



# AFTERMATH

DEPORTATION LAW AND THE

NEW AMERICAN DIASPORA

DANIEL KANSTROOM

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*For Julie, Emily, and Hannah*

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## PREFACE

Prisoner, hear the sentence of the Court. The Court decides, subject to the approval of the President, that you never hear the name of the United States again.

—Edward Everett Hale (1863)<sup>1</sup>

This book is about how deportation has worked in the United States, a “nation of immigrants.”<sup>2</sup> In one sense, it is a book of stories—many sad, some frustrating or infuriating, but some inspiring—about people who have had to leave one home only to be forcibly removed, often years later, from another. The stories are also about the United States itself, which has undertaken a radical social experiment with massive deportation enforcement. I call this a radical experiment because, although deportation is at least as old as the modern nation-state, we have never before seen an immigration enforcement system of the size, ferocity, and scope that has been built, ironically, in one of history’s most open and immigrant-friendly societies. The experiment has now continued for more than a decade. It is time to consider what it has accomplished and what it has wrought.

Deportation, at first glance, would seem to be mostly about border enforcement. To citizens of affluent nation-states, this generally seems an important and protective function. Borders aim to safeguard culture, identity, social peace, security, and relative wealth. They serve as semi-permeable membranes, enabling governments to control the movements of people, especially workers.<sup>3</sup> Most basically, though, border enforcement seeks to keep various forms of foreign turmoil at bay, as it separates “us”—the citizens—from “them”—the foreigners, the outsiders, the aliens, and from various Hobbesian international realities.<sup>4</sup> Neither globalization,

international legal tribunals, supra-national entities like the European Union, the Internet, social networking, nor the “flatness” of the world have fundamentally changed this reality.<sup>5</sup> Reports of the death of the nation-state, in short, have been exaggerated, as have reports of the irrelevance of national borders.<sup>6</sup> The importance of geographic space may have diminished somewhat with the advance of transportation and new communication technologies.<sup>7</sup> But the poor and the oppressed of the world encounter a tighter regime of state regulation—with fewer migration possibilities—than many would have found in the past.<sup>8</sup>

And yet all boundaries—especially physical borders—are inevitably imperfect and porous.<sup>9</sup> This fact creates not only a certain anxiety, but also enforcement dilemmas. Control of the physical border is equated with such elastic but viscerally powerful goals as “national security” and compliance with the “rule of law.” But there are always, inevitably, many of “them” among “us.” In the United States, this has led to a particularly harsh situation: the lives of many millions of noncitizens without legal status—and of many others with legal status but who may have violated certain legal rules—are starkly different from those of all but the most marginalized citizens.<sup>10</sup> A knock on the door in the early morning, a uniformed government agent at the workplace, the flashing light of a police car due to a minor traffic violation, or a simple dispute with a landlord or an employer can mean the end of all life plans, arrest, detention, separation from loved ones, poverty, physical danger, and permanent banishment.

The most common justification for imposing such a precarious existence on noncitizens is rhetorically resonant but complex: these people, it is said, have violated the “rule of law.”<sup>11</sup> No nation-state in history has more strongly associated itself with law than the United States. As Tocqueville asserted long ago, America could be well-described as “a Nation of people who aspire to live according to the rule of law.”<sup>12</sup> Today, “rule of law” discourse, though often crudely deployed, marks virtually all debates about border enforcement and deportation. As one well-known proponent of strict enforcement responded to those who supported mercy and compassion for undocumented noncitizens: “They broke the law. Period.”<sup>13</sup> But the law is not so simple; and its complexity suggests that a question mark rather than a period should follow the assertion that “they broke the law.” Laws have certainly been broken. But what should we do about it?

