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TOWARD PROPORTIONAL DEPORTATION

*Polly J. Price**

ABSTRACT

Professor Price discusses how Professor Banks's contribution provides an especially compelling illustration of the disjuncture between citizenship status and long-term residence in U.S. immigration law. Professor Price argues that Professor Banks makes a compelling case that Congress unintentionally created this schism and that this state of affairs need not be.

INTRODUCTION

With comprehensive immigration reform at a critical juncture in the United States, Angela Banks's timely article reminds us of an important part of that debate—the deportation of noncitizens with long-term, significant ties to this country.¹ Specifically, Banks addresses deportation on “aggravated felony” grounds as an overinclusive net for the public policy it was intended to serve.² In doing so, she has identified one of the most important and contentious issues in deportation policy today.

The larger principle at issue—that citizenship is an inadequate proxy for membership interests in U.S. society—is well-traveled ground. Recent literature on this theme, much of which she cites, can be found in the scholarship of law professors Daniel Kanstroom,³ Hiroshi Motomura,⁴ and Linda Bosniak,⁵ as well as in the scholarship of history and political science

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¹ See Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 EMORY L.J. 1243 (2013).

² See *id.* at 1248–50, 1287–88.

³ See DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 243 (2007).

⁴ See HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 195–97* (2006).

⁵ See LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 3 (2006).

professors Linda Kerber⁶ and Ayelet Schachar.⁷ The debate over birthright citizenship in the United States is premised upon the “arbitrary” nature of ascriptive rules: should full membership rights be based solely on the ground of territorial birth? And the concept of *jus nexi* has been well-developed both in U.S. and international scholarship.⁸ The notion that ties to the United States—and not formal citizenship—has been recognized in some contexts by the U.S. Supreme Court.⁹

Banks’s contribution, however, provides an especially compelling illustration of the disjuncture between citizenship status and long-term residence in U.S. immigration law. Banks elucidates the expansion of crimes encompassed by the federal aggravated felony deportation ground, as well as the removal of discretion at nearly all levels of the deportation process.¹⁰ Banks acknowledges the administrative concerns favoring a speedy, predictable response to violent crimes committed by recent arrivals, particularly those who entered the country surreptitiously. But “green card” holders and long-term residents, she argues, deserve better. This is especially true for any noncitizen with significant community ties. Families are left destitute and U.S. citizen children lose critical parental support, often for a one-off, nonviolent crime committed and punished years ago.

This state of affairs need not be, and Banks makes a compelling case that Congress unintentionally created it. Banks’s exploration of the legislative history of deportation on criminal grounds is an impressive contribution: we see that the United States has followed different policies in the past, with arguably more success as a deterrent to crime, and certainly with more fairness. We also see that Congress’s 1996 foray into deportation strategy—and particularly, the aggravated felony expansions—exhibited substantial confusion about the effect on green card holders and other long-term

⁶ See generally, e.g., Linda K. Kerber, Presidential Address, *The Stateless as the Citizen’s Other: A View from the United States*, 112 AM. HIST. REV. 1 (2007) (examining the interplay between statelessness and citizenship).

⁷ See generally AYELET SCHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* 112 (2009) (arguing that the basis for citizenship is neither birth in a particular territory nor “descent from a member parent,” but, instead, “stems from being a participant in the relevant bounded membership community”).

⁸ See *id.* at 16. See generally RE-IMAGINING POLITICAL COMMUNITY: STUDIES IN COSMOPOLITAN DEMOCRACY (Daniele Archibugi et al. eds., 1998) (collecting essays on national sovereignty, concepts of membership, and the response of political institutions to globalization).

⁹ See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

¹⁰ See Banks, *supra* note 1, at 1251, 1281–82, 1287.

residents.¹¹ Subsequent efforts to ameliorate this effect have gained no traction, Banks notes, because legislators generally fear the “soft on crime” label. It is always difficult to roll back criminal sanctions, especially in the midst of a highly charged debate over illegal immigration.

Banks’s article is thought provoking and leads to further questions and challenges for U.S. immigration policy. I would like to raise three such questions, in abbreviated form. I do not provide answers because the issues I identify are sufficiently complex to warrant separate analysis. Nonetheless, I believe these questions both highlight the important contributions of Banks’s article and underscore its further implications.

