

# Deportability and the Carceral State

Torrie Hester

Unlawfully entering the United States after a deportation is a felony. Remaining in the United States after the expiration of a visa is a felony. Passing a bad check when undocumented is an aggravated felony. Each punishable by at least one year in prison, these immigration-related crimes today constitute the leading cause of imprisonment in the federal penal system. Drug offenders, in other words, no longer constitute the majority of federal prisoners. Over the past decade, immigration offenders have consistently equaled or outnumbered drug offenders in the federal penal system, although the margin is relatively slight. In 2011, for example, drug offenders made up 29.1 percent of all federal convictions compared to immigration offenders who represented 34.9 percent of all convictions. Together, however, immigration and drug offenders were the majority of all prisoners in the federal penal system, making both immigration control and the war on drugs cornerstones of the carceral state.<sup>1</sup>

Scholars of the carceral state have published numerous analyses of the war on drugs, but far fewer have examined when, why, and how immigration control became a cornerstone of the carceral state. Since the 1880s, in the name of immigration control, the federal government has deported more than 50 million people. By detailing the creation and expansion of deportability (the legal condition of being deportable) and the stunning number of deportations since the late nineteenth century, this essay provides a brief history of how immigration control emerged as a leading cause of incarceration in the United States. It focuses on deportation because more than 75 percent of immigration offenders are unauthorized immigrants sentenced to prison for entering the United States without inspection or for overstaying an immigrant visa. U.S. federal prisons, therefore, are filling up with deportees.<sup>2</sup>

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<sup>1</sup> Immigration and Nationality Act, v. 4, 8 U.S.C. sec. 1227 (2), 1326 (b) (2012). United States Sentencing Commission, *2011 Sourcebook of Federal Sentencing Statistics*, [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2011/sbtoc11.htm](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2011/sbtoc11.htm).

<sup>2</sup> On immigration control and crime control, sometimes called crimmigration, see Juliet P. Stumpf, "Doing Time: Crimmigration Law and the Perils of Haste," *UCLA Law Review*, 58 (July 2011), 2011–25; and César

As the work of Mae Ngai and Kelly Lytle Hernández has made clear, the history of deportation from the United States is largely a history of race. From the passage of federal legislation to everyday immigration law enforcement, race has deeply influenced who is defined and policed as deportable. This essay, therefore, highlights how deportation has evolved as a story of race in the United States.<sup>3</sup>

The first law used to deport an immigrant from the United States, the Chinese Exclusion Act of 1882, was an unmasked racial project of the nineteenth-century U.S. West. Since the era of the California gold rush, white workers in the U.S. West regarded Chinese migration as a threat to the jobs of white men and to white manhood, and even to American democracy. In response to their demands, Congress passed the Chinese Exclusion Act of 1882, which prohibited Chinese laborers from entering the United States for the next ten years. Congress extended and expanded the act until the 1940s, making the 1880s to the 1940s the age of Chinese exclusion.<sup>4</sup>

In the decades following the passage of the Chinese Exclusion Act, Congress expanded the list of immigrants prohibited from entering the United States. By 1903 Congress had passed laws restricting legal entry for contract laborers, idiots, the insane, paupers, polygamists, persons liable to become a public charge, individuals convicted of a felony or other crime or misdemeanor involving moral turpitude, and sufferers of a loathsome or dangerous contagious disease. Any immigrant who entered the United States in violation of these conditions was subject to deportation. But Congress narrowed the window of their deportability: after an excluded immigrant lived in the United States for one year, they were no longer subject to deportation. Congress revised some of the time limits, eventually extending many of them to five years in 1917.<sup>5</sup>

Despite the broad legal category of deportability established between the 1880s and 1920s, federal authorities deported only a few thousand people a year between 1882 and 1924, a period when as many as 1 million people annually immigrated to the United States. The time limits of deportability for unlawful immigrants except those of Chinese

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Cuahtémoc García Hernández, "The Perverse Logic of Immigration Detention: Unraveling the Rationality of Imprisoning Immigrants Based on Markers of Race and Class Otherness," *Columbia Journal of Race and Law*, 1 (no. 3, 2012), 353–64. Office of Immigration Statistics, *2012 Yearbook of Immigration Statistics* (Washington, 2013), [https://www.dhs.gov/sites/default/files/publications/ois\\_yb\\_2012.pdf](https://www.dhs.gov/sites/default/files/publications/ois_yb_2012.pdf), p. 103. On deportability, see Nicholas De Genova and Nathalie Peutz, eds., *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement* (Durham, N.C., 2010); and Daniel Kanstroom, *Deportation Nation: Outsiders in American History* (Cambridge, Mass., 2007). For the 75% figure, see United States Sentencing Commission, *2011 Sourcebook of Federal Sentencing Statistics*. At the conclusion of their prison terms, these unauthorized immigrants are deported from the country.

