance of equities (length of residence in the country, family ties, employment, evidence of rehabilitation in criminal cases, etc.). However, punitive deportation laws passed in 1996 eroded some of these gains: deportation is now mandatory for many offenses, and it has become virtually impossible to secure relief on grounds of hardship. The guiding principles of territoriality and

numerical restriction that had framed immigration law since the 1920s became thoroughly naturalized by midcentury. Earlier policies—statutes of limitations on deportation and other ongoing methods of regularizing undocumented migrants, as well as and open borders with Mexico and Canada—have become unthinkable in our time, even as economic globalization has eroded other indexes of national sovereignty, such as trade protectionism. The debates over legalization and border control taking place at the time of this writing reflect differences over whether or not the regulation of immigration can, in fact, be absolute. The history of undocumented migration indicates that it cannot.

But just as undocumented migration is invariably produced by restrictive immigration laws, those laws and their effects have also generated movements to legalize the undocumented and for other legal reforms. Illegal aliens have been able to legalize their status at certain moments —Europeans during the 1930s and 1940s, Chinese during the Cold War, Mexicans and others in the mid-1980s. The Immigration and Control Act of 1986 legalized nearly three million undocumented immigrants, but because IRCA did not change the basic structures of restriction, unauthorized entry continued and in fact soared from 1990s to the late 2000s as part of the United States' long economic boom.

Since the mid-1990s the U.S.-Mexico border has undergone an unprecedented militarization. The numbers of apprehensions, detentions, and removals steadily increased into the new century. Between 2000 and 2005, over one thousand migrants died while trying to enter the country across the Arizona desert.[7] In December 2005 the U.S. House of Representatives passed an immigration bill that would have criminalized unauthorized migrants and anyone who assisted them, including humanitarian workers who left bottles of water in the desert.[8] The bill did not become law because it did not pass the Senate, but it ignited a new immigrant rights movement, led by immigrants themselves, legal and illegal. In May 2006, several million people participated in protests across the country, including hundreds of thousands in Los Angeles and Chicago and high school "walk outs" in several states, mobilized by Spanish-language radio, the Catholic Church, labor unions, student networks, and hometown associations. Their slogans expressed a politics of human and civil rights and the claims of belonging that come with living and working in America: "No human being is illegal," "We are America," and, presciently, "Today we march, tomorrow we vote."

Over the next several years three trends emerged that have altered the political landscape and created new possibilities for legalization and immigration-law reform. The first trend was the growth of the Latino/a population and its electoral power. In 2012 the Census Bureau

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7) For detailed analysis of border control and other mechanisms of enforcement from the 1990s to 2013 see Doris Meissner, Donald M. Kerwin, Muzaffar Chisti, and Clare Bergamon, *Immigration Enforcement: The Rise of a Formidable Machinery* (Washington, DC: Migration Policy Institute, 2013). The cumulative total of deaths related to desert-border crossings between 2000 and 2013 is at least 2,666. http://www.nomoredeaths.org/information/deaths.html (last accessed Sept. 5, 2013).

8) The Border Protection, Anti-terrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005).

estimated 53 million "Hispanics" in the U.S., 17 percent of the U.S. population. Moreover, contrary to stereotype, not all Latinos/as are undocumented. In fact, more than half are native born and nearly 75 percent of all Latino/as are U.S. citizens, either by native-birth or naturalization. Importantly, Latino/as comprise significant voting constituencies in states that previously voted Republican but tipped to Democratic in the 2008 and 2012 Presidential elections (Nevada, New Mexico, Colorado, Florida, Virginia, North Carolina [2008]).[9)]

Second, a robust social movement of immigrant workers has emerged, sometimes allied with but also autonomous from, and occasionally in tension with, traditional organized labor. This movement has been building since the 1990s among Mexican, Central American, Chinese, Pakistani, and other immigrant workers. High-profile campaigns like "Justice for Janitors" to unionize Latino/a immigrant workers in Los Angeles overturned the conventional wisdom that immigrants could not be organized. Indeed, the opposite has proven true, that immigrants, including the unauthorized, are more likely to be receptive to unionizing efforts than native-born workers. Immigrant workers also have organized in community-based "worker centers," which are not unions but pursue similar goals of economic advancement. During the first decade of the century, worker centers grew prolifically among immigrant labor especially in areas where employers routinely flout wage and hour laws, such as day labor and garment sweatshops. The centers help workers sue for unpaid wages and more broadly advocate for economic justice. Immigrant workers, both legal and unauthorized and members of both unions and worker centers were a major force in the 2006 mass mobilizations for immigrant rights. In turn, the immigrant rights movement has further propelled labor organizing. Sociologist Ruth Milkman has aptly described the post-2006 immigrant rights movement as both a civil rights movement and a labor movement.[10)]

Finally, there are the "dreamers." These are the nearly two million undocumented young adults, who came to the U.S. with their parents when they were young children; they essentially grew up as Americans but have no legal status.[11)] The predicament of their impossibility is partially addressed by the Supreme Court's ruling in *Plyler v. Doe* (1982), which recognized

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9) National Council of La Raza, "20 FAQ about Hispanics," accessed Sept. 5, 2013, http://www.nclr.org/index.php/about_us/faqs/most_frequently_asked_questions_about_hispanics_in_the_us/; Mark Hugo Lopez and Ana Gonzalez-Barrera, "Inside the Latino Electorate," Pew Hispanic Research Center, June 3, 2013, accessed Sept. 5, 2013, http://www.pewhispanic.org/2013/06/03/inside-the-2012-latino-electorate/.

