The Rights of Noncitizens in the United States

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Abstract

Over the past three decades, sociolegal scholarship on the rights of noncitizens in the United States has sought to explain rights and exclusions while incorporating new theory regarding racialization, biopolitics, neoliberalism, risk, and states of exception. Early work in this period distinguished between legal and illegal immigration, with a focus on assimilation, ethnicity, and new ethnic enclaves in the case of the former, and an examination of the relationship between membership and movement in the case of the latter. Large-scale restructurings of the immigration enforcement regime have made the distinction between citizens and noncitizens more important than before. Thus, scholars have coined such terms as "crimmigration" to describe the unprecedented convergence of criminal and immigration law, "rescaling" to refer to shifts from national to local enforcement efforts, and "securitization" to denote the infusion of antiterrorist measures within immigration policymaking.

INTRODUCTION

The rights of resident noncitizens have emerged as one of the most polarizing issues in the United States in the latter half of the past decade. Recent years have witnessed record-setting marches in support of immigrants' rights (Buff 2008, Gonzales 2009); increased deployment of border patrol agents (Heyman 1995, Nevins 2002); presidential calls for comprehensive immigration reform; construction of a wall along portions of the U.S.-Mexico border; the emergence of a new "sanctuary" movement (Hondagneu-Sotelo 2007, 2008); rising detention and deportation rates (Cole 2003, Coleman 2007, Kanstroom 2007); the targeting of criminal aliens (Chacon 2007, 2010; Eagly 2010); proposals to make being undocumented a felony; calls for eliminating birthright citizenship (Romero 2008); and passage of the controversial Arizona Senate Bill 1070, which requires noncitizens to carry verification of legal status and police to check the immigration status of anyone fitting the profile of an illegal immigrant. Among immigrants and immigrant-rights advocates, there is a sense of profound change, that new legal regimes and forms of social control are redefining immigration, immigrants, and citizenship itself. At the same time, restrictionists have bemoaned what they see as a lack of action on the part of federal authorities in the face of borders that they consider out of control (Gilbert 2009). And, although they are on opposing sides of this issue, both advocates and restrictionists share a sense that neither membership categories nor enforcement measures have kept pace with the realities of human movement.

In the midst of such heightened public controversy, sociolegal scholarship on noncitizens' rights has flourished. Recent work in this area has highlighted both the intensification of enforcement regimes and the rigidification of membership categories. Large-scale restructurings of the immigration enforcement regime have made distinctions between citizens and noncitizens increasingly important. Thus, scholars have coined such terms as "crimmigration" to describe the unprecedented convergence of criminal and immigration law at the levels of statute, policy, and implementation (Stumpf 2006); "rescaling" to refer to shifts from national to local immigration policymaking (Varsanyi 2008); and "securitization" to denote the infusion of antiterrorist measures within immigration policymaking (Astor 2009, Bigo 2002, Coleman 2005, Welch 2002). At the same time, scholars have attended to a lack of opportunity for rights-claims to move forward in ways that could regularize the status of unauthorized migrants who, in earlier eras, would have had the opportunity to legalize. Papers, and the right kind of papers, are becoming both more necessary and more elusive than ever (Kalhan 2008), despite earlier claims that new "postnational" or "deterritorialized" states (Basch et al. 1994), in which rights would be afforded by humanity rather than citizenship (Soysal 1994), were on the horizon. The systems that allocate membership, therefore, appear to derive from political forms that are increasingly out of date.

Given this coupling of intensified enforcement and stagnant membership categories, it is not surprising that, over the past three decades, the questions that have animated legal scholarship on noncitizens have retained a focus on explaining rights and exclusions even as they have been complicated by new theory regarding racialization, biopolitics, neoliberalism, risk, and states of exception. Early work in this period distinguished between legal and illegal immigration, with a focus on assimilation, ethnicity, and new ethnic enclaves in the case of legal immigration, and with an examination of the relationship between membership and movement in the case of illegal immigration. There has also been a robust literature on the workings of the institutions that implement immigration law, particularly on the interface between state and nonstate institutions. Distinctions between legal and unauthorized migration have been less important within more recent work, which has sought to locate both phenomena within globalization, transnationalism, and other developments that challenge

Westphalian understandings of nations and citizens. This newer work theorizes both legal status and immigration enforcement as components of regimes through which society's "others" are excluded, but also, sometimes, granted membership. Sociolegal scholarship on noncitizens in the United States thus contributes to a retheorizing of rights and citizenship more broadly.

LEGAL AND ILLEGAL IMMIGRATION

Immigrant Communities and their Homelands

Immigrants have long occupied a paradoxical position in the United States: They are considered to be the essence of America and are also marked as irrevocably "different." In *Strangers in the Land: Patterns of American Nativism, 1860–1925*, Higham (1963) traces the rise of nativism in the United States, providing an early example of the degree to which immigrants are presumed to be outside the category of "citizens," even when they have immigrated legally. Even legal immigrants are vulnerable to exclusion or removal, as evidenced by the Japanese internment, Chinese Exclusion Act, and Operation Wetback (Calavita 2000, Gutiérrez 1995, Ngai 2004). Historical analyses of immigration denaturalize the category of the illegal immigrant and demonstrate how citizenship is inflected with race (Calavita 2007, Haney-López 1996). Beginning with the 1798 Alien and Sedition Acts, the U.S. Constitution has grappled with the rights to be afforded to territorially present aliens (Neuman 1996), and "myths" about immigrants have been applied to different groups at different historical moments (Chavez 2001, 2008; Hing 1997; Jacobson 2008; Perea 1997).

