

# LEARNING FROM DEPORTED AMERICANS

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When I was a deputy federal public defender in Los Angeles, I represented many individuals who were charged with the federal crime of illegal reentry.<sup>1</sup> One client in particular still stands out in my memory. When I first met him in lock-up, he told me that he should not have been deported. When I asked why, the answer was simple: *he was American*. He had lived in the United States from the time he was a baby. He knew nobody in Mexico and did not speak Spanish. He had pledged his allegiance to the American flag every day in elementary school. His children were United States citizens, as were his wife and parents. Yet, he had been expelled from the country he loves and would soon begin a federal prison sentence for returning to it.

At the heart of Beth Caldwell's beautifully chronicled new book, *Deported Americans*, is a central tension in what it means to be American.<sup>2</sup> On the one hand, being American can be defined as it is under the citizenship law, as a native-born or naturalized citizen. On the other hand, as the stories of the deported Americans Caldwell shares in her book teach us, being American can be understood as a set of shared experiences, loyalties, and relationships that make someone feel and identify as American.<sup>3</sup> One deported American featured in Caldwell's book explained the tension this way: "If you ask me, 'What are you?' I'm going to say I'm American. That's where I grew up. That's what I know . . . . My papers say I'm Mexican but

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1. Under the federal law, it is a felony to return to the United States after being deported. 8 U.S.C. § 1326 (2018).

2. BETH C. CALDWELL, *DEPORTED AMERICANS: LIFE AFTER DEPORTATION TO MEXICO* (2019).

3. My colleague Hiroshi Motomura has shown how U.S. immigration law has contributed to this tension by at times treating immigration as a kind of contractual arrangement that can be terminated, while at other times valuing the ties that immigrants form after coming to the United States. HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006).

there's a lot more to it than what my birth certificate says."<sup>4</sup> A deported military veteran had this to say: "I am an American at heart and in many other aspects. It's the paperwork stating that I am an American that I regretfully lack."<sup>5</sup>

In *Deported Americans*, Caldwell masterfully paints a grisly picture of what the American immigration system has become: a punitive, deportation-centric system that ousts people who are American in every way except on paper.<sup>6</sup> Caldwell's work on the book began in 2009 when she moved to Mexico on a Fulbright Garcia-Robles grant and started to interview deported Americans who had been exiled from the only home they knew. The in-depth research process for *Deported Americans* is best described as longitudinal—Caldwell continued to conduct interviews with the people she met about their lives over a period of seven years. Caldwell also supplemented her in-depth interviews by spending time with the people she met "in their homes, at their jobs, in parks, and in restaurants."<sup>7</sup>

Caldwell goes about her work by exploring the political and legal history of U.S. immigration policy, but, more importantly, by introducing her readers to the extended community of people impacted by deportation that she has gotten to know so well. This includes not only those who were formally deported by the U.S. government, but also their extended families—including children, spouses, and parents. Some families made the difficult decision to be deported together, despite the fact that many family members were themselves U.S. citizens or lawful permanent residents. Others remained separated from their loved ones, enduring loneliness, depression, and other harms that accompany the "slow death" of family separation.<sup>8</sup> Caldwell traces the twists and turns of their lives after deportation.<sup>9</sup> Not surprisingly, many of the individuals that Caldwell follows returned to the United States after their deportation. The pull to be reunited with their children and families made it impossible to live in exile.

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4. CALDWELL, *supra* note 2, at 156.

5. *Id.* at 1.

6. *Id.* at 6.

7. *Id.* at 11.

8. Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2336 (2019).

9. Examples of scholarship that adopt a transnational lens and address the post-deportation experiences of deportees are rare, but for some important examples, see DANIEL KANSTROOM, *AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA* (2012); SUSAN BIBLER COUTIN, *EXILED HOME: SALVADORAN TRANSNATIONAL YOUTH IN THE AFTERMATH OF VIOLENCE* (2016); NANCY HIEMSTRA, *DETAIN AND DEPORT: THE CHAOTIC U.S. IMMIGRATION ENFORCEMENT REGIME* (2019).

