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DEPORTATIONS PAST, DEPORTATIONS PRESENT

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TORRIE HESTER, *DEPORTATION: THE ORIGINS OF U.S. POLICY* (UNIVERSITY OF PENNSYLVANIA PRESS 2017). PP. 256. HARDCOVER \$45.00.

For most of the nineteenth century, federal removal of migrants was essentially nonexistent, and whether the Constitution even permitted deportation remained an open question.¹ Today, the federal government detains and forcibly removes hundreds of thousands of individuals annually.² Deportation is described as a feature of public safety and essential to national self-determination. In *Deportation: The Origins of U.S. Policy*, historian Torrie Hester chronicles deportation's shift from the margins of United States law to a pillar of twenty-first century policing. Combining powerful storytelling with fine-grained historical exegeses, she humanizes deportation's life-changing impacts. By identifying threads that run across the whole of federal deportation history, *Deportation* is a window into the past that tells us much about our present. Ultimately, though, Hester fails to unearth its troubling normative foundations, overlooking deportation's role in creating and maintaining a sophisticated social hierarchy based largely on race, gender, and class.

Deportation's growth into immigration law enforcement's central feature was not a smooth transition flawlessly executed by the federal government alone. For the nation's first century, states, cities, and towns engaged in a form of deportation as they regularly removed undesirable newcomers from within their boundaries: penury widows, especially mothers, freed slaves, religious dissenters, convicts, and more. When, in the late 1800s, the federal government first set itself on the course that led to an ongoing deportation machinery, deportation depended on an international legal regime that accepted deportees; numerous U.S. citizens who viewed race, sexual behavior, and political beliefs as legitimate grounds for removal; and dutiful bureaucrats willing to execute deportations,

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1. TORRIE HESTER, *DEPORTATION: THE ORIGINS OF U.S. POLICY* 3 (2017).

2. See César Cuauhtémoc García Hernández, *ICE Detention Population Closed Obama Era at Record Daily High*, CRIMMIGRATION.COM (Mar. 27, 2018), <http://crimmigration.com/2018/03/27/ice-detention-population-closed-obama-era-at-record-daily-high/>; DEP'T OF HOMELAND SECURITY, 2016 YEARBOOK OF IMMIGRATION STATISTICS 103 tbl. 39 (2017), <https://www.dhs.gov/sites/default/files/publications/2016%20Yearbook%20of%20Immigration%20Statistics.pdf> (reporting 340,056 removals in 2016).

sometimes with disturbing zeal. While these institutional and individual actors enabled deportation, others resisted. As with Chinese migrants' collective funding of legal challenges to the Chinese Exclusion Act or the information-sharing that spurred substantial habeas litigation, many migrants protested deportation practices, bringing challenges that sometimes succeeded in halting the wheels of banishment or altering the legal landscape that enabled it.³ Likewise, actors within the government sometimes resisted deportation efforts, with certain judges and agency officials working to protect migrants facing potential removal.⁴

In describing the disjointed ascent of federal deportation practices, Hester goes into stunning detail about the individual stories of those who lived the rise of deportation. For instance, Hester tells the story of Chan Leong Hee, a Chinese merchant and later laborer who escaped deportation despite regulations that seemed to mandate his removal;⁵ Josephine Bissonette, a Canadian woman who successfully challenged her removal after her family accused her of running a brothel;⁶ Emma Goldman and Alexander Berkman, the famous anarchist lovers deported together to Soviet Russia after Goldman, a U.S. citizen, was denaturalized;⁷ and Moola Singh, Rhagat Singh, and Sundar Singh, three Indian men among a group of ninety-five who challenged the government's racist use of the public charge ground of deportability.⁸ Likewise, Hester draws on the stories of government actors, detailing, for instance, the numerous delicate steps U.S. officials took as they negotiated politically sensitive deportations with foreign governments.⁹ She adds a rich description of the larger-than-life Assistant United States Secretary of Labor Louis Post who insisted on upholding basic principles of procedural fairness even when government agents targeted communists, anarchists, socialists, and other radical leftists. In the process, Post single-handedly stopped countless deportations.¹⁰

