

# The case against removal: *Jus noci* and harm in deportation practice

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## Abstract

The United States removes from its territory almost 400,000 noncitizens annually—Germany removes about 50,000 people each year, France 26,000, and Canada 12,000. In this article, we focus on the impact of removal, and we argue that many individuals—often those who are best integrated in their countries of long-term residence—will suffer significant physical, psychological, economic, and social harm upon their return. Democratic states have normative reasons for taking the harm of deportation into consideration, and we also find qualified support for this position in existing refugee and immigration law. In response, we articulate *jus noci* as a normative principle for harm avoidance in deportation practice. According to *jus noci*, democratic states must take into consideration the expected harmful effects of territorial removal and refrain from deporting individuals whose removal is, all other things being equal, likely to impose significant harm.

**Keywords:** deportation, harm avoidance, removal

*Thirty-nine-year-old Vasilio Martínez ‘was caught in Arizona trying to return to his wife and five children in Washington State, where he had lived for nine years. . . . On the day he was repatriated to Nuevo Laredo—about 1,500km (950 miles) east of where he had originally crossed—he did not know where he was. All he knew was that the city had a reputation for drug violence. Instead of relief at being back in Mexico on his first day of freedom, he was terrified. And he had no idea when he would see his family again.’*

(*The Economist*, February 8th, 2014)

## 1. Introduction

Long-term residents, both undocumented and with legal residency, are removed from liberal democracies in large numbers every year.<sup>1</sup> The United States and countries such as Australia, Canada and many in Europe have invested heavily in border and internal enforcement policies and changed their laws, easing removal and criminalizing unauthorized entry (FRONTEX 2012; Kanstroom 2004; Council of Europe 2010). In recent years, the

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United States has removed from its territory almost 400,000 noncitizens annually, up from 189,026 in 2001 (US Department of Homeland Security 2010). In 2013, US immigration enforcement removed 438,000 people, expedited the expulsion of 178,000 individuals, detained 441,000, and apprehended 662,000 noncitizens. According to recent estimates, more than 16 million people live in mixed-status families in the United States: a large number of them have been affected by deportations while the rest live in fear that a family member will be apprehended. According to the Global Detention Project <<http://www.globaldetentionproject.org>>, Germany removes about 50,000 people each year, France 26,000, Canada 12,000 and Australia 10,000.

Various terms denote the involuntary removal of individuals from the physical territory of a state. ‘Expatriation’ or ‘denationalization’ are typically reserved for citizens who renounce their citizenship or who are forcibly stripped of it (Weil 2013; *Perkins v. Elg*: 334). ‘Exclusion’ and ‘deportation’ are reserved mostly for noncitizens. The term ‘exclusion’ is reserved for decisions to not admit aliens into the territory of a nation-state. This is a judgment that typically takes place at the border. ‘Deportation’, in contrast, applies to individuals who have either been admitted in error or who have violated the conditions associated with their admission or abode. In these cases, the state reserves the right to physically remove from its territory legal residents who are deemed unfit for continued residency. Deportation, in legal terms, is ‘simply the withdrawal of a privilege to remain in the United States’ (Aleinikoff, Martin and Motomura 2003: 544). Since there is no equivalent word for a person who is excluded, we use the common term ‘deportee’ to refer to any long-term resident who is involuntarily removed.

The practice of removal poses a significant normative problem for all but the most ardent cosmopolitans. On the one hand, it is usually thought to be the prerogative of liberal democracies and their publics to determine the conditions under which noncitizens are granted admission or full membership. Only a few scholars (e.g. Abizadeh 2008) challenge the community’s right to unilaterally set the rules of admission or membership in accordance with democratic procedures and constrained by basic liberal values. Arguably, the right to political self-determination must imply a right to unilaterally decide to physically remove individuals who are already present but who do not meet the requisite conditions (e.g. Wellman and Cole 2011). Like most scholars, the legal systems of liberal democracies also reserve the right of the state to deport.<sup>2</sup>

On the other hand, liberal democracies are expected to refrain from harming those who are subject to their rule, and, as both the law and the literature agree, deportation can cause harm. Harm is a central concept in the liberal and civic republican traditions of thought and it conditions how we understand capabilities, (human) rights, and fundamental interests of human beings, as well as how we delineate the role of the state. The commitment to harm avoidance is also important in the area of refugee and asylum law. Migrants are given refugee status—and permission to stay—when they are deemed to have suffered (or have reason to fear) persecution on account of, for example, their race, religion, or political activism in their home country. In addition, in ordinary immigration cases, a suspension or cancellation of deportation can be obtained when removal is expected to lead to extreme and unusual hardship on the part of citizen relatives. The harm of deportation has also received some attention in the literature on immigration. Concerns about ‘lived experience’ and social connection (Smith 2011, 2010; Cohen 2011; Shachar 2009; Carens 2005;

Schuck 2010) suggest, however obliquely, that the state is committing a harmful act against the individual when it mandates her removal.

In this article, we argue that many individuals will suffer great social, economic, physical, and psychological harm upon their removal. The persons who are most likely to be harmed are those who are especially well integrated in their country of residence, and who, conversely, cannot easily be reintegrated in their country of citizenship. They include graduates whose education has prepared them for the job market of their country of residence rather than the one that they find themselves facing upon removal; individuals who speak the language(s) of the country of residence rather than the language(s) of the country to which they are deported; and individuals who were socialized in the country of residence and lack familiarity with the social norms and customs of their country of origin. Unlike the current immigration literature, which focuses on past experience, we offer the complementary, outward-looking perspective of the prospective experience of the well-integrated noncitizen in the event of her physical removal.

We argue that, all other things being equal, democratic states should avoid harm in deportation practice, and we articulate a normative principle of non-removal that we call *jus noci* or the right not to be harmed. Democratic states must take into consideration the expected harmful effects of territorial removal and cancel the removal of individuals who are likely to be significantly harmed by it. The harm of deportation cannot be justified as an appropriate punishment for violating state law or as a ‘necessary evil’ that accompanies the pursuit of collective self-determination. While remaining agnostic about the question of full membership or citizenship, we argue that states may need to grant many of their residents a *de facto* right to continued territorial presence.