10) Ruth Milkman, *LA Story: Immigrant Workers and the Future of the American Labor Movement* (New York: Russell Sage, 2006); Jennifer Gordon, *Suburban Sweatshops: The Fight for Immigrant Rights* (Cambridge, MA: Harvard University Press, 2005); Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream* (Economic Policy Institute, 2006).

11) "Who and Where the Dreamers Are," Immigration Policy Institute, Oct. 2012, accessed Sept. 9, 2013, http://www.immigrationpolicy.org/just-facts/who-and-where-dreamers-are-revised-estimates; Jeanne Batalova, Sarah Hooker and Randy Capps, "Deferred Action for Childhood Arrivals at the One-Year Mark," MPI Issue Brief, August 2013, accessed Sept. 9, 2013, http://www.migrationpolicy.org/pubs/cirbrief-dacaatoneyear.pdf.

the constitutional right of all children to public education regardless of immigration status. But *Plyler* also further exacerbates their predicament because although education brought greater social and cultural integration, they remain without lawful status. Upon graduating from high school they could not go to college or get a job, obtain a driver's license, open a bank account, or travel abroad—the common indices of becoming an adult that most Americans take for granted.

The activism of undocumented youth for access to higher education led to the introduction of the DREAM Act (Development, Relief and Education for Alien Minors) in the U.S. Congress in 2001. While federal legislation stalled over the next dozen years fifteen state-level dream acts made unauthorized students eligible for in-state tuition fees at state universities.[12] Still lacking federal legislation in 2012 President Barack Obama established an administrative program of Deferred Action for Childhood Arrivals. DACA provided legalization (with authorization to work) for those younger than 30 years of age, who arrived before 2007 and before their sixteenth birthday, and who have a high school education.[13]

The student dreamers' movement, begun as a quest for education, by the late 2000s grew into a broader call for legalization and immigration law reform. By 2013 the movement had grown to seventy-five state and local dreamers' organizations and two nation-wide networks. Dream activists engage in legislative lobbying as well as radical acts of "coming out" and civil disobedience. They march under the sign, "undocumented, unafraid, and unapologetic." Like the second generation of Euro-American ethnics that sought to repeal the national origins quotas. After World War II, the dream activists are also the acculturated children of immigrants. They took civics classes in high school and learned about the movements for female suffrage and black civil rights. Indeed the language of the "dream" and "coming out" resonate with both the civil rights and gay rights movements. Many of the dreamers have experience in high school and college student governments and organizations. They know, as dream activist-leader Gaby Pacheco explains, "how to navigate" politics and society.[14]

Trained in organizing, lobbying, and media skills, the dream activists have promoted a compelling message that highlights the injustice of their impossibility. They tell personal

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[12] California, Texas, New York, Utah, Washington, Oklahoma, Illinois, Kansas, New Mexico, Nebraska, Maryland, Connecticut, Colorado, Minnesota, and Oregon. National Conference of State Legislatures, "Allow In-State Tuition for Undocumented Students," July 2013, accessed Sept. 9, 2013, http://www.ncsl.org/issues-research/educ/undocumented-student-tuition-state-action.aspx.

[13] In the first year of DACA, 637,000 people applied, or 59 percent of the eligible population. Batalova et al., "Deferred Action for Childhood Arrivals at One-Year Mark."

[14] Author interview with Gaby Pacheco, Sept. 9, 2013, Washington, DC. See also Walter Nicholls, *The DREAMers: How the Undocumented Youth Movement Transformed the Immigrant Rights Movement* (Stanford: Stanford University Press, 2013); Hinda Seif, "Unapologetic and Unafraid: Immigrant Youth Come Out from the Shadows," *New Directions in Childhood and Adolescent Development* 134 (2011): 59-75; René Galindo, "Embodying the Gap between National Inclusion and Exclusion: The Testimony of Three Undocumented Students at a 2007 Congressional Hearing," *Harvard Latino Law Review* 14 (2011): 377.

stories—stories of their dreams of becoming a teacher, or lawyer or nurse; the high school valedictorian, who won a scholarship but could not go to college. They speak of the pain of watching a parent or sibling deported; or their despair at facing a diminished future. They tell their stories because "we know the power of our narrative," explained Gaby Pacheco. The dreamers' identification as Americans; the innocence of their childhood migration; and their academic and civic achievements have elicited sympathy throughout American society. At the same time, Pacheco concedes that portraying the dreamers as deserving implicitly casts others—including their parents—as undeserving lawbreakers. They try to counter this by fighting for legalization for all unauthorized migrants. In fact, the dream activists' work has been crucial in swaying American public opinion to support legalization and a path to citizenship for all the undocumented.[15)]

[15)] Pacheco interview. Polling data in 2012 and 2013 show 66 to 78 percent of respondents supporting some kind of legalization. Polling Report INC., accessed Sept. 16, 2013, http://www.pollingreport.com/immigration.htm.