

Toward a History of Statelessness in America

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Browsing through an electronic card catalog not long ago, I found a new edition of Edward Everett Hale's *A Man Without a Country*.¹ First published during the Civil War, the novella is a frightening cautionary tale. The fiction begins in 1805, when a young naval officer is seduced (Hale's word, not mine) by Aaron Burr, and drawn into the former vice president's conspiracy to detach the Southwest and reconfigure the United States. The voice of the narrator moves between fact and fiction; many readers are still convinced that they are reading history. In the story, the young officer, Philip Nolan, is tried for treason in a regional imitation of Aaron Burr's trial in Richmond, Virginia. When the chief judge asks him whether he has anything to say that will prove his loyalty to the United States, Nolan blurts out, "Damn the United States! I wish I may never hear of the United States again!"

The shocked court, composed of Revolutionary War veterans, grants his wish. Nolan is condemned to perpetual exile, sailing around the globe on American ships for the rest of his life, doomed never to return and never to hear talk of home. He does not question his punishment. Late in life, he cautions another young officer, the narrator, to avoid his fate: "And for your country, boy . . . and for that flag . . . never dream a dream but of serving her as she bids you." The punch line is absolute and uncritical.

The tale is a densely layered fable. Philip Nolan himself may not step on the earth over which his nation's flag waves or claim his nation's protection, but he lives out his life on a floating nation, a ship that flies the American flag and freely moves across the globe, conveying American claims to authority and influence, and in that way constructing the new nation as a player in an international contest for space and power. Aaron Burr figures in the narrative in only one dimension of his many-dimensional career: only in the guise of the Devil, whispering temptation, the Aaron Burr who killed the hero Alexander Hamilton in a duel. There is no hint of the Aaron Burr who admired Mary Wollstonecraft, the Aaron Burr who raised his daughter, Theodosia, to be an intellectual (as Thomas Jefferson most assuredly did not raise his daughter,

Martha). There is certainly no hint of the Aaron Burr who eloquently opposed the Alien and Sedition Acts and who called on America to be “an asylum to the oppressed of every nation.”²

Edward Everett Hale intended simply to make an intervention into the politics of his own time, hoping to undermine Confederate sympathizer Clement Vallandigham’s race for governor in Ohio.³ But Hale’s novella has had an extraordinarily long life. Reaching back to the founding era for its setting, published as a patriotic narrative in the midst of the Civil War and as a support to Abraham Lincoln’s suspension of civil liberties, it was reprinted steadily throughout the nineteenth and twentieth centuries, with flurries of new editions during World War I and again during World War II. During World War I several dramatic versions were staged; shortly after World War II a radio adaptation was broadcast, with voice-over narration by Bing Crosby, and in 1973 a sympathetic made-for-TV version appeared, echoing the anxieties of the Vietnam War, starring Cliff Robertson. And then no more reprints until after 9/11.

A roughly similar drift in the pace of attention paid to the issue of statelessness can be traced in the lineage of nonfiction books and articles, tracking with chilling accuracy the rise and fall of the threat of statelessness throughout the world. Thus a number of legal and political monographs were published in the aftermath of World War I, then their numbers receded. They reemerged in the 1930s; among them the rare monograph on the subject, published a little more than seventy years ago: Catheryn Seckler-Hudson’s 1934 *Statelessness: With Special Reference to the United States (A Study in Nationality and Conflict of Laws)*.⁴ In the aftermath of World War II, the Atlantic world swarming with displaced people, Hannah Arendt wrote what remains the most powerful set of reflections on statelessness—the stunning ninth chapter of *The Origins of Totalitarianism*, written between 1945 and its publication date of 1951, not long before the passage of the notorious McCarran-Walter Immigration and Nationality Act of 1952.⁵ Attention to statelessness receded again in the 1960s, reemerged modestly when attention was claimed by refugees from Vietnam and by the contested condition of Palestinians, and then exploded in our own moment.

Today, once again, statelessness matters. With the end of the cold war and fall of the Berlin Wall; with the people made refugees by war in the Balkans, Rwanda, and the Sudan; with the fragility of citizenship in entities like Palestine, increasing numbers of people lack secure citizenship.⁶ Although international conventions have long provided protections against *refoulement*—the recirculation of refugees on to other receiving countries or even back to the

nations in which they feel themselves in danger—its practice is increasing as asylum seekers are increasingly returned to third countries, many of which will not provide them safety.⁷ The United Nations High Commissioner for Refugees recently estimated that some 9.7 million people are now refugees—an increase of close to 50 percent since 1980—and that another 7 million are what UNHCR calls “persons of concern” (stateless citizens of the former Soviet Union who have not obtained nationality in any of the new countries that succeeded the USSR) and “internally displaced persons” (uprooted persons who fall through the cracks of current human rights law).⁸ These “persons of concern” introduce a new dimension into our understanding: stateless persons have been commonly understood to be a population made vulnerable by movement; Philip Nolan is forced out of the state he calls home. But citizenship ties can be fractured in stasis as well as in movement; liminal people who have not moved physically sometimes find that state boundaries have shifted, and the protections that citizenship were thought to provide suddenly evaporate.⁹

Imprisonment heightens vulnerability. Citizenship in one country has long been a fragile claim to protection for those in the prisons of another country, but that fragility has been heightened in American military prisons of the post–cold war era, which Amnesty International has recently decried as twenty-first century “gulags” in which even U.S. citizenship has not assured prisoners of the civil rights of citizens, such as the right to counsel. U.S. citizens captured in post-9/11 conflicts have been declared to be “enemy combatants” and denied, for varying periods of time, the right to consult their own lawyers. The United States held Yaser Esam Hamdi incommunicado for three years, “without any semblance of normal legal process or rights despite his citizenship.” After the U.S. Supreme Court intervened, Hamdi, who was born in Baton Rouge, was finally allowed to leave the country, but only at the price of relinquishing his citizenship.¹⁰