The answer requires fundamental rethinking of both ends and means. As Seyla Benhabib has noted, we are like “travelers navigating an unknown terrain with the help of old maps, drawn at a different time and in response to different needs.”<sup>14</sup> We must rethink the norms and goals of deportation as we also examine enforcement mechanisms in light of current realities. The agency that now controls most U.S. deportation is the Department of Homeland Security (DHS), its very name a fitting blend of aspiration and atavism. DHS asserts that we need a “smarter, more holistic approach that embeds security and resilience directly

into global movement systems.” The agency itself recognizes, however, that these goals of security and resilience must include protection of “civil liberties and the rule of law.”<sup>15</sup> The hard task is to sort out what this really means in practice, both within and outside U.S. territorial borders.<sup>16</sup>

The outside, extraterritorial space has become especially important because of a phenomenon that I term, somewhat provocatively, the *new American diaspora*.<sup>17</sup> The United States deportation system has created a forcibly uprooted population of people with deep and cohesive connections to each other and to the nation-state from which they were removed. Around the world, from Haiti and the Dominican Republic to Brazil, from Mexico and Guatemala to the Azores, from Cape Verde to Cambodia, there are now hundreds of thousands of former long-term legal resident deportees who were raised and fully acculturated in the United States. In addition to their moral claims and the complex policy implications of their very existence, their legal rights are a problem that demands serious attention.

Let me make something clear at the outset: this book does not argue for completely open borders, for the abolition of the nation-state, or against all immigration enforcement. Its call is for critical, thorough, humane analysis and reconceptualization of a deportation system that has become shockingly large, unnecessarily harsh and, in many ways, dysfunctional. Once a relatively seldom-used and legally nuanced, flexible process, deportation in the United States has developed into a huge, expensive, and rigid enterprise. Its goals are elusive to define, and its positive effects are difficult to measure, especially when compared to its substantial negative collateral consequences. It has thrived in its current form for nearly two decades, having developed an impressive politico-legal momentum despite opposition from critics on the left and the right. It was, after all, not an immigrant rights organization, but the editorial board of the *Wall Street Journal* who argued presciently—a decade ago—that deportation “would break up families [and] would disrupt businesses that depend on foreign labor for jobs that Americans don’t want. . . .”<sup>18</sup> Still, the system endures.

Deportation law is part of the U.S. constitutional legal system, though the fit is complicated and imperfect. It offers a salient example of the deep tension between the best ideals of liberal universalism and human rights and the realities of restricted membership in this nation-state.<sup>19</sup> Simply put, it mediates the line between our highest aspirations and our most basic fears. And yet it has largely done so without drawing the critical attention it deserves. Indeed, compared to the famous late eighteenth-century debates over the Alien and Sedition Acts, the biting controversies over Chinese exclusion and deportation laws in the late nineteenth century, ideological deportation episodes after World War I, and massive repatriations of Mexicans in the mid-twentieth century, there has been insufficient sustained recent consideration of deportation as a matter of fundamental

principle. After many years of laboring in this system, teaching law students about it, and studying its history and nature, I realized that it evoked for me Marshall McLuhan's old adage, "I don't know who discovered water but it wasn't a fish."<sup>20</sup> To the extent that we think about it at all, many of us have now simply come to accept deportation as a background fact of normal modern life. But the nature of the current system demands that this be challenged.

Nearly a century ago, Raphael Lemkin, a Jewish lawyer from Poland, began developing a powerful new idea.<sup>21</sup> As he later put it: "New conceptions require new terms." His proposed term, "genocide," defined a new international crime, "the destruction of a nation or of an ethnic group."<sup>22</sup> The idea was so powerful that it is now considered one of the pillars of the modern human rights law regime.<sup>23</sup> In short, Lemkin changed the way we think about law and about basic human rights. The aims of this book—while much more modest—are inspired by this sort of history. Deportation does not require us to conceptualize a new term, but to *fundamentally rethink new forms of an old phenomenon*—to see how the system has developed, incrementally, into something in urgent need of major reform. My hope is that this work—at the very least—will inspire serious thought about the basic rights of deportees and their families, broadly defined. Of course, their rights claims are not simple. Most deportees are, by definition, not completely innocent victims, and many (though not all) have violated the law. Still, they have powerful moral and legal claims. Their life stories transcend the boundaries of the nation-state, and their voices should be heard. The size and consequences of the current deportation system have rendered the traditional "out of sight, out of mind" approach unjustifiable.