While Hester's narrative brings key figures to life, it also describes systemic tensions between law enforcement imperatives and constitutional norms. As leftist political radicalism gained support among the working classes, elites became increasingly fearful that radicals posed a serious threat to their political and economic interests. Capitalizing on a series of violent episodes and militant labor actions, many officials supported abridging traditional civil liberties in the interest of national security.¹¹ Launching a series of mass arrests and deportations now known as the Palmer Raids, officials with the Department of Labor's Bureau of Immigration and the Department of Justice's (DOJ) Bureau of Investigation targeted suspected anarchists and leftists.¹² In the process, federal, state, and local police forces made warrantless arrests, sometimes using brutal force; arrested those with tenuous, if any, connection to suspected radicals; and entered homes

3. See, e.g., HESTER, *supra* note 1, at 9–10, 70–71, 159–60.

4. See *id.* at 129–32.

5. *Id.* at 70–71.

6. *Id.* at 93–95.

7. *Id.* at 114–16.

8. HESTER, *supra* note 1, at 141–42.

9. See, e.g., *id.* at 119–24.

10. *Id.* at 130–32.

11. *Id.* at 116–17.

12. *Id.* at 112–13, 124.

without search warrants.¹³ Ultimately, federal authorities arrested thousands of people, among whom were U.S. citizens, those who did not know they were members of the Communist Party, and those with no propensity toward political radicalism whatsoever.¹⁴ Many arrestees faced months in detention without a hearing¹⁵ and often endured abhorrent conditions while detained.¹⁶ Further, DOJ officials took affirmative steps to limit detainees' access to counsel¹⁷ and pursued deportations based on evidence so shaky that one judge described it as "wholly inadequate and unreliable."¹⁸ To combat these abusive practices, Secretary of Labor William B. Wilson and his successor, Louis Post, dismissed thousands of deportations, restored migrants' access to counsel earlier in the deportation process, sought to limit time in detention without a hearing, insisted on fairer bail, and discarded unlawfully gathered evidence and testimony given without a lawyer present.¹⁹

Much of this story is not new. Goldman, Berkman, and Post are well-known. Post is often held up as a symbol of an altruistic insider committed to the rule of law. Goldman is far more famous; in some activist circles today, it would not be a surprise to see her face appear on a t-shirt. While Hester recounts their roles vividly, she adds little to the extant history of U.S. deportation practices or radicalism. In focusing on the struggles of people who have never been heroized, though, she adds immensely to our understanding of governmental power and valiant resistance to immigration policing. Everywhere, her lucid storytelling makes this thorough history an informative and enjoyable read.

Hester's contribution is also important because she highlights historical problems that continue to plague immigration policy today, paving the road for future research. For instance, Hester discusses the narratives that drove the deportation of purported prostitutes, explaining how stories of innocent women being sold into "white slavery" drove the ostensibly compassionate decision to deport alleged prostitutes.²⁰ Such narratives relied on a vision of female victimhood that denied the possibility of a woman actively consenting to unconventional sexual activity.²¹ According to this view, prostitutes racialized as white were victims of sexual exploitation in need of protection and rehabilitation in their native countries.²² Women could sometimes stay their deportations by embracing this narrative, positioning themselves as respectable victims who could be reformed by charitable organizations in the U.S.²³ In contrast, immigration officials often saw Asian and Mexican women not as victims of exploitation but debased individuals who had chosen an "immoral" life.²⁴ Early twentieth century immigration policy thus divided

13. HESTER, *supra* note 1, at 117; see also Matthew C. Waxman, *Police and National Security: American Local Law Enforcement and Counterterrorism After 9/11*, 3 J. NAT'L SECURITY L. & POL'Y 377, 379 (2009) (explaining that the Bureau of Investigation "enlisted local police agencies" to conduct the Palmer Raids).

14. HESTER, *supra* note 1, at 124–27.

15. *Id.* at 131.

16. *Id.* at 128.

17. *Id.* at 127–28.

18. *Id.* at 129 (internal quotations omitted).

19. HESTER, *supra* note 1, at 130–32.

20. *See id.* at 82–111.

21. *Id.* at 89.

22. *Id.* at 89–91.

23. *Id.* at 95–96.

24. HESTER, *supra* note 1, at 108.

“good” migrants from “bad” migrants. White women were depicted as victims in need of protection, while women of color were presumed to have elected their moral depravity and therefore deserved banishment.