If nativists attack immigrants for their cultural differences, then questions arise regarding the degree to which immigrants are able to assimilate and which factors promote successful assimilation. There is an abundance of work on processes of assimilation (Waters & Jiménez 2005), most of which examines what happens after immigrants arrive, presumably legally. One of the ways that law figures within this work is in terms of "context of reception" (Menjívar 2000, Portes & Rumbaut 2001, Rumbaut & Portes 2001): If people are deemed to be illegal or are subject to discrimination, then their ability to assimilate and to be upwardly mobile is adversely affected (Abrego 2009). Ethnic enclaves, in which new immigrants cluster in particular neighborhoods within urban centers (Waldinger & Bozorgmehr 1996), simultaneously mark difference (e.g., public signs may be printed in languages other than English, businesses cater specifically to immigrants' needs) and provide a supportive environment for new arrivals (Menjívar 2000).

If immigrants are clustering in particular neighborhoods, then it is also possible that they are establishing identities as subgroups. Some work has examined the formation of pan-ethnic identities (e.g., De Genova & Ramos-Zayas 2003, Kasinitz 1992), whereas other work has examined ties between existing ethnic groups and new arrivals, particularly through the concept of segmented assimilation (Portes & Rumbaut 2001), that is, the idea that all too often immigrants assimilate by becoming members of marginalized subgroups, a social location that works against their upward mobility. Scholars have also questioned the ideas that the populace is monolithic and that assimilation is unidirectional. As Flores & Benmayor (1997) argue, the presence of ethnic and racial subcultures transforms the social landscape, resulting in a "salad bowl" rather than "melting pot." Nonetheless, these authors insist, historical patterns of social inequality delimit the public space within which marginalized cultural forms can be expressed. There is thus a potential for migrants to challenge their own marginalization—and perhaps to do so through the law.

The formation—and celebration—of subnational identities also suggests that new immigrants may be developing transnational identities through strong linkages to their homelands. The literature on immigrant

transnationalism delineates the new forms of citizenship being practiced by immigrants. Schiller and colleagues (1995) suggest that the term immigrant should be replaced with transmigrant to acknowledge the degree to which migrant households and social networks span national borders (see also Bosniak 2000, Itzigsohn 2008, Schiller & Fouron 2001). Such attention to macro-level processes has been accompanied by work that examines migrants' own agency in constructing transnational linkages (Smith & Guarnizo 1998) or even in prompting states to follow migrants' examples (Baker-Cristales 2008). Mobilizing law is one way that migrants have exerted agency (Buff 2008). Note, however, that Menjívar (2002) and others (Levitt & Waters 2002) have questioned the degree to which transnationalism is practiced beyond the first generation of migrants.

Some studies examine the impact of immigration law on undocumented communities in the United States. *Shadowed Lives* (Chavez 1992) focuses on the degree to which undocumented immigrant farm workers in California are kept in a "liminal" phase between exclusion and full membership. Their liminality is revealed through the spaces that they occupy—camps on the outskirts of urban communities, a soccer field that even the border patrol treated as part neither of the United States nor of Mexico. *Deciding to Be Legal* (Hagan 1994) recounts the impact of the 1986 Immigration Control and Reform Act (IRCA) on a Mayan community living in Houston. Hagan found that, over the course of this program, participants were able to challenge initially restrictive documentation requirements such that, by the program's end, many were able to "decide" to legalize, regardless of whether they officially met eligibility requirements. Coutin (2000) has also detailed the ways that unauthorized migrants from El Salvador have engaged U.S. immigration law in a quest for legal permanent residency and improved immigrant rights. These and other studies of undocumented communities suggest that law has a profound impact on these immigrants' lives regardless of whether it deters them from migrating.

Explaining the Relationship Between Law and Unauthorized Movement

In the 1970s and 1980s, as the United States sought to formulate a new approach to immigration, scholars worked to explain why undocumented immigration persisted despite laws barring this practice. Some concluded that, given large numbers of undocumented entrants, the law lacked "teeth." For example, Harwood (1985, 1986; see also Briggs 1984) argued that, owing to the high cost of enforcement, the draconian nature of the measures that would be required, and the strength of the forces compelling international movement, it was difficult for the United States to commit the resources required to close the borders to unlawful entry. Other scholars have suggested that the United States not only has failed to close its borders, but also has actively recruited undocumented workers to fill particular labor needs. For example, Kearney (1986) details theoretical shifts within the field of anthropology: Once viewed as a modernizing force, migration came to be regarded as the extraction of a commodity—labor—from peripheral to core countries. Likewise, Portes (1978) provides a structural explanation of migration as a means of recruiting exploitable undocumented workers. He questions whether "in the face of sustained internal and external pressures" (Portes 1978, p. 481) the United States can prevent unauthorized entry and concludes that "illegal or not . . . international labor immigration responds to structural determinants in both sending and receiving countries" (p. 477). Similarly, Jenkins (1978) argues that, by making the undocumented vulnerable to deportation, U.S. immigration law enables employers to recruit docile workers, and Bach (1978) details the ways that U.S. treatment of Mexican immigrant workers responded to competing needs to accumulate capital and to appease domestic labor unions.