Robert, for example, was brought to the United States when he was only three years old. Following an assault conviction, he was deported and left behind his wife and four children—all of whom were U.S. citizens.<sup>10</sup> While living in Tijuana, Robert learned that his wife had developed a drug addiction. This led Robert to cross the border in an attempt to support his children. He went to court and was granted emergency custody of his children, but soon thereafter “his wife reported him to immigration authorities[.]”<sup>11</sup> He found himself, like so many of my former clients, prosecuted for illegal reentry and serving a nearly five-year sentence in federal prison. Despite his incarceration, Robert confided in Caldwell: “Even though I’m in jail here, I feel closer to my kids than I did there, free.”<sup>12</sup>

Or, consider Edgar—a husband and father of two—who was brought to the United States by his mother when he was just four years old. When Edgar’s wife was pregnant, they were at a carnival when a fight broke out. Edgar ended up sustaining a conviction for making a threat during the altercation.<sup>13</sup> Although the conviction did not make him deportable at the time, in 1996 the law was amended and Edgar’s conviction was reclassified as an “aggravated felony,” subjecting him to deportation. These same 1996 reforms also eliminated the availability of relief from deportation for those convicted of aggravated felonies, preventing immigration judges from weighing factors such as Edgar’s long-term residence in the United States and the fact that all of his immediate family members were U.S. citizens. Five years after being deported, Edgar tried to save his marriage by returning to the United States but was caught in the process and prosecuted for illegal reentry.<sup>14</sup> After being deported again to Mexico, his “sixteen-year marriage fell apart under the stress of their physical separation[.]” and Edgar now only sees his children “a few times a year.”<sup>15</sup>

Caldwell carefully probes the devastating impact of the deportation-reentry-prison cycle on the children of deportees. George was only three when his father was arrested on a drug charge and then deported. Understandably, George’s father kept trying to return to the United States so he could be with his son but tragically ended up serving nine years in prison for three separate illegal reentry convictions.<sup>16</sup> For young George, this meant that his only memories of his father were from brief visits to Mexico or

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10. CALDWELL, *supra* note 2, at 92.

11. *Id.*

12. *Id.*

13. *Id.* at 41.

14. *Id.* at 110-11.

15. *Id.*

16. *Id.* at 133.

occasional trips to the far-away U.S. prisons where his father was held. At the age of thirteen, George told Caldwell that he had grown up without his father: “It’s like if I don’t even have a dad.”<sup>17</sup>

One partial solution gaining increasing public support is to repeal the criminal law that makes crossing the border after deportation a federal crime.<sup>18</sup> Although the illegal reentry law has been on the books since 1929, it has been prosecuted with increasing frequency since the 1990s and now is one of the most prosecuted crimes in federal court.<sup>19</sup> Over time, however, prison sentences for violating the illegal reentry law have declined.<sup>20</sup> In part, this downward slide reflects recognition by federal judges of some of the human suffering caused by deportation and the reasons why people return. In making judges understand these human impacts, criminal defense lawyers play a central role in reducing implicit bias by educating judges about their clients’ lives and the many roles they play as a parent, employee, spouse, and family member.<sup>21</sup> Caldwell’s book has much to contribute to this conversation by documenting, through personal accounts, the searing pain that deportation imposes on families separated across borders.

Gina is another of the many individuals that we learn from in *Deported Americans*. Gina was brought to the United States by her parents when she was a young child and was a lawful permanent resident for over twenty years. As she told Caldwell in their first interview, she had even passed the citizenship test and looked forward to applying to become a U.S. citizen.<sup>22</sup> Gina, who had moved to Colorado to escape an abusive partner, did not realize that she had already been ordered deported by an immigration judge in Los Angeles.<sup>23</sup> The cause of her deportation was a conviction for domestic violence. Gina sustained this conviction after her abusive partner brought charges against her. In reality, Gina was the victim in the relationship, surviving abuse “so severe that she suffered two miscarriages following

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17. *Id.*

18. See Ingrid V. Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C. L. REV. 1967, 1972 (2020).

19. Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1297-98, 1351-53 (2010); see also AM. IMMIGR. COUNCIL, PROSECUTING PEOPLE FOR COMING TO THE UNITED STATES, (Jan. 10, 2020), <https://www.americanimmigrationcouncil.org/research/immigration-prosecutions>.