I. WHAT ARE THE BEST STRATEGIES TO FIX THE PROBLEM?

Banks advocates a statutory approach that would provide concrete criteria to determine which noncitizens should be allowed to stay when facing deportation for a post-entry crime. She admits that this approach would require “complex” rules enacted by Congress, not formulated in her article.¹² Distributional fairness may require such categorical complexity if a discretionary approach—standards rather than rules—permits unacceptable variation in deportation decisions. But perhaps other strategies might further her goal? Prosecutorial discretion in selecting whom to deport gets little attention in the article, but rules directing prosecutors to account for residential ties could perhaps provide the outcome Banks seeks without requiring Congress to act. This approach, of course, depends upon the will of the Executive, and would likely be viewed by some members of Congress as unacceptable executive action (similar to the reaction of some members of Congress to President Obama’s implementation of deferred action for childhood arrivals as a matter of prosecutorial discretion).

Another approach might be to restore the discretion formerly held by immigration law judges, if not the federal judiciary. Banks cites the Federal Sentencing Guidelines as a model for the complex rules to be enshrined by statute, but the Guidelines, too, have long been criticized for one-size-fits-all

¹¹ In 1996, Congress enacted both the Anti-Terrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (frequently referred to as IIRIRA). See Banks, *supra* note 1, at 1279.

¹² Banks states, “Complex rule-like directives could be used to achieve this goal. Congress could create a system like the Federal Sentencing Guidelines that takes account of a variety of factors in determining an individual’s punishment.” Banks, *supra* note 1, at 1303.

punishment, when in some circumstances judges see the need for an individualized approach.¹³ The Guidelines have eroded in favor of greater judicial control over individualized sentencing. It might be possible to tap into this more general devolution for criminal sentencing as an argument equally applicable to deportation proceedings.

Finally, are there any significant prospects for a successful constitutional challenge to automatic deportation for an aggravated felony? It is true, as Banks notes, that the long-standing “deportation is not punishment” refrain is still the reigning paradigm. On the other hand, some judges and even the Supreme Court have recently expressed discomfort with this nineteenth-century declaration.¹⁴ Banks’s hypothetical case of “Gerardo,” reflected in many real-life instances, might present a compelling opportunity to rid the law of this categorical distinction.

II. SHOULD WE CONSIDER DETRIMENTAL EFFECTS OF U.S. DEPORTATION DECISIONS ON OTHER NATIONS?

Some nations on the receiving end of U.S. deportations, primarily in Central America, maintain that U.S. deportation practices have led to substantial increase in drug- and gang-related violent crime in their countries.¹⁵ There is ample reason to believe this is true.¹⁶ But should this be a consideration for the U.S. government? After all, dangerous criminals make the paradigm case for aggravated felony exclusions. We make our country safer when we expel such persons.

The end game of deportation is to expel a person to his or her country of origin.¹⁷ For the receiving nation, this outcome is arbitrary if the deportee has little or no connection to the country of his or her nationality. On the other

¹³ See *id.* at n.350.

¹⁴ See, e.g., *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010); H. Lee Sarokin, *Debunking the Myth That Deportation Is Not Punishment*, HUFFINGTONPOST.COM (Oct. 14, 2009, 4:44 PM), http://www.huffingtonpost.com/judge-h-lee-sarokin/debunking-the-myth-that-d_b_321329.html.

¹⁵ See Steven Dudley, *Part II: Gangs, Deportation, and Violence in Central America*, INSIGHTCRIME.ORG (Nov. 26, 2012), <http://www.insightcrime.org/violence-against-migrants/part-ii-gangs-deportation-and-violence-in-central-america>.

¹⁶ See MICHAEL SHIFTER, COUNCIL ON FOREIGN RELATIONS, *COUNTERING CRIMINAL VIOLENCE IN CENTRAL AMERICA*, at vii, 7, 9, 21–22, 29 (2012), http://www.thedialogue.org/PublicationFiles/Criminal_Violence_CSR643.pdf.

¹⁷ In some instances, deportation cannot occur because nationality cannot be determined or no country is willing to receive the deportee. Polly J. Price, *Stateless in the United States: Current Reality and a Future Prediction*, 46 VAND. J. TRANSNAT'L L. 443, 472 (2013).

hand, the return of an adult criminal who only recently left that country can be more easily justified. Long-term U.S. residents deported on aggravated felony grounds arguably developed a propensity for violence or drug use in this country. Rather than punish and reform these individuals, the United States prefers to export its own crime problem. Citizenship and nationality, absent the *jus nexi* principle advocated by Banks, is underinclusive in this way as well.