The argument that denying rights to noncitizen workers serves economic interests helps to explain why the U.S. approach toward the undocumented has varied over time: Immigrant

workers have been recruited at times of heightened labor need, such as during the Second World War, but removed en masse regardless of citizenship during periods of unemployment, as in Operation Wetback (Ngai 2004, Gutiérrez 1995). Furthermore, U.S. immigration authorities practiced selective enforcement—removing undocumented migrant farm workers after the harvest rather than before, and eliminating undocumented labor by legalizing it but only in the form of a bracero whose "legality" is tied to a particular employer (Calavita 1992) and who, as a result, undergoes a dehumanizing commodification (García 2006). Likewise, IRCA's employer-sanction provisions impose fines on employers who knowingly hire unauthorized workers, but they do not hold employers accountable for the validity of the documents that workers present to them (Calavita 1990). Immigration authorities thus appear to tolerate undocumented labor, exacting the "tax" of removing those apprehended at the border, but, given that those who are removed can simply attempt to reenter, not effectively preventing unauthorized migrants from entering the United States (Harwood 1986, Heyman 1995). Indeed, Harwood (1985) proposed collecting this tax in the form of an entry fee that otherwise would simply go to an alien smuggler.

At the same time, this argument has been criticized for downplaying migrants' agency and for underestimating the power of immigration law. In his analysis of Los Angeles labor unions, Delgado (1993) found that, rather than working "hard and scared," undocumented workers were willing to organize, and Gordon (2007) detailed legal activism on the part of immigrant workers in New York. Given that immigration enforcement results in rising border deaths (Nevins 2002), the de facto denaturalization of deported citizens (Kanstroom 2007), the denial of rights and services to the undocumented (Chavez 1992, Coutin 2000, De Genova 2005; see also Cornelius et al. 1994), and the deportation of legal immigrants who have been convicted of particular crimes, it is odd to characterize U.S. policy as one of "tolerance." The ability to prevent unlawful entry may, therefore, not be the best measure of the power of immigration law.

Another line of scholarship on immigration enforcement examines the unexpected or counterproductive consequences of new immigration policies. For example, IRCA was intended to eliminate illegal immigration by legalizing long-term undocumented residents, making it more difficult for employers to hire undocumented workers (thus removing the incentive of such employment), and stiffening border enforcement. According to Bean et al. (1990), however, IRCA's legalization program actually reduced cyclical migration between the United States and Mexico in that migrant workers who otherwise would have returned home stayed in the United States, while family members who had been living outside of the United States rejoined their newly legalized relatives. IRCA did not keep employers from hiring undocumented workers, but it did give rise to a new market in fraudulent documentation (Calavita 1990, Hagan 1994, Mahler 1995). More stringent border enforcement did not prevent unauthorized immigration but did increase border violence, leading groups involved in organized crime to take up alien smuggling, driving "mom and pop" alien smugglers out of business, and causing the fees charged by alien smugglers to rise (Andreas 2000). Deporting noncitizens who are convicted of crimes may also have played a part in making gangs a transnational rather than merely local phenomenon (Zilberg 2011). This work suggests that efforts to deny rights to noncitizens may backfire by exacerbating the very problems such denials are ostensibly designed to solve.

Exceptional Categories: Refugees and Humanitarianism

Sociolegal studies of the rights of noncitizens have also addressed the legal distinction between refugees who flee persecution and may be in need of special legal protections, on the one hand, and economic immigrants who migrate to take advantage of particular job opportunities, but whose lives are not in

danger in their countries of origin, on the other. As a result of the record numbers of refugees and stateless persons produced by World War II, international refugee law has sought to establish internationally recognized protections for the persecuted (Marrus 1985). For humanitarian reasons, refugees are deemed to face exceptional circumstances and, thus, to have rights that not all noncitizens enjoy. The United Nations High Commission on Refugees, founded in 1950, defines a refugee as a person outside of his or her country of nationality who has a well-founded fear of persecution within his or her country on the grounds of race, religion, nationality, membership in a particular social group, or political opinion. The United States incorporated this definition into domestic law through the passage of the 1980 Refugee Act. Furthermore, according to the principle of *nonrefoulement* established under the 1951 United Nations Convention Relating to the States of Refugees, individuals are not to be returned to countries where they are likely to face persecution. Defining persecution, determining which fears are well-founded, and deciding which instances of persecution fit the established grounds have nonetheless proven to be highly contentious issues (Legomsky 2007).

A number of sociolegal scholars have examined the unfulfilled promise of refugee protections (Bohmer & Shuman 2008). In *Without Justice for All: The Constitutional Rights of Aliens*, Hull (1985) describes the influence of foreign policy considerations on U.S. asylum determinations (see also Swanwick 2006, Tucker et al. 1990). Churgin (1996) contends that U.S. administrations have responded to refugee groups, ranging from Cuban *marielitos* to Haitian refugees to Central Americans fleeing civil war, with ad hoc policies rather than a careful application of the provisions of the 1980 Refugee Act. Ramji-Nogales et al. (2009) detail glaring discrepancies in asylum-grant rates varying from judge to judge, whereas Bosniak (1991) considers the ways that contradictions between national sovereignty and international law prevent international law from being enforced. For instance, even though individuals may have the right to leave their countries of origin, other nations also have the right to control their borders, thus making legal exit a practical impossibility for many people. Furthermore, inclusive and exclusionary notions of citizenship build contradictions into the very categories through which noncitizens' rights are administered. Exceptionality can be the basis for humanitarian relief, but it also creates grounds for rendering rights inapplicable to certain categories of people (Rosas 2006).

