

The Right Against Removal: Harm Avoidance in Immigration Practice¹

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Abstract

The removal of noncitizens from democratic states is currently an integral part of these countries' immigration policy. We argue that removal often involves extensive harm of a social, economic, physical and psychological kind and that the harm of removal outweighs the citizens' privilege to expel individuals who are already present but who do not meet democratically-determined conditions for entry or abode. Instead, we propose "jus noci," which captures the right to not be harmed, as a principle for immigration practice. Jus noci relies on the notion that physical removal from the territory is often an infringement of a person's welfare interests. We argue that jus noci requires that democracies minimize or completely suspend the practice of removal for long-term noncitizen residents.

Introduction

Long-term residents, both undocumented and with legal residency, are removed from Western democracies in large numbers every year.² The thousands of removals that are processed annually pose a significant problem for liberal-democratic states. On the one hand, liberal democracies and their publics are generally thought to have the privilege to use the tools of democratic deliberation to determine the conditions under which noncitizens are granted group membership.³ The right to determine the rules of membership implicitly includes the right to physically remove individuals who are already present but who do not meet such conditions. On the other hand, democracies are expected to refrain from harming those who are subject to their rule. Liberal-democratic states have enshrined in law, and hold as inviolable, a set of individual rights that protect vital welfare interests.

In this essay, we argue that the harm that often accompanies removal runs contrary to this liberal-democratic commitment to harm avoidance. As our evidence will show, removal often entails not simply a return to the country of origin but rather severe economic, social, physical and/or psychological harm to the individual. As a result, *a prima facie ban on removal* of long-term residents as a routinized and institutionalized immigration practice is warranted.

I. Removal and Jus Noci, The Principle of Harm Avoidance

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² This paper defines long-term residents as individuals who have resided in a country that is not their native country for at least one year (cf. UN definition of international migrant). Our definition does not make a distinction based on status. Time of residence alone is our definitional criterion. We use the term 'removal' to refer to both deportation and exclusion. We discuss this distinction in more detail below.

³ This gives rise to what is known as the democratic boundary problem. The democratic boundary problem or demos problem refers to the question of who should be eligible to participate in the drawing of these boundaries. Our paper does not engage with the crucial puzzle for democratic theory, which is how the group is constituted in the first place (Goodin 2007; Dahl 1989; Whelan 1983).

In recent decades, many liberal democracies have developed harsh removal policies in response to both legal and undocumented immigration. States such as the United States, Australia, Canada, and many in Europe have invested heavily in border and internal enforcement policies and changed their laws, easing deportation and exclusion, and criminalizing unauthorized entry (FRONTEX 2012; Kanstroom 2004; Council of Europe 2010). In recent years, the United States has removed from its territory almost 400,000 noncitizens annually, up from 189,026 in 2001 (U.S. Department of Homeland Security 2010). According to the Global Detention Project (globaldetentionproject.org), Germany removes about 50,000 people each year, France 26,000, Canada 12,000 and Australia 10,000.

In legal theory and practice, the removal of noncitizens from the physical territory of a state is characterized as either exclusion or deportation. The term “exclusion” is reserved for decisions to not admit aliens into the territory of a nation-state. This is a judgment that typically takes place at the border. “Deportation,” in contrast, applies to individuals who have either been admitted in error or who have violated the conditions associated with their admission or abode. In these cases, the state reserves the right to physically remove from its territory legal residents who are deemed unfit for continued residency. As of 1996, US law treats those who entered without inspection (EWI) as un-admitted aliens. When these individuals are intercepted in the interior of the country, they are legally treated as persons seeking admission, not as admitted noncitizens who have contravened the conditions of entry and abode. EWIs are thus technically subject to exclusion from admission, rather than deportation, and the law treats EWIs, even those who have been present in the country for decades, as individuals who never entered the territorial space of the United States. The U.S. government calls this “delayed exclusion” (Aleinikoff, Martin, and Motomura 2003, 552). As a result of this distinction, individuals whom public discourse calls “undocumented” may be subject to either exclusion or deportation. Those who entered legally but overstayed visas are subject to deportation because they violated their terms of entry. Those who entered without documentation (EWI) are subject to exclusion because they are inadmissible.

The legal classification of an individual’s removal from the territory of the host state does not, however, fully determine what his experience with removal will look like, including whether he will suffer any associated harm. The extent of harm is determined by the circumstances of the individual’s return to, and renewed residence in, the country of origin; not his immigration status in the host country. For instance, since the populations of countries of origin have little understanding of the range of reasons for removal, removal can be a stigma for the deportee regardless of the legal reasons that led to the person’s expulsion. In this article, we will distinguish between exclusion and deportation where needed, and we will stray from legal terminology where this is warranted. Since there is no equivalent word for a person who is excluded, we will use the common term “deportee” to refer to any person who is involuntarily removed from the territory of a host state.⁴

Much of the current debate on states’ obligations to noncitizens has focused on the “genuine connection” or “lived experience” that such individuals have built up (Shachar 2009; Carens 2005; Schuck 2010). Shachar (2009) and Schuck (2010) separately emphasize the genuine connection of such individuals to the political community, and Carens (2005) relates how their lives have ‘intertwined’ with those of others. Shachar and Schuck put more emphasis on political ties than Carens does (Carens emphasizes ties to other individuals rather than to institutions) but the unifying theme is the day-to-day, first-hand experience of noncitizens in the territory and the bonds that ensue. The everyday lived experience ties those individuals to that particular society by way of the people and institutions

⁴ For our purposes, individuals who opt for what American law calls “voluntary departure” are also included in the category of deportees. Voluntary departure is an option offered to noncitizens in the custody of the state. The state agrees to waive certain penalties in exchange for the noncitizen’s agreement to waive an appeal of the order of removal and leave the country immediately. Given the power relationship that conditions this interaction, we do not consider these departures to be truly voluntary.

encountered. Such ties may heighten the allegiance of noncitizens to the state and thus entitle them to political membership and the representation of interests -- that is, citizenship.

Rogers Smith (Smith 2010, 2011) also focuses his attention on lived experience but in a way that is divorced from territorial presence in a host country. Instead, he grounds it in the coercive authority of the state to shape individuals' identities and sense of self, arguing that individuals ought to be represented politically if they have been shaped by the state. In this view, our lived experience, which shapes the meaning of our existence, is in part the result of policies instituted not only by our home country, but by great powers as well. In what he terms a general principle of "constituted identities," Smith claims that democracies have an obligation to extend formal citizenship to noncitizens whom they have "coercively affected in specific ways" (Smith 2010, 280) and, more specifically, whose identities they have "pervasively" (Smith 2010) shaped through public policies. Smith argues that the principle of "constituted identities" requires that "every constitutional democracy is obligated to include as equal citizens all persons whose identities have been pervasively constituted, even if not wholly determined, by the democracy's coercively enforced governmental measures, should those persons wish to be citizens" (Smith 2010, 282).