Extreme economic vulnerability also can propel people into something that looks like statelessness; they dare not ask for asylum, and often have no one from whom to ask for it. In this situation most notably are the millions of laborers, many of whom are women, who can escape the desperate circumstances of their home countries only by accepting airfare from traffickers who transport them to labor situations close to slavery, in which they have no recourse against the exploitation and anger of their employers.¹¹

Gender has, in fact, been a key factor in the history of statelessness. Only recently have gender-specific asylum claims such as rape, dowry-related violence, or coerced female circumcision been recognized, and that recognition has been sporadic. Among refugees, in settings in which gender and age de-

mographics are provided by the United Nations High Commissioner for Refugees, adults divide evenly between men and women, but women are much more likely to be accompanied by children. Most significant, as Jacqueline Bhabha has recently emphasized, crude numbers do not describe the situation as women experience it: there is a significant disparity in exposure to statelessness between men and women refugees and asylum seekers in different parts of the world, which emerges only when microclimates are examined. “In every single developing country of asylum neighboring the refugees’ country of origin, women and children refugees [representing nearly 80 percent of the refugees] substantially outnumber adult males . . . [I]n every developed state, male asylum seekers far outnumber females.” Women historically have had less access than men have to “the formal and informal structures that facilitate migration (state agencies, travel agents, smugglers, family funding), together with dependent family status, resource inadequacy, personal history and social positioning, which militate against a self-perception as an autonomous asylum seeker, [and] are likely to be powerful impediments to individual flight,” Bhabha observes.¹²

Statelessness is a subject that most historians of the United States have treated as though it belongs to others—Jews, Gypsies, Palestinians. That U.S. history is taken to be innocent of engagement with the subject is yet another example of the habits of American exceptionalism. Since the *meanings* of statelessness have changed over time, the subject is one that should command the attention of historians as well as humanitarians. In recent years, when some boundaries between states have become more plastic, “statelessness” has been given a positive valence in the form of cosmopolitanism, flexible citizenships, multiple citizenships; statelessness can be made to sustain a dream of unboundedness.¹³ The dreamers include many citizens of the member states of the European Union, whose passports carry them over the borders of twenty-five countries, and hundreds of thousands of people who hold more than one passport, often wealthy people with property on two continents. For these people, a destabilized citizenship is an enriched citizenship, and ties to a particular state seem less important than they once were. Such people speak cheerfully of multiplied citizenships, a comfortable cosmopolitanism, being a citizen of the world—an empowered status, an enlargement of the traditional relationship of subject to king, citizen to nation. If citizenship is about what might be called statefulness, then some people are rich in it.

When we speak informally of citizenship, the “other” is often constructed as the citizen of another state—the citizen of Mexico, of Japan, rather than of the United States—and is directed to a different line in customs. Or the “other”

might be someone with doubled citizenship and dual passports, the enriched citizenship of the multiply stated. But even the enriched state is defined by borders; inside those borders are citizens and subjects, their identity secured by passports. In fact, the ultimate “other” to citizenship lies in its absence, in lack, in *statelessness*. It is possible that the state *needs* its negation in order to know itself. “The boundaries of a state’s identity are secured by the representation of [what counts as] danger,” David Campbell has observed; a full decade before 9/11 Campbell sensed “a general disquiet about the pervasive nature of ambiguity and uncertainty.” Our post-9/11 moment intensifies Campbell’s challenge to historians: “What functions have difference, danger, and otherness played in constituting the identity of the United States?”¹⁴ To historicize statelessness is to write a history of the practices of race, gender, labor, and ideology, a history of extreme otherness and extreme danger.

The nightmare of statelessness—of the man or woman without a country—exists everywhere in our own time. But the contours of statelessness are now somewhat different from those Hannah Arendt limned a half century ago. Statelessness is in part the description of a status, fixed in its contemporary moment. But statelessness is also a condition that changes over time, dynamically created and re-created by sovereignties in their own interests, defining the vulnerable in ways that affirm the invulnerable, and in the process revealing changing domestic values and changing power relations across international boundaries. As the meanings of work, racial identity, and gender identity have shifted over time under the stress of war, political struggles, global economic relations, and developing ideologies, vulnerability to statelessness has been reconfigured. To examine the phenomenon as it now presents itself—in the context of new turn-of-the-century wars, in the context of American fears of terrorism, and when, as likely as not, it’s the woman who lacks the country—and to attempt to place the matter in the long course of U.S. history, is a long overdue exercise.

The work of Hannah Arendt is a crucial starting point for any examination of statelessness. She calls our attention to ironies of the era of the democratic revolutions of the eighteenth century when civil and human rights were reconceptualized. Americans speak of inalienable rights, the French of the “rights of man”—abstractions that gain power from not being rooted in time or place. Yet both democratic revolutions, Arendt points out, situated the practice of those rights in the context of the new national sovereignty. Revolution-

aries were convinced that true freedom and true popular sovereignty could be attained only with full national emancipation, that is, within a nation. Inadvertently, as Arendt saw it, they left in limbo people who lacked their own national government. Thus one of our major inheritances from the era of democratic revolutions, an era that generally we honor for its expansive vision, is a narrow understanding of individual human rights. Arendt finds herself thinking Burke was right:

The Rights of Man, after all, had been defined as “inalienable” because they were supposed to be independent of all governments; but it turned out that the moment human beings lacked their own government and had to fall back on their minimum rights, no authority was left to protect them and no institution was willing to guarantee them. . . . [Instead,] civil rights—that is the varying rights of citizens in different countries—were supposed to embody and spell out in the form of tangible laws the eternal Rights of Man, which by themselves were supposed to be independent of citizenship and nationality. All human beings were citizens of some kind of political community; if the laws of their country did not live up to the demands of the Rights of Man, they were expected to change them, by legislation in democratic countries or through revolutionary action in despotisms.¹⁵

What was “supposedly inalienable, proved to be unenforceable,” Arendt observed. It is a sad irony.