<sup>3</sup> Kelly Lytle Hernández, *Migra! A History of the U.S. Border Patrol* (Berkeley, 2010); Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton, 2004).

<sup>4</sup> Before 1882 some state governments had the power to deport, and while Congress had passed a law at the turn of the eighteenth century that authorized political expulsions, it was never used to deport anyone. For this early history, see Hidetaka Hirota, "The Moment of Transition: State Officials, the Federal Government, and the Formation of American Immigration Policy," *Journal of American History*, 99 (March 2013), 1092–1108; T. Alexander Aleinikoff, *Semblances of Sovereignty: The Constitution, the State and American Citizenship* (Cambridge, Mass., 2002); and Gerald L. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* (Princeton, 1996). A racial project is, as Michael Omi and Howard Winant define it, "simultaneously an interpretation, representation, or explanation of racial dynamics, and an effort to reorganize and redistribute resources along particular racial lines." Michael Omi and Howard Winant, *Racial Formation in the United States: From the 1960s to the 1990s* (New York, 1994), 56. On Chinese migration and exclusion, see Erika Lee, *At America's Gates: Chinese Immigration during the Exclusion Era, 1882–1943* (Chapel Hill, 2003); Madeline Yuan-yin Hsu, *Dreaming of Gold, Dreaming of Home: Transnationalism and Migration between the United States and South China, 1882–1943* (Stanford, 2000); and Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill, 1995).

<sup>5</sup> Act of March 3, sec. 11, 26 Stat. 1084 (1891); Act of March 3, sec. 20, 32 Stat. 1213 (1903); Act of Feb. 20, sec. 20, 34 Stat. 898 (1907); Act of Feb. 5, sec. 19, 39 Stat. 874 (1917).

heritage reduced the number of unauthorized immigrants living in the United States. Further, Congress had yet to invest in an immigration law enforcement infrastructure capable of widely identifying, arresting, and deporting unauthorized immigrants.<sup>6</sup>

During the 1920s, however, Congress greatly expanded deportability and established the U.S. Border Patrol. By the end of the decade, immigration authorities were deporting tens and then hundreds of thousands of people each year. Congress created all new deportable categories in the 1920s when it developed a new immigration system designed to halt large-scale immigration from southern and eastern Europe as well as a small immigration stream from Asia. Under the new “national origins system,” immigrants were required to obtain visas and pay fees. Each nation in the Eastern Hemisphere was assigned a visa quota of no fewer than one hundred persons, yet 70 percent of the total, around 110,000 visas, went to England, Ireland, and Germany. Congress based the distribution of visas according to a formula rigged to discriminate against people from southern and eastern Europe. The new national origins system also extended bans on Asian immigration, which by 1917 included Chinese migrants and almost all other Asians. In 1924 Congress closed off the only remaining legal immigration stream out of Asia—one from Japan. The new laws made much of the immigration from eastern and southern Europe and all of Asia unlawful. People who migrated anyway—those who came in violation of immigration law—were deportable.<sup>7</sup>

The new restrictive immigration system unintentionally expanded the deportability of Mexicans and led to fundamental changes in immigration control and the history of race. Mexican immigration became an increasingly important labor source in the U.S. West during the 1920s. Big western corporate farms, or agribusiness, had expanded from producing very little at the turn of the twentieth century to providing 40 percent of all U.S. fruits and vegetables. Their continued growth depended upon securing workers, and they looked to Mexicans. Employers in the Southwest pushed Congress for an exemption for Mexico from the numerical restrictions of the national origins system because they worried such limits would interrupt the flow of Mexican labor. Congress assented to them, but it also capitulated to anti-immigrant forces by expanding requirements for people from the Western Hemisphere to pay head taxes and visa fees. The new immigration requirements did not interrupt the total labor flow from Mexico, but it did reduce the numbers of Mexicans who migrated to the United States legally. Many Mexicans, fleeing economic and political instability, immigrated to the United States without paying the fees to obtain the required documents. They helped meet the demand for low-wage labor in the West but were also in the United States in violation of immigration law—and so were deportable.<sup>8</sup>

By the 1930s the U.S. Border Patrol was prioritizing the deportation of Mexicans, and in the process they built up a capacity to deport hundreds of thousands of people annually. The percentage of Mexicans as a total of persons deported increased from just under 29 percent in 1931 to over 52 percent in 1943; just two years later, the figure was 96

<sup>6</sup> Office of Immigration Statistics, *2012 Yearbook of Immigration Statistics*, 5, 103.