Genuine connection, the intertwining of lives, and lived experience all happen over the course of several years, and Elizabeth Cohen (2011) has argued that the temporal principle is the unifying theme in recent scholarship on citizenship and migration. Elevating time itself to an overarching principle of citizenship, Elizabeth Cohen argues that *jus temporis* is the standard that "create[s] a process for naturalization" (2011, 580). According to Cohen's reading of recent literature, consent to citizenship is established by the combination of time and variables such as physical presence or education. As she puts it, "[c]onsent ... occurs over time ... as specific political events unfold" (Cohen 2011, 578).

These proposals focus on past experience in the host country – and how that experience affects the noncitizen today – and they neglect arguments about future experience. Our conceptualization offers the complementary perspective of the prospective experience of the noncitizen in the event that she is physically removed from the host state. Our goal is not to propose a new principle upon which to ground claims to citizenship but rather to provide normative justification for a ban on removals of long-term resident noncitizens. We propose a principle for guiding immigration practice that we call "jus ne cui noceatur," or "*jus noci*," which translates as "the right to not be harmed."⁵ The principle of *jus noci* demands that we look at the likely effects of removal on a noncitizen, and that we refrain from expelling an individual who is expected to suffer significant harm upon repatriation. We consider harm in its multiple forms, asking how removal would affect the deportee's ability to be free from physical and psychological harm, integrate socially and pursue a livelihood. The principle of *jus noci* draws on normative discussions of economic hardship as a justification for asylum, the ambivalent position of the U.S. Supreme Court on whether deportation constitutes punishment, and empirical research in sociology and anthropology that documents the social, economic, physical, and psychological effects of deportation.

We do not deny that the individuals who comprise a democratic community are entitled to govern themselves, and that this entails at least a partial right to draw the parameters of the polity. Instead, we assume an existing democratic community, and we recognize that this community has the privilege to regulate the entry of noncitizens, which is the problem of immigration proper. In this sense, we agree with David Miller (1995, 258), who reserves the right for communities to decide their admission policies, writing that the "general justification for immigration restrictions involves an appeal to national self-determination and in particular a people's right to shape its own cultural development".

⁵ While we believe that the principle of *jus noci* can be applied broadly, we restrict ourselves here to the difficult case of potential deportees.

A liberal democracy should not refuse to admit all would-be immigrants, but it may deny admission to certain among them on the basis of the current inhabitants' legitimate desire to preserve the state, its institutions, and its national character.

However, we do question *the extent* of the community's right to remove noncitizens who already live in their midst. It is often thought that a crucial aspect of the right to regulate entry into the community is the right to exclude, by removal if necessary, those who are present in the territory but who were never inspected at the border and who therefore do not meet the requisite conditions of residence, and to deport those who were initially admitted but who have since violated the conditions of entry and residence. We argue that this is not the case. Even defenders of restrictive immigration policies such as Miller (Miller 2007, 2008a) are moral cosmopolitans, by which we mean that they attach "equal moral worth" to individuals, and that they treat "the individual as prior to the community" (Carens 1987, 252). Since, as we will argue, removal imposes substantial harm on individuals, these philosophers should agree to avoid it as a practice. Indeed, Walzer (1983) recognizes the distinction between the entry of would-be immigrants and the removal of currently-present immigrants when he defends the right of the community to restrict admissions but views favorably the claim to naturalization by individuals once they are territorially present. In a similar vein, we argue that the liberal-democratic state's duty to avoid harming individuals within its jurisdiction casts doubt on the practice of removal.

At stake is protection against removal for long-term residents who are already territorially present. We argue that the removal of long-term resident noncitizens often causes significant harm to them, and that such harm trumps appeals by the community to self-government. Our contribution consists in 1) the extension of arguments about harm from the category of asylum seekers to long-term resident noncitizens more broadly, and 2) our contention that the harm of removal ought to be reflected in the principle by which determinations about removals are made. In the next sections, we explain what we mean by harm and why the harm of deportation is so significant that its avoidance should anchor a state's immigration practice.

II. Economic and Social Harm Associated with Removal

Understood as a 'setback to interests', harm has been defined broadly to include economic, social, physical, and psychological aspects (Feinberg 1987). So-called welfare-related interests involve that which is necessary to live a minimally satisfactory life. According to Joel Feinberg, this includes "interests in the continuance for a foreseeable interval of one's life, and the interests in one's own physical health and vigor, ... minimal intellectual acuity, emotional stability, ... the capacity to engage normally in social intercourse and to enjoy and maintain friendships, at least minimal income and financial security, a tolerable social and physical environment, and a certain amount of freedom from interference and coercion" (Feinberg 1987, 37).

Other interests involve the development of long-term goals such as pursuing a career and raising a family. The ability of an individual to pursue economic and social fulfillment in any given polity depends on the compatibility of his skills and abilities required for success in that economy and society. Many immigrant-sending countries suffer from chronic economic problems. Local economies may produce few well-paying jobs and most jobs may be in sectors that combine physical hazards, long hours, and low pay. The few well-paying jobs may be distributed in a non-meritocratic way, making it very difficult for individuals who have not been part of specific networks to compete effectively. Even the countries of origin that have flourishing economies may depend on jobs for which their long-departed citizens are ill-prepared. Skilled, white collar jobs, for instance, tend to require both language proficiency and an understanding of the structures and institutions of the state.

A long-term resident who is repatriated to her country of origin often does not have the skills, or social networks required to pursue a livelihood comparable to the one she had in the host country. In

addition, in countries where the economy is dominated by the state, or where state approval may be a condition for employment, a deportee may have an especially difficult time gaining employment. In Jamaica, for example, the state has refused to provide deportees with state identification cards which are required to secure employment, thus making it impossible for them to get jobs in the formal economy (Miller 2011). Even worse, deportees may have no recourse because reporting the discrimination can produce further harm. This is the case in Somalia, where deportees fear government reprisal if they report social or state-incited discrimination (Peutz 2006).

Physical removal from a host country may thus lead to substantial economic disadvantage in several ways. First, the individual may not be able to perform a job for which he is trained and for which he has the skills. Second, he may lack the skills that could make him competitive in the local economy. Third, he may lack the social connections necessary to secure employment in countries where jobs are not provided in a meritocratic way. Fourth, the individual may face substantial access problems in countries where employment is state-controlled. And finally, social prejudice directed at deportees may lead to discrimination and economic deprivation.