20. See Eagly, *supra* note 18, at 1988 tbl.1.

21. See generally Walter I. Gonçalves, Jr., *Narrative, Culture, and Individuation: A Criminal Defense Lawyer’s Race-Conscious Approach to Reduce Implicit Bias for Latinxs*, 18 SEATTLE J. FOR SOC. JUST. 333, 366 (2020) (arguing that defense lawyers should use the moment of sentencing to “blunt the effects of racial stereotyping”).

22. CALDWELL, *supra* note 2, at 3.

23. *Id.* at 17.

beatings.”<sup>24</sup> After a routine traffic stop, Gina was arrested and deported to Mexico without ever having gone to speak with an immigration judge. She made the heart-wrenching decision to leave behind her three young children, including one with special needs, with her parents.<sup>25</sup> “Five years later,” Gina told Caldwell, her children “don’t even want to talk to me. It’s like I’m a stranger to them.”<sup>26</sup>

Since 1990, federal law has required immigration judges to deport individuals like Gina who miss even just one court hearing.<sup>27</sup> Yet, Gina’s removal without a court hearing raises important questions about whether she ever received proper notice of her court date in Los Angeles. The U.S. Supreme Court’s 2018 decision in *Pereira v. Sessions* has put the spotlight on the government’s pervasive failure to include the date and time of the hearing on the initial charging document.<sup>28</sup> Counsel for the government revealed at oral argument before the Supreme Court that “almost 100 percent” of notices to appear issued over the preceding three years had omitted the date and time of the court hearing.<sup>29</sup> Had Gina known about the hearing and attended she might have qualified for relief from deportation. Or perhaps she would have qualified for post-conviction relief if her criminal defense lawyer failed to advise her of the immigration consequences associated with her plea.<sup>30</sup>

In a recent study, Steven Shafer and I looked closely at the practice of *in absentia* removal.<sup>31</sup> We found that individuals like Gina who do not have lawyers to guide them in the hearing process were far more likely be ordered deported *in absentia* without ever going to court.<sup>32</sup> We also found that fifteen

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24. *Id.* at 3.

25. *Id.* at 19, 132.

26. *Id.* at 132.

27. Immigration Act of 1990, Pub. L. No. 101-649, § 545(a), 104 Stat. 4978, 5063 (codified as amended at 8 U.S.C. § 1229a(b)(5)(A) (2018)) (“Any alien who . . . does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (c)(2)).”).

28. 138 S. Ct. 2105 (2018).

29. Transcript of Oral Argument at 52, *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) (No. 17-459) (Frederick Liu, Assistant to the Solicitor General, Department of Justice, responding to Justice Anthony M. Kennedy).

30. See *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (finding that the Sixth Amendment requires defense lawyers to advise their noncitizen clients if deportation will result from their conviction). Under California Penal Code Section 1473.7, a noncitizen who was not able to “meaningfully understand” the adverse immigration consequences of a guilty plea may move to vacate the judgment of conviction. CAL. PENAL CODE § 1473.3 (West 2020).

31. Ingrid V. Eagly & Steven Shafer, *Measuring In Absentia Removal in Immigration Court*, 168 U. PA. L. REV. 817, 818 (2020).