One of the redeeming joys of working in the often depressing realm of deportation law is a moving tradition of camaraderie and solidarity and an inclusive vision of human rights. In my last book, *Deportation Nation*, I sought to highlight a history of noncitizens' rights discourse that ranged from Jefferson and Madison to Charles Sumner; from Louis Post and Frances Perkins to immigration lawyers Jack Wasserman, Louis Boudin, and Carol King. It has included such poets as Henry Wadsworth Longfellow and Emma Lazarus; such singers as Woody Guthrie, Paul Robeson, Harry Belafonte, and Pete Seeger; and such activists as Harry Bridges, Carey McWilliams, Gordon Hirabayashi, Fred Korematsu, Minoru Yasui, César Chávez and Dolores Huerta, along with many, many others. I have been deeply inspired by their work and, my modest hope is to be able to continue its best traditions.

I owe debts of gratitude to more people than I can name who have helped with my research, writing and understanding of this project over many years. I am particularly grateful to Deans John Garvey and Vincent Rougeau, Interim Dean George Brown, and to my colleagues at Boston College Law School for their ideas and support. Special thanks are also due to Jacqueline Bhabha, Susan

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## Notes

1. Edward Everett Hale, *The Man Without A Country*, ATLANTIC MONTHLY, vol. 12, issue 73 (published anonymously December 1863), at 667.
2. For recent examples of the genre, see DANIEL KANSTROOM, *DEPORTATION NATION* (Harvard University Press 2007); BILL ONG HING, *DEPORTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY* (Cambridge University Press 2006); *THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT* (Nicholas De Genova & Nathalie Peutz eds., Duke University Press 2010).
3. As Zygmunt Bauman has put it, "Traveling for profit is encouraged; traveling for survival is condemned." ZYGMUNT BAUMAN, *SOCIETY UNDER SIEGE* 84 (Cambridge: Polity Press 2002).
4. See ROBERT GILPIN, *WAR AND CHANGE IN WORLD POLITICS* 7 (Cambridge University Press 1981) (cited in JOHN RAWLS, *THE LAW OF PEOPLES* 28 (Harvard University Press 1999)).
5. The European Union, often cited as a counterexample vis-à-vis its member states, confirms the basic point clearly against, for example, migrants and refugees from Africa. See Jacqueline Bhabha, "Get Back to Where You Once Belonged": *Identity, Citizenship, and Exclusion in Europe*, 20 HUMAN RIGHTS Q. 592–627 (August 1998). See also THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (2005). As Giorgio Agamben once piquantly put it: humanity itself has, for border control purposes, become a dangerous class. *No to Bio-Political Tattooing*, LE MONDE, Jan. 10, 2004, at 3. (quoted in