As Cohen (2011) argues, time plays an essential role when determining the obligations of the host country to the noncitizen. Time is important *both* in assessing ties to the new land and in determining the probable harm of removal. Time of residence in the host country *in combination* with the level of exposure to the host country's culture, institutions and economy are of great importance in understanding the likely effects of removal on an individual. A person who has spent his formative years in a host country, achieved fluency in the host country's language, and developed skills and abilities suited to the host economy may not be able to successfully adapt to the home country. An individual who has been educated in the United States, speaks English as her first language, and is trained to perform white collar tasks, may be unable to effectively compete in the labor market in an agricultural or resource extraction-based economy, where experience with manual labor is required for survival. Similarly, a person who has transformed her set of skills and dexterities to meet the demands of her new setting, may have a difficult time adapting to the home country setting and as a result face economic and social harm after removal. In general, integration into the host country's economy and society can serve as an indicator of how difficult it will be for a noncitizen to adapt to the norms, skills and expectations of the home economy and society.

In addition to economic hardship, deportees may also suffer from social hardship that is unrelated to their economic reintegration. First of all, a large number of deportees leave behind family members and all leave behind friends. In the first half of 2010, the U.S. deported more than 46,000 parents of U.S.-born children, many of whom remain in the United States with other relatives (Wessler 2011a). Data from the U.S. indicate that there are more than 5,000 children in foster care because their parents have been detained or deported (Wessler 2011a). Separation from family members of this type can constitute a substantial social hardship that could qualify noncitizens for membership under our principle. Similarly, thousands of American-born children with few cultural, linguistic and social experience of their parents' home country are forced to leave the United States along with their removed parents and are deprived of an American upbringing. According to recent estimates, more than 45,000 families faced this dilemma in the first half of 2012 alone (O'Neill 2012)

Even if those removed are able to find employment at the level at which they were accustomed in their former, long-term country of residence, they may suffer greatly from a lack of social acumen and savoir-faire not to mention from social discrimination. Social norms are acquired before adulthood (Portes and Rumbaut 2001; Portes 1995) and, given the lack of explicit signaling, the individual who grew up in the host country may struggle to grasp the norms that govern social interactions in the country of origin. Many deportees will lack a sophisticated command of the language, and many more will be accustomed only to host country habits and values. The exposure to the ways and institutions of the host country can be visible on the bodies of deportees, making them different from others in the

country of origin. Difference in accents, in dress and even in movement can betray the deportees' foreign influence, making them permanently suspect and ineligible for social and economic inclusion. According to Peutz (2006, 223), "deported bodies are suspected of carrying with them the pollution contracted abroad while also remaining anomalies at home, their forced return subverting the fetishized immigrant success story." Carens (2009) recognizes that removal can be hard on a person whose psychosocial makeup has been altered by the host society when he laments the "moral absurdity" of removing individuals who "arrived at a young age and stayed for long." Although he does not mention the harms of removal as a guideline, the way we see it, his contention that the extent of genuine connection, tracked in large part by time, should inform state policy on removals, dovetails nicely with our principle.

A democracy is obligated to protect from removal long-term residents who can demonstrate that their expulsion will result in substantial social and economic harm. This harm does not have to rise to the levels required to substantiate persecution in asylum claims, nor to the "extreme and unusual harm" required by extant U.S. law, but it has to be significant enough to have a substantial impact on the social and material well-being of the individual and his family. Cases such as the exclusion of a U.S.-raised undocumented immigrant or the deportation of a permanent resident whose minor crime has risen to the level of "felony for immigration purposes" under the 1996 rules, would not rise to the standards required by asylum law. However, such individuals would qualify for protection against removal under a standard of *jus nocui*.

III. Physical and Psychological Harm Associated with Removal

Removal is not simply return migration, even if, as we will discuss later, some legal scholars and jurists have viewed it as such. Because of the widespread misperceptions about deportees in home countries, removal is a source of social stigma that may lead to serious physical and psychological harm. Misjudgments about deportees' moral character and deservedness may result from a misunderstanding of the normative valence of removal, which stems from the involuntary nature of the individual's return. In turn, this erodes social trust toward deportees, which leads to social exclusion if not to physical confinement. The effects of removal are both personal and social and they can migrate along with the deportee to the country of origin. Journalistic accounts and academic studies have documented the hardship of removal, the suffering experienced by families who remain behind, and the hardship that the deportees themselves face upon their return (Peutz 2006; Hagan, Eschbach, and Rodriguez 2008; Golash-Boza 2012; Hiemstra 2012; Dingeman and Rumbaut 2009; Kanstroom 2012).⁶

The perception that removal is punishment for criminal or inappropriate behavior is widespread in home countries. A forcible return is often viewed with suspicion and the individual is the target of formal or informal discrimination and restrictions. Deportees have expressed feelings of social and linguistic isolation, fear of exposure to physical harm, and suicidal tendencies (McFadden 2011). The most glaring example of post-removal hardship is the experience of Haitian deportees. The Haitian government operates on the presumption that deportees are criminals who require further detention (Kushner 2011; Wessler 2011b). Even though three out of four deportees have no U.S. criminal record, the Haitian government incarcerates them for days. Since these individuals have not been charged with any crime in Haiti, these practices are in violation of both Haitian law and international treaties (Organization of American States 2011). In addition, Haitian prisons do not have the infrastructure or the resources to provide health services to deportees. Because these prisons are unsanitary, deportees are exposed to contagious and lethal diseases such as cholera.

⁶ Equally disturbing and normatively more complex are the numerous cases of erroneous deportation of U.S. citizens (Kanstroom 2012).

This experience is not unique to Haiti. Ethnographic research conducted in such disparate locales as Jamaica, Central America, Ecuador and Somalia underscores the transformative effects of removal (Miller 2011; Peutz 2006; Hiemstra 2012). In the Caribbean, the media have emphasized the link between removal and criminality and accused deportees of gang activity, leading to discrimination against deportees (Jameson 2012; Felson 1996). Many Jamaicans believe that deportees are criminals who “have developed a separate, inferior culture;” an attitude that encourages vigilante groups to hunt them down (Miller 2011, 143).