The transformations that we call the era of the democratic revolution—asserting as they did an increase of freedom and civil liberties—simultaneously drew new boundaries and thickened already existing ones until nations constructed themselves out of provinces, principalities, counties, and townships. As Robert Wiebe brilliantly discerned, the democratic transformations of the late eighteenth century paradoxically gathered an increasingly mobile population, one no longer tied to the soil, into populations fictively tied to a nation. Systematized citizenship had its advantages for the state; it simplified taxation, it provided an identifiable pool of male citizens vulnerable to military conscription. And in these redefinitions, it might be added, the space between those who belonged to a state and those who lacked one expanded.¹⁶

The new American republic made no promises of the rights of man to enslaved people, although they were physically located inside the national state. Slaves were inhabitants who were locked out of the protective aspects of citizenship. While Americans were systematically inventing a political structure in which the fundamental rights of mankind could be practiced, they were simultaneously devising structures that fundamentally deprived a large segment of their population of human rights. Like Arendt’s stateless people, slaves were deprived “of a place in the world which makes opinions significant and

actions effective . . . belonging to the community into which one is born is no longer a matter of course and not belonging no longer a matter of choice. . . . They are deprived, not of the right to freedom, but of the right to action; not of the right to think whatever they please, but of the right to opinion.”¹⁷ In 1773, as Massachusetts patriots were challenging the Tea Act, enslaved inhabitants petitioned the legislature: “We have no Property. We have no Wives. No Children. We have no City. No Country.” Three years before Thomas Jefferson articulated a fundamental right to the “pursuit of happiness” they described themselves repeatedly as “unhappy,” described their “greatest unhappiness” and signed themselves, wistfully, “FELIX.”¹⁸ On the eve of the Civil War, voting with the majority in *Dred Scott v. Sanford*—a decision that arguably helped to bring the war into being—Associate Justice Peter V. Daniel of Virginia stated what he took to be truth: that among Africans “there never has been known or recognized by the inhabitants of other countries anything partaking of the character of nationality, or civil or political polity; that this race has been by all the nations of Europe regarded as subjects of capture or purchase; as subjects of commerce or traffic.”¹⁹ His is a chilling definition of permanent statelessness.

No characteristic of slaves’ statelessness had been more obvious than their lack of freedom to travel. How to demonstrate that one is no longer stateless? After the Civil War, the presence of freedpeople in public places, dressed in clothes that no longer marked them as slaves, signaled their claim to enter the national state and angered whites who thought that whatever changes in status slaves experienced should be invisible. “Young women particularly flock back & forth by scores to Hilton Head, to Beaufort, to the country simply to while away their time, or constantly to seek some new excitement,” complained A. S. Hitchcock, Acting General Superintendent of Contrabands, when the Union Army took over the Georgia Sea Islands.²⁰ As federal courts removed restrictions on internal travel, establishing that the right to travel within the United States was a right of national citizenship, Congress began to restrict physical entry from outside the nation. Immigration restriction had in it an element of the restoration of some notion of equilibrium, as though the balance among exotic others admitted into the American population had to be reset.²¹

The Chinese themselves—whether or not admitted—were not stateless. But hostility to them led to passage of the Page Law of 1875, which targeted Chinese women as likely to be imported for the purposes of prostitution, and its successors, the Chinese Exclusion Laws of 1882, 1892, and 1902, which forbade the entry of Chinese laborers and severely restricted the entry of oth-

ers. In struggles over the enforcement of the laws, the Bureau of Immigration often resorted to deportation; in the process, as Lucy Salyer has eloquently described, government agencies “undermined the very principles they accused the Chinese of subverting”—rights to counsel, judicial review, habeas corpus, due process of law.²² This system of exclusion defined a new category of those who did not deserve to enter, and, because even those Chinese who did enter could not be naturalized, provided the context in which Congress expanded the range of its claims to plenary power over immigration.²³ In the first decades of the twentieth century, Japanese and Indians from South Asia were also made ineligible for U.S. citizenship.²⁴ Whether by statute or by court decision, by the early twentieth century a vast class of people found themselves vulnerable to being turned back at the border, or faced with deportation should they get in, and a number of individuals with complicated histories of their own, including women born in one country who married a citizen of another, were dragged perilously close to statelessness. There was, for example, the American-born woman citizen married to a Chinese man who went with him to visit China and then tried to return to the United States in 1925. Because she was married to a man who was not eligible for citizenship, and had gone out of the borders of the United States, she had lost her citizenship. Suddenly her passport was no good; she had been involuntarily expatriated.²⁵