- Ronen Shamir, *Without Borders? Notes on Globalization as a Mobility Regime*, 23(2) SOCIOLOGICAL THEORY 197–217 (2005).
6. See, e.g., Bryan S. Turner, *Enclosures, Enclaves, and Entrapment*, 80(2) SOCIOLOGICAL INQUIRY 241–60 (May 2010) (noting important trends toward increased immobility of people across borders due to enhanced methods of tracking and containing people and a greater emphasis on securitization by the state); see also Bryan S. Turner, *The Enclave Society: Towards a Sociology of Immobility*. 10(2) EUR. J. OF SOC. THEORY 287–303 (2007); Ronen Shamir, *Without Borders? Notes on Globalization as a Mobility Regime*, 23(2) SOCIOLOGICAL THEORY 197–217 (2005) (suggesting that the emergence of a global mobility regime, oriented to closure and to the blocking of access, is premised not only on national or local grounds but also on a principle of perceived universal dangerous personhoods, “a paradigm of suspicion.” The aim of this mobility regime is “to maintain high levels of inequality in a relatively normatively homogenized world.”); Rogers Brubaker, *The ‘Diaspora’ Diaspora*, 28(1) ETHNIC & RACIAL STUD. 9 (January 2005) (“states have gained rather than lost the capacity to monitor and control the movement of people by deploying increasingly sophisticated technologies of identification and control including citizenship, passports, visas, surveillance, integrated databases and biometric devices”); JOHN TORPEY, *THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP AND THE STATE* (Cambridge University Press 2000).
  7. As Paul Virilio noted, “speed-space” has replaced “time-space” as the most relevant operative concept. VIRILIO LIVE: SELECTED INTERVIEWS 71 (John Armitage ed., 2001).
  8. Brubaker, *The ‘Diaspora’ Diaspora*, *supra* note 6, at 9 (citing PAUL HIRST AND GRAHAME THOMPSON *GLOBALIZATION IN QUESTION* 30–31, 267 (Cambridge: Polity Press 1999)).
  9. Nevertheless, a main purpose of the nation-state is still “to guard the selectivity of osmosis.” BAUMAN, *supra* note 3, at 82. See GABRIEL SHEFFER, *DIASPORA POLITICS: AT HOME ABROAD* 22 (Cambridge University Press 2003) (noting the “unprecedented porosity” of borders).
  10. See, e.g., YASEMIN SOYSAL, *LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE* 3 (University of Chicago Press 1994) (describing the rights of noncitizens); see also Devon W. Carbado, “Racial Naturalization,” in *LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS* 41 (Mary L. Dudziak and Leti Volpp eds., Johns Hopkins Press 2006).
  11. See Matthew Gibney, *Precarious Residents: Migration Control, Membership and the Rights of Non-Citizens*, UNDP. Human Development Research Paper, 2009/10 (“Precarious residents can be defined as non-citizens living in the state that possess few social, political or economic rights, are highly vulnerable to deportation, and have little or no option for making secure their immigration status.”)
  12. ALEXIS DE TOCQUEVILLE, *1 DEMOCRACY IN AMERICA* 278 (Knopf 1945); see Austin Sarat, “At the Boundaries of Law: Executive Clemency, Sovereign Prerogative, and the Dilemma of American Legality,” in *LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS* 21 (Mary L. Dudziak & Leti Volpp eds., Johns Hopkins Press 2006).
  13. U.S. Representative Steve King, R-Iowa, quoted in Elizabeth Llorente, “Steve King Asks What Part of the ‘Rule of Law’ Don’t We Understand?” *Fox News Latino*, January 7, 2011, available at <http://latino.foxnews.com/latino/politics/2010/12/14/key-force-immigration-congress-vows-focus-enforcement/>.
  14. See SEYLA BENHABIB, *THE RIGHTS OF OTHERS* 6 (2004).
  15. U.S. Department of Homeland Security, *Quadrennial Homeland Security Review Report: A Strategic Framework for a Secure Homeland*, Washington, DC, February 2010, at 16.
  16. For insightful consideration of how this actually works in the United States, see Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 3 STAN. J. C. R. & C. L. 165 (2007); see also Huyen Pham, *When Immigration Borders Move*, 61 FLA. L. REV. 1115 (2009).
  17. I fully realize that this is a complex and, for some, problematic word choice. As Rogers Brubaker has noted, the “latitudinarian ‘let-a-thousand-diasporas-bloom’ approach may have rendered the category stretched to the point of uselessness.” See Brubaker, *The ‘Diaspora’ Diaspora*, *supra* note 6. See also the Introduction in this volume for my justifications; *DIASPORA AND TRANSNATIONALISM: CONCEPTS, THEORIES AND METHODS* (Rainer Bauböck & Thomas Faist eds., 2010).

18. As the editorial continued: “The U.S. needs policies in place that recognize the economic realities that come with a long, porous border between an immensely rich country and a poor one. We need programs that will legalize the status of foreigners who are here already and contributing to our economy. We need more legal channels, such as temporary work programs, to handle future arrivals. And we need to speed up family reunifications.” *The GOP’s Immigration Fumble*, WALL ST. J., August 4, 2002.
19. See, e.g., Mark Tushnet, *Essay-Review: United States Citizenship Policy and Liberal Universalism*, 12 GEO. IMMIGR L. J. 311 (1998).
20. McLuhan repeated many versions of this maxim in public talks as well as in print. See, e.g., MARSHALL MCLUHAN AND QUENTIN FIORE, *WAR AND PEACE IN THE GLOBAL VILLAGE* 175 (1968) (“they have no anti-environment which would enable them to perceive the element they live in”); MARSHALL MCLUHAN, *CULTURE IS OUR BUSINESS* 191 (1970) (“Fish don’t know water exists till beached.”).
21. The concept, which Lemkin had earlier referred to as “the crime of barbarity,” was crafted from the root words *genos* (Greek for family, tribe, or race) and *cide* (Latin for killing).
22. RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION—ANALYSIS OF GOVERNMENT—PROPOSALS FOR REDRESS* 79–95, ch. IX: “Genocide a New Term and New Conception for Destruction of Nations” (Washington, DC: Carnegie Endowment for International Peace, 1944).
23. See the Convention on the Prevention and Punishment of the Crime of Genocide. 78 UNTS 277 (1951).