IV. Harm Avoidance in Political Theory and Law

Immigration law in general and American immigration law more specifically recognizes certain forms of harm as a justification for cancelation of removal. Relief from expulsion may apply to cases of either deportation or exclusion. The law attempts to balance the interests of the polity against the humanitarian concerns associated with removal of the noncitizen, especially when removal leads to extreme hardship. Immigration statutes from the early 20th century required noncitizens to show “serious economic detriment” in order to qualify for a stay of deportation or exclusion. In 1952, this was elevated to “extreme hardship” to the individual or the U.S.-based family. In 1996, the consideration of individual hardship was dropped and the statute raised the bar higher by demanding “extreme and unusual hardship” to the noncitizen’s U.S.-born or permanent resident family (Aleinikoff, Martin, and Motomura 2003). Whereas both the statutes and case law have focused their attention to issues arising from “lived experience” and “genuine connection,” we argue instead that the harm that can occur as a result of repatriation must also be taken into account in this judgment as it was the case prior to 1996.

Our perspective is further supported by scholarship in refugee and asylum law. Such scholars have long argued that in addition to physical harm, which constitutes the normative bedrock of the principle of asylum, “economic and social hardship” should be considered among the possible justifications for extending asylum to noncitizens (Foster 2007; Hathaway 1990). As early as the 1980s, the refugee flows resulting from wars sensitized scholars to the economic hardship faced by the world’s poor, leading Zolberg, et.al. (1989) to advocate for the inclusion of economic refugees on humanitarian grounds.

Violations of economic rights and social or economic deprivation have also been introduced in case law and legal scholarship on asylum and refugees in several common law countries (Jastram, Mactavish, and Mathew 2008). Goodwin-Gill and McAdam (2007) have argued that even lesser forms of disadvantage such as employment restrictions, restricted access to education or a professional career could rise to the level of persecution. Australian law codifies economic harm as a basis for asylum specifying that discrimination in employment or education may suffice as evidence of persecution. Denial of access to social services and healthcare or single motherhood in a country that shuns children out-of-wedlock can also be used to substantiate claims to asylum (Jastram, Mactavish, and Mathew 2008, 6). Cases in Canada⁷ and in the United States⁸ have explored similar questions about the conditions under which economic deprivation rises to the level required by the persecution standard. In both countries, substantial restrictions on a person’s right to earn a livelihood can be used as the basis of an asylum claim. In the United States, *Vincent Elias v. Mukasey*⁹ and *Capric v. Ashcroft*¹⁰ have discussed extreme economic hardship as a “form of persecution and independent grounds for asylum.”

⁷ He v. Minister of Employment and Immigration (1994) F.C.J., No. 1243; Lin v. Canada (Minister of Employment and Immigration) (1993) F. C.J. No. 809; Soto v. Canada (Minister of Citizenship and Immigration) (2002) F.C.J. No. 1033.

⁸ *Capric v. Ashcroft* (7th Cir. 2004); *Vincent Elias v. Mukasey* (10th Cir. 2008). Also see: *Kovac v. INS*, 407, 2nd 102 (9th Cir., 1969); *Guan Shan Liao v. USDOJ*, 293 F.3rd 61 (2nd Cir., 2002); *In re T-Z-*, 24 I.&N. Dec. 163 (BIA 2007).

⁹ *Vincent Elias v. Mukasey*, 10th Cir. (2008)

¹⁰ *Capric v. Ashcroft*, 7th Cir. (2004)

We argue that the same line of reasoning should be applied to cases of deportation and exclusion that do not involve asylees but rather long-term residents with other immigration status.

In addition, there is normative space for our argument even in the tradition of political thought that views restrictions on political membership most favorably. Although some cosmopolitan thinkers argue that all admission decisions are coercive unless they are subject to democratic control by would-be immigrants (Abizadeh 2008), many theorists have instead made a distinction between the permissible (within limits) exclusion of individuals who have not yet been admitted, and the heavily constrained conditions for the removal of individuals who are already present in the territory. In his reply to Abizadeh, Miller (2010) concedes that the manner of exclusion often leaves much to be desired, while denying that it is coercive to regulate – and restrict – who may enter a specific territory. According to Miller (2007, 228), the “general justification for immigration restrictions [at the border] involves an appeal to national self-determination and in particular a people’s right to shape its own cultural development.”

The same argument does not extend, however, to the removal of those who are already present, regardless of their status. The removal of legal and undocumented immigrants who are long-term residents is often problematic. Like Walzer (1983), Miller considers legal immigrants members of the host society, and he argues that fairness compels us to consider their interests, rights and obligations in conjunction with those of the host community. After all, “immigration typically confers benefits and imposes costs on both parties—the immigrant group and the host society” (Miller, 2008, 372). In liberal democracies, individual rights limit the power of the state – such as by proscribing cruel and unusual punishment that inflicts unacceptable suffering (cf. US Bill of Rights) – and guarantee the individual’s freedom to pursue his own goals as long as he does not harm others. Liberalism thus envisions a role for the state in harm prevention and avoidance (Miller 2002). While liberal democracies “have some leeway in deciding on the conditions that must be fulfilled before the full rights of citizenship are granted, they are compelled by their own principles to leave the path to citizenship open” (Miller 2008, 378).

While Miller is keen to treat legal and undocumented immigrants differently, he agrees that even the latter must be accorded various rights “as a matter of justice,” since “a just legal regime for irregular immigrants must incorporate protections for their human rights, including procedural protections” (Miller 2008b, 195). Even when he argues for punitive measures against noncitizens who undermine the state’s objectives, he demands that we ‘fairly’ consider both the interests of undocumented migrants and “the wider questions of social justice and democratic legitimacy that their position raises” (Miller 2008b, 197). As we have shown above, the removal of undocumented migrants from the territory often entails such harm to their interests that Miller’s fair approach should compel even him to raise doubts about physical removal as a routine immigration practice.

V. Counterargument: Is the Harm of Removal Justified?

At this stage, a proponent of removal may argue that exclusion or deportation, while harmful to the individuals involved, is a justified component of an immigration regime. After all, not all harms are normatively problematic. Criminal punishment involves an imposition of harm, but we have reasons for justifying it. Sometimes, the harm of criminal punishment will be justified by reference to a harm that the individual who is being punished has caused to others. A harm is most obviously *wrong*, then, when it violates rights. The advocate of removal may claim that the practice serves in part as a legitimate punishment for violating state law, and that any inflicted harm that results from illicit behavior is not normatively problematic.