<sup>7</sup> *Ibid.*, 103. On the visa quotas, see Robert L. Fleege, *Ellis Island Nation: Immigration Policy and American Identity in the Twentieth Century* (Philadelphia, 2013), 29. Act of May 26, sec. 13 (c), 43 Stat. 153 (1924). For more on these restrictions and their reach, see Ngai, *Impossible Subjects*; Roger Daniels, *Coming to America: A History of Immigration and Ethnicity in American Life* (New York, 2002); and Leonard Dinnerstein, Roger L. Nichols, and David M. Reimers, *Natives and Strangers: A Multicultural History of Americans* (New York, 2009).

<sup>8</sup> Zaragosa Vargas, *Labor Rights Are Civil Rights: Mexican American Workers in Twentieth-Century America* (Princeton, 2005), 18.

percent. In a publicized campaign in 1954 known as Operation Wetback, the proportion of Mexicans of the total of all deportations increased more than ever, to 96 percent. In that year the U.S. government removed 1,022,267 Mexicans, while deporting only 5,979 other immigrants in total—3,345 of whom were Canadians.<sup>9</sup>

To reach these numbers, immigration authorities innovated and streamlined enforcement procedures in the U.S.-Mexico borderlands. They created the infrastructure—special mobile task forces, temporary detention facilities, cross-border collaboration with Mexico, transport vehicles—to deport a million people a year. Central to this huge capacity to deport was a shortcut deportation procedure known as voluntary removal. Under a voluntary removal, an immigrant would admit to an immigration violation and then return to his or her country of origin. Immigrants chose this method for several reasons, including avoiding the wait for a formal deportation hearing. Immigration authorities preferred voluntary removals because they did not require hearings and were cheaper. When the federal government publicized the deportation numbers for Operation Wetback, almost all were voluntary removals. Out of the more than 1 million deportations in 1954, 97 percent were voluntary removals.<sup>10</sup>

Both the expansion of the legal basis for the deportation of low-wage Mexican workers and the enforcement priority in the U.S.-Mexico borderlands exacerbated racial inequality in the Southwest. Mexicans immigrants before this expansion of deportability faced a broad spectrum of racial discrimination, from a dual-wage system that paid ethnic Mexicans less than white workers to racist biological and cultural stereotypes to segregated and unequal education. After the expansion, deportable Mexicans had few rights and could be paid even lower wages—even in employment sectors where they were in high demand. Employers and white Americans more generally, moreover, did not regularly distinguish between legal and illegal Mexican migrants or even U.S. citizens of Mexican heritage. The requirements of fees and documents that created systemic deportability for people from Mexico did not enshrine racism into law as did Chinese exclusion, but border patrol practices systemically fostered racial subordination. Immigration enforcement, as the historian Kelly Lytle Hernández puts it, “transformed the legal/illegal divide into a problem of race.” Thus, deportability deepened the racialization of Mexicans and Mexican Americans alike.<sup>11</sup>

Policy makers and employers worked to create a legal mechanism to make it easier for Mexican immigrants to immigrate lawfully. They established a new subcategory of immigrant in U.S. policy—the guest worker. During and after World War I, federal immi-

<sup>9</sup> Hernández, *Migra!*, 81, 148, 156–57. See also Kitty Calavita, *Inside the State: The Bracero Program, Immigration, and the I.N.S.* (New York, 1992). Immigration and Naturalization Service, *Annual Report of the Immigration and Naturalization Service* (Washington, 1961), 66.

<sup>10</sup> On the massive buildup in capacity, see Hernández, *Migra!* Immigrants who chose voluntary removal also would not have a record of a deportation that would limit their lawful entry at a later point. Hernández, *Migra!*, 76. Immigration and Naturalization Service, *Annual Report of the Immigration and Naturalization Service*, 55.

<sup>11</sup> On the racialization of Mexican immigrants, see Natalia Molina, *How Race Is Made in America: Immigration, Citizenship, and the Historical Power of Racial Scripts* (Berkeley, 2013); Matthew Garcia, *A World of Its Own: Race, Labor, and Citrus in the Making of Greater Los Angeles, 1900–1970* (Chapel Hill, 2001); Neil Foley, *The White Scourge: Mexicans, Blacks, and Poor Whites in Texas Cotton Culture* (Berkeley, 1997); George J. Sánchez, *Becoming Mexican Americans: Ethnicity, Culture, and Identity in Chicano Los Angeles, 1900–1945* (New York, 1993); and David Montejano, *Anglos and Mexicans in the Making of Texas, 1836–1986* (Austin, 1987). On ways deportability affected Mexican Americans, see Francisco E. Balderrama and Raymond Rodríguez, *Decade of Betrayal: Mexican Repatriation in the 1930s* (Albuquerque, 1995); and Camille Guérin-Gonzales, *Mexican Workers and American Dreams: Immigration, Repatriation, and California Farm Labor, 1900–1939* (New Brunswick, 1994). See also Devon W. Carbado, “Racial Naturalization,” *American Quarterly*, 57 (Sept. 2005), 633–58. Hernández, *Migra!*, 222.