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# Aftermath

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# Introduction

## *“What Part of ‘Illegal’ Do You Not Understand?”*

As to its cruelty, nothing can exceed a forcible deportation from a country of one’s residence, and the breaking up of all the relations of friendship, family, and business there contracted.

—Supreme Court Justice Stephen J. Field (1893)<sup>1</sup>

Fear is the parent of cruelty.

—James Anthony Froude (1876)<sup>2</sup>

Picture a woman—let’s call her Marie—who came to the United States twenty years ago as a refugee with her 1-year-old son, Marc. Marie is poor and speaks very little English. She has struggled to make a good life, but she never became a citizen, nor did Marc. They were both legal permanent residents of the United States, with “green cards.”<sup>3</sup>

Marie always saw Marc as a good boy; he was polite and a decent student. But they lived in a tough neighborhood, and in high school, Marc fell in with a bad crowd. Arrested by state police with some of the drug called ecstasy in his pocket, he pled guilty to “aiding and abetting the possession of a controlled substance.”<sup>4</sup> According to his criminal lawyer, this was a very good deal—he was sentenced to one year of probation. He had no other criminal record. Marie was frustrated and angry with him, but she figured he would learn his lesson.

However, when he went to meet his probation officer one day in 2005, Marc was arrested by federal Immigration and Customs Enforcement (ICE)<sup>5</sup> agents, placed in mandatory detention with no right to even ask for bail, and told he faced inevitable deportation as an “aggravated felon” (a technical term under U.S. immigration law that can include many types of crimes, including some drug offenses). He was to be sent to the country from which he and his mother had fled, but where they have no contacts and no more family.<sup>6</sup> When Marie went to visit him in ICE detention, Marc told her that he had thought they were the same as U.S. citizens, if he had ever thought about it all.<sup>7</sup> His appointed

criminal lawyer said she could not help him with his deportation case as it was not part of her job. Marie had no money for an immigration lawyer, and the lawyers with whom she talked said it seemed there was probably nothing they could do for him anyway. One day, Marc was transferred to another facility two thousand miles away from her. Then, a few months later, he was deported and banned from the United States for life.

Marie, now almost 60 years old, was devastated. She was especially upset to learn that after Marc's removal, the U.S. Supreme Court had ruled that his offense never should have been classified as an aggravated felony and that he should have been able to ask an immigration judge for a discretionary waiver of the deportation order. But Marc's situation was even worse than Marie had imagined. Soon after Marc was deported, Marie learned that he was HIV-positive and that, after deportation, he would be held in his home country for at least two weeks in a filthy, overcrowded, and corrupt prison with no access to medication.<sup>8</sup> Now completely alone and fearing that her son had, in effect, been sentenced to death, she asks a legal expert if there is anything that can possibly be done to bring him back to the United States. The answer, essentially, is "no."

This story must surely be troubling even to those who favor strict immigration enforcement. Reflecting more than the personal tragedies of a mother left alone and a son condemned perhaps to die in what, for him, is a foreign, unknown place, it raises deep questions of law and justice. Should people who immigrate as young children—legally or not—be forever subject to deportation if they do not become citizens? Should there be a statute of limitations for deportation? Should immigration authorities and courts balance the gravity of the offense against other factors such as legal status or foreseeable hardship to the deportee or his/her family? How should legal mistakes or changes in law be addressed? These questions, and many more like them, are the subjects of this book. Though they have complicated and technical aspects, they also present some of the most compelling politico-legal and ethical dilemmas of our time.

This book advocates a dramatic change of focus in our thinking about immigration admissions and enforcement. Historically, much of the U.S. system was a comparatively optimistic enterprise. Entry and admission were the key concepts, and the widespread assumption was that those who came here would succeed, stay, and become citizens. Of course, as I have previously shown, exclusion and deportation were always critical parts of this enterprise.<sup>9</sup> Indeed, the systematic control of foreign laborers, particularly those from Asia and Latin America who entered in irregular ways or who lack legal status, has long been oppressive. In recent decades, however, removal has become such an overwhelming and integral component of the U.S. immigration system that it now vies with admission and naturalization as a central operating principle. For many millions of noncitizens, the threat of deportation now looms at least as large as the promise