In order to determine whether removal can be considered a just punishment for law-breaking behavior, we first need to ask whether removal is punishment at all; that is, whether its purpose is to reform the individual or provide restitution to society, and, if so, whether it is appropriate for the crime

in question. Consistent with a normative theory of national sovereignty over aliens, the reigning Supreme Court doctrine interprets removal not as a form of punishment but rather as a tool of remediation and a matter of administrative law (Banks 2009; Kanstroom 2007b). This is certainly the case for EWI, where the state does not recognize the long-standing physical presence of the individual, designating these removals as exclusions rather than deportations. Sovereignty over a national territory implies that the state has exclusive authority to determine the conditions under which noncitizens are allowed to enter and remain therein. Thus, removal is a procedure that allows a state to rectify incongruities between the actual and the desired alien resident population, but the process itself is not meant to have normative content.¹¹ In other words, removal is not a tool of criminal justice meant to secure justice for a society that has been harmed by the individual's actions. Even when removal is applied to legally immigrants who are found in violation of some law, the state does not consider expulsion as punishment, but rather as a nullification of a contract because the immigrant violated the conditions of entry (Motomura 2006; Kanstroom 2007a, 2012). In this view, non-citizens are "eternal guests until they naturalize. They are thus not being punished; they are simply being regulated" (Kanstroom 2007a, 208). In this view, removal either does not involve any harm, or the harm is incidental; not intentional or normatively important. As Justice Scalia has noted, "[e]ven when deportation is sought because of some act the alien has committed, in principle the alien is not being punished for that act... but is merely being held to the terms under which he was admitted."¹²

In a series of late 19th century decisions, the Supreme Court distinguished removal from punishment and especially from banishment, a common form of criminal punishment in earlier times. In *Fong Yue Ting v. United States*,¹³ the Court explained that deportation is "in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment [of state sovereignty]... a method of enforcing the return to his own country of an alien who has not complied with the conditions [of legal residency]." The Court went on to explain that the criminal protections of the constitution "have no application" in removal cases. In *Wong Wing v. United States*,¹⁴ the Court further clarified that "the order of deportation is not a punishment for crime. It is not 'banishment' in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions [of admission]." This jurisprudential tradition makes it difficult to sustain the argument that deportation constitutes punishment.

Even if we were to accept removal of long-term resident noncitizens as punishment that may have some just purpose, we would then have to ask whether this punishment is proportionate to the offense, and whether the benefits to citizens exceed the harm. At this juncture, we must distinguish between long-term residents whose only offense is undocumented entry and residence in the host country or a visa overstay, and long-term legal residents who have committed criminal offenses. In the former case, neither the law as a practical matter nor political theory is settled on its nature as a distinctly criminal offense.¹⁵ Responses to undocumented immigration by intellectuals and others in the public sphere range from concern with the individuals' decision to violate immigration law (e.g., Brimelow 1996) to concern with the state's prerogative to police borders (cf., Cole 2000; Nyers 2003; Pritchett 2006). Suggested political solutions similarly range from removal to amnesty, both of which democracies have practiced and continue to practice.

¹¹ See: *Chae Chang Ping v. United States* (130 U.S. 581 (1889)) (the Chinese Exclusion Case); *Fong Yue Ting v. United States* (149 U.S. 698 (1893)); *Wong Wing v. United States* (163 U.S. 228 (1896))

¹² *Reno v. AADC*, 525 U.S. at 491 (1999).

¹³ *Fong Yue Ting v. United States* 149 U.S. 698 (1893)

¹⁴ *Wong Wing v. United States* 163 U.S. 228 (1896)

¹⁵ U.S. immigration law designates multiple EWI offenses as a criminal act, but a single EWI, not.

By contrast, those noncitizens who commit more serious crimes are subject to criminal law. Deportation takes place *after* the individual has served a prison sentence, not *in lieu* of confinement. As such, deportation operates as a post-entry social control measure that is applied outside of the criminal justice system and without the approval of a jury (Kanstroom 2007a, 2007b). The noncitizen is thus subjected to sanctions that are *over and above* what a citizen faces, only because of her noncitizen status. The normative justification for this disparate treatment is difficult to sustain especially in the United States, whose founding documents decry the practice of banishment and the “transportation” of criminals away from their place of residence.

Despite the U.S. Supreme Court’s precedent-setting decisions, there is an alternative legal and theoretical tradition in the country that has viewed physical removal of citizens and noncitizens alike as a particularly severe form of punishment. In the debates over the Alien and Sedition Acts, Madison argued that removing a person from the U.S. as required by the proposed legislation must be construed as severe punishment. “If a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied,” he noted (4 Elliott’s Debates, p. 455, as mentioned in *United States v. JuToy*). Justice Brewer recognized banishment of citizens as a terrible fate, “a punishment of the severest kind... The forcible removal of a citizen from his country is spoken of as banishment, exile, deportation, relegation, or transportation; but, by whatever name called, it is always considered a punishment. In Black’s Law Dictionary ‘banishment’ is defined as ‘a punishment inflicted upon criminals, by compelling them to quit a city, place, or country, for a specific period of time, or for life. It is inflicted principally upon political offenders, ‘transportation’ being the word used to express a similar punishment of ordinary criminals.”

Justice Brandeis has acknowledged that, much like banishment, deportation can be a deprivation of liberty and that “it may result also in loss of both property and life, or of all that makes life worth living.”¹⁶ In *Mahler v. Eby*,¹⁷ the Court recognized that deportation “may be burdensome and severe for the alien,” and in *Galvan v. Press*¹⁸ conceded that deportation is “close to punishment” because of its intrinsic consequences. Subsequent decisions have implicitly or explicitly recognized the severity or harshness of deportation by characterizing it as “a penalty... a drastic measure and at times equivalent of banishment and exile,” and a “drastic sanction, one which can destroy lives and disrupt families.”¹⁹ In *Padilla v. Kentucky*,²⁰ the Court recognized that deportation is “intimately related to the criminal process” and “an integral part—indeed, sometimes the most important part, of the penalty [imposed on convicted aliens].”