gration authorities ran a small guest worker program. Almost all the participants in the program, which ran between 1917 and 1921, came from Mexico to work for southwestern employers in agriculture and on railroads. The bracero program, an all-Mexican program, ran from 1943 to 1964, and the H2 program, which drew heavily from Jamaica, ran from 1943 to 1986. Guest workers in these programs faced deportation if they did not meet the terms of their employment, and after the term of their employment they had to return to their country of origin or face deportation. While guest worker programs often applied to more than one group, most fulfilled labor demands in the American Southwest and facilitated patterns of migration out of Mexico. Between 1952 and 1961, for example, 3,557,076 agricultural guest laborers entered the United States. Over 3.4 million—around 95 percent—came from Mexico. The second largest group (81,050) came from the British West Indies, especially Jamaica. Canadians made up the third largest group, with 62,134 agricultural laborers participating. The political will to enable Mexicans to immigrate in numbers to match labor demands, though, was limited to creating temporary workers, not permanent residents. For many of the lawful Mexican guest workers, while their deportability differed from Mexicans without the right documents, their legal status led to similar ends: limits on their rights, wages, and ability to integrate into U.S. society.<sup>12</sup>

Between World War II and the 1960s, Congress made important changes to the sweep of deportability by removing many provisions in immigration law that discriminated explicitly on the basis of race. In 1943 Congress repealed the Chinese Exclusion Act of 1882, recognizing that a ban on Chinese immigration would hurt relations with its new ally in the war against Japan. After the war, Congress faced the reality that Nazi genocide, the growing civil rights movement, and Cold War pressures called into question much of the racialized logic underlying U.S. immigration policy. It responded by establishing small quotas for all Asian migrants in 1952. In 1965 Congress removed all racial and ethnic quotas discriminating against Asians and eastern and southern Europeans in its repeal of the 1924 National Origins Act. Many of the explicit racial grounds for deportability were taken away.<sup>13</sup>

When it came to resolving the ways immigration control contributed to racial inequality facing people of Mexican heritage, however, Congress chose to exacerbate the problems. Between 1964 and 1975, policy makers drastically reduced the number of visas issued specifically to low-wage workers from Mexico. U.S. officials ended the bracero program and imposed annual, numerical limits on the immigrant visas issued to Mexicans. These changes in U.S. law did not alter the causes of migration, and millions of workers continued to migrate to fill millions of jobs in the United States. Eliminating hundreds of thousands of visas annually meant that even more Mexican immigrants lived in the United States without the right documents.<sup>14</sup>

<sup>12</sup> For more on guest worker programs, see Cindy Hahamovitch, *No Man's Land: Jamaican Guestworkers in America and the Global History of Deportable Labor* (Princeton, 2011); Deborah Cohen, *Braceros: Migrant Citizens and Transnational Subjects in the Postwar United States and Mexico* (Chapel Hill, 2011); and Mark Reisler, *By the Sweat of Their Brow: Mexican Immigrant Labor in the United States, 1900–1940* (Westport, 1976). Immigration and Naturalization Service, *Annual Report of the Immigration and Naturalization Service*, 48.

<sup>13</sup> This law did not entirely remove all anti-Asian racism from immigration policy. As Mae Ngai writes: “The law’s Asiatic policy contained both progressive and reactionary elements. The law eliminated the racial bar to citizenship, which finally ended Japanese and Korean exclusion and made policy consistent with the recent repeals of Chinese, Indian, and Filipino exclusion. . . . But the law also created an ‘Asia Pacific Triangle,’ which was a global race quota aimed at restricting Asian immigration into the United States. Persons of Asian descent born or residing anywhere in the world could immigrate only under the Asia-Pacific quotas of one hundred per country.” Ngai, *Impossible Subjects*, 238.

<sup>14</sup> Thomas Alexander Aleinikoff, David A. Martin, and Hiroshi Motomura, *Immigration and Citizenship: Process and Policy* (St. Paul, 2003), 332.



Policy makers responded to the growing numbers of undocumented Mexicans by institutionalizing mass deportations as a regular enforcement policy. That decision turned out to be an important step in making deportability a cornerstone of the carceral state. Since the 1920s Mexicans had been the top priority of immigration enforcement, but the numbers of people deported fluctuated. When employers needed a large supply of inexpensive laborers, immigration authorities responded by keeping deportation numbers low. At other times, in response to the demands of anti-immigrant sentiment, the number of Mexican immigrants deported increased dramatically. Under this fluctuating enforcement pattern, the federal government voluntarily removed nearly 6 million people in the 1927–1965 period. As the numbers of undocumented immigrants grew even larger after the new laws in 1965, immigration agents changed tack and made enforcement of deportability a regular objective. Between 1966 and 2011, the federal government voluntarily removed, or in today's nomenclature, "returned" over 41 million people. For nearly all of that time, deportations via this method of removal remained constant, at close to 1 million people per year.<sup>15</sup>