of permanent residence and citizenship. For millions of others, the reality of deportation has already destroyed such opportunities, and it has done so in ways that are unprecedented in their harshness. This is not to say that deportation can never be warranted. If one accepts the basic legitimacy of the nation-state, then deportation as a tool of *extended border control* is logical and at least potentially justifiable.<sup>10</sup> Also, for severe human rights abusers, violent terrorists, and serious criminals (all terms in need of very careful definition), deportation may be a necessary enforcement tool. But acceptance of some forms of deportation in principle surely does not require acceptance of the current system, which has vastly exceeded any historical precedent in terms of its size, its ferocity, its disproportionality, its disregard for basic rights, and its substantial negative effects.

How might we best understand and reform the system? Anecdotes alone, no matter how compelling they may be, are insufficient. For every story like that of Marc and Marie (and there are many), others offer chilling counter-narratives. Reports of foreign terrorist plots and crimes by “illegal aliens” inspire strong public reactions. One website even features “America’s Most Forgotten,” dedicated “to all of the innocent people and their families who have been victimized by illegal aliens as a result of the refusal of our elected officials to enforce United States immigration law and to secure our borders.” A particularly tragic story describes a 21-year-old Marine corporal home on leave for Thanksgiving from Iraq who was killed by “an illegal alien with a blood alcohol level four times the legal limit.”<sup>11</sup> The site also includes a list of “must reads” such as “School Bus Tragedy Ends in Death At the Hands of Illegal Alien Driver,” “Drunk Illegal Alien Causes Christmas Eve Crash: Three Family Members Die” and “13-Year-Old Strangled by Illegal Alien.”<sup>12</sup> As we shall see, the data about immigrants and crimes indicate no need for substantial concern about noncitizen criminality.<sup>13</sup> Still, such stories have a certain logic and an obvious emotional appeal: “if these people, who have no right to be here, had been deported, then this never would have happened.”<sup>14</sup>

So how can we better understand deportation? Theories about the border and the nation-state are important starting points, but too abstract to yield specific policy solutions. Statistics are essential, but perhaps not so different from anecdotes in their malleability. Cost-benefit analyses may be useful but—like such research in the criminal justice system—famously complex. As two researchers once put it: “Estimating the social costs and benefits of competing transportation or environmental policies is no analytical picnic. But estimating them for imprisonment and other sentencing options is a certain analytical migraine.”<sup>15</sup> This is at least equally true of deportation research. Ultimately, we must consider such strong normative claims as those of basic rights to dignity, family, proportionality, and equality. This approach, too, may cut in different directions, however. Marc and Marie undoubtedly have powerful rights claims.

But so do others in the society in which they live, including perhaps rights to self-determination,<sup>16</sup> to define the nature of membership,<sup>17</sup> to associate with each other as citizens in a nation-state<sup>18</sup> and against drug-dealing in their community. These claims, however, are subject both to internal limits (set by the “members” themselves) and to fundamental principles.<sup>19</sup> To ignore such principles is to risk a profound, well-recognized historical danger: “the rule of citizens over non-citizens, of members over strangers is probably the most common form of tyranny in human history.”<sup>20</sup>

Clearly, deportation is a complex subject with many facets, complicated roots, and many possible permutations. Even a quick look in a thesaurus for synonyms for the word, “deportation,” yields a moving litany: banishment, displacement, expatriation, expulsion, relegation. A list of “related words” is similarly evocative, including: ostracism, diaspora, dispersion, scattering, emigration, ethnic cleansing, transportation, dispossession, ejection, and ouster.<sup>21</sup> To understand deportation, then, we must carefully blend many analytical methods.