Other scholars question the distinction between refugees and economic immigrants, suggesting that the latter may be no less deserving than the former. Harris (1999) notes that victims of large-scale violence and "economic immigrants" who flee poverty and famine may face as much danger as those who have been singled out for persecution. The distinction between being forced to move (Adelman 2001) and having a choice in the matter may also be a false one. For example, Kim (2009) and Haynes (2009) argue that, despite legal distinctions between trafficking victims and undocumented workers, both groups are subjected to potentially coercive labor exploitation. Such analyses suggest that, far from being exceptional, the dire circumstances that refugees experience are quite pervasive.

The inadequacy of distinctions between refugees and other migrants has prompted legal advocates to seek to expand the category of "asylee." Gender-based asylum claims have been challenged by the contradictions between restricting asylum to those who are "singled out" for persecution and the pervasiveness of policies and practices that discriminate against women (Anker 2002, Bhabha 1996, Kelly 1993). Luibhéid & Cantú (2005) detailed the presumptions about sexual orientation that are part of U.S. immigration law and that impact queer migrants. Merry (2006) has also highlighted the distinction between cultural particularity and universal human rights that is often drawn by countries that challenge international efforts to prevent violence against women. She suggests that attention to the vernacularization of human rights is useful in understanding how

local groups interpret and apply international conventions. Gang members have also been the target of innovative advocacy work by attorneys who question the distinction between political violence associated with civil conflict and criminal violence associated with gang recruitment (Coutin 2011, Zilberg 2011).

Although the focus on humanitarianism as a basis for rights has been seen as a move away from state-based notions of membership (Soysal 1994, Jacobson 1996), a number of scholars argue that the state's role in determining the rights that accrue to both citizens and noncitizens is expanding rather than contracting (Coleman 2007, De Genova & Peutz 2010, Inda 2006, Nevins 2002, Welch 2002). As evidence, they cite increasing demands for proof of citizenship.

Immigration Law "On the Ground"

In practice, sociolegal scholars noted, the rights that accrue to noncitizens depend on the actions of the state and nonstate entities charged with carrying out the law. Scholars have, therefore, studied both the workings of immigration institutions and the ways that legal categories play out in the lives of immigrants. To some degree, this focus on law "on the ground" is simply a variation on the broader sociolegal interest in examining the difference between law "on the books" and law "in action." Thus, laws that define noncitizens' rights, are, similar to other legal domains, indeterminate, and therefore understanding their meanings requires examining how they are implemented. At the same time, studying the workings of immigration and citizenship law in action reveals the increasing diffusion of immigration law enforcement, as employers, local officials, school administrators, doctors, landlords, police, social services workers, and others become increasingly responsible for checking the legal status of those with whom they interact (Coleman 2009, Coutin 2000, Decker et al. 2009, Varsanyi 2008). This diffusion, which may be part of a broader effort to enlist citizens as quasi-police (Grewal 2006), subjects noncitizens to increasing social exclusion. In a practical sense, it is the everyday implementation of immigration law, more than formal legal proceedings, that situates individuals as subjects within legal categories. At the same time, these everyday transactions create opportunities for noncitizens to contest their own subjectification (Coutin 2000, Hagan 1994).

The key "street-level bureaucrats" (Lipsky 1980) responsible for carrying out immigration law include immigration inspectors, border patrol agents, asylum officials, and increasingly, the police. Studying the ways that immigration inspectors interpreted and applied the 1882 Chinese Exclusion Act, Calavita (2000, 2006) found that class, race, and gender were key to these officials' interpretations of such categories as "merchant," a group that was permitted to enter the country, and "laborer," a group that was not (see also Salyer 1995). Relatedly, at congressional hearings regarding immigration reform, discussions of the U.S. and immigrant populations have reproduced implicit assumptions regarding race and gender (Chock 1994). Heyman (1995) and Harwood (1986) highlight the moral calculus that informed the use of discretion by the former Immigration and Naturalization Service and the U.S. Border Patrol. They found that officers were demoralized by the fact that their enforcement powers appeared to be largely limited to delaying, rather than preventing, unlawful entry. In addition, officers had some sympathy for border crossers who simply sought jobs in the United States, but officers were much more critical of individuals who resisted apprehension, smuggled other immigrants, or engaged in other criminal activities. Officers were more likely to treat such individuals roughly as an "informal" punishment to accompany delaying their entry. Agents' use of the term "Tonk" for immigrants, a reference to the sound of a flashlight hitting an individual over the head, revealed something of officials' punitive mentality.

In *Inside the State*, Calavita (1992) further examines the history of the U.S. bracero program, which permitted Mexican workers to remain in the United States legally, as long as they worked

for a particular employer. She found that the way Immigration and Naturalization Service officials treated braceros depended on competition between government agencies, particularly the Departments of Labor and Justice, and on officials' desire to accommodate growers' needs. Thus, officials insisted on legalizing—"drying out"—bracero workers by bringing undocumented workers across the border and then issuing them a permit to reenter the country legally. This practice reduced the number of undocumented workers while also supplying growers with laborers. This study reveals that noncitizens' "rights" were not abstract legal constructs but rather were shaped by the complex pressures that U.S. immigration authorities confronted.