The proportionality argument runs afoul of the realities of deportation practice. Deportation, at least in the American context, is practically irrevocable, which makes it inconsistent with widely held principles of justice that require the availability of recourse and redress. The Supreme Court has recognized that the state does not compensate those who may have been unjustly punished. In *Nken v. Holder*, the Court recognized, in a majority opinion written by Justice Roberts, that a stay of deportation should be granted if the petitioner shows that removal will cause “irreparable harm.” However, it concluded erroneously that removal while an appeal is pending cannot cause such level of harm because deportees have legal recourse from their home country and “those who prevail can be afforded effective relief by facilitation of their return [to the U.S.], along with restoration of the immigration

¹⁶ *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). Also see: *Bridges v. Wixon* (326 U.S. 135, 147 (1945)); *Chin Yow v. United States*, [208 U.S. 8](#), 13 (1908); *Galvan v. Press*, 347 U.S. 522 (1954)

¹⁷ *Mahler v. Eby*, 264 U.S. 32 (1924)

¹⁸ *Galvan v. Press*, 347 U.S. 522 (1954)

¹⁹ *Fong Haw Tan v. Phelan* (333 U.S. 6 (1948)), also quoted in *Jordan v. De George* (341 U.S. 223 (1951)); *Guestelum-Quinnones v. Kennedy* 374 U.S. 469, 479 (1963)

²⁰ *Padilla v. Kentucky*, 130 S.Ct. 1473 (March 31, 2010)

status they had upon removal.”²¹ The U.S. Department of Justice subsequently admitted that the government had no policies in place to facilitate the appeal of deportation from abroad, making return to the U.S. effectively impossible (Bravin 2012). In its letter to the Supreme Court, the U.S. government acknowledged that there are “questions about the promptness and consistency with which return has actually been accomplished,” noting that even in the few cases of successful return, non-citizens “encountered significant impediments in returning... [which] stemmed from the absence of a written, standardized process for facilitating return... and the lack of clear or publicly accessible information for removed aliens to use in seeking to return if they received favorable judicial rulings” (U.S. Department of Justice 2012).

The proportionality question is especially relevant when considering the case of undocumented entry which is considered an administrative infraction not a crime. Given that social science and economic analysis suggests that all forms of immigration produce more social benefits than costs (Ganz 2008; Immigration Policy Center 2011) it is difficult to understand why a minor offence deserves the punishment of removal. While it is important for citizens to have some control over their own political community (Miller 2005, 2007, 2008a) and a legal response of some kind may be necessary to disincentivize further undocumented immigration, the expulsion of long-term residents from the state altogether is not proportionate to the character and severity of the infraction. An alternative approach could instead give the long-term resident the opportunity to avoid removal by paying a fine or making a non-monetary contribution to the community.

In addition to our concern with proportionality, we also worry that any blanket justification of deportation as a response to crime risks lumping together categories of individuals who are not equally culpable. In particular, the association of unauthorized presence with crime may wrongly target individuals who are present in the territory through no fault of their own. The category of undocumented minors is the prime example, but ‘grey’ cases may include individuals such as farm workers who arrive in response to offers of employment by companies in the host state. We do not have space to develop this line of thought here, but it may be possible to argue that no individual who engages in undocumented entry and residence can be considered culpable when strong economic incentives in combination with decades of ineffective and inconsistent enforcement of immigration law have led him to believe that he is needed, if not welcome. The imposition of harm through deportation cannot be justified if the potential deportees lack culpability.

The proponent of removal may concede that physical expulsion is harmful but may argue that it is a necessary evil, and that it is justified because it is simply unavoidable. In spirit, this is the position of Justice Scalia and the Roberts Court when they view removal as a means to correct an administrative error. Removal is regrettable but necessary to enforce immigration law and ensure that admissions are correct. However, to say that expulsion is ‘unfortunate but unavoidable’ begs the question. It is not clear why one issue – self-determination and the right to control membership – should trump another – that is, harm, or why the harm to deportees should be an appropriate price to pay for the privilege of the population to determine the conditions of group membership *beyond* the regulation, within bounds, of admission. An argument is needed for why self-determination should be of greater importance than the protection of the welfare interests of immigrants. It falls to our critics to explain why a subset of interests of certain individuals should outweigh the more basic interests of others.

The “necessary evil” argument would be stronger if removal were successful in deterring undocumented entry or post-admission criminality and thus effectively promoted the goals of citizens. However, there is scarce evidence that deportation is an effective deterrent. Since 1996, the United States has introduced more stringent deportation laws, practically eliminated judicial discretion and expanded the list of offenses that qualify for post-conviction deportation (Kanstroom 2007b). Similar

²¹ *Nken v. Holder*, 08-1813, 556 U.S. 435 (2009)

patterns obtain in other western countries (FRONTEX 2012; Kanstroom 2004). However, evaluations of the effectiveness of these policies indicate that there is a substantial gap between expectations and performance (Carling 2007; Triandafyllidou 2010; Roberts et al. 2011; Congressional Research Service 2012; U.S. Government Accountability Office 2009). For the most part, the move to stricter deportation laws has coincided with an *increase*, not a decline, in undocumented entry. According to official estimates, Europe is home to as many as 3.8 million unauthorized migrants (European Commission 2009) while the United States hosts as many as 11 million such migrants (Passel and Taylor 2010). In 1990, there were about 3 million undocumented immigrants in the United States and a very small number in Europe. Deportation thus does not seem to be a ‘necessary evil’ in the service of a greater good.

Conclusion

In this essay, we have argued that the harm that usually accompanies the removal of long term resident noncitizens from their state of residence runs contrary to liberal democracies’ commitment to avoid harm, and that physical removal should therefore not be a routine part of a liberal democracy’s immigration practice. We explored the role of harm in legal arguments about asylum and refugee status, and argued that removal often involves significant social, economic, physical, and psychological harm. We proposed *jus noci* or the ‘right to not be harmed’ as a principle to guide immigration practice. We also considered and rejected the counterargument that the harm of removal is justified because it is an appropriate punishment for violating state law or because it simply cannot be avoided and is a ‘necessary evil’. We explained that removal is not always intended as a punitive measure, but that, even when it is, it is not justified, because it is disproportionate to the offense.

Our proposal has important implications for immigration practice. Following the principle of *jus noci*, the strength of a potential returnee’s claim to citizenship can be determined by reference to the harm that would result upon removal. An individual who would be incur significant social, economic, physical or psychological harm if they were removed has a stronger claim to citizenship through the principle of *jus noci* than an individual who, for instance, speaks the native language and is prepared for the labor market of the home country.

Future research should consider whether a stay of removal ought to be accompanied by the granting of citizenship. A move in the recent literature decouples claims of residence and claims of citizenship (2009; Pevnick 2011), arguing that we can decry removal and yet deny such individuals citizenship. Some immigrants would be granted residence indefinitely and be protected against removal, but they would not receive citizenship status. It remains to be seen whether this is a satisfactory alternative to full citizenship. A status that falls short of citizenship may not be a sufficiently reliable guarantor for harm avoidance, since noncitizens cannot ensure that the government will continue to protect their interests. In times of political upheaval, even previously reliable democracies have been known to become hazardous for residents. It may not be possible to rely on measures of representation that fall short of the conferral of citizenship.