A central focus of our inquiry must be on the idea of the “rule of law.” As we shall see, rule of law discourse—both domestic and international—is far more than a rhetorical trope deployed by those who support greater border control or strict internal enforcement. It crystallizes and renders specific critical aspects of the deep debate over the nature and effects of deportation. It incorporates the data and bridges the gaps between anecdotes and statistics, between normative values and cost-benefit calculations, between raw majoritarian power and legitimacy.<sup>22</sup>

Human rights are no less a part of the coercive power of the rule of law than government enforcement power.<sup>23</sup> For deportees, however, rights are very much works-in-progress that require textured and nuanced thought, not only about the rights they may have due to their humanity, but also by virtue of their residence in the United States.<sup>24</sup>

The U.S. Department of Homeland Security (DHS) states that it is imperative to its mission to know who lives and works within U.S. national borders.<sup>25</sup> This might, of course, include constant oversight of everyone, but DHS focuses mostly on noncitizens. Its major aims include deterrence of immigration violations.<sup>26</sup> A large part of this task involves “removing those who violate our laws.” DHS accepts that this must be done not only with “efficiency,” but also with “fairness, and integrity.”<sup>27</sup> The hard question, simply put, is how to define and balance these three criteria. This, as we shall see, involves both legal rules and the related concept of discretion. The Obama administration has, for example, interpreted “family” to include gay and lesbian couples and has developed important new guidelines for prosecutorial discretion. Indeed, in August 2011, the Administration announced a bold new initiative to stop focusing on people who are “low priorities for deportation.” This includes young people who were brought

to this country as small children as well as military veterans and the spouses of active-duty military personnel.<sup>28</sup> If this program works as described (its exact procedures and parameters are unclear as of this writing), it will be a major step forward—albeit a belated and perhaps temporary one—toward a smarter and more humane enforcement regime.<sup>29</sup>

Still, the hard basic facts of deportation must be confronted. Since its reinvigoration in the late 1990s, deportation has torn through many communities like a capricious tornado: touching down suddenly from dark clouds and leaving a trail of devastation in its wake, while sweeping away tens of millions of people from our midst. It has had profound and still-understudied effects on individuals, families, and communities, both in the United States and in the countries to which deportees are sent. This book therefore considers the nature of deportation, its justifications, its accomplishments, and its failures. It then considers its consequences, its *aftermath*. We must engage in as thorough, objective, and careful an empirical study as the data permit.

But let us also listen to the voices of deportees and try to see the system as they do. Here is how one deportee, Jose Angel Carachuri, whose legal case is discussed in Chapter 4, was described in the government's legal brief before the U.S. Supreme Court:

Petitioner is a citizen of Mexico. After obtaining lawful permanent residency in the United States, he committed a variety of crimes. He was convicted . . . of two state drug possession offenses. The Department of Homeland Security charged petitioner with being removable. . . .<sup>30</sup>

Compare that laconic description with one written by Mr. Carachuri's lawyers:

Petitioner was born in Mexico and immigrated to the United States with his parents. He later became a lawful permanent resident, and has worked as a carpet installer from the time he was seventeen years old. Petitioner is engaged to a U.S. citizen, with whom he has four children, each also a U.S. citizen. In addition, petitioner's mother and two sisters live in the United States. Petitioner has no family in Mexico, and before the government removed him from the country, petitioner had made no visits to Mexico since childhood.<sup>31</sup>

This narrative dissonance reflects more than the skills of legal advocates. Our perceptions of deportation vary depending on how we view the deportees themselves. Are they objectified "illegal aliens"—who bear their illegality existentially and permanently—or do they have life stories to which attention must be paid? For those unaccustomed to hearing the voices of undocumented migrants, their



eloquence can be both surprising and moving. As one Salvadoran mother put it, “[The] laws say that a person who crosses [the border] is a criminal. It’s more criminal to let your children starve to death. If I have to lose my life, at least I wanted to try rather than let my children die of hunger.”<sup>32</sup> Deportees, when their voices are heard, often describe their plight with poignant simplicity. A 26-year-old man, raised in the United States, was deported to Haiti in 2011 because of a conviction for possession of cocaine. Suddenly he found himself living in a tent along with thousands of Haitians, amid the horrors of an earthquake that had ravaged the country, facing cholera, chaos, abject poverty, and permanent banishment. He observed, “I wouldn’t wish Haiti on my worst enemy. . . . I’m used to being treated like a human being, but a human life has absolutely zero value in Haiti.”<sup>33</sup>