## 2. Harm and harm avoidance

The principle of harm avoidance has a long history in liberal and civic republican political theory. In his ‘harm principle’, Mill argued that the prevention of harm was the only purpose for which states could exercise their power over individuals against their will (Mill 2002 [1859]). More generally, harm avoidance is tied to individual rights and liberties. Following Locke, Madison argued that individuals are born equal and free, and that all possess certain natural rights, chief among which was protection from harm committed by the state. The American Bill of Rights accordingly protects the basic rights of individuals against state abuse and harmful interference. The prohibition on ‘cruel and unusual punishment’ (cf. Eighth Amendment), for instance, and the prohibition on the ‘deprivation of life, liberty or property, without due process of law’ (cf. Fifth Amendment) are anchored in respect for the individual and the requirement of harm avoidance.<sup>3</sup> The harm associated with the removal of citizens from their home country has also long been recognized in American political thought and jurisprudence (cf. Elliot’s<sup>4</sup> Debates, *United States v. Ju Toy*). One of the key expectations of citizenship has been an inviolable right to territorial presence, ‘the certainty that somewhere on this globe he [the citizen] was at home, in his own country, and that no reversals of personal fortune could deprive him of his inherent right to have his being there’ (Goldman 2002 [1909]).

The prominent concern that the state, when unchecked, would be capable of inflicting great injury and harm is shared by prominent contemporary thinkers. The liberal philosophers Rawls (1971) and Nozick (1974) both prioritize the rights of individuals in their conceptions of justice, albeit in very different ways. More recently, Pettit (1997) has put forward a civic republican theory that also elevates individual freedom as a primary value. Even proponents of restrictive immigration policies, such as Walzer (1983), attach equal moral worth to individuals and consider the rights to life and liberty as part of a 'minimal and universal moral code' (Walzer 1987: 24). For each of these scholars, individuals are the unit of moral concern, and the state a potential offender whose power must be checked. They all recognize that the state can cause substantial harm to individuals, citizens and noncitizens alike. More explicitly, Shapcott (2008, 2010) has articulated a cosmopolitan version of the harm principle, and in international relations theory, Linklater (2011) has provided a comprehensive account of harm and harm avoidance in world politics.<sup>5</sup>

We adopt an ecumenical approach to the conceptualization of harm. It is possible to understand harm as a 'setback to interests', as Feinberg (1987) puts it in his classic definition. According to Feinberg, so-called welfare-related interests involve that which is necessary to live a minimally satisfactory life: 'interests in the continuance for a foreseeable interval of one's life, and the interests in one's own physical health and vigor, . . . minimal intellectual acuity, emotional stability, . . . the capacity to engage normally in social intercourse and to enjoy and maintain friendships, at least minimal income and financial security, a tolerable social and physical environment, and a certain amount of freedom from interference and coercion' (Feinberg 1987: 37). Feinberg distinguishes these welfare interests from ulterior interests, which include higher aspirations such as producing a work of art or serving in political office.

In addition to Feinberg's focus on (setbacks to) interests, harms can also be understood by reference to basic rights or basic capabilities. The extensive literature on human rights and basic rights has attempted to isolate a small set of goods, the access to which is a matter of *right* or entitlement and not privilege or desert. Human or basic rights apply to all human beings—rather than to a deserving subset—and they apply equally—without making special allowances for personal talent, effort or resources. The list of human or basic rights varies across legal and political documents and philosophical scholarship, but commonly included are life, liberty, property, shelter and subsistence, due process, privacy and family life, freedom from torture, freedom of expression, the right to work, and the right to participate in government (Alston, Steiner and Goodman 2008; United Nations 1948). Human or basic rights are often described as inalienable, since they attach fundamentally to the person and cannot be given away. Unlike the right to, say, a government-promised pension, the right to basic healthcare is considered essential to the proper functioning of a person. An individual who, upon deportation, risks losing access to a pension scheme does not face harm of the same magnitude as an individual who will lack access to required healthcare resources for an existing medical condition. Relatedly, Moore (2014) has explored attachment to territory and Ochoa-Espejo (2014) has identified rights that are connected to territory, such as certain administrative rights. It does not require a giant leap to then also imagine a right to *be* in the territory in which one holds those territory-specific rights.

The capabilities approach offers yet another path to understanding the importance of harm. Rather than focusing on rights, the capabilities approach looks at what individuals are actually able to do and to be (Nussbaum 2003; Sen 1999). Central capabilities include life, bodily health, bodily integrity, and emotions. These are expressed as, for instance, ‘not dying prematurely’ and ‘being able to move freely from place to place’. The capability category that Nussbaum calls ‘emotions’ is described as: ‘... being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one’s emotional development blighted by fear and anxiety’ (Nussbaum 2003: 41). Harm, whether defined as setbacks to interests, rights or capabilities, can be seen as central to contemporary normative ideals.

The harm of removing noncitizens is also implicitly recognized in the various principles that ground democracies’ obligations to include. For example, the principles that focus on ‘lived experience’ and social connection suggest that the state is committing a harmful and unjust act against the individual when it mandates her removal. Carens maintains that ‘living with one’s family is a fundamental human interest, [a right] recognized as a basic human right in various European laws . . . All liberal democratic states recognize the principle of family reunification’ (2010: 15). The implication here is that removal is a violation of an individual’s right to be protected from harm.

This and similar proposals focus on past experience in the host country—and how that experience affects the noncitizen today—as the source of harm. Whether it is time itself that gives rise to the state’s obligation not to harm with removal (Cohen 2011) or the role of the state in coercively shaping individuals’ identities (Smith 2011), or the ‘genuine connections’ (Shachar 2009) and the growing ties to ‘spouses and partners, sons and daughters, friends and neighbors and coworkers, people we love and people we hate’, or the accumulating experiences of ‘birthdays and braces, tones of voice and senses of humor, public parks and corner stores, the shape of the streets and the way the sun shines through the leaves, the smell of flowers and the sounds of local accents . . . all that gives life its purpose and texture’ (Carens 2010: 17), the underlying normative implication is that removal constitutes harm to the individual.