A related question follows from the banishment of violent criminals to a country with which they have no ties. State governments object to the expense of imprisoning noncitizens, particularly those with no legal permission to be in the United States. From this perspective, state and local governments prefer immediate deportation after a conviction, thus avoiding the significant cost of incarceration. But this also substitutes society's traditional "punishment" for the crime in favor of the "punishment" of deportation. If this result applied only to noncitizens with no substantial ties here, would that be an acceptable trade-off for implementing the rules Banks advocates? Crime victims might disagree, especially if the deportee finds an illicit way back.

III. IF THE UNITED STATES EASES ITS "WAR ON DRUGS," SHOULDN'T THAT BE REFLECTED IN IMMIGRATION LAW?

Finally, Banks's article invites broader reflection on America's "war on drugs." It is no coincidence that Congress imposed near-automatic deportation for drug crimes in the same era that it created inflexible and harsh federal sentences—including the death penalty—for certain drug crimes.¹⁸ The U.S. prison population is notoriously large, and a high proportion of inmates are there because of drug crimes.¹⁹ Drug crimes, in turn, have been the centerpiece for deportation on aggravated felony grounds.

Recently, however, politicians readily admit that there are disparities and other problems with harsh sentencing for drug crimes, and, in some instances, they have attempted to ameliorate these problems. The Fair Sentencing Act of 2010, for example, reduced the disparity in sentencing between crack and powder cocaine.²⁰ A recent CNN report labeled the war on drugs "a trillion-

¹⁸ The Violent Crime Control and Law Enforcement Act of 1994, for example, included the death penalty for large-scale drug trafficking. U.S. Dep't of Justice, *Violent Crime Control and Law Enforcement Act of 1994*, NCJRS.GOV (Oct. 24, 1994), <https://www.ncjrs.gov/txtfiles/billfs.txt>.

¹⁹ See Adam Liptak, *U.S. Prison Population Dwarfs That of Other Nations*, N.Y. TIMES, Apr. 23, 2008, <http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html?pagewanted=all>.

²⁰ *Fair Sentencing Act*, ACLU.ORG, <https://www.aclu.org/fair-sentencing-act> (last visited May 15, 2014).

dollar failure.”²¹ The governors of Georgia²² and New Jersey,²³ among other states, have expressed the desire to lessen the prison sentence for those convicted of what are increasingly viewed to be minor drug offenses. The potential legalization of marijuana use would also contrast sharply with marijuana-related deportations.

Will different priorities in the war on drugs also be reflected in immigration law? Logically, they should be. In Banks’s hypothetical, Gerardo’s \$10 bag of marijuana led to deportation. If minor drug offenses cease to count as aggravated felonies for deportation, we would at least be one step closer to proportional deportation.

CONCLUSION

Many of the questions briefly explored here are beyond the scope of what Banks set out to do in her article. This Essay is thus not in the nature of a traditional criticism, but instead points out ways in which Banks’s article inspires further practical implications and alternative frameworks. Legal scholarship is at its best when it identifies and describes a significant problem and proposes workable solutions. It is even better when, as here, an article invites reflection on a wider range of policy concerns and provides the historical context necessary to tackle them.

²¹ Richard Branson, *War on Drugs a Trillion-Dollar Failure*, CNN.COM (Dec. 7, 2012, 6:05 PM), <http://www.cnn.com/2012/12/06/opinion/branson-end-war-on-drugs/>.

²² See Jim Galloway, *A New Governor Looks Behind Georgia’s Prison Bars to Save Money*, AJC.COM (Jan. 15, 2011, 3:00 PM), <http://blogs.ajc.com/political-insider-jim-galloway/2011/01/15/a-new-governor-looks-behind-georgias-prison-bars-to-save-money/>.

²³ See Reihan Salam, *Chris Christie and the “Failed War on Drugs,”* REUTERS.COM (Jan. 24, 2014), <http://blogs.reuters.com/reihan-salam/2014/01/24/chris-christie-and-the-failed-war-on-drugs/>.