At the turn of the twentieth century, in the aftermath of the Spanish-American War of 1898 (which stretched, in the Philippines, at least to 1902), the United States invented the ambiguous and unstable category of “noncitizen national” to describe a new status of people who lived under the U.S. flag without the full range of constitutional protections that flag normally carries. When the United States acquired the Philippines, Guam, Cuba, and Puerto Rico, Congress and the Supreme Court devised a series of related statutes, decisions, and conceptualizations that defined the status of these places in ways that simultaneously, as Christina Duffy Burnett eloquently puts it, took “control over territory while avoiding many of the responsibilities that sovereignty implies.” Like other imperial powers—the British in India and elsewhere, the Germans in Africa, the French in North Africa and Asia—the United States, through the Supreme Court, simultaneously asserted sovereignty while holding “that these territories were *neither* foreign *nor* part of the United States.”²⁶ Despite the extension of numerous federal statutes to these territories, they could not look forward to developing into states. The U.S. Supreme Court drew a distinction between “incorporated territories,” such as those that had been covered by the Northwest Ordinance of 1787, and “unincorporated territories” such as Guam and the Philippines.²⁷ When Congress pro-

vided a Bill of Rights for the Republic of the Philippines after squashing the insurgency in 1902, it omitted the rights to bear arms and to jury trial.²⁸ The Constitution did not follow the flag.²⁹ In the aftermath of 1898, as the United States developed an empire, some geographical configurations defined by the United States—states—were fully peopled by citizens; other geographical configurations were colonies, inhabited by subjects who were not, and could not be, citizens. The nation experimented with the creation of ambiguous spaces between the domestic and the foreign, between the national and the international, between sovereignty and subjugation.³⁰ And in those spaces lay great potential for statelessness.

The legal baggage carried from the colonial era into the republic also included the concept of *coverture*, a set of rules and practices that linked married women to the state through their husbands, defining them as “covered” by their husbands’ legal identity. The culture of coverture had no room for the concept that there might be limits to a husband’s sexual access to his wife’s body. It embedded the husband’s control of the wife’s property and earnings in the heart of the marriage contract. Married women were thus extremely vulnerable under the law: as one judge in the Supreme Judicial Court of Massachusetts observed in 1805, “a married woman has no more political rights than an alien.”³¹ In this culture—and Americans were not peculiar; these practices persist in other nations into our own time—the common sense of the matter was that when a male citizen married a foreign woman, his citizenship stretched to embrace her. She did not even have to go through the process of naturalization. But when a woman citizen married a foreign man, she lost her citizenship, and, depending on the laws of the other country, statelessness loomed. Even Ulysses Grant’s daughter was denationalized when she married an Englishman in 1874, and it took a special act of Congress to reinstate her citizenship when she was widowed. “Are we aliens because we are women?” demanded abolitionist Angelina Grimke.³²

No one had definitively answered Grimke’s question until 1907, when Congress passed a statute, and 1915 when the U.S. Supreme Court upheld it, that provided that the marriage of a woman citizen to a foreigner produced her denaturalization, even if she had been born here. The Expatriation Act confirmed that hundreds of American-born women were no longer citizens. When World War I began, many hundreds of American-born women who had married men from countries with which the United States was at war were required to register as alien enemies.³³ Yet not all of their husbands’ homelands embraced them as citizens. In the United States in the interwar years, gender was a category of instability and potential statelessness; most individual cases of statelessness involved women and arose from marriage.³⁴

Indeed, once American women seized the vote, among the first things for which they used it was to press for the integrity of married woman's citizenship. The Cable Act, passed in 1922 in the midst of a movement for immigration restriction, secured married women's nationality—*unless* they had married a man who was ineligible for citizenship and went overseas with him to live. If they resided overseas for two years in their husband's country or five years in another country, they were considered to have renounced their citizenship and could not reclaim it if the marriage ended by death or divorce. Thus, even the legal device intended to protect women from vulnerability increased the vulnerability of some. Moreover, women from nations that expatriated them when they married an alien—from countries including Britain and Canada—now became stateless when they married American men. "Women Without a Country Are in Straits from the New American Nationality Law," was the headline of an article in the *New York Times* in 1922. And, writes Candice Bredbenner, "most resident immigrant women who married Americans after the passage of the Cable Act became stateless on their wedding days and remained so until they earned a naturalization certificate."³⁵

By the mid-1920s, women who were naturalized citizens also found themselves with limited citizenship rights. Naturalized women, many of them Jewish, desperately tried to bring husbands and fiancés into the United States during the 1930s. They organized themselves as the Citizen Wives Organization, established in an office by the Hebrew Immigrant Aid and Sheltering Society in New York.³⁶ In the context of fascist expansion, the inability of American women, whether citizens by birth or by naturalization, to transmit their citizenship to their stateless children or husbands spelled danger.

In our time, the opening years of the twenty-first century, the "undocumented alien" describes a condition of danger in relation to statelessness. Documentation or its lack is a defining aspect of the production of statelessness today. By contrast, in the opening years of the twentieth century, before visas were required for entry to the United States, and when the United States understood itself to be in great need of new labor, most of the people who entered at Ellis Island lacked documents of any sort. It was the disruption of national boundaries devised by the Treaty of Versailles in the aftermath of World War I that gave federal claims of absolute power at the borders considerably more frequent occasions on which to be deployed. The fascists' rise to power intensified the pressures. In this context the Nansen Passport, a mea-

sure of desperation devised in 1922 by Fridtjof Nansen, the League of Nations' High Commissioner for Refugees, which granted departure without the right of return and was widely used as an identification and travel document by the USSR and Eastern European countries, was a devil's bargain.³⁷ In its wake, Britain, France, and the United States hastened to stabilize and seal their borders against the millions of refugees and stateless whom the post-Versailles remapping of the European landscape had created.³⁸ But what contemporaries called "nationality problems" entered anyway. In 1930, political scientist Richard W. Flourney dourly blamed the "increase in facilities of travel, especially through the development of the airplane," for exacerbating population movements and heightening the visibility of the vulnerable.³⁹

The United States Immigration Act of 1924 reduced entry to the United States by some 85 percent of what it had been on the eve of World War I. Once the statute was backed by enforcement mechanisms, Mae Ngai writes, deportation "amounted to permanent banishment under threat of felony prosecution."⁴⁰ In addition, the clash between the new statute and the explosive aftermath of the war meant that the difference between the immigrant and the refugee began to blur; even more blurred became the difference between the refugee and the stateless. By the 1930s, the United States was no longer excused from the nightmare. Fleeing Nazis, thousands of stateless Jews begged for sanctuary and were turned back at the U.S. borders.⁴¹