## 2.1 *Jus noci*

Our conceptualization of harm does not focus on social closeness, that is, the depth and rootedness of social ties, as a way to conceptualize harm and argue for its avoidance. Even if not explicitly, the existing literature has already made the argument that removal is harmful to interests. Instead, we look outward, to the prospective experience of the noncitizen in the event that she is physically removed from the state of long-term residence.

We propose a principle for guiding removal practices that we call ‘*jus ne cui noceatur*’, or *jus noci*, which translates as ‘the right to not be harmed’.<sup>6</sup> The principle of *jus noci* demands that we look at the likely effects of removal, and that we refrain from expelling an individual who is expected to suffer significant harm upon expatriation or repatriation. We consider harm in its multiple forms, asking how removal would affect the deportee’s ability to be free from physical and psychological harm, integrate socially and pursue a livelihood. Much like the principle of non-refoulement which is a bedrock of asylum law, *jus noci* seeks to prevent

states from returning people to countries where they may experience harm. However, we extend the definition of harm to forms of injury that are not fully captured by reference to persecution. The principle of *jus noci* draws on normative discussions of harm, legal and normative discussions on asylum law, the ambivalent position of the US Supreme Court on whether deportation constitutes punishment, and empirical research in sociology and anthropology that documents the social, economic, physical, and psychological effects of deportation.

### 3. Understanding the harms associated with removal

In Feinberg's classic text, a distinction is made between basic interests related to welfare and the aspirational, ulterior interests that convey less immediate needs and are less crucial to human functioning. For *jus noci* to function as a normative principle for deportation practice, it must be able to differentiate between deportation-related harms that are significant enough to overcome the presumption of political self-determination, and deportation-related harms that do not rise to that level. The previous section introduced the concept of welfare interests and interests related to basic rights and freedoms. In this section, we offer an understanding of what makes a harm *significant*, and we elaborate on the four dimensions of harm—economic, social, physical, and psychological.

The human rights paradigm and capabilities approach mostly identify a very similar set of 'goods' or experiences whose lack may constitute significant harm (Nussbaum 2003; Sen 1999). However, two differences between the approaches come to mind. First, some of Nussbaum's capabilities are broader in scope than the human rights of the UN Declaration—though not necessarily broader than the list of human rights as endorsed by various philosophers. Second, and more importantly, the description of the capabilities explicitly takes into account the different conditions that individuals may find themselves in, and it acknowledges that individuals may need widely divergent levels of assistance in order to obtain the same level of functioning. Whereas one individual may not need much help to live a healthy life or may not have strong attachments to family, a person with a medical condition may need to be provided with expensive life-long care and a person with a large, close-knit family may need to be given the opportunity to live with them or visit them often. While it is impossible and probably counterproductive to provide a comprehensive list of significant deportation-related harms, many important harms can be identified. The four dimensions are economic, social, psychological, and physical harms.

The ability of an individual to pursue economic and social fulfillment in any given polity depends on the compatibility of his skills and abilities required for success in that economy and society. Many immigrant-sending countries suffer from chronic economic problems. Local economies may produce few well-paying jobs and most jobs may be in sectors that combine physical hazards, long hours, and low pay. The few well-paying jobs may be distributed in a non-meritocratic way, making it difficult for individuals who have not been part of specific networks to compete effectively. Even the countries of origin that have flourishing economies may depend on jobs for which their long-departed citizens are ill-prepared. Skilled, white collar jobs, for instance, tend to require both language proficiency and an understanding of the structures and institutions of the state.

A well integrated, long-term resident who is removed to her country of origin or any other country often does not have the skills or social networks required to pursue a livelihood comparable to the one she had in the host country. In addition, in countries where the economy is dominated by the state, or where state approval may be a condition for employment, a deportee may have an especially difficult time gaining employment. In Jamaica, for example, the state has refused to provide deportees with state identification cards which are required to secure employment, thus making it impossible for them to get jobs in the formal economy (Miller 2011). In addition, deportees may have no recourse because reporting the discrimination can produce further harm. This is the case in Somalia, where deportees fear government reprisal if they report social or state-incited discrimination (Peutz 2006).

Physical removal from a host country may thus lead to substantial economic disadvantage in several ways. First, the individual may not be able to perform a job for which she is trained and for which she has the skills. Second, she may lack the skills that could make her competitive in the local economy. Third, she may lack the social connections necessary to secure employment in countries where jobs are not provided in a meritocratic way. Fourth, the individual may face substantial access problems in countries where employment is state-controlled. And finally, social and state-sanctioned prejudice directed at deportees may lead to discrimination and economic deprivation.

As Cohen (2011) argues in the immigration context, time plays an essential role when determining the obligations of the host country to the noncitizen. Time is important *both* in assessing ties to the new land and in determining the probable harm of removal. Time of residence in the host country *in combination* with the level of exposure to the host country's culture, institutions and economy are of great importance in understanding the likely effects of removal on an individual. A person who has spent his formative years in a host country, achieved fluency in the host country's language, and developed skills and abilities suited to the host economy may not be able to successfully adapt to the home country. An individual who has been educated in the United States, speaks English as her first language, and is trained to perform white collar tasks, may be unable to effectively compete in the labor market in an agricultural or resource extraction-based economy, where experience with manual labor is required for survival. After years of linguistic adaptation in the host country, people's ability to speak their home country language can diminish or their accents, speech patterns and mannerisms can change to resemble those of the people in the host country. Upon return to the home country, these linguistic differences can be quite easily detectable and a cause for isolation or discrimination. Similarly, a person who has transformed her set of skills and dexterities to meet the demands of her new setting may have a difficult time adapting to the home country setting and as a result face economic and social harm after removal. In general, integration into the host country's economy and society can serve as an indicator of how difficult it will be for a noncitizen to adapt to the norms, skills and expectations of the home economy and society.