Of course, every large government system has its horror stories. Those of deportation, however, have been distressingly common, both predictable and predicted. Thirty-four-year-old deportee Wildrick Guerrier had been nicknamed “Black Jesus” because of his attempts to assist other struggling inmates. While detained in a Port-au-Prince police station after his deportation, Guerrier displayed cholera-like symptoms of diarrhea, weakness, and vomiting after tending to other sick and wounded detainees. Other detainees reportedly begged the police for medical care for Guerrier. But there was to be no help. Several deportees interviewed by the Associated Press said the police told them: “This is what you came here for: to suffer.”<sup>34</sup> As one attorney noted, during his pre-deportation detention in Louisiana, Guerrier had expressed grave concerns that he had no family in Haiti, that he had not been to Haiti for a very long time, and that he was afraid of what would happen to him amid a cholera outbreak. In retrospect, she sadly intoned, “he was right to be terrified.”<sup>35</sup>

This book thus revisits fundamental legal questions about deportation: Does it demand proportionality?<sup>36</sup> How powerful a legal value is “finality”? How does deportation fit within our constitutional legal system? What are its limits in time and in territorial space? How should we understand the increasingly pervasive idea of “discretion”?<sup>37</sup> But deportation also raises questions that transcend the nation-state, evoking considerations of “globalization,” “post-nationalism,” and “transnational families.”<sup>38</sup> Most important, deportation has created a large foreign population of people who were raised in the United States, who speak English as their primary language, who often have deep family ties in the United States, and who are culturally and socially American. In effect, this is a new, unplanned *diaspora*. The use of this term in this uncommon, somewhat polemical way requires explanation. Though an ancient and useful idea, the term *diaspora* has, in recent years, become popular to the point where no single, exact definition is possible.<sup>39</sup> As Rogers Brubaker has suggested, we face a “diaspora’ diaspora,” in which there are such a wide variety of meanings in “semantic,

conceptual and disciplinary space” that the term itself may be lost.<sup>40</sup> The original, core meaning of diaspora related to Jewish dispersion, and was then applied to such “classical” examples as the Armenian and Greek diasporas.<sup>41</sup> Most basically, the term has signified displaced populations that have maintained strong racial, religious, or ethnic ties to what they recognize as their original homeland. But recent usages have ranged more widely to include political communities, labor migrants, and many others. Thus, some write of “Dixie,” white, liberal, gay, queer, and even digital diasporas.<sup>42</sup> The attempt in this work is to relate the contemporary situation of U.S. deportees to the traditional meaning, but with a unique twist: the deportees’ identity is based on their upbringing, socialization, culture, and family connections to the United States, *despite* their lack of formal citizenship status. The U.S. deportation *diaspora* consists of a forcibly uprooted population of people with deep, cohesive social and cultural connections to each other and to the nation-state from which they have been involuntarily removed.<sup>43</sup> The term, I suggest, may appropriately apply to the hundreds of thousands of (former) long-term legal resident deportees who were raised and acculturated in the United States.<sup>44</sup> These people, now widely scattered, share features that constitute the core of the generally accepted use of the term: First, they have faced a “traumatic dispersion.”<sup>45</sup> Second, as we shall see, many of them maintain deep connection to their former homeland (the United States) as an “authoritative source of value, identity and loyalty.”<sup>46</sup> (This distinguishes them from those around the world who may voluntarily undertake “second-generation” return.)<sup>47</sup> But what about “boundary-maintenance?”<sup>48</sup> Historically, scholars have viewed the preservation of a distinctive identity in host societies as the *sine qua non* of a diaspora.<sup>49</sup> The basic idea is that of a “separate society or quasi-society in a larger polity.”<sup>50</sup> Describing U.S. deportees as a diaspora community may thus depend upon the extent to which they eventually reintegrate into the countries to which they are deported. Various governments now have programs to facilitate such reintegration, as do some international nongovernmental organizations.<sup>51</sup> However, the success of such efforts has been sporadic and, on the whole, minimal. Given the fact that the current U.S. deportation experiment, though massive and radical, is less than two decades old, we shall have to wait and see what the future research holds. In the meantime, one could view the term *diaspora* in this context as an idiom, a stance, or a tentative claim as much as an objectively settled description of deportation phenomena.<sup>52</sup> It is worth noting, however, that some deportees themselves use the terminology of diaspora—indeed, a group of young people in Massachusetts have created an organization called *Deportation Diaspora* with which I have worked. Of course, what is especially tricky here is that deportees, by definition, have not been U.S. citizens or had full membership rights in U.S. society. Can people be “diaspora-ed” from a homeland that never granted them full membership? The question seems