32. See *id.* at 859-60.

percent of *in absentia* orders issued were later successfully rescinded because of notice problems.<sup>33</sup> This important measurement reveals serious problems with the system for providing notice about immigration court hearings. As Gina expressed to Caldwell, she wanted to go to court so she could just “talk to a judge—to explain how this was just a mistake and that my kids need me.”<sup>34</sup> In her view, getting deported without first getting to “explain my problems to a judge” just “wasn’t fair.”<sup>35</sup>

A related trend occurring during the years that Caldwell conducted her field research is the increasing reliance on deportation procedures that bypass the immigration court.<sup>36</sup> Changes in the immigration law since the 1980s have narrowed the group of individuals who qualify for a hearing with an immigration judge, while at the same time eliminating many forms of relief from deportation. For example, under a process known as expedited removal, immigrants apprehended at a port of entry within two weeks of entry may be summarily expelled.<sup>37</sup> Under something known as administrative removal, noncitizens who are not lawful permanent residents can be deported without ever seeing an immigration judge if they are convicted of an aggravated felony.<sup>38</sup> And, a procedure known as reinstatement allows for prior removal orders to be reactivated without a right to judicial review.<sup>39</sup> The result is that more and more individuals are deported without ever stepping foot in court, and without being able to have a judge consider the equitable factors in their case.<sup>40</sup>

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33. *Id.* at 855 tbl.8.

34. CALDWELL, *supra* note 2, at 18.

35. *Id.*

36. See Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 611-32 (2009) (summarizing the methods, aside from removal hearings, that the government uses to deport noncitizens); Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 3 (2014) (arguing that the human cost of “speed deportations” are “significant and can result in the ejection of people who would otherwise qualify for relief before an immigration judge or who present strong equities”); Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 183 (2017) (revealing that “the vast majority of cases in which the government issues removal orders against noncitizens never reach the immigration courts”); see also ACLU, AMERICAN EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM (2014), [https://www.aclu.org/sites/default/files/field\\_document/120214-expeditedremoval\\_0.pdf](https://www.aclu.org/sites/default/files/field_document/120214-expeditedremoval_0.pdf) (documenting 136 cases of individuals who were deported without ever being heard in court).

37. INA § 235(b)(1)(A), 8 U.S.C. § 1225(b)(1)(A); see also Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877, 48880 (Aug. 11, 2004) (authorizing the DHS to place a designated class of immigrants in expedited removal proceedings).

38. INA § 238(b), 8 U.S.C. § 1228(b).

39. INA § 241(a)(5), 8 U.S.C. § 1231(a)(5); see also 8 C.F.R. § 1241.8(a) (2020).

40. Jennifer Lee Koh, *Anticipating Expansion, Committing to Resistance: Removal in the Shadows of Immigration Court Under Trump*, 43 OHIO N.U. L. REV. 459 (2017) (explaining that today most removals take place outside of immigration courts).

Jose, another deportee that Caldwell introduces us to, fell victim to one of these administrative forms of deportation. Jose was just four years old when his mother brought him from Mexico to the United States.<sup>41</sup> His childhood in the United States was plagued by poverty and also the physical and emotional abuse of his stepfather.<sup>42</sup> Growing up with these stressors, Jose ran away from home and ultimately joined a gang.<sup>43</sup> At the age of sixteen, Jose was sentenced to twelve years in prison for participating in a robbery. During his time in prison, he cut ties with his former gang, sustained strong relationships with his siblings, and earned his GED and an A.A. degree.<sup>44</sup> Yet, because Jose was only a conditional permanent resident at the time of his conviction (rather than a lawful permanent resident), he was removed at the end of his sentence through an administrative process.<sup>45</sup> He never saw an immigration judge and had no opportunity to apply for relief from deportation. As Jose told Caldwell:

It didn't feel right . . . that they could just stamp a paper and say you're banned for the rest of your life without even taking me to court. I feel like if they're going to take people to court before making them pay a fine or putting them in jail for a few days, they should at least take me to court before they tell me I can never come back. They just took me into an office and gave me a paper that said I'm banned for life.<sup>46</sup>

At the time of his deportation, all of Jose's siblings were U.S. citizens and he had no family in Mexico.<sup>47</sup>

Jose's story, like those of so many others featured in the book, brings Caldwell to propose reforming the deportation law. One key change is to allow immigration judges to make individualized determinations in deportation cases, balancing the need for deportation against the harm that deportation inflicts.<sup>48</sup> Another change that Caldwell endorses is "creating a lawful path to return to the United States based on demonstrated rehabilitation."<sup>49</sup> Importantly, Caldwell advocates including persons convicted of crimes in these legislative reforms. Doing so would require policymakers to move away from a zero-tolerance criminal removal system and instead recognize that persons with criminal convictions are

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41. CALDWELL, *supra* note 2, at 53.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 32.