In addition to economic hardship, deportees may also suffer from social hardship that is unrelated to their economic reintegration. A large number of deportees leave behind family members and all leave behind friends. In the first half of 2010, the United States deported more than 46,000 parents of US-born children, many of whom remain in the United States with other relatives (Wessler 2011a). Data from the United States indicate that there are

more than 5,000 children in foster care because their parents have been detained or deported (Wessler 2011a). Separation of this type from family members can constitute a substantial social hardship that could qualify noncitizens for membership under our principle. Similarly, thousands of American-born children with little cultural, linguistic and social experience of their parents' home country are forced to leave the United States along with their removed parents and are deprived of an American upbringing. According to recent estimates, more than 45,000 families faced this dilemma in the first half of 2012 alone (O'Neill 2012).

Even if those removed are able to find employment at the level to which they were accustomed in their former long-term country of residence, they may suffer greatly from a lack of social acumen and *savoir faire*, not to mention from social discrimination. Social norms are acquired before adulthood (Portes and Rumbaut 2001; Portes 1995) and, given the lack of explicit signaling, the individual who grew up in the host country may struggle to grasp the norms that govern social interactions in the country of origin. Many deportees will lack a sophisticated command of the language, and many more will be accustomed only to host country habits and values. The exposure to the ways and institutions of the host country can be visible on the bodies of deportees, making them different from others in the country of origin. Difference in accents, in dress and even in movement can betray the deportees' foreign influence, making them permanently suspect and ineligible for social and economic inclusion. According to Peutz (2006: 223), 'deported bodies are suspected of carrying with them the pollution contracted abroad while also remaining anomalies at home, their forced return subverting the fetishized immigrant success story'. Carens (2009) recognizes that removal can be hard on a person whose psychosocial makeup has been altered by the host society when he laments the 'moral absurdity' of removing individuals who 'arrived at a young age and stayed for long'. Although he does not mention the harms of removal as a guideline, the way we see it, his contention that the extent of genuine connection, tracked in large part by time, should inform state policy on removals, dovetails nicely with our principle.

A democracy is obligated to protect from removal long-term residents who can demonstrate that their expulsion will result in substantial social and economic harm. This harm does not have to rise to the levels required to substantiate persecution in asylum claims, nor to the 'extreme and unusual harm' required by extant US law, but it has to be significant enough to have a substantial impact on the social and material well-being of the individual and his family. Cases such as the exclusion of a US-raised undocumented immigrant, or the deportation of a permanent resident whose minor crime has risen to the level of 'felony for immigration purposes' under the 1996 rules, would not rise to the standards required by asylum law. However, such individuals would qualify for protection against removal under a standard of *jus nocui*.

Removal is not simply return migration, even if, as we will discuss later, some legal scholars and jurists have viewed it as such. Because of the widespread misperceptions about deportees in home countries, removal is a source of social stigma that may lead to serious physical and psychological harm. Misjudgments about deportees' moral character and deservedness may result from a misunderstanding of the normative valence of removal, which stems from the involuntary nature of the individual's return. In turn, this erodes social trust toward deportees, which leads to social exclusion if not to physical confinement.

The effects of removal are both personal and social and they can migrate along with the deportee to the country of origin. Journalistic accounts and academic studies have documented the hardship of removal, the suffering experienced by families who remain behind, and the hardship that the deportees themselves face upon their return (Peutz 2006; Hagan, Eschbach and Rodriguez 2008; Golash-Boza 2012; Hiemstra 2012; Dingeman and Rumbaut 2009; Kanstroom 2012).<sup>7</sup>

The perception that removal is punishment for criminal or inappropriate behavior is widespread in home countries. A forcible return is often viewed with suspicion and the individual is the target of formal or informal discrimination and restrictions. Deportees have expressed feelings of social and linguistic isolation, fear of exposure to physical harm, and suicidal tendencies (McFadden 2011). The most glaring example of post-removal hardship is the experience of Haitian deportees. The Haitian government operates on the presumption that deportees are criminals who require further detention (Kushner 2011; Wessler 2011b). Even though three out of four deportees have no US criminal record, the Haitian government incarcerates them for days. Since these individuals have not been charged with any crime in Haiti, these practices are in violation of both Haitian law and international treaties (Organization of American States 2011). In addition, Haitian prisons do not have the infrastructure or the resources to provide health services to deportees. Because these prisons are unsanitary, deportees are exposed to contagious and lethal diseases such as cholera.

This experience is not unique to Haiti. Ethnographic research conducted in such disparate locales as Jamaica, Central America, Ecuador and Somalia underscores the transformative effects of removal (Miller 2011; Peutz 2006; Hiemstra 2012). In the Caribbean, the media have emphasized the link between removal and criminality and accused deportees of gang activity, leading to discrimination against deportees (Jameson 2012; Felson 1996). Many Jamaicans believe that deportees are criminals who ‘have developed a separate, inferior culture’—an attitude that encourages vigilante groups to hunt them down (Miller 2011: 143).

#### 4. Harm avoidance in philosophical and legal scholarship on immigration

We do not deny that the individuals who comprise a democratic community are entitled to govern themselves, and that this entails at least a partial right to draw the parameters of the polity. Instead, we assume an existing democratic community, and we recognize that this community may have the privilege to regulate the entry of noncitizens, which is the problem of immigration proper. In this sense, we do not disagree with David Miller (1995: 258), who reserves the right for communities to decide their admission policies, writing that the ‘general justification for immigration restrictions involves an appeal to national self-determination and in particular a people’s right to shape its own cultural development’.<sup>8</sup>

However, we do question *the extent* of the community’s right to remove individuals who already live in their midst. It is often thought that a crucial aspect of the right to regulate entry into the community is the right to exclude, by removal if necessary, those who are

present in the territory but who were never inspected at the border and who therefore do not meet the requisite conditions of residence, and to deport those who were initially admitted but who have since violated the conditions of entry and residence. Arguments have also been made that national security concerns justify the denationalization or denaturalization of citizens. We argue that the community does not generally have the privilege to remove individuals if removal will result in harm. Even defenders of restrictive immigration policies such as Miller (2007, 2008a) are moral cosmopolitans, by which we mean that they attach 'equal moral worth' to individuals, and that they treat 'the individual as prior to the community' (Carens 1987: 252). They cannot countenance a state practice that promotes collective aims at the expense of the basic interests of individuals, even noncitizens who aren't full members. Since, as we argue, removal imposes substantial harm on individuals, these philosophers should agree to avoid it as a practice. Indeed, Walzer (1983) recognizes the distinction between the entry of would-be immigrants and the removal of currently-present immigrants when he defends the right of the community to restrict admissions but views favorably the claim to naturalization by individuals once they are territorially present. In a similar vein, we argue that the liberal democratic state's duty to avoid harming individuals within its jurisdiction casts doubt on the practice of removal.