References

- Abizadeh, Arash. 2008. "Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders." *Political Theory* no. 36:37-65.
- Aleinikoff, Thomas A., David A. Martin, and Hiroshi Motomura. 2003. *Immigration and Citizenship: Process and Policy*. St. Paul, MN: Thomson-West Publishers.
- Banks, Angela M. 2009. "Proportional Deportation." *The Wayne Law Review* no. 55:1651-1682.
- Bravin, Jess. 2012. "Deportation Practices Shift." *The Wall Street Journal* no. (April 24, 2012) <http://online.wsj.com/article/SB10001424052702303978104577364371988403372.html>.
- Brimelow, Peter. 1996. *Alien Nation: Common Sense About America's Immigration Disaster*. New York: Harper Perennial.
- Carens, Joseph H. 1987. "Aliens and Citizens: The Case for Open Borders." *Review of Politics* no. 49 (2):251-73.
- . 2005. "On Belonging: What We Owe People Who Stay." *Boston Review* no. 30 (Summer 2005) (<http://bostonreview.net/BR30.3/carens.php> (Last accessed March 1, 2012)).
- . 2009. "The Case for Amnesty: Time Erodes the State's Right to Deport." *Boston Review* no. <http://bostonreview.net/BR34.3/carens.php> (Last accessed March 1, 2012).
- Carling, Jorgen. 2007. "The Merits and Limitations of Spain's High-Tech Border Control." *Migration Information Source* no. (June 2007) <http://www.migrationinformation.org/Feature/display.cfm?ID=605>.
- Cohen, Elizabeth F. 2011. "Reconsidering US Immigration Reform: The Temporal Principle of Citizenship." *Perspectives on Politics* no. 9 (3):575-583.
- Cole, P. 2000. *Philosophies of Exclusion: Liberal Political Theory and Immigration*. Edinburgh, UK: Edinburgh University Press.
- Congressional Research Service. 2012. *Border Security: Immigration Enforcement Between Ports of Entry*. Washington, DC: Government Printing Office (<http://fpc.state.gov/documents/organization/180681.pdf>).
- Council of Europe. 2010. *Criminalization of Migration in Europe: Human Rights Implications*. Strasbourg, FR: Council of Europe, Commissioner for Human Rights (<https://wcd.coe.int/ViewDoc.jsp?id=1579605>).
- Dahl, Robert. 1989. *Democracy and Its Critics*. New Haven, CT: Yale University Press.
- Dingeman, M. Kathleen, and Ruben G. Rumbaut. 2009. "The Immigration-Crime Nexus and Post-Deportation Experiences: En/Countering Stereotypes in Southern California and El Salvador." *University of LaVerne Law Review* no. 31:363-402.
- European Commission. 2009. "Size and Development of Irregular Migration to the EU " *CLADESTINO Research Project* no. (October 2009) [http://irregular-migration.net/typo3_upload/groups/31/4.Background Information/4.2.Policy Briefs EN/ComparativePolicyBrief SizeOfIrregularMigration Clandestino Nov09 2.pdf](http://irregular-migration.net/typo3_upload/groups/31/4.Background%20Information/4.2.Policy%20Briefs%20EN/ComparativePolicyBrief%20SizeOfIrregularMigration%20Clandestino%20Nov09%202.pdf).
- Feinberg, Joe. 1987. *The Moral Limits of the Criminal Law, Volume 1: Harm to Others*. New York: Oxford University Press.
- Felson, R. 1996. "Mass Media Effects on Violent Behavior." *Annual Review of Sociology* no. 22:103-28.
- Foster, Michael. 2007. *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*. Cambridge, UK: Cambridge University Press.
- FRONTEX. 2012. *Annual Risk Analysis 2012*. Warsaw, Poland: European Agency for the Management of Operational Cooperation at the External Borders of the States of the European Union ([http://www.frontex.europa.eu/assets/Attachment Featured/Annual Risk Analysis 2012.pdf](http://www.frontex.europa.eu/assets/Attachment%20Featured/Annual%20Risk%20Analysis%202012.pdf)).

- Ganz, Judith. 2008. *Immigrants in Arizona: Fiscal and Economic Impacts*. Phoenix, AZ: University of Arizona, Udall for Studies in Public Policy (<http://udallcenter.arizona.edu/immigration/publications/impactofimmigrants08.pdf>).
- Golash-Boza, Tanya. 2012. *Due Process Denied: Detentions and Deportations in the United States*. New York: Routledge.
- Goodin, Robert. 2007. "Enfranchising All Affected Interests, and its Alternatives." *Philosophy and Public Affairs* no. 35 (1):40-68.
- Goodwin-Gill, G., and J. McAdam. 2007. *The Refugee in International Law*. Oxford, UK: Oxford University Press.
- Hagan, Jacqueline, Karl Eschbach, and Nestor Rodriguez. 2008. "U.S. Deportation Policy, Family Separation, and Circular Migration." *International Migration Review* no. 42 (1):64-88.
- Hathaway, James C. 1990. "A Reconsideration of the Underlying Premise of Refugee Law." *Harvard International Law Journal*:129-169.
- Hiemstra, Nancy. 2012. "Geopolitical Reverberations of US Migrant Detention and Deportation: The View from Ecuador." *Geopolitics* no. 17 (2):293-311. doi: 10.1080/14650045.2011.562942.
- Immigration Policy Center. 2011. The Racial Blame Game. <http://www.immigrationpolicy.org/just-facts/racial-blame-game>.
- Jameson, Leopold. 2012. *Migration et reintegration sociale*, Social Work, University of Haiti, unpublished.
- Jastram, Kate, Anne Mactavish, and Penelope Mathew. 2008. "Violations of Socio-economic Rights as a Form of Persecution and as an Element of Internal Protection." *International Association of Refugee Law Judges Human Rights Nexus Working Party Paper* no. http://www.iarlj.org/general/images/stories/wp_papers_cape_town/report_of_the_working_party.pdf (Last accessed February 21, 2012).
- Kanstroom, Daniel. 2004. "Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law"." *North Carolina Journal of International Law and Commerce Regulation* no. 29:630-661.
- . 2007a. "Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?" *Stanford Journal of Civil Rights and Civil Liberties* no. 3 (2):195-231.
- . 2007b. *Deportation Nation: Outsiders in American History*. Cambridge, MA: Harvard University Press.
- . 2012. *Aftermath Deportation Law and the New American Diaspora*. Oxford, UK: Oxford University Press.
- Kushner, Jacob. 2011. "Wilbeie Vereus: U.S. Resident Deported to Haiti, Reveals Brutal Conditions and Severe Health Risks in Jail." *The Huffington Post* no. (November 14, 2011) (http://www.huffingtonpost.com/2011/11/14/us-deportees-to-haiti-jai_n_1092819.html (Last accessed, May 31, 2012)).
- McFadden, David. 2011. "Deportees Struggle to Readjust in Haiti." *The Washington Times* no. (March 7, 2011) <http://www.washingtontimes.com/news/2011/mar/7/deportees-struggle-to-readjust-in-haiti/> (Last accessed June 3, 2012).
- Mill, John Stuart. 2002. *On Liberty*. Toronto, CA: Dover Publications.
- Miller, David. 1995. *On Nationality*. Oxford, UK: Oxford University Press.
- . 2005. "Immigration: The Case for Limits." In *Contemporary Debates in Applied Ethics*, edited by A. Cohen and C. Wellman. Oxford, UK: Blackwell.
- . 2007. *National Responsibility and Global Justice*. Oxford, UK: Oxford University Press.
- . 2008a. "Immigrants, Nations and Citizenship." *The Journal of Political Philosophy* no. 16 (4):371-390.