As we have seen, marriage could expose women to statelessness. In the twentieth century, until well after World War II, it was common practice for married women to travel on their husbands' passports. The implications—that husband and wife would always be together, that she would not leave the country without him—are harmless only in times of peace and quiet. In time of disruption, the lack of a passport of one's own could be life threatening. The stabilization of the "national identity of married women" was a key item on the League of Nations' human rights agenda in the 1930s. When Western democracies emerged from World War II, feminists—led by Dorothy Kenyon, the American member of the UN's Commission on the Status of Women—began again to sketch out an agenda that had the independent citizenship of the married woman high on the list of their goals.⁴²

Although red-baiting derailed Kenyon's UN career, she and her allies doggedly kept the issue alive. In 1957 the UN created a "Convention on the Nationality of Married Women," forbidding compulsory expatriation. The issue was not solved. The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), established in 1979, provides that neither marriage to an alien nor a husband's change of nationality shall render

a woman stateless, but there is virtually no enforcement mechanism for any provision of CEDAW.

Children—often subsumed in the category “women and children”—have had and continue to have their own specific vulnerabilities to statelessness. In the United States, where “all persons born . . . are citizens,” children are citizens at birth. But the meanings of citizenship are different for children and adults, not least because children are spared or excused from the key rights and obligations of citizenship: to vote, to serve on a jury, to perform military service. Is anything meaningful left to them? “It is only from a perspective that takes the adult male as norm that women and children merge as a group, ‘the other,’ united by an assumption of common dependency, and socio-political inferiority,” Jacqueline Bhabha warns.⁴³ A crudely drafted American statute of 1802 excluded foreign-born legitimate children of American fathers from citizenship. Had they the misfortune to be born in a nation in which citizenship followed blood rather than birth—a category that grew as the *Code Napoleon* spread—these children could find themselves without any citizenship at all. In 1855, it was American fathers (not mothers) who transmitted citizenship to their children, and that continued to be the case well into the 1930s.

When adults are deported, their citizen children go with them. The most notorious example of this is the U.S. internment camps of World War II, where the birthright citizen children of Japanese-American parents (some of whom were themselves birthright citizens) were confined without recourse.⁴⁴ The *bracero* program—the agreement with Mexico that the United States would import some two hundred thousand contract laborers a year—was initiated in 1948. Mexican farm workers had, of course, been entering the United States for decades, forming families, and becoming parents to American citizen children. By the time the *bracero* program was ended in 1964, several million Mexican men had been part of it. Most were individual men who had not brought their families with them, but over the years many built families in America. When the program ended and the *braceros* were forced back to Mexico, their citizen children could not force a pause for reconsideration; they left with their parents.⁴⁵ In the aftermath of 9/11, an uncounted number of citizen children have risked or actually faced the deportation of noncitizen parents.⁴⁶

As a 2001 Supreme Court decision, *Tuan Anh Nguyen v. INS*, makes clear, the claim to U.S. citizenship of children born overseas remains unbalanced, and relationships of empire continue to haunt American law. Children born on U.S. soil, whether or not their parents are citizens, whether or not their parents are married to each other, are citizens at birth. Children born abroad whose parents are married to each other, and at least one of whom is a citizen,

are citizens at birth, so long as one parent has lived in the United States for five years, at least two of which were after age fourteen—a rule intended to ensure that we do not develop a class of citizens who from one generation to the next have never lived in the United States. But should the parents not be married to each other, and only one is a U.S. citizen, then the sex of the citizen parent has major consequences. In a practice that reaches back to medieval England, when the older rule that the bastard was the child of no one was revised to make the bastard the child of the mother (continuing to free the father from any obligation to the child), extended when the American colonies reified the practice in the form of statutes that provided that children fathered by slave masters “followed the condition of the mother,” birthright citizenship for children born overseas to unmarried couples is transmitted only through the mother.

Thus although Tuan Anh Nguyen’s father, a civilian employee of a U.S. construction company, kept Nguyen after his Vietnamese mother had abandoned them both, and he raised the child, first in Vietnam and then in Houston, Nguyen was not a citizen. Although Joseph Boulais provided financial support, he did not officially register the birth or demonstrate a blood relationship between them. So long as life moved along quietly, so long as Boulais supported his son, what did formal paperwork matter? But in the early 1990s, Nguyen was found guilty of sexual assault of a minor. While he was serving his prison sentence, Congress, responding to a rising tide of anti-immigrant sentiment, tightened the rules controlling legal resident aliens such as Nguyen. By the time he was ready to emerge from prison, the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 had been passed. Conviction for what immigration law now termed an aggravated felony now meant deportation. And a five-to-four U.S. Supreme Court majority denied Nguyen’s father’s claim that he should have been able to transmit birthright citizenship to his child on the same terms that an American citizen woman can.⁴⁷