Congress also universalized the policy long behind the mass deportability of low-wage Mexicans by expanding it to low-wage workers from all over the world. This change greatly affected the largest streams of low-wage workers to the United States, which by 1980, came largely from other Latin American countries and Asia. The population of deportable, low-wage workers in the United States rose to new levels. Scholars estimate that the numbers of deportable immigrants grew from around 3.5 million in 1980 to an estimated 12 to 15 million in 2012, and as much as 70 percent of these deportable immigrants were from Mexico. After Mexico, the next six nations with the largest populations of immigrants of this status were El Salvador, Guatemala, Colombia, Honduras, China, and Ecuador.<sup>16</sup>

In the 1980s policy makers added mass incarceration to their strategy of mass deportation of low-status, low-wage workers. Immigration agents stepped up criminal prosecutions of immigrants who reentered the country after a deportation, in what has been labeled "'high consequence' enforcement outcomes." Policy makers hoped that the prospect of time in federal prison would deter undocumented migration. Incarceration for reentry had precedent in a 1929 federal law. A first-time unauthorized entry became a misdemeanor and each reentry after that was a felony punishable by a two-to-five-year prison term and a fine. But federal authorities rarely prosecuted the crime of reentry until the early 1990s, when political pressures increased in the context of immigration reform during the Clinton administration.<sup>17</sup>

As late as 1980, in the early years of the "carceral age," only one thousand of the twenty-seven thousand federal inmates in prisons were immigrants serving time for im-

<sup>15</sup> Hernández, *Migra!*, 188–89, 194; Ngai, *Impossible Subjects*, 153. Office of Immigration Statistics, *2012 Yearbook of Immigration Statistics*, 103.

<sup>16</sup> The legislative changes expanded the number of visas for skilled workers and stepped up the priority of family reunification. Frank D. Bean, Edward E. Telles, B. Lindsay Lowell, "Undocumented Migration to the United States: Perceptions and Evidence," *Population and Development Review*, 13 (Dec. 1987), 671–90; Douglass Massey, Jorge Durand, and Nolan J. Malone, *Beyond Smoke and Mirrors: Mexican Immigration in an Era of Economic Integration* (New York, 2003); Jeffrey S. Passel, D'Vera Cohn, and Ana Gonzalez-Barrera, "Population Decline of Unauthorized Immigrants Stalls, May Have Reversed," Sept. 23, 2013, *Pew Research Hispanic Trends Project*, <http://www.pewhispanic.org/2013/09/23/population-decline-of-unauthorized-immigrants-stalls-may-have-reversed/>. On the next six nations with the largest populations of immigrants, see Aleinikoff, Martin, and Motomura, *Immigration and Citizenship*, 1101.

<sup>17</sup> Lisa Seghetti, Congressional Research Service, "Border Security: Immigration Enforcement between Ports of Entry," Dec. 31, 2014, <http://fas.org/sgp/crs/homesec/R42138.pdf>. Act of March 4, 1929, (a), 45 Stat. 1551 (1929); Hernández, *Migra!*, 92; Ngai, *Impossible Subjects*, 60.

migration-related felonies. The proportion of immigrants in federal custody rose dramatically as lawmakers prioritized prosecuting reentry. The federal immigrant inmate population swelled from 3.6 percent in 1980 to approximately 17.5 percent of all federal convictions in 1999 and further increased to 34.9 percent of all federal convictions in 2011. Most of the imprisoned immigrant men and women in federal prisons serve time not for smuggling or violent crimes; instead, three-quarters of all people in federal prisons for immigration-related crimes are sentenced for entering the United States without inspection or overstaying an immigrant visa. The federal prisons are filled with immigrants confined simply because they are deportable.<sup>18</sup>

The drive to prosecute the crime of reentry overwhelming applied to migrants from Latin America. In 2012, for example, a little over 88 percent of all immigrants sentenced for immigration-related crimes were Hispanic men. Several factors contributed to this figure: the continued large-scale migration of people from Latin America attracted to jobs in the United States, their deportability once in the United States, and the increased enforcement capacity of immigration control. Over the previous century, immigration law made people from Latin America systemically deportable, and officials built an infrastructure to carry out mass deportations. To better police crimes of reentry, authorities expanded the system of immigration control in the U.S.-Mexico borderlands. An important police enforcement program in this effort has been the Consequence Delivery System (CDS), in operation since 2005. The set of policies, now known as CDS, limited voluntary removal and increased criminal prosecutions for immigration violations in the U.S. states bordering Mexico. In the 1980s, then, policy makers transitioned from mass deportations of Mexicans to mass deportations of all Latin Americans, with the addition of mass incarceration.<sup>19</sup>