46. *Id.* at 33.

47. *Id.* at 53.

48. *Id.* at 181.

49. *Id.*

“multidimensional people who are more similar to people without convictions than public discourse implies.”<sup>50</sup>

Now is an especially important time for policymakers to learn from the lives of deported Americans and to consider the policy solutions that Caldwell introduces. President Barack Obama—dubbed America’s “Deporter-in-Chief” by some critics—presided over the deportation of over three million people during his eight years in office.<sup>51</sup> By 2019, the Trump administration had removed nearly a million noncitizens from U.S. soil.<sup>52</sup> The majority of those deported were from Mexico,<sup>53</sup> many of whom had lived much of their lives in the United States. The prevalence of Mexican deportation underscores a long history of racial exclusion and reliance on immigration enforcement efforts that both justify and target those racialized as Mexican.<sup>54</sup> As we enter a new presidential administration, deportation remains central to the immigration policy debate in the United States.

Today the majority of Americans do not favor deporting all persons who are here unlawfully.<sup>55</sup> Some immigrant rights groups have begun to advocate a deeper recognition of the racial violence imposed by existing structures of immigration enforcement, including by “abolishing ICE” and “ending deportation.”<sup>56</sup> In its place, our country could begin to imagine a more just and equitable system for immigrant integration. Yet, when policymakers discuss deportation, very rarely do they address the real pain and separation endured by people impacted by deportation. *Deported Americans* helps to fill this void. By weaving together the powerful narratives of the people she met into a rich narrative tapestry, Caldwell exposes the deep flaws in current

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50. *Id.* at 186.

51. Muzaffar Chishti et al., *The Obama Record on Deportations: Deporter in Chief or Not?*, MIGRATION POL’Y INST. (Jan. 26, 2017), <https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not>.

52. OFF. OF IMMIGR. STAT., DEP’T OF HOMELAND SEC., 2019 YEARBOOK OF IMMIGRATION STATISTICS tbl.39 (2020), <https://www.dhs.gov/immigration-statistics/yearbook/2019>.

53. *See id.* at tbl.41 (reporting that sixty percent of noncitizens removed in fiscal year 2019 were from Mexico).

54. ADAM GOODMAN, *THE DEPORTATION MACHINE: AMERICA’S LONG HISTORY OF EXPELLING IMMIGRANTS* (2020); Jennifer M. Chacón & Susan Bibler Coutin, *Racialization Through Enforcement*, in *RACE, CRIMINAL JUSTICE, AND MIGRATION CONTROL: ENFORCING THE BOUNDARIES OF BELONGING* 159 (Mary Bosworth et al. eds., 2017); *see also* Carrie Rosenbaum, *Crimmigration: Structural Tools of Settler Colonialism*, 16 OHIO ST. J. CRIM. L. 9, 22-23 (2018) (tracing how “crimmigration” has replicated the “racialized harms of both the criminal and immigration systems”).

55. *Immigration*, GALLUP, <https://news.gallup.com/poll/1660/immigration.aspx> (last visited Jan. 25, 2021).

56. Angélica Cházaro, *The End of Deportation*, 67 UCLA L. REV. (forthcoming 2021); Peter L. Markowitz, *Abolish ICE... and Then What?*, YALE L.J. F. (Nov. 7, 2019), <https://www.yalelawjournal.org/forum/abolish-ice-and-then-what>.

deportation policy. At bottom, she pushes the law to embrace a broader definition of American, one that recognizes people's lived experiences, supports family ties, and rewards social membership.