In reaching this decision, the majority on the Court made two major arguments. One was an argument about gender equity, in which the court expressed doubt that the appropriate comparison was between the ability of birth mothers and birth fathers to transmit birthright citizenship, and emphasized rather that the nonmarital father of a child born overseas was not being burdened more severely than were many nonmarital fathers of children born within the United States who are required to exhibit their relationship to the child.⁴⁸ The other, an extended argument that did not receive much press coverage, invoked the danger of statelessness. The Court sustained the Department of Justice’s assertion that the reason for different legislative criteria

had long been the danger “that the foreign-born children of unwed citizen mothers might become stateless if they were not eligible for United States citizenship, because the children would not be eligible for citizenship in their country of birth or in the country of the unwed father.”⁴⁹ In the United States, citizenship accompanies birth on American soil, whatever the citizenship or marital status of the parents. But in many nations (though fewer than in 1940, the time of the passage of the original statute), citizenship is traced through bloodline. In dozens of foreign countries, illegitimate children follow the mother’s nationality, and it seemed imperative that U.S. law confirm this practice. The 1940 statute and its successors—notably section 1409 of the Immigration and Nationality Act of 1952—was intended to ensure that the child of an unwed citizen mother had U.S. nationality at birth.⁵⁰ “Congress minimized the burdens on unwed mothers who seek citizenship for their children,” the Department of Justice concluded, “. . . in order to advance its important interest in avoiding statelessness.”⁵¹

A few years before *Nguyen*, in a case that tested similar questions and arrived at similar conclusions, the Department of Justice had revealed the subtext: fear of fraud by the children of American military men stationed abroad:

The Department of State . . . has consulted . . . with consular officers in six nations in which the United States has or has had a significant military presence and which, not coincidentally, account for a large proportion of citizenship claims by illegitimate children born abroad. The Department reports that the problem of foreign law . . . remains a clear concern today in at least Germany, Great Britain, South Korea and Vietnam. Recent legal changes in the Philippines and Thailand have allowed an illegitimate child born there of a non-national mother to acquire Philippine or Thai nationality, respectively, if the father is a Philippine or Thai national and complies with the requirements of local law. The possibility of statelessness remains, however, in all other cases, unless the mother can transmit her citizenship in accordance with the law of her own country.⁵²

In a dissenting opinion in one of the cases that formed a backdrop to *Nguyen*, Judge Andrew Kleinfeld of the Ninth Circuit Court of Appeals had emphasized that Congress had understood full well what they were doing:

This statute was passed during the Korean War. Members of Congress knew that American soldiers who went abroad to fight wars, and caused children to be conceived while they were abroad, were overwhelmingly male, because only males were drafted, so that the number of children born illegitimately of male citizens might be large enough to affect immigration policy, while the number of illegitimate children of female citizens would be negligible. They may also have sought to minimize the administrative burden on the Department of Defense for paternity and citizenship claims respectively by the women the soldiers left

behind and their children. This may not be pretty, but it is a rational basis for the sex distinction . . . Some noncustodial fathers of children born out of wedlock do not care to pay child support if it can be avoided.⁵³

In other words, even those men representing the United States abroad have the Court's permission to father children out of wedlock and abandon them. "I expect very few of these are the children of female service personnel," Ruth Bader Ginsburg observed to the amusement of the audience during the oral argument in *Nguyen*. "There are these men out there who are being Johnny Appleseed."⁵⁴

After the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 required deportation for what immigration law referred to as aggravated felony convictions and defined as such felonies an expansive range of crimes, minor as well as serious, thousands of permanent legal residents were subject to deportation. Nguyen was unusual among them because he had the hope of making the argument that he was a U.S. citizen. But most who faced deportation came from nations with which the United States has no treaty of reciprocity (Cambodia, Vietnam, Laos) and others whose birth nation refused to take them back, effectively rendering them stateless. In Seattle, Assistant Federal Public Defender Jay Stansell found an entire floor of the Federal Detention Center devoted to the nearly two hundred prisoners who had prospect neither of freedom nor deportation.⁵⁵ A hundred such cases were brought together for appeal for habeas corpus proceedings and a limit to the indefinite detention to which they were subject. In the early spring of 2001, defending indefinite detention in response to a series of questions from Justice Ginsburg, Deputy Solicitor General Edwin Kneedler found himself saying, in an eerie reprise of Edward Everett Hale, that "one way to remove the alien [who has no country to go to] would be to put him on a boat."⁵⁶ And when Stansell emphasized the vulnerability of one of the youthful prisoners, his inability to speak the language, his lack of contacts if he were to be sent back to Cambodia, Justice Scalia was skeptical: "It is up to you to find a country to get sent back to. The burden is not on us."⁵⁷

But the Supreme Court ruled (although Scalia dissented) that although the attorney general "may" continue to detain aliens who present risks to the community, he does not have unlimited discretion. Drawing on Justice Robert H. Jackson's legendary dissent in *Shaughnessy v. United States ex rel. Mezei* at the height of the cold war, the Supreme Court now ruled that "once an alien enters the country . . . the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, un-

lawful, temporary or permanent.”⁵⁸ Stansell’s clients were spared indefinite detention—a limbo not unlike statelessness—only until the administration found a place to which to deport them. As repatriation agreements were negotiated—with Cambodia, with Vietnam—they were deported to nations where they knew no one, whose languages they did not speak.⁵⁹

Indefinite detention has long been the norm at the U.S. Naval Station at Guantánamo Bay, Cuba, which identifies itself as the United States’ “oldest . . . military installation overseas and “host to the Detainee Mission of the War on Terrorism.”⁶⁰ Guantánamo is now the prison for men captured in Afghanistan and elsewhere who are thought to be fighting for Al Qaeda. In three separate decisions in 2004, justices of the U.S. Supreme Court expressed their suspicion of unlimited detention and simultaneously limited severely the ability of the detainees to test it.⁶¹ Justice Stevens invoked the barons at Runnymede and Justice Jackson’s dissent in *Mezei*. In an *amicus brief*, former attorney general Janet Reno invoked the Civil War–era case that had so angered Edward Everett Hale, *Ex parte Milligan*: “The power which the Executive seeks in this case is far broader and far more terrifying.”⁶² Likening “incommunicado detention for months on end” to torture, Justice Stevens, joined by Justices Ginsburg, Souter, and Breyer, complained that “if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.” More than a year after the Guantánamo decisions were handed down, many questions remain unresolved. The International Committee of the Red Cross, its patience at an end, broke its usual commitment to confidentiality in November 2004, charging that psychological and physical coercion, “an intentional system of cruel, unusual and degrading treatment,” sometimes “tantamount to torture,” was repeatedly used on prisoners on Guantánamo.⁶³ Yaser Hamdi, a U.S. citizen who had been captured in Afghanistan, was forced to relinquish his American citizenship in order to return to Saudi Arabia, where his family lived and where he had grown up.⁶⁴ Almost a year after the Supreme Court remanded the case of José Padilla, an American citizen who had been accused of participation in a bomb plot, to a lower court for reargument, a federal district court judge in South Carolina ordered the administration either to release him or, within forty-five days, charge him formally with a specific crime.⁶⁵ The protective dimensions of American citizenship seem gradually to be eroding in the aftermath of 9/11.