Deportability's role in the carceral state also reaches beyond federal prisons. Since the 1980s hundreds of thousands of immigrants have been deported after serving state and local criminal sentences. In 2009, for example, the federal government deported 130,000 immigrants directly from state and local jails and prisons. The grounds for their deportations differ from the federal priority for prosecuting the crime of reentry—these deportations are for post-entry infractions, committed by both immigrants in the United States legally and those who are not.<sup>20</sup>

<sup>18</sup> Peter H. Schuck and John Williams, "Removing Criminal Aliens: The Pitfalls and Promises of Federalism," *Harvard Journal of Law and Public Policy*, 22 (no. 2, 1999), 378–79. "Figure A: Distribution of Offenders in Each Primary Offense Category, Fiscal Year 1999," in *2011 Sourcebook of Federal Sentencing Statistics*, by United States Sentencing Commission, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/1999/FigA.pdf>. United States Sentencing Commission, *2011 Sourcebook of Federal Sentencing Statistics*, [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2011/sbtoc11.htm](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2011/sbtoc11.htm).

<sup>19</sup> United States Sentencing Commission, "Demographic and Offense Information for Immigration Offenses, Fiscal Year 2012," in *2012 Sourcebook of Federal Sentencing Statistics*, by United States Sentencing Commission, [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2012/Table46.pdf](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/Table46.pdf). As stated in the U.S. Customs and Border Patrol strategic plan, the Consequence Delivery System (CDS) "provides a process designed to uniquely evaluate each subject and apply the appropriate post-arrest consequences to that individual to break the smuggling cycle and end the subject's desire to attempt further illegal entry. The CDS is a means of standardizing the decision-making process regarding the application of consequences and provides for the evaluation of outcome effectiveness." See "2012–2016 Border Patrol Strategic Plan," <http://foiarr.cbp.gov/streamingWord.asp?j=246>. Marc R. Rosenblum, "Border Security: Immigration Enforcement between Ports of Entry," Jan. 6, 2012, <http://fpc.state.gov/documents/organization/180681.pdf>.

<sup>20</sup> Immigration and Naturalization Service, *Annual Report of the Immigration and Naturalization Service*, 57; Enforcement and Removal Operations, "ICE Total Removals through August 25th, 2012," *U.S. Immigration and Customs Enforcement*, <http://www.ice.gov/doclib/about/offices/ero/pdf/ero-removals1.pdf>. Visa overstays are now also a kind of postentry infraction, but for the purpose of this article, postentry infractions refer to criminal-status violations.

Until the 1980s the power to deport for post-entry infractions had been relatively limited and dated back to the early twentieth century. The federal government first created the power to deport even immigrants in the country legally for post-entry infractions with a 1907 provision to police the sex trade. Before that, to be deported an immigrant needed to be in violation of exclusions—for entering without approval. Immigrants were criminally and civilly liable for what they did after entering the United States but were not deportable for it. At the turn of the twentieth century, though, people around the world believed that an international sex trade in women, which they called the white slave trade, existed and was getting worse. Congress and the Bureau of Immigration responded to the panic by granting the federal government authority to deport sexually immoral immigrants under antiprostitution provisions. And, in 1907, as part of their anti-white slavery legislation, lawmakers made actions on U.S. soil by immigrants in the first three years of residence deportable offenses. For the first time, lawful immigrants could be deported for post-entry infractions.<sup>21</sup>

In 1917 Congress created another relatively limited power to deport for post-entry infractions that had long-term consequences: this time claiming even wider latitude to deport men and women from jails and prisons for crimes committed on U.S. soil. The Immigration Act of 1917 made immigrants who violated laws involving “moral turpitude” deportable. The capacious definition of *moral turpitude* covered “anything done contrary to justice, honesty, principle or good morals.” The 1917 law did, however, contain a time limit of five years, which protected most long-term residents from deportation, even if they committed a crime involving moral turpitude. Over the next forty-five years, these criminal-status provisions had limited application and impact: on average, fewer than eight hundred people annually were deported for moral turpitude offenses.<sup>22</sup>

Those numbers remained small for three reasons: the relatively small prison populations, the extremely vague the nature of what constituted a deportable, post-entry crime, and the limited enforcement capacity. In 1926, for example, immigration agents calculated that there were roughly forty-five thousand immigrants serving time for crimes committed on U.S. soil. Not all criminal convictions, however, made immigrants deportable—only those involving moral turpitude. Enforcement of the criminal-status provisions was difficult because, at least before the 1980s, state prison officials and local authorities seldom initiated deportation proceedings or sought federal involvement. Responsibility for enforcement of the criminal-status provision was left almost completely to federal immigration officials. To determine which inmates were deportable, immigration agents needed to gain access to state and local institutions and then interview immigrants in prison. The Bureau of Immigration would also need to send agents around the country to interview a prisoner’s friends, relatives, and employers to determine whether the crime fit within the vague definition of moral turpitude—which

<sup>21</sup> Sucheng Chan, “The Exclusion of Chinese Women, 1870–1943,” in *Entry Denied: Exclusion and the Chinese Community in America, 1882–1943*, ed. Sucheng Chang (Philadelphia, 1991), 132–33; Deirdre M. Moloney, *National Insecurities: Immigrants and U.S. Deportation Policy since 1882* (Chapel Hill, 2012); Grace Peña Delgado, “Border Control and Sexual Policing: White Slavery and Prostitution along the U.S.-Mexico Borderlands, 1903–1910,” *Western Historical Quarterly*, 43 (Summer 2012), 157–78.