Immigration law in general, and American immigration law more specifically, already recognizes certain forms of harm as a justification for cancellation of removal. Relief from expulsion may apply to cases of either deportation or exclusion. The law attempts to balance the interests of the polity against the humanitarian concerns associated with removal of the noncitizen, especially when removal leads to extreme hardship. Immigration statutes from the early twentieth century required noncitizens to show 'serious economic detriment' in order to qualify for a stay of deportation or exclusion. In 1952, this was elevated to 'extreme hardship' to the individual or the US-based family. In 1996, the consideration of individual hardship was dropped and the statute raised the bar higher by demanding 'extreme and unusual hardship' to the noncitizen's US-born or permanent resident family (Aleinikoff, Martin and Motomura 2003). Whereas both the statutes and case law have focused their attention on issues arising from 'lived experience' and 'genuine connection', we argue instead that the harm that can occur as a result of repatriation must also be taken into account in this judgment, as was the case prior to 1996.

Our perspective is further supported by scholarship in refugee and asylum law. Such scholars have long argued that in addition to physical harm, which constitutes the normative bedrock of the principle of asylum, 'economic and social hardship' should be considered among the possible justifications for extending asylum to noncitizens (Foster 2007; Hathaway 1990). As early as the 1980s, the refugee flows resulting from wars sensitized scholars to the economic hardship faced by the world's poor, leading Zolberg et al. (1989) to advocate for the inclusion of economic refugees on humanitarian grounds. More recently, scholars have been discussing states' obligations to environmental refugees, people whose homes are threatened by climate change (Bell 2004).

Violations of economic rights and social or economic deprivation have also been introduced in case law and legal scholarship on asylum and refugees in several common law countries (Jastram, Mactavish and Mathew 2008). Goodwin-Gill and McAdam (2007) have argued that even lesser forms of disadvantage such as employment restrictions, or restricted

access to education or a professional career could rise to the level of persecution. Australian law codifies economic harm as a basis for asylum, specifying that discrimination in employment or education may suffice as evidence of persecution. Denial of access to social services and healthcare, or single motherhood in a country that shuns children out-of-wedlock, can also be used to substantiate claims to asylum (Jastram, Mactavish and Mathew 2008: 6). Cases in Canada (*He v. Minister of Employment and Immigration*; *Lin v. Canada*; *Soto v. Canada*) and in the United States (*Capric v. Ashcroft*; *Vicente Elias v. Mukasey*; also see: *Kovac v. INS*; *Guan Shan Liao v. USDOJ*; *In re T—Z—*) have explored similar questions about the conditions under which economic deprivation rises to the level required by the persecution standard. In both countries, substantial restrictions on a person's right to earn a livelihood can be used as the basis of an asylum claim. In the United States, *Vicente Elias v. Mukasey* and *Capric v. Ashcroft* have discussed extreme economic hardship as a 'form of persecution and independent grounds for asylum'. We argue that the same line of reasoning should be applied to cases of deportation and exclusion that do not involve asylees but rather long-term residents with other immigration statuses.

In addition, there is normative space for our argument even in the tradition of political thought that views restrictions on political membership most favorably. Although some cosmopolitan thinkers argue that all admission decisions are coercive unless they are subject to democratic control by would-be immigrants (Abizadeh 2008), many theorists have instead made a distinction between the permissible (within limits) exclusion of individuals who have not yet been admitted, and the heavily constrained conditions for the removal of individuals who are already present in the territory. In his reply to Abizadeh, Miller (2010) concedes that the manner of exclusion often leaves much to be desired, while denying that it is coercive to regulate—and restrict—who may enter a specific territory. According to Miller (2007: 228), the 'general justification for immigration restrictions [at the border] involves an appeal to national self-determination and in particular a people's right to shape its own cultural development'.

The same argument does not extend, however, to the removal of those who are already present, regardless of their status. The removal of legal and undocumented immigrants who are long-term residents is often problematic. Like Walzer (1983), Miller considers legal immigrants members of the host society, and he argues that fairness compels us to consider their interests, rights and obligations in conjunction with those of the host community. After all, 'immigration typically confers benefits and imposes costs on both parties—the immigrant group and the host society' (Miller 2008a: 372). In liberal democracies, individual rights limit the power of the state—such as by proscribing cruel and unusual punishment that inflicts unacceptable suffering (cf. US Bill of Rights)—and guarantee the individual's freedom to pursue his own goals as long as he does not harm others. Liberalism thus envisions a role for the state in harm prevention and avoidance (Mill 2002). While liberal democracies 'have some leeway in deciding on the conditions that must be fulfilled before the full rights of citizenship are granted, they are compelled by their own principles to leave the path to citizenship open' (Miller 2008a: 378).

While Miller is keen to treat legal and undocumented immigrants differently, he agrees that even the latter must be accorded various rights 'as a matter of justice', since 'a just legal regime for irregular immigrants must incorporate protections for their human rights, including procedural protections' (Miller 2008b: 195). Even when he argues for punitive

measures against noncitizens who undermine the state's objectives, he demands that we 'fairly' consider both the interests of undocumented migrants and 'the wider questions of social justice and democratic legitimacy that their position raises' (Miller 2008b: 197). As we have shown above, the removal of undocumented migrants from the territory often entails such harm to their interests that Miller's fair approach should compel even him to raise doubts about physical removal as a routine immigration practice.