The history of the right to citizenship in U.S. law is an ambivalent one. We are inheritors of *Yick Wo v. Hopkins*, the great California case of 1896 that honored the claims of the alien ineligible for citizenship; of *Trop v. Dulles*, in

which the Supreme Court held in 1958 that the “use of denationalization as a punishment is barred by the Eighth Amendment”; and of *Afroyim v. Rusk* in which the Court held in 1967 that “every citizen in the U.S. has a constitutional right to remain a citizen . . . unless he voluntarily relinquishes that citizenship.”⁶⁶ But we are also inheritors of a strongly skeptical countertradition that emphasizes the *alien* ingredient in the “legal resident alien.” This suspicion, with its inherent xenophobia, was greatly strengthened after 9/11.⁶⁷ The Patriot Act gave the attorney general expanded power to detain noncitizens who are suspected of terrorist activity; he is not required to notify them of the reason for detention or to share the evidence on which detention is based with the detainee.⁶⁸ The draft of *Patriot II* contemplated stripping even native-born Americans of their citizenship if they provide support for organizations marked as terrorist.⁶⁹ The decisions in *Hamdi*, *Padilla*, and *Rasul* offer citizens accused of being enemy combatants limited protections, aliens even fewer protections. Indefinite detention may be our contemporary opposite of expulsion. Guantánamo, the island prison where the American flag flies, inhabited by men whose own nations cannot assure them decent prisoner-of-war treatment, is today’s floating prison of men without a country.

The dream of a cosmopolitan citizenship—and the nightmare of its absence in statelessness—in American history is a complicated one, whose presence we are only just beginning to acknowledge. In trying to understand the expansive meanings embedded in the status of statelessness, we come to consider not only questions of who can be a citizen and on what terms, but also to consider some of the instabilities of public/private distinctions, of the way the personal and the political merge, of the way in which the state regularly relies on the microclimates of the workplace, the bedroom, and the birthing room to sustain national citizenship. Behind the public story is a backstory of distrust: today, a distrust of the future complexities of sorting out the claims of thousands of people who might well conclude that they could now claim citizenship retroactively, and in the past, a distrust of women as tricksters, accompanied by a belief that men should be able to pick and choose for which of their children they will be responsible. These issues have such resilience not only because they are stereotypes based on actual trends (U.S. military men, stationed overseas, are indeed culpable of fathering more nonmarital children than are U.S. women who are in other countries), but also because they are rooted in concepts that reach back to the founding era, when the property

regime of *coverture* ensured that married women's relation to the state was filtered through their husbands.

The categories that define who is vulnerable to statelessness have been refigured since the 1930s, when Seckler-Hudson sought to provide it with a syntax. Statelessness is not a simple conceptual matter; it now breaks along the fault lines of perceptions of state security, race and ethnicity, ideal workers, and gender. Indeed the fault lines are not themselves always clear. Hannah Arendt has reminded us of the difficulty of distinguishing between stateless refugees and "normal" resident aliens. "Who," she asked, "will guarantee human rights to those who have lost their nationally guaranteed rights?"⁷⁰ Statelessness is now made in the daily decisions of immigration officers, deciding who is a guest worker and who is not, and in the daily decisions of captors in prisons like Abu Ghraib and Guantánamo, deciding who is entitled to the protections of international law and who is not.

Today's transnational market in domestic labor is filled with people who are not technically refugees, but are homeless in having left their home country, who are citizens of one country but undocumented aliens where they work. By far most of these people are women, many of whom, like Miss Saigon, slide all too easily into the international traffic in women. If citizenship is linked to work—as it is in Judith Shklar's understanding of citizenship as the "right to earn," T. H. Marshall's understanding of social citizenship as the right to basic material well-being, and Alice Kessler-Harris's understanding of economic citizenship—then what citizenship can be claimed by those trapped jobless in the underworld of the globalized marketplace?⁷¹ Hundreds of thousands of trafficked women are brought to the United States each year.⁷² Indeed, anthropologist Aihwa Ong argues that in the last generation "the norms of good citizenship in advanced liberal democracies have shifted from an emphasis on duties and obligations to the nation to a stress on becoming autonomous, responsible choice-making subjects who can serve the nation best by becoming "entrepreneurs of the self."⁷³ Those who lack resources are almost bound to fail that entrepreneurial challenge. Ambiguous borders cloud the margins between Ong's "mobile homo economicus" and the trafficked, between the trafficked and the refugee, between the refugee (subject to multiple *refoulements* despite its illegality in international law) and the stateless.