<sup>22</sup> On the definition of moral turpitude, see Aleinikoff, Martin, and Motomura, *Immigration and Citizenship*, 555. Immigration and Naturalization Service, *Annual Report of the Immigration and Naturalization Service*, 59. For a history of early deportability for criminal-status violations, see Angela M. Banks, “The Normative and Historical Cases for Proportional Deportation,” *Emory Law Journal*, 62 (no. 5, 2013), 1243–1307.



did not parallel state and local crimes—and whether it occurred within five years of immigration. Immigration authorities had neither the budget nor the staff to carry out such investigations.<sup>23</sup>

Major changes to deportability for post-entry infractions were ushered in when state and local governments launched major anticrime campaigns in the 1980s. In the name of more effectively fighting the war on drugs or the truancy of minors or homelessness, state lawmakers created harsher penalties for existing criminal offenses and created new ones. Prison populations exploded. The vast majority of the growing state prison and local jail populations were U.S. citizens, but the immigrant inmate population grew as well. In 1980 a little over one hundred thousand inmates were housed in state and county prisons, and approximately eight thousand of them were immigrants. By 2011 the total population of state prisons and local jails had ballooned to over 2.1 million. The population of foreign-born inmates grew to 124,026. Since more immigrants were in jail than ever before, many more were deportable for post-entry infractions after their prison sentences.<sup>24</sup>

In 1996 federal policy makers increased the number of deportations from state and local institutions by expanding the grounds for post-entry deportations. Congress created that year the new deportable category of aggravated felony. Crimes classified as such included felonies that involved drugs and firearms. The aggravated felonies category cast a far wider net than the older, vague category of moral turpitude. Since Congress built the aggravated felony to match efforts to extend the War on Crime at the state and local level, the new deportable category had the effect of importing the priorities and targets of state and local law enforcement into federal immigration control.<sup>25</sup>

In the same 1996 act, Congress also dismantled much of the statute of limitations on deportation for criminal-status violations. Thereafter, more immigrants became deportable under the criminal-status provisions because they were no longer protected by long-term, legal permanent residence. Through these policy changes, thousands of young men, many who immigrated lawfully as very young children from Southeast Asia or Latin America, are now deportable. Now, with the broadening scope of deportable crimes and the lack of time limits, even more criminal convictions trigger deportability. Federal immigration control has now assumed a major anticrime mandate.<sup>26</sup>

In the network of state and local prisons, anticrime mandates and the massive deportability of low-wage workers combined to expand the reach of the carceral state. By 1999, for example, immigrants who entered the United States without the correct documents or entered without inspection (EWI) totaled approximately two-thirds of all immigrants in state custody. The rest were immigrants lawfully in the country, most of whom were legal permanent residents. These numbers reflect the fact that local and state law enforcement campaigns affected all immigrants, both those with and without legal status. The large EWI population in state and local jails indicates another

<sup>23</sup> Bureau of Immigration, *Annual Report of the Commissioner-General of Immigration* (Washington, 1927), 25.

<sup>24</sup> Marc R. Rosenblum and William A. Kandel, Congressional Research Service, "Interior Immigration Enforcement: Programs Targeting Criminal Aliens," Dec. 20, 2012, <http://www.fas.org/sgp/crs/homesecc/R42057.pdf>, p. 7. Schuck and Williams, "Removing Criminal Aliens," 378–79.

<sup>25</sup> Schuck and Williams, "Removing Criminal Aliens," 367–463, 387–88. See also David A. Martin and Peter H. Schuck, eds., *Immigrant Stories* (New York, 2005).