- . 2008b. "Irregular Migrants: An Alternative Perspective." *Ethnic and International Affairs* no. 22 (2):193-197.
- . 2010. "Why Immigration Controls Are Not Coercive: A Reply to Arash Abizadeh." *Political Theory* no. 38 (1):111-120.
- Miller, O. Alexander. 2011. "Deportation as a Process of Irreversible Transformation." *Journal of Ethnic and Migration Studies* no. 38 (1):131-146. doi: 10.1080/1369183x.2012.640024.
- Motomura, Hiroshi. 2006. *Americans in Waiting: The Lost History of Immigration and Citizenship in the United States*. New York: Oxford University Press.
- Nyers, P. 2003. "Abject Cosmopolitanism: the politics of protection in the anti-deportation movement." *Third World Quarterly* no. 24 (6):1069-1093.
- O'Neill, Helen. 2012. "U.S.-Born Kids Of Deported Parents Struggle As Family Life Is 'Destroyed' " *The Huffington Post* no. (August 25, 2012) http://www.huffingtonpost.com/2012/08/25/us-born-kids-deported-parents_n_1830496.html (Last accessed January 27, 2013).
- Organization of American States. 2011. IACHR Urges United States to Suspend Deportations to Haiti. (February 4, 2011) http://www.oas.org/en/iachr/media_center/PReleases/2011/006.asp (May 31, 2011).
- Passel, Jeffrey S., and Paul Taylor. 2010. *Unauthorized Immigrants and Their U.S.-Born Children*. Washington, DC: Pew Hispanic Center.
- Peutz, Nathalie. 2006. "Embarking on an Anthropology of Removal." *Current Anthropology* no. 47 (2):217-241.
- Pevnick, R. 2011. *Immigration and the Constraints of Justice: Between Open Borders and Absolute Sovereignty*. Cambridge, UK: Cambridge University Press.
- Pevnick, Ryan. 2009. "Social Trust and the Ethics of Immigration Policy." *Journal of Political Philosophy* no. 17 (2):146-67.
- Portes, Alejandro. 1995. "Segmented Assimilation Among New Immigrant Youth." In *California's Immigrant Children: Theory, Research and Implications for Educational Policy*, edited by Ruben Rumbaut and Wayne Cornelius. San Diego, CA: Center for U.S.-Mexican Studies, University of San Diego.
- Portes, Alejandro, and Ruben Rumbaut. 2001. *Legacies: The Story of the Immigrant Second Generation*. Berkeley, CA: University of California Press.
- Pritchett, L. 2006. *Let Their People Come: Breaking the Gridlock on Global Labor Mobility*. Washington, DC: Center for Global Development.
- Roberts, Bryan, Gordon Hanson, Derekh Cornwell, and Scott Borger. 2011. *An Analysis of Migrant Smuggling Costs Along the Southwest Border*. Washington DC: Office of Immigration Statistics, Department of Homeland Security (<http://www.dhs.gov/xlibrary/assets/statistics/publications/ois-smuggling-wp.pdf>, last accessed December 10, 2011).
- Schuck, Peter. 2010. "Birthright of a Nation." *The New York Times* no. August 13:A19 (<http://www.nytimes.com/2010/08/14/opinion/14schuck.html?pagewanted=print>, Last accessed January 3, 2012).
- Shachar, Ayelet. 2009. *The Birthright Lottery: Citizenship and Global Inequality*. Cambridge, MA: Harvard University Press.
- Smith, Rogers M. 2010. "Constitutional Democracies, Coercion, and Obligations to Include." In *The Limits of Constitutional Democracy*, edited by Jeffrey K. Tulis and Stephen Macedo. Princeton, NJ: Princeton University Press.
- . 2011. "Living in a Promiseland?: Mexican Immigration and American Obligations." *Perspectives on Politics* no. 9 (3):545-557.

- Triandafyllidou, Anna. 2010. *Irregular Migration in Europe: Myths and Realities*. London, UK: Ashgate Publishing.
- U.S. Department of Homeland Security, Office of Immigration Statistics. 2010. Immigration Enforcement Actions 2010. <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf> (Last accessed, March 8, 2012).
- U.S. Department of Justice. 2012. Re: Jean Marc Nken v. Holder, S.Ct. No. 08-681. In (*U.S. Department of Justice letter to the Supreme Court*) edited by U.S. Department of Justice. Washington, DC.
- U.S. Government Accountability Office. 2009. Border Patrol: Checkpoints Contribute to Border Patrol's Mission, but More Consistent Data Collection and Performance Measurement Could Improve Effectiveness. Washington, DC: GAO-09-824.
- Walzer, Michael. 1983. *Spheres of Justice: A Defense of Pluralism and Equality*. New York, NY: Basic Books.
- Wessler, Seth Freed. 2011a. "U.S. Deports 46k Parents with Kids in Just Six Months." *Colorlines.com* no. http://colorlines.com/archives/2011/11/shocking_data_on_parents_deported_with_citizen_children.html (Last accessed, March 10, 2012).
- . 2011b. "U.S. Set to Resume Deportations to Haiti." *Colorlines.com* no. (January 14, 2011) http://colorlines.com/archives/2011/01/just_one_year_after_a.html (Last accessed May 31, 2012).
- Whelan, Frederick G. 1983. "Democratic Theory and the Boundary Problem." In *Nomos XXV: Liberal Democracy*, edited by J.R. Pennock and J.W. Chapman, 13-47. New York: New York University Press.
- Zolberg, Aristide, Astri Suhrke, and Sergio Arguayo. 1989. *Escape from Violence*. New York: Oxford University Press.