## 5. Counterargument: is the harm of removal justified?

At this stage, a proponent of removal may argue that exclusion or deportation, while harmful to the individuals involved, is a justified component of an immigration regime. After all, not all harms are normatively problematic. Criminal punishment involves an imposition of harm, but we have reasons for justifying it. Sometimes, the harm of criminal punishment will be justified by reference to a harm that the individual who is being punished has caused to others. A harm is most obviously *wrong*, then, when it violates rights. The advocate of removal may claim that the practice serves in part as a legitimate punishment for violating state law, and that any inflicted harm that results from illicit behavior is not normatively problematic.

In order to determine whether removal can be considered a just punishment for law-breaking behavior, we first need to ask whether removal is punishment at all; that is, whether its purpose is to reform the individual or provide restitution to society, and, if so, whether it is appropriate for the crime in question. Consistent with a normative theory of national sovereignty over aliens, the reigning Supreme Court doctrine interprets removal not as a form of punishment but rather as a tool of remediation and a matter of administrative law (Banks 2009; Kanstroom 2007b). This is certainly the case for Entering Without Inspection (EWI), where the state does not recognize the long-standing physical presence of the individual, designating these removals as exclusions rather than deportations. Sovereignty over a national territory implies that the state has exclusive authority to determine the conditions under which noncitizens are allowed to enter and remain therein. Thus, removal is a procedure that allows a state to rectify incongruities between the actual and the desired alien resident population, but the process itself is not meant to have normative content (see: *Chae Chang Ping v. United States* (the Chinese Exclusion Case); *Fong Yue Ting v. United States*; *Wong Wing v. United States*). In other words, removal is not a tool of criminal justice meant to secure justice for a society that has been harmed by the individual's actions. Even when removal is applied to legal immigrants who are found in violation of some law, the state does not consider expulsion as punishment, but rather as a nullification of a contract because the immigrant violated the conditions of entry (Motomura 2006; Kanstroom 2007a, 2012). In this view, noncitizens are 'eternal guests until they naturalize. They are thus not being punished; they are simply being regulated' (Kanstroom 2007a: 208). In this view, removal either does not involve any harm, or the harm is incidental; not intentional or normatively important. As Justice Scalia has noted, '[e]ven when deportation is sought because of some act the alien has committed, in principle the alien is not being punished for that act . . . but is merely being held to the terms under which he was admitted' (*Reno v. AADC*: 491).

In a series of late nineteenth century decisions, the Supreme Court distinguished removal from punishment and especially from banishment, a common form of criminal punishment in earlier times. In *Fong Yue Ting v. United States*, the Court explained that deportation is ‘in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment [of state sovereignty]. . . a method of enforcing the return to his own country of an alien who has not complied with the conditions [of legal residency].’ The Court went on to explain that the criminal protections of the Constitution ‘have no application’ in removal cases. In *Wong Wing v. United States*, the Court further clarified that ‘the order of deportation is not a punishment for crime. It is not ‘banishment’ in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions [of admission].’ This jurisprudential tradition makes it difficult to sustain the argument that deportation constitutes punishment.

Since the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the United States has introduced a host of criminal justice remedies into a domain that the Supreme Court continues to recognize as civil law. Certain deportees are subject to admissibility bars; depending on the case, the bar could be three years or ten years. The intersection of the two domains, criminal justice and immigration, has made the issues of punishment and proportionality more relevant. This is especially the case, as federal courts continue to insist that immigration law is governed by civil and administrative law principles, generally downplaying if not altogether ignoring the nexus between immigration law and the criminal justice system (Stumpf 2007; Legomsky 2007). Prompted by these legal and institutional developments, recent legal scholarship has argued that immigrant detention constitutes punishment because the intent of the legislators, as revealed in Congressional debates in the 1980s and the 1990s, was to punish immigrants for violating immigration law (Garcia-Hernandez 2014).

Even if we were to accept removal of long-term resident noncitizens as punishment that may have some just purpose, we would then have to ask whether this punishment is proportionate to the offense, and whether the benefits to citizens exceed the harm. At this juncture, we must distinguish between long-term residents whose only offense is undocumented entry and residence in the host country or a visa overstay, and long-term legal residents who have committed criminal offenses. In the former case, neither the law as a practical matter nor political theory is settled on its nature as a distinctly criminal offense.<sup>9</sup> Another example where the issue of proportionality arises is in the removal of juvenile offenders. While the courts have developed a number of protections for juvenile offenders, this is not the case for noncitizen juvenile offenders who may face lifetime bars from the United States (Caldwell 2012). Many of these children were raised in the United States and have very few ties in their country of citizenship.

Responses to undocumented immigration by intellectuals and others in the public sphere range from concern with the individuals’ decision to violate immigration law (e.g. Brimelow 1996) to concern with the state’s prerogative to police borders (cf. Cole 2000; Nyers 2003; Pritchett 2006). Suggested political solutions similarly range from removal to amnesty, both of which democracies have practiced and continue to practice.

By contrast, those noncitizens who commit more serious crimes are subject to criminal law. Deportation takes place *after* the individual has served a prison sentence, not *in lieu* of

confinement. As such, deportation operates as a post-entry social control measure that is applied outside of the criminal justice system and without the approval of a jury (Kanstroom 2007a, b). The noncitizen is thus subjected to sanctions that are *over and above* what a citizen faces, only because of her noncitizen status. The normative justification for this disparate treatment is difficult to sustain, especially in the United States, whose founding documents decry the practice of banishment and the ‘transportation’ of criminals away from their place of residence.