<sup>26</sup> Daniel Kanstroom, *Aftermath: Deportation Law and the New American Diaspora* (New York, 2012); David C. Brotherton and Luis Barrios, *Banished to the Homeland: Dominican Deportees and Their Stories of Exile* (New York, 2011); Bill Ong Hing, *Deporting Our Souls: Values, Morality, and Immigration Policy* (New York, 2006).

development. As scholars have shown, state and local law enforcement efforts disproportionately targeted the poor, especially the racialized poor. Since deportability correlates to lower wages and poverty, undocumented immigrants, especially those racialized as nonwhite, became more vulnerable to arrest by local and state law enforcement. The large numbers of EWI populations in state and local jails is a consequence of merging the aggressive anticrime mandate with the expansion of deportability of low-wage workers.<sup>27</sup>

As federal immigration control and anticrime mandates merged, state and local officials called for unprecedented levels of involvement of federal immigration authorities in state and local prisons. In the early 1990s California and Texas began to demand reimbursement from the federal government for the expenses of imprisoning EWI immigrants. State authorities argued that since this population was in the country without the right documents, federal authorities bore some responsibility for their imprisonment. The federal government assented in 1994 and sent reimbursements to the states totaling \$130 million; those reimbursements totaled \$213 million in 2013. State governments also created infrastructure to expedite deportations directly from prisons in a process known as judicial removal. State and local prosecutors also now use deportation as part of plea bargains in criminal cases. State governments, therefore, tied the operations of their carceral institutions to federal immigration law and its apparatus in unprecedented ways. This far-reaching enforcement capacity not only helped support carceral institutions but it also contributed to growing numbers of criminal-status deportations.<sup>28</sup>

The responses of Congress to the attacks of September 11, 2001, and terrorism generally, heightened the national security dynamic of immigration enforcement. In its efforts to protect national security, Congress folded immigration enforcement into the Department of Homeland Security, which, in turn, expanded the jurisdiction of local and state officials in immigration enforcement. Since 2004, for example, U.S. Immigration and Customs Enforcement has trained more than 1,200 state and local officials to enforce immigration law. The budget for programs targeting criminal aliens also skyrocketed from around \$23 million in 2004 to nearly \$700 million in 2010. The addition of antiterrorism to the list of the government's goals magnified its ability to carry out mass deportations and mass incarceration.<sup>29</sup>

The purpose of this article has been to highlight the place of deportability and deportations within the carceral state. Between 2009 and 2011 alone, the federal government deported over 2.5 million immigrants. Just over half of these were of the voluntary type that immigration authorities publicly heralded during Operation Wetback of 1954. To process all the deportees, the federal government operates over 250 immigrant detention

<sup>27</sup> Schuck and Williams, "Removing Criminal Aliens," 382. See, for example, Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (New York, 2006); Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Durham, N.C., 2009); Ramiro Martinez Jr. and Abel Valenzuela Jr., eds., *Immigration and Crime: Race, Ethnicity, and Violence* (New York, 2006); and Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (Berkeley, 2007).

<sup>28</sup> On the early 1990s, see Schuck and Williams, "Removing Criminal Aliens," 382–83. On the reimbursements, see *ibid.*, 448–49; and *Office of Justice Programs: State Criminal Alien Assistance Program*, [https://www.bja.gov/ProgramDetails.aspx?Program\\_ID=86](https://www.bja.gov/ProgramDetails.aspx?Program_ID=86).

<sup>29</sup> "26 Law Enforcement Officers Trained by ICE to Enforce Immigration Law," July 22, 2010, *U.S. Immigration and Customs Enforcement*, <http://www.ice.gov/news/releases/26-law-enforcement-officers-trained-ice-enforce-immigration-law>. On the budget for jail enforcement, see Rosenblum and Kandel, "Interior Immigration Enforcement," 1.

centers throughout the country. These numbers are one stark outcome of the merging of immigration control and mass incarceration.<sup>30</sup>

The expansion of deportability since 1882 has shaped the practice of mass deportations and mass incarceration. In the first half of the twentieth century, the laws of Chinese exclusion or the national origins system created deportability on explicitly racial grounds. Most of the deportations, however, were for document violations of Mexican immigrants. The deportability and deportations of Mexicans did not work as an explicit racial project as did Chinese exclusion, yet it played a major role in the racial subordination of people of Mexican heritage in the United States. Through the 1940s and 1960s Congress repealed many laws that explicitly tied together race and deportability, but it expanded the systemic deportability of low-wage Mexicans. Since the 1980s this deportability has dovetailed with changes in criminal law. Deportability's role in the carceral state is now manifest in constant, mass deportations and growing federal prison populations. Deportability also contributes to the staggering growth of state and local prison populations. Since the 1980s, deeply rooted ideas about "illegal" low-wage workers, redeployed under the crime-security nexus, now serve as a cornerstone of the carceral state.

<sup>30</sup> Office of Immigration Statistics, *2012 Yearbook of Immigration Statistics*, 103. Immigration and Customs Enforcement, "Fact Sheet: Detention Management," Nov. 2011, *U.S. Immigration and Customs Enforcement*, <http://www.ice.gov/news/library/factsheets/detention-mgmt.htm>. See also Marc R. Rosenblum and Doris Meissner, *The Deportation Dilemma: Reconciling Tough and Humane Enforcement* (Washington, 2014), <http://www.migrationpolicy.org/research/deportation-dilemma-reconciling-tough-humane-enforcement>.