Sociolegal scholars have also analyzed the important role played by nonstate agents in determining noncitizens' rights. Gilboy (1992) examined the interdependence between immigration inspectors and U.S. airlines. She found that inspectors were more likely to release suspects who arrived on the last flight of the day than suspects who arrived when outbound flights were available and inspection could be extensive. In this instance, noncitizens' rights (to enter, to avoid detention) depended on the particularities of airline schedules. Likewise, Lee (2009) concludes that employers function as "private immigration screeners" who collaborate with the Department of Homeland Security by identifying potentially removable aliens and who are thus able to undercut workers' abilities to challenge violations of labor law. Furthermore, liability for the use of fraudulent work-authorization documents rests largely with workers rather than with employers (Calavita 1990, De Genova 2002).

The enforcement role played by state and nonstate street-level bureaucrats gives noncitizens some opportunity to negotiate their own immigration status. Abrego (2008) examines the ways that passage of California AB-540, a law that permitted undocumented students to pay in-state tuition at California public universities, transformed these students' consciousness, removing the stigma associated with being "undocumented" and encouraging these youth to join organizations dedicated to advancing the rights of undocumented students. Likewise, Gonzales (2008) analyzed advocacy on behalf of undocumented students, and Wong (2006) studied the impact that business and ethnic groups have had on recent immigration legislations, arguing that such groups are most successful when they adopt universalistic and inclusive language.

These and other studies of how immigration law plays out on the ground, in state and nonstate institutions, and in immigrants' lives suggest that the United States is currently in the midst of a profound shift. Previously, there was a sharp distinction between the rights of legal permanent residents, who could remain in the United States and naturalize, and unauthorized residents, who were potentially subject to deportation. The adoption of more restrictive immigration measures has moved this line, such that increasingly, the most significant legal distinction is between citizens, who cannot be deported legally, and noncitizens, who are ineligible for particular rights and services and who can be deported if convicted of any of a broad range of criminal offenses. This shift raises questions about how and why immigration law and policy are changing. To address these questions, sociolegal scholars have drawn on new theoretical frameworks, even as earlier interest in the nature of exclusion on the basis of immigration status has persisted.

CITIZENS AND NONCITIZENS

Redrawing Legal Lines

In 1996, a series of immigration and related reforms eroded key protections that legal permanent residents had enjoyed, making the distinction between citizens and noncitizens, regardless of the immigration status of the latter, more salient than before. Three pieces of legislation, the Welfare Reform Act (also referred to as the Personal Responsibility and Work Opportunity Reconciliation Act), the Antiterrorism and Effective Death Penalty Act

(AEDPA), and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), made legal permanent residents ineligible for most forms of federal assistance, expanded the range of criminal offenses that made individuals ineligible to obtain or retain legal permanent residency, eliminated the waivers through which individuals who had been convicted of crimes could challenge deportation, and restricted judicial review of immigration cases (Kanstroom 2007, Moore 2000, Morawetz 2000). In effect, legal permanent residents who were convicted of even minor offenses were subject to a relatively inevitable deportation, as immigration judges no longer had discretion to evaluate whether an individual's equities in the United States outweighed the rationale for deportation. At the same time, means of legalization that were previously available to the undocumented were eliminated or made more difficult to obtain (Dobkin 2006–2007), and border enforcement, detention, and deportation regimes were intensified, leading to family separations and adverse psychosocial effects (Hagan et al. 2008, Thronson 2006). The 2001 USA Patriot Act and the 2005 Real I.D. Act expanded the situations in which individuals must present official identity documents and made such documents harder to obtain (Kanstroom 2006). Local authorities have been given increased authority to enforce federal immigration laws and have launched their own restrictionist initiatives, such as requiring landlords to obtain proof of legal status from tenants (Decker et al. 2009, Rodriguez 2008, Wishnie 2001). In contrast to the days when immigrants were considered an economic boon (Calavita 1992), English-only initiatives, the curtailment of bilingual education, a rise in public rhetoric that characterizes immigrants as "encroachers," and new forms of vigilantism have contributed to a deep stigmatization of immigrants, whether documented or otherwise (Chavez 2001, 2008).

These seemingly profound shifts in the legal order that governs U.S. immigration have generated considerable work detailing the nature, direction, and social and legal significance of these changes. Perhaps leading among these is *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States* (Motomura 2006). In this legal analysis of 200 years of U.S. immigration history, Motomura (2006) argues that, in the past, legal immigrants were treated as Americans-in-the-making, individuals who were in transition to U.S. citizenship. Legally, recent immigrants' transitional status was recognized through the principles of contract, according to which new immigrants are presumed to have signed a contract with the United States that guarantees them eventual full membership, as long as they abide by its terms, and of affiliation, which awards new immigrants rights as they become affiliated to the United States through family, economic, and community ties. Motomura (2006) argues that the notion of immigrants as future citizens who are in transition has been eroded in recent debates over noncitizens' status and that, to promote democratic principles, it should be resuscitated.