Today, immigration policy continues to turn on similarly gendered and racialized notions of deservingness. At times, courts have stripped mothers of parental rights when they wind up in the immigration prison and deportation pipeline.²⁵ High-level administration officials warn parents of the dangers of encouraging their children to migrate unlawfully to the United States. The Trafficking Victims Protection Act uses fragile, objectifying narratives of migrant victimhood that are rife with risk to anyone who does not meet the standard of an “iconic victim.”²⁶ But as Hester’s work suggests, these moral decisions embedded into contemporary immigration policy need critical reexamination. Terminating parental rights hides the state’s role in tearing apart families. Admonishing parents about what risks are acceptable for their children ignores that there are few lawful routes into the United States for most poor people. The existing anti-trafficking legal framework creates a false binary between victims and perpetrators in which the same governmental authority that splits up families and pushes people toward life-risking migratory decisions becomes the sole arbiter of morality.

Without doubt, Hester’s detailed history of this time is worth careful study because many of the questions arising during this formative period in the development of U.S. deportation practices are still relevant today. Just as many were disturbed by the abuses that characterized the arrests of migrants and their associates during the 1920s, controversy continues to surround Immigration and Customs Enforcement (ICE) arrests today. For instance, some have challenged the constitutionality of ICE’s existing arrest practices;²⁷ numerous jurisdictions refuse to honor ICE detainer requests,²⁸ with several courts holding that such requests raise constitutional concerns;²⁹ and serious questions endure regarding migrants’ access to counsel and the sufficiency of process given migrants facing removal.³⁰ Likewise, prolonged detention and poor conditions in detention are still major

25. Allison S. Hartry, *Gendering Crimmigration: The Intersection of Gender, Immigration, and the Criminal Justice System*, 27 BERKELEY J. GENDER L. & JUST. 1, 16 (2012); Marcia Yablon-Zug, *Separation, Deportation, Termination*, 32 B.C. J.L. & SOC. JUST. 63, 82–83 (2012).

26. See Sabrina Balgamwalla, *Trafficking in Narratives: Conceptualizing and Recasting Victims, Offenders, and Rescuers in the War on Human Trafficking*, 94 DENV. L. REV. 1, 17 (2016).

27. See Michael Kagan, *Immigration Law’s Looming Fourth Amendment Problem*, 104 GEO. L.J. 125, 156–64 (2015).

28. See DEP’T OF HOMELAND SECURITY, ENFORCEMENT AND REMOVAL OPERATIONS: WEEKLY DECLINED DETAINDER OUTCOME REPORT 10–23 (Feb. 2017), https://www.ice.gov/doclib/ddor/ddor2017_02-11to02-17.pdf (listing jurisdictions that place limits on honoring ICE detainers).

29. See, e.g., *Morales v. Chadbourne*, 793 F.3d 208, 215–17 (1st Cir. 2015) (explaining that ICE detainers must be supported by probable cause to avoid a Fourth Amendment violation); *Galarza v. Szalczyk*, 745 F.3d 634, 643–45 (3d Cir. 2014) (holding that ICE detainer requests must be interpreted as voluntary to avoid Tenth Amendment concerns); *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-CV-02317-ST, 2014 WL 1414305, at *9–11 (D. Or. Apr. 11, 2014) (honoring ICE detention request constituted Fourth Amendment violation); see also *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 510 (N.D. Cal. 2017), *reconsideration denied*, 267 F. Supp. 3d 1201 (N.D. Cal. 2017), *appeal dismissed as moot sub nom. City & Cty. of S.F. v. Trump*, 17-16886, 2018 WL 1401847 (9th Cir. Jan. 4, 2018) (“Several courts have held that it is a violation of the Fourth Amendment for local jurisdictions to hold suspected or actual removable aliens subject to civil detainer requests because civil detainer requests are often not supported by an individualized determination of probable cause that a crime has been committed.”).

30. See, e.g., Michael Kaufman, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*,

problems today.³¹ This is true even though nine decades have passed since Louis Post sought to taper these excesses and even longer since Chinese migrants turned to the courts for reprieve. Indeed, immigration scholars reading *Deportation* might wonder whether migrants arrested during the Palmer Raids received more procedural protections under Post, who rejected evidence unlawfully gathered and testimony given without a lawyer present,³² than do migrants today, who cannot suppress evidence unlawfully seized except in egregious circumstances³³ and most of whom lack counsel entirely.³⁴

