

‘Historically, America both legalized and deported migrants — since 1996, it only deports’

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Joseph Carens offers a persuasive case for granting amnesty to unauthorized migrants. He argues that liberal democracies should acknowledge the social ties that migrants establish over time, which make them de facto members of society, even if they lack formal legal status. The longer migrants stay in the United States, the stronger their moral claim to remain. In effect, Carens says, the better answer to the misalignment of social inclusion and unlawful status is legalization, not deportation. Carens writes from the standpoint of the ethical commitments that undergird liberal democratic societies. I would like to add a historical argument. The history of American immigration policy suggests two lessons of current relevance. First, as long as we have had restrictions on immigration, we have had provisions for both deportation *and* legalization. Carens’s argument is worthy, but it also is not new; legalization has always been based on the same principles: length of stay and familial ties to citizens. Second, there is a rough correlation between race and legalization. From the late nineteenth century through the middle of the twentieth, the United States established myriad policies that enabled some irregular migrants from Europe to legalize their status, but harsh policies toward those from China and Mexico.

From the time of the founding of the republic through most of the nineteenth century, immigration to the United States was normatively open. It may be hard for us today to imagine a system with no passports, visas, quotas, green cards, border patrol, deportations. The first restrictive immigration laws were the Chinese exclusion laws, passed by Congress in 1875 and 1882, first barring “Mongolian” prostitutes and then all Chinese laborers. Enforcement included both extreme interrogation of new arrivals and deportation of those without legal status. In 1892 Congress required legally resident Chinese to carry a permit; failure to produce it on demand was punishable by a year’s imprisonment at hard labor followed by deportation — unless one could produce three white witnesses to vouch for one’s legal status. The U.S. Supreme Court upheld the permit requirement, ruling in *Fong Yue Ting v. United States* that aliens entered and remained only by “the license, permission, and sufferance of Congress.” The court did strike down the provision for imprisonment at hard labor. In 1882 Congress also passed the first general immigration law, which excluded from the United States convicts, lunatics, idiots, and persons likely to become public charges. By World War I the list of excludable categories grew to include contract laborers, persons with “loathsome and contagious disease,” prostitutes, polygamists, and anarchists. These exclusions indexed concern over potential drains on the public coffers and fears of moral contaminants. The first deportation law, passed in

1891, authorized the removal of aliens who within one year of arrival became public charges from causes existing prior to landing. The expense of deportation was borne by the steamship company that originally brought the unwanted immigrant. Deportation was thus conceived as appropriate only for persons with limited length of stay in the country. Even as Congress extended the statutes of limitations on removal to five years for certain categories in the early twentieth century, it still hewed to this basic principle. However, that appreciation of immigrant settlement and incorporation did not extend to the Chinese, whose exclusion was based on a racial logic that Chinese were inherently unassimilable. There was no statute of limitation for deporting unauthorized Chinese.

When Congress passed the first *numerical* restrictions on European immigration in the 1920s, it provided no statutes of limitations for violations of the quota laws, evincing a different attitude toward trespass against the nation's sovereignty than it had toward individual qualification. By the early 1930s there was public outcry over the deportation of immigrants, especially those of European origin with longtime residence in the United States. Frances Perkins, who as Secretary of Labor was responsible for enforcing the immigration laws, devised various administrative mechanisms that allowed for the legalization of irregular migrants. By the 1940s and '50s Congress passed legislation for suspension of deportation and legalization of status in cases of long-term residence, marriage to a citizen or a legal immigrant, and where deportation would result in "hardship" to the deportee or to family members left behind. The data suggest that far more Europeans were regularized under these programs than were Latinos or Asians. But both racial advantage and disadvantage were often leavened by ideology: the two big "red scares" of the twentieth century, after World War I and after World War II, especially targeted European-immigrant radicals. During the cold war, the Immigration and Naturalization Service (INS) deported unauthorized Chinese in the United States who were leftists, while offering legalization to unauthorized Chinese who foreswore association with communism.

The imposition of numerical limits on immigration from countries of the Western Hemisphere under the Hart-Celler Act of 1952 led to an upsurge of unauthorized migration from Mexico and Central America. There were two responses: on the one hand, nativist outcry against illegal aliens and, on the other hand, mobilization by a growing Latino political constituency for recognition and inclusion. The 1986 Immigration Reform and Control Act responded to these competing interests with a compromise—amnesty for the undocumented, greater border enforcement to prevent future unauthorized entry, and employer sanctions to prevent employment of irregular migrants (this latter provision was never seriously enforced). During these years the INS adopted a rationalized method for granting suspensions of deportation, involving a balance of equities that weighed the seriousness of one's offense against one's length of residence in the United States, familial and community ties, evidence of reform in the case of criminals, etc.

At the same time, the meaning of "hardship" steadily narrowed so that by the 1990s it was virtually useless as grounds for voiding a deportation order. Indeed the 1996 immigration laws (passed just as Congress was ending "welfare as we know it") made removal *mandatory* for nearly all cases of

unauthorized presence, with no administrative discretion or judicial review. America's long history of practicing both deportation and legalization pretty much came to an end. The United States now only deports people. Amnesty, no stranger to the history of immigration policy, is now considered politically unthinkable. In fact, some of our older policies — statutes of limitations on unauthorized presence and mechanisms on the books for individuals to adjust their status — are actually more sensible than one-time amnesty programs because they serve as built-in correctives that prevent the accretion of a large unauthorized population.

When the Supreme Court stated in 1893 that Congress had the absolute authority to expel Chinese migrants, that authority applied to *all* immigrants, at least in theory. In practice, however, immigration policy was much more forgiving toward unauthorized migrants from Europe. For a time, during the long civil rights era, Asians and Latinos were able to tap into that tradition. But that inclusionary impulse has since given way to exclusionary nativism, in which anxiety over migrant illegality has been arguably a proxy for racism against Latinos. But, in a twist of contemporary colorblindness, it also has become virtually impossible for all unauthorized migrants, regardless of national origin, to legalize their status. In a sense, Justice David Brewer's dissent against arbitrary deportation in *Fong Yue Ting*, has come to pass: "It is true," he wrote, that "this statute is directed only against the obnoxious Chinese, but, if the power exists, who shall say it will not be exercised tomorrow against other classes and other people?"