The notion that legal immigrants are on "probation" (Park & Park 2005) and therefore potentially removable is also taken up in *Deportation Nation: Outsiders in American History*, in which Kanstroom (2007) argues that historically, deportation has served as a form of social cleansing, enabling the United States to remove noncitizens deemed "undesirable" on the basis of their poverty, race, political opinion, or criminal activity. Kanstroom (2007) documents the existence of a dual legal order in which noncitizens have been denied rights to due process, family unity, and territorial presence that citizens enjoy. Relatedly, Romero (2005, p. 1) critiques what he refers to as the "constitutional immigration law paradox," namely, the fact that the U.S. Constitution protects the equality of persons while reserving particular rights for citizens alone. Hing (2006) further analyzes the moral dilemmas associated with current deportation policies, and Park (2004) highlights the contradictions between the liberal principle of equality between persons and the sovereign right to make distinctions.

The importation of "responsibility" and "accountability" from financial models to

immigration laws has also been a central focus of sociolegal scholarship on noncitizens' rights (Moore 2000). Calavita (1996) argues that "balanced budget conservatism" prevalent during the Gingrich period of the 1990s has provided a rationale for making legal immigrants ineligible for social services. This rationale may also be behind the 1996 "deeming" requirements that individuals demonstrate that they can financially support relatives for whom they petition (Borjas 2001). The expansion of deportable offenses under IIRIRA and AEDPA also implies that immigrants need to be held more accountable for their behavior (Morawetz 2000, Rodriguez 2008), and the Real I.D. Act's emphasis on requiring states to issue drivers licenses only to individuals who are legally present in the United States implies that, previously, identity documents were "unreal" or fraudulent. In making detention mandatory for individuals who are in removal proceedings, the AEDPA's and IIRIRA's provisions also articulate a deep suspicion of noncitizens (Taylor 2004). Together, these laws suggest that noncitizens are irresponsible, potential flight risks, financially improvident, and likely to commit fraud or other crimes. As I discuss in greater detail below, such provisions constitute a neoliberalization of U.S. immigration laws in that they subject noncitizens and, by extension, citizens to regimes of reporting, surveillance, accountability, and responsibilization in which the state, as a source of support and guarantor of rights, retreats (Coleman 2007, Varsanyi 2008).

The increasing convergence of criminal and immigration law has led some to coin the term "crimmigration." Numerous scholars have attended to the ways that immigration proceedings are being used to circumvent the constitutional protections and evidentiary requirements associated with criminal law (Chacon 2007, 2010; Cole 2003; Eagly 2010). For example, after the attacks of September 11, 2001, suspected terrorists who were noncitizens were often held on immigration violations rather than criminal charges. As a result, U.S. authorities did not have to fully disclose evidence against suspects, set bail, provide defense attorneys at public expense, or prove guilt beyond a reasonable doubt (Welch 2002, 2006, 2009). Likewise, noncitizens may be apprehended on the basis of a suspected immigration violation but then may be subsequently charged with a crime. Evidence obtained during the immigration apprehension is not necessarily subject to search and seizure restrictions and, therefore, may not be subject to the exclusionary rule in a criminal case (Chacon 2010). Furthermore, criminal prosecutions of immigration violations now consume more of the federal docket than any other type of case. Eagly (2010) analyzed the ways that the lower level of procedural protections associated with administrative proceedings such as immigration hearings is coming to characterize immigration-related criminal prosecutions as well. Thus, fast-track mass prosecutions of entry without inspection or unlawful reentry following a deportation utilize prepared plea agreements and require defendants to waive rights to grand jury indictment, jury trial, constitutional challenges, and appeal. Eagly (2010) argues that, in essence, "crimmigration" has created a two-track justice system: one for citizens, in which constitutional protections are (or are supposed to be) observed, and one for noncitizens, in which they are not.

Closely linked to the convergence of immigration and criminal law has been an increased localization of immigration lawmaking (Olivas 2007). Throughout most of U.S. history, immigration policy has been deemed a matter of federal law and executive discretion (Aleinikoff 2002), such that states and localities have been prohibited from regulating immigration into the United States. On the basis of a review of immigration-related U.S. Supreme Court cases, Varsanyi (2008, 2010) argues that there has been a recent rescaling of immigration policymaking, such that cities declare themselves sanctuaries and set up guest-worker sites but also participate in 287(g) agreements that permit city and county police to question suspects regarding their immigration status. Hazelton, Pennsylvania, which passed a city ordinance requiring landlords to check tenants'

immigration status, exemplifies this trend (McKanders 2007). In essence, Varsanyi (2008, 2010) concludes that cities and states that previously were required to treat "immigrants as persons" deserving of constitutional protections have, since the 1990s, been able to treat "persons as immigrants" who are to some degree outside of the U.S. Constitution. In a national study of the ways that police departments regard immigration law enforcement, Decker et al. (2009) found considerable variation in attitudes: Some departments felt that enforcing immigration law harmed officers' relationship with community members and thus compromised other police activities, whereas other departments embraced the new mandate as an additional tool to be used in fighting crime. Their study further found that few departments had developed formal policies to govern officers' interactions with suspected undocumented immigrants. Given that many noncitizens now enter the deportation pipeline via a criminal apprehension or conviction, officers' understandings of U.S. immigration law are likely to play an important role in the practical application of noncitizens' rights in the future.