Hester also describes a nascent contract labor program that relied on enforcement tactics that parallel ICE activities today. In 1917, employers lobbied for a policy that would allow them to bring in cheap, racialized labor.³⁵ Facing an anti-Asian lobby that had prevented almost all migration from China, Japan, and India, employers turned to Mexico, where revolution, economic dislocation, and recruitment by U.S. employers had created the conditions for migration.³⁶ Mexicans who came to the U.S. as guest workers would be deported if they left their jobs.³⁷ Tying immigration status to employment meant subjecting migrant laborers to employers' demands and caprices. Workers were beholden to employers even if employers neglected working conditions and paid low wages.³⁸ Indeed, when the Mexican consul complained of the poor wages and living conditions on behalf of workers brought in through the program, U.S. officials responded by deporting those who were "dissatisfied."³⁹ Policies and practices today thus have roots in the contract labor program Hester describes. Not only do immigration laws continue to require temporary workers stay with their employers, creating conditions ripe for exploitation, but legal doctrine leaves employers with the power to flout what little protections exist for workers attempting to improve their conditions through workplace organizing.⁴⁰ More visibly, ICE workplace raids instill fear in migrant workers, pushing them further into the margins of the U.S. legal regime, where they are more easily exploitable.⁴¹

Amid the numerous stories of individuals caught up in the rise of deportation practices, Hester sometimes gets lost in the details. Frequently, she presents each individual as a special case study without drawing conclusions about broader trends.

4 STAN. J. C.R. & C.L. 113, 114–16 (2008).

31. See, e.g., Mariela Olivares, *Intersectionality at the Intersection of Profiteering & Immigration Detention*, 94 NEB. L. REV. 963, 975–76 (2016); see also Jennings v. Rodriguez, 138 S. Ct. 830, 847–48 (2018) (holding that three INA provisions clearly permit prolonged detention with no required bond hearing).

32. HESTER, *supra* note 1, at 132.

33. See *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1050–51 (1984).

34. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 7 (2015) (finding that thirty-seven percent of migrants in removal proceedings from 2007 to 2012 had counsel).

35. HESTER, *supra* note 1, at 164–65.

36. *Id.* at 165–66.

37. *Id.* at 167.

38. *Id.*

39. *Id.*

40. See *Hoffman Plastics v. NLRB*, 535 U.S. 137, 149 (2002).

41. See Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL'Y J. 125, 140 (2009) ("[W]orkplace immigration raids . . . push[] undocumented workers into the shadows."); Leticia M. Saucedo, *A New "U": Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 896 (2008) ("ICE has calculated raids to instill fear in both employers and employees in such workplaces.").

Indeed, despite all its vivid details, the book's greatest weakness is its lack of any critical thesis about the rise of deportation. In recounting detention's role in facilitating deportation, for example, she allows her discussion to veer into humanitarianism without challenging the fundamental mismatch between forced confinement and human liberty.⁴² Summarizing the current visa for victims of human trafficking, she again focuses on its humanitarian aspect without noting that it is tied to police and prosecutorial decisions that can appear random: victims must be certified by police or prosecutor partners and some agencies do not have a process for doing so. Nor does Hester venture into the downsides of linking an immigration benefit to criminal prosecutions of traffickers. Its punitive bent is outshone by its visa-granting potential only if people can be neatly divided into victims and perpetrators and police and prosecutors succeed in putting everyone into the correct categories.⁴³ Her oversight is particularly surprising given her past work linking deportation to state regulation of low-wage labor markets and reification of racial subordination.⁴⁴

Although *Deportation* eschews questions about what exactly caused the United States' transformation from a nation with almost no deportation to one that deports hundreds of thousands of people per year—and why this matters—it provides fabulously detailed accounts of the years during which this transformation occurred. A history is what *Deportation* promises, and a history is what it provides. Readers can decide for themselves why exactly the U.S. deportation regime arose at the turn of the twentieth century and consider how those formative years continue to affect immigration policy today.

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42. HESTER, *supra* note 1, at 90–91.

43. As others have shown, such neat divisions are impracticable. See Sabrina Balamwalla, *Trafficking Rescue Initiatives as State Violence*, 122 PENN ST. L. REV. 171, 190–92 (2017); Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1635 (2010) (referring to the “gray area” between being a victim of “severe” trafficking and a smuggled migrant subject to some labor exploitation).

44. See Torrie Hester, *Deportability and the Carceral State*, 102 J. AM. HIST. 141, 150 (2015) (describing “the place of deportability and deportations within the carceral state”).