Despite the US Supreme Court’s precedent-setting decisions, there is an alternative legal and theoretical tradition in the country that has viewed physical removal of citizens and noncitizens alike as a particularly severe form of punishment. In the debates over the Alien and Sedition Acts, Madison argued that removing a person from the United States as required by the proposed legislation must be construed as severe punishment. ‘If a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied’, he noted (4 Elliot’s Debates, p. 455, as mentioned in *United States v. Ju Toy*). Justice Brewer recognized banishment of citizens as a terrible fate, ‘a punishment of the severest kind . . . The forcible removal of a citizen from his country is spoken of as banishment, exile, deportation, relegation, or transportation; but, by whatever name called, it is always considered a punishment’. In Black’s Law Dictionary ‘banishment’ is defined as ‘a punishment inflicted upon criminals, by compelling them to quit a city, place, or country, for a specific period of time, or for life. It is inflicted principally upon political offenders, “transportation” being the word used to express a similar punishment of ordinary criminals.’

Justice Brandeis has acknowledged that, much like banishment, deportation can be a deprivation of liberty and that ‘it may result also in loss of both property and life, or of all that makes life worth living’ (*Ng Fung Ho v. White*: 284; also see: *Bridges v. Wixon*: 147; *Chin Yow v. United States*: 13; *Galvan v. Press*). In *Mahler v. Eby* the Court recognized that deportation ‘may be burdensome and severe for the alien’, and in *Galvan v. Press* conceded that deportation is ‘close to punishment’ because of its intrinsic consequences. Subsequent decisions have implicitly or explicitly recognized the severity or harshness of deportation by characterizing it as ‘a penalty . . . a drastic measure and at times equivalent of banishment and exile’, and a ‘drastic sanction, one which can destroy lives and disrupt families’ (*Fong Haw Tan v. Phelan*, also quoted in *Jordan v. De George*; *Gastelum-Quinones v. Kennedy*: 479). In *Padilla v. Kentucky*, the Court recognized that deportation is ‘intimately related to the criminal process’ and ‘an integral part—indeed, sometimes the most important part, of the penalty [imposed on convicted aliens]’.

The proportionality argument runs afoul of the realities of deportation practice. Deportation, at least in the American context, is practically irrevocable, which makes it inconsistent with widely held principles of justice that require the availability of recourse and redress. The Supreme Court has recognized that the state does not compensate those who may have been unjustly punished. In *Nken v. Holder*, the Court recognized, in a majority opinion written by Justice Roberts, that a stay of deportation should be granted if the petitioner shows that removal will cause ‘irreparable harm’. However, it concluded erroneously that removal while an appeal is pending cannot cause such level of harm because deportees have legal recourse from their home country and ‘those who prevail can be afforded effective relief by facilitation of their return [to the United States], along

with restoration of the immigration status they had upon removal'. The US Department of Justice subsequently admitted that the government had no policies in place to facilitate the appeal of deportation from abroad, making return to the United States effectively impossible (Bravin 2012). In its letter to the Supreme Court, the US government acknowledged that there are 'questions about the promptness and consistency with which return has actually been accomplished', noting that even in the few cases of successful return, non-citizens 'encountered significant impediments in returning . . . [which] stemmed from the absence of a written, standardized process for facilitating return . . . and the lack of clear or publicly accessible information for removed aliens to use in seeking to return if they received favorable judicial rulings' (US Department of Justice 2012). Stevens (2009) underscores the problem of finding recourse; her research on American citizens who have been erroneously deported suggested that even in such clear cases of bureaucratic error, the state makes it all but impossible for individuals to be re-admitted into the United States and seek justice.

The proportionality question is especially relevant when considering the case of undocumented entry, which is considered an administrative infraction not a crime. Given that social science and economic analysis suggests that all forms of immigration produce more social benefits than costs (Ganz 2008; Immigration Policy Center 2011), it is difficult to understand why a minor offense deserves the punishment of removal. While it is important for citizens to have some control over their own political community (Miller 2005, 2007, 2008a) and a legal response of some kind may be necessary to disincentivize further undocumented immigration, the expulsion of long-term residents from the state altogether is not proportionate to the character and severity of the infraction. An alternative approach could instead give the long-term resident the opportunity to avoid removal by paying a fine or making a non-monetary contribution to the community.

In addition to our concern with proportionality, we also worry that any blanket justification of deportation as a response to crime risks lumping together categories of individuals who are not equally culpable. In particular, the association of unauthorized presence with crime may wrongly target individuals who are present in the territory through no fault of their own. The category of undocumented minors is the prime example, but 'grey' cases may include individuals such as farm workers who arrive in response to offers of employment by companies in the host state. We do not have space to develop this line of thought here, but it may be possible to argue that no individual who engages in undocumented entry and residence can be considered culpable when strong economic incentives in combination with decades of ineffective and inconsistent enforcement of immigration law have led him to believe that he is needed, if not welcome. The imposition of harm through deportation cannot be justified if the potential deportees lack culpability.

The proponent of removal may concede that physical expulsion is harmful but may argue that it is a necessary evil, and that it is justified because it is simply unavoidable. In spirit, this is the position of Justice Scalia and the Roberts Court when they view removal as a means to correct an administrative error. Removal is regrettable but necessary to enforce immigration law and ensure that admissions are correct. However, to say that expulsion is 'unfortunate but unavoidable' begs the question. It is not clear why one issue—self-determination and the right to control membership—should trump another—that is, harm, or why the harm to deportees should be an appropriate price to pay for the privilege of the

population to determine the conditions of group membership *beyond* the regulation, within bounds, of admission. An argument is needed for why self-determination should be of greater importance than the protection of the welfare interests of immigrants. It falls to our critics to explain why a subset of interests of certain individuals should outweigh the more basic interests of others.

The argument of ‘necessary evil’ would be stronger if removal were successful in deterring undocumented entry or post-admission criminality and thus effectively promoted the goals of citizens. However, there is scarce evidence that deportation is an effective deterrent. Since 1996, the United States has introduced more stringent deportation laws, practically eliminated judicial discretion and expanded the list of offenses that qualify for post-conviction deportation (Kanstroom 2007b). Similar patterns obtain in other western countries (FRONTEX 2012; Kanstroom 2004). However, evaluations of the effectiveness of these policies indicate that there is a substantial gap between expectations and performance (Carling 2007; Triandafyllidou 2010; Roberts et al. 2011; Congressional Research Service 2012; US Government Accountability Office 2009). For the most part, the move to stricter deportation laws has coincided with an *increase*, not a decline, in undocumented entry. According to official estimates, Europe is home to as many as 3.8 million unauthorized migrants (European Commission 2009) while the United States hosts as many as 11 million such migrants (Passel and Taylor 2010). In 1990, there were about three million undocumented immigrants in the United States and a very small number in Europe. The routinized practice of deportation thus does not seem to be a ‘necessary evil’ in the service of a greater good.