These profound shifts in the legal landscape have led to calls for comprehensive immigration reform, a cause taken up by President Obama during his election campaign. Motomura (2010b) suggests that instead of viewing legalization as a one-time "fix" or change in the status of undocumented residents, it is more useful to consider how the opportunity to legalize has been incorporated into U.S. policies historically. For example, individuals who are eligible for a family- or employment-related visa have been allowed to adjust their status to that of legal permanent residents. Motomura (2010b) suggests that removing current barriers to such adjustments could be more productive and consistent than instituting a new legalization program. His analysis presents an intriguing alternative to the usual thinking about comprehensive immigration reform. Motomura (2008, p. 2093) further argues that resolving seemingly intractable public disagreements about immigration requires considering "international economic development, economic development inside the United States, and domestic educational policy." He thus suggests that immigration law and policy are inextricable from the U.S. and globalized economic, political, and social structures within which they are located.

Neoliberalism and Global Restructuring

In the mid-twentieth century, the problem of "stateless persons" was presumed to be temporary and legally remediable (Marrus 1985). However, globalization and neoliberalism have continued to produce both large-scale movements of persons and laws that bar their entry and presence, in effect giving rise to a new population of individuals who, for practical purposes, lack state protection. Sassen (1991) analyzed the rise of global financial centers, places where highly paid professionals and low-paid service workers, many of whom are immigrants, converge (see also Ong et al. 1994). Sassen (1989) argues that it is not poverty alone that leads to immigration, but rather an interdependency between sending and receiving states, such that these form part of a regional economic circuit (see also Rouse 1991). Furthermore, neoliberal policies, which emphasize foreign investment, a retraction in state services, the outsourcing of jobs, and the elimination of trade barriers, disrupt traditional occupations (Nevins 2010), leading individuals to relocate, for example, from rural agricultural areas to foreign-owned *maquilas* or assembly plants. Without a safety net or government reemployment program and with ties to the country that owns the *maquila*, unemployed workers are likely to emigrate (Sassen 1989). Employment opportunities in sending countries may also be diminished by the importation of cheaper goods into local markets. This combination of reduced opportunities in sending states and the active recruitment of low-wage and service workers in receiving states may account for continued large-scale migration.

The contradiction within neoliberal policies that allow goods but not people to cross borders may also be responsible for shifts in immigration enforcement regimes. Varsanyi (2008, p. 883; 2010) argues that stiffened border enforcement and restricted legalization opportunities produce "a nationally bounded, relatively free internal labor market, populated by disciplined, divided (along the lines of legal status), largely nonunion, and vulnerable labor force for which the state bears few costs and has few responsibilities or obligations." Coleman (2005, 2007) agrees that a "security/economy nexus" shapes U.S. policy along the U.S.-Mexico border but emphasizes that, on the ground, this nexus produces contradictory and sometimes incoherent policies. Thus, on the one hand, a porous border could be perceived as a security threat, but, on the other, some degree of porosity is needed to facilitate trade. Stiffened border enforcement and an expanded detention and deportation regime may also be designed to produce what De Genova (2002) terms migrant "deportability." In other words, instead of aiming to eliminate the undocumented population, which, most agree, is not a feasible goal, deportations may instill the fear of deportation in those who are left behind, resulting in "the legal production of 'illegality' as a distinctly spatialized and typically racialized social condition for undocumented migrants . . . [thus] sustaining their vulnerability and tractability as workers" (De Genova 2002, p. 439).

The notion that noncitizens are privatized and expendable workers has enormous gender implications. Hochschild (2000) and others (Abrego 2009; Hondagneu-Sotelo 1994, 2003) have documented the gendered nature of transnational chains of care. In a restructured but global labor market, immigrant women are increasingly caring for children and the elderly in immigrant-receiving states, whereas in sending countries, these women's own parents and children are cared for by other relatives. Although women are deported at lower rates than are men, domestic care is a particularly unregulated domain, where violations of minimum wage, overtime, and other labor laws are common (Hondagneu-Sotelo 2001). Although protections for immigrant women who are victims of sex trafficking, gender persecution, or domestic violence have increased (Srikantiah 2007), in other ways, female noncitizens enjoy fewer protections than do their male counterparts (Musalo & Rice 2008).

Securitization

Curtailment in the rights afforded to noncitizens can also be attributed to the securitization of immigration law, that is, to treating immigration as a matter of security and immigrants as potential security risks. Drawing on Foucauldian notions of biopolitics and governmentality, Inda (2006) analyzes the knowledge practices and the forms of border regulation through which the U.S. government has made "illegal immigrants" a target of policy. He argues that racialized others—Latinos and Asian Americans, in particular—have been deemed less capable of regulating their own practices and therefore less qualified for citizenship (see also Romero 2006). Likewise, Walters (2002) uses a governmentality perspective to situate modern deportation policies within a broader set of practices through which, historically, people have been expelled from national territories. Walters employs Agamben's (1998) notion of the camp as a "zone of indistinction," a space outside of national territory where law is suspended, to understand the subject position occupied by noncitizens. Quoting Hannah Arendt, Walters (2002, p. 275) contends that noncitizens who are subject to deportation are presumed to pose such a security threat that they face "expulsion from humanity," in that deportation deprives them of the ability to live and work in their territory of residence and sometimes also their country of citizenship. Amoore & de Goede (2008) use Beck's (1992) concept of the "risk society" to analyze the ways that government agencies now encourage private citizens—including both average people and specialized entities such as bank officials—to assess the "risk" posed by those around them and to monitor their

own transactions and interactions. Immigrants, they note, are among those who deviate from norms and who are therefore presumed to be suspicious. Moreover, officials' discretion to determine which aliens are likely to support terrorism has increased (Neuman 2006).