We do, however, acknowledge that deportation may be permissible or even advised in two sets of circumstances. First, and most obviously, individuals who will not be significantly harmed by deportation may in fact be removed. Not all noncitizens are well integrated in their country of residence: they may not speak the language well enough to communicate with citizens, and they may not have been exposed to the prevailing norms and customs of the host society—either because they arrived very recently or because they remained segregated from the wider community. While it may be *preferable* from their own standpoint to remain in the host country, they may be deported as long as it is unlikely that they will suffer substantial economic, social, physical, or psychological harm upon their return. We thus severely constrain but do not eliminate the country’s prerogative to determine who resides within its borders. Second, if the continued residence of potential deportees inflicts significant harm on citizens, their deportation might be warranted. An exemplary case is that of the Nazi war criminal John Demjanjuk (e.g. Kanstroom 2012: 38). The dimensions of harm that we highlighted previously can also be brought to bear on the experiences and lives of citizens. It may be reasonable to argue that the continued presence of Demjanjuk—even if in prison—would cause significant psychological harm to the citizens of the United States, especially those with a personal connection to the Holocaust. The interests of the citizens should thus also be taken into account in *jus noci*. It may be advisable to deport an individual such as Demjanjuk before or after they serve their sentence, even though in the latter case, this would inflict punishment over and above what a citizen would face for the same crime. Crucially, however, rather than weakening the principle of *jus noci*, these two categories of exceptions lend further support to the contention that cases must be tested against *jus noci* on an ad hoc basis. Some individuals will not meet the necessary threshold of the harm-based principle of

non-removal, but many, and possibly most, will. Given the prevalence and importance of deportation-related harm, *jus noci* mandates a stay on deportation as a routinized immigration practice.

## 6. Conclusion

In this article, we have argued that the harm that usually accompanies the removal of long-term residents from their state of residence runs contrary to liberal democracies' commitment to avoid harm, and that physical removal should therefore not be a routine part of a liberal democracy's arsenal of social control. We explored the role of harm in legal arguments about asylum and refugee status, and argued that removal often involves significant social, economic, physical, and psychological harm. We proposed *jus noci* or the 'right to not be harmed' as a principle to guide immigration practice. Our argument serves as an important complement to existing literature because we focus squarely on the principle of harm avoidance as the moral basis for an end to the practice of removal. Extant research has only implicitly theorized the role of harm in immigration practice. We also considered and rejected the counterargument that the harm of removal is justified because it is an appropriate punishment for violating state law or because it simply cannot be avoided and is a 'necessary evil'. We explained that removal is not always intended as a punitive measure, but that, even when it is, it is not justified, because it is disproportionate to the offense.

Our proposal has important implications for immigration practice. Following the principle of *jus noci*, the strength of a potential returnee's claim to continued residence can be determined by reference to the harm that would result upon removal. A well-integrated individual who would be likely to incur significant social, economic, physical, or psychological harm if they were removed has a stronger claim through the principle of *jus noci* than an individual who, for instance, only speaks the native language of the home country and who is familiar with its customs and labor market.

Future research should consider whether a stay of removal ought to be accompanied by the granting of citizenship. A move in the recent literature decouples claims of residence and claims of citizenship (Pevnick 2009, Pevnick 2011), arguing that we can deny removal and yet deny such individuals citizenship. Some immigrants would be granted residence indefinitely and be protected against removal, but they would not receive citizenship status. However, a status that falls short of citizenship may not be a sufficiently reliable guarantor for harm avoidance, since noncitizens cannot ensure that the government will continue to protect their interests. In times of political upheaval, even previously reliable democracies have been known to become hazardous for noncitizens. It remains to be seen whether there is a satisfactory alternative to full citizenship, but *jus noci* does leave open this possibility.

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## Notes

1. This article defines long-term residents as individuals who have resided in a country that is not their native country for at least one year (cf. UN definition of international migrant). Our definition does not make a distinction based on status. We use the term 'removal' to refer to both deportation and exclusion. We discuss this distinction in more detail below.
2. For the purposes of this article, we assume that this majority view is correct.
3. Legal provisions that protect individuals against the state also exist in the Canadian and European systems. In the Canadian Charter of Rights and Freedoms, Section 12 prohibits 'cruel and unusual treatment or punishment' and Section 7 guarantees 'the right to life, liberty, and security of the person'. In the member states of the Council of European Union, Articles 2–5 of the European Convention on Human Rights secure life and liberty and protect against torture and slavery, whereas Articles 15 and 18 restrict the conditions under which states can partially revoke rights or set limits on them.
4. Thomas Jefferson and James Madison argued against the Alien Act of 1798, which allowed the government to deport aliens, in the Kentucky Resolutions. Kentucky Resolutions, November 19, 1798, in *The Debates in the Several Conventions on the Adoption of the Federal Constitution* 541 Ed. Jonathan Elliot, 1836.
5. The focus of this article is on state harm. We recognize that other forms of harm may impact a person which are relevant to the immigration experience but not produced by state action. For example, an immigrant may leave behind family members and that can be psychologically injurious. However, if this decision is not the result of state action, then it is not relevant to our argument.
6. While we believe that the principle of *jus noci* can be applied more broadly, we restrict ourselves here to the difficult case of potential deportees.
7. Equally disturbing and normatively more complex are the numerous cases of erroneous deportation of US citizens (Kanstroom 2012).

8. In this sense, any harm that may come to citizens as a result of migration can be considered when admissions policy is devised but not after a noncitizen has entered the country and resided there for a period.
9. US immigration law designates multiple EWI offenses as a criminal act, but a single EWI, not.

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