The USA Patriot Act and the post-9/11 measures taken against suspected terrorists further single out noncitizens as being in need of close surveillance (Volpp 2002, Boyle & Busse 2006). The 2002–2004 National Security Entry/Exit Program required noncitizens from particular countries to register voluntarily with the U.S. government, a process that many considered to be discriminatory (Koulish 2010). Welch (2002, 2006, 2009) has analyzed the ways that immigration became the focus of a moral panic that, in the context of the war on terror, led noncitizens to be detained for lengthy periods without warrant, deported on the basis of evidence that was not publicly disclosed, held at Guantanamo outside of the constitutional protections afforded by presence within a U.S. territory or by prosecution in a criminal court, and generally scapegoated for terrorist actions within the United States. Welch (2002) suggests that these practices have given rise to a highly profitable "detention-industrial" complex that employs detention-center staff, border patrol agents, customs officials, and the companies that produce and mount weaponry and surveillance technology along an increasingly militarized U.S.-Mexico border (see also Cole 2003, Dow 2004, Honigsberg 2009). The war on terror may have consolidated and furthered a process of securitization that was already under way (Coleman 2007).

Other scholars have examined the ways that the bolstering of immigration enforcement in a context of heightened security concerns has played out at the U.S.-Mexico border (Vila 2003). Nevins (2002) studied Operation Gatekeeper, which predated the war on terror and which entailed stationing border patrol agents and surveillance equipment near San Diego, California, along the most heavily traveled stretch of the border. According to Nevins (2002), Operation Gatekeeper (much like "Hold the Line" and similar initiatives) failed to deter unauthorized migrants but did lead immigrants to devise new routes—with deadly results. He writes, "The number of crossing-related fatalities has steadily grown, reaching historic highs, averaging more than 350 documented deaths per year between 1995 and 2006 and doubling in terms of annual average between 1999 and 2005" (Nevins 2002, p. 173). These deaths have received little attention in the United States.

Interestingly, Motomura's (2010a) analysis of arguments that can be made to challenge enforcement tactics suggests that immigrants who are present but outside the law can assert oblique or indirect rights. For example, to challenge workplace discrimination, undocumented aliens can rely on a citizen proxy argument to contend that because all workers are harmed by violations of labor law, all workers should be protected, regardless of immigration status. Such oblique rights reflect what Motomura (2010a, p. 1783) terms "a national ambivalence toward immigration outside the law," an ambivalence that increasingly challenges the deservingness of legal immigrants as well.

DISCUSSION

The salience of the current distinction between citizens and noncitizens reveals key forms of inclusion and exclusion that shape noncitizens' rights. On the one hand, sociolegal scholars have demonstrated that to the degree that rights are based on humanity or on territorial presence, noncitizens enjoy key legal protections. Thus, regardless of their immigration status, children can attend U.S. schools (Abrego 2008, Gonzalez 2008), defendants in criminal proceedings have due process rights, and constitutional protections apply to those within U.S. borders, and, in some instances, to those beyond borders as well. Indeed, the daily lives of green card holders, temporarily authorized immigrants, and long-term undocumented residents may not be particularly different from those of the U.S. citizens among whom they

reside and work. On the other hand, legal scholars have documented current practices that erode these protections. "Fast-track" immigration prosecutions undercut the due process rights associated with criminal proceedings, immigration hearings are considered administrative and therefore not governed by these special protections, the focus on criminal aliens has made even legal permanent residents ineligible for waivers of deportation, and mandatory detention makes it difficult for noncitizens to exercise their legal rights. Intensified immigration enforcement has militarized borders, subjecting all travelers to increased scrutiny, even as in the interior, more restricted legalization opportunities have made membership categories more exclusionary and less permeable. Owing to the current economic recession, the chances of achieving a legislative reform that would address the status of the some 12 million noncitizens who are in the country without authorization are slim.

Given this coupling of increased de facto membership and intensified de jure exclusion, it is highly appropriate for scholars to turn to racialization, governmentality, neoliberalism, globalization, and securitization for explanatory frameworks. This turn suggests that the shifts in the legal and social "ground" across which migration moves may be so profound that those who study immigration policymaking and its concrete effects may need to look in new places. Promising areas of future inquiry include the micro- and macroeconomies that are enabled by the criminalization of immigration; the exchanges through which immigration policies are formulated and negotiated; the spaces occupied by those who are excluded; the unexpected alliances that immigration creates; the forms of advocacy devised by noncitizens; the degree to which, regardless of official policies, migrants make their own lives; and the borders and territories that erupt in unlikely places. It is also important to attend to the irrationalities that infuse immigration and immigration law, ranging from societal desires for an excluded other, to the deportation of community members, to the myths that motivate immigration. Indeed, instead of being out of touch with the realities of international migration, legal notions of rights and membership may both entice and criminalize movement, thus giving rise to the very phenomena that they ostensibly regulate. The challenges that the long-term presence of officially disenfranchised or prohibited populations poses to social justice and democratic inclusion make such matters worthy of investigation.

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