If we listen to patriotic public speeches these days in the context of the preemptive war in Iraq, we hear citizenship described as unambivalent, stable, and unidimensional. Even if the Patriot Act is not expanded, it has articulated fresh possibilities of expatriation in an atmosphere already soaked with suspicion, possibilities that are now being explored at Guantánamo. The outcry of

dismay that greeted the leaked draft of the expanded Patriot Act in 2003 gave reason to hope that it would be challenged by another, more expansive understanding of citizenship, and that the strongest elements of the new proposals, in particular those threatening expatriation, would quietly be erased. But the initiation of war in Iraq has transformed public attention, making it unlikely that we will find a renewed commitment to the heightened ideals of equal citizenship that emerged out of the principles of fairness that were freshly articulated only a generation ago, in the civil rights, women's, and gay liberation movements.⁷⁴

In this volatile political context, statelessness is no longer so easily measured only by the presence or absence of a passport; it is a state of being produced by new and increasingly extreme forms of restriction and of the creation of new categories of stateless human beings.

It is widely understood—thanks not least to Nansen and to Arendt—that statelessness haunted twentieth-century Europe. Statelessness has also haunted the United States throughout its history, from its oxymoronic founding as a republic of slavery to our own time. “Once they had left their homeland they remained homeless; once they had left their state they became stateless; once they had been deprived of their human rights they were rightless.”⁷⁵ Arendt’s heartbreaking words conspicuously begin not with a crime but with a passive and neutral behavior: “once they had left.” It is the leaving that makes the individual or community vulnerable. But if, for Arendt, twentieth-century statelessness was triggered by a single act, statelessness today, in particular in relation to the borders and borderlands of the United States, is most usefully understood not only as a status but as a practice, made and remade in daily decisions of presidents and judges, border guards and prison guards, managers and pimps. The stateless are the citizen’s other. The stateless serve the state by embodying its absence, by providing frightening models of the vulnerability of those who lack sufficient awe of the state. The stateless serve the state by signaling who will not be entitled to its protection, and throwing fear into the rest of us.

Notes

1. Edward Everett Hale, *A Man Without a Country* (Annapolis, Md.: Naval Institute Press, 2002).
2. Aaron Burr in the House of Assembly, Legislature of New York, January 8, 1799, “Debate on Proposed Amendments to the U.S. Constitution,” *Political Correspondence and Public Papers of Aaron Burr*, vol. 1, ed. Mary-Jo Kline (Princeton, N.J.: Princeton University Press, 1983), 366, 371.

3. Vallandigham's habeas corpus challenge to the claims of military courts to try civilians reached the U.S. Supreme Court in *Ex parte Vallandigham* 68 U.S. (1 Wall.) 243 (1863). For Hale's own reflections on the origins of the story, see E. E. Hale, "The Man Without a Country," *Outlook* 59 (May 5, 1898): 116.
4. Catheryn Seckler-Hudson, *Statelessness: With Special Reference to the United States (A Study in Nationality and Conflict of Laws)* (Washington, D.C.: Digest Press, 1934), published under the auspices of the Department of International Law and Relations of the American University Graduate School, with preface by Ellery C. Stowell, who described statelessness as "an inexcusable anomaly," and an "intolerable condition."
5. Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt Brace Jovanovich, 1951); McCarran-Walter Immigration and Nationality Act, Pub. L. No. 82-414 (1952).
6. There is ongoing argument about whether Palestinian refugees are stateless persons. See "The Status of Palestinian Refugees and Stateless Persons in Europe," Briefing Paper prepared by BADIL Resource Center for Palestinian Residency and Refugee Rights, for the Council of Europe, Committee on Migration, Refugees and Demography, December 2002, <http://www.badil.org/Publications/Monographs/CoE.2002.pdf> (accessed August 10, 2005). The United Nations conventions on statelessness can be found at <http://www.ohchr.org/english/law/statelessness.htm> (Convention relating to the Status of Stateless Persons, Adopted on September 28, 1954, by a Conference of Plenipotentiaries convened by Economic and Social Council Resolution 526 A [XVII] of April 26, 1954) and (Convention on the Reduction of Statelessness, 1961) (all accessed July 19, 2005).
7. Stephen H. Legomsky, "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection," *International Journal of Refugee Law* 15 (2003): 567-677.
8. "2003 Global Refugee Trends: Overview of Refugee Populations, New Arrivals, Durable Solutions, Asylum-Seekers and Other Persons of Concern to UNHCR," June 15, 2004, <http://www.reliefweb.int/rw/lib.nsf/db900SID/LHON-634JPE?OpenDocument> (accessed July 19, 2005).
9. I am indebted to Mary Dudziak for this insight.
10. Speech by Irene Khan, president of Amnesty International, at Foreign Press Association, *Washington Post*, September 24, 2004, A24.
11. For a recent example see Amy Waldman, "Sri Lankan Maids Pay Dearly for Perilous Jobs Overseas," *New York Times*, May 8, 2005, A1, detailing "exploitation so extreme that it sometimes approaches 'slaverylike' conditions, according to a recent Human Rights Watch report on foreign workers in Saudi Arabia."
12. Jacqueline Bhabha, "Demography and Rights: Women, Children, and Access to Asylum," *International Journal of Refugee Law* 16 (2004): 232, 235; see also Jacqueline Bhabha, "'More Than Their Share of Sorrow': International Migration Law and the Rights of Children," *Saint Louis University Public Law Review* 22 (2003): 253, n. 1.
13. Arjun Appadurai, "Patriotism and Its Futures," *Public Culture* 5.3 (1993), 423-24; Aihwa Ong, *Flexible Citizenship: The Cultural Logics of Transnationality* (Durham, N.C.: Duke University Press, 1999).
14. David Campbell, *Writing Security: United States Foreign Policy and the Politics of Identity* (Manchester: Manchester University Press, 1992), 3, 7.
15. Arendt, *The Origins of Totalitarianism*, 291-93.
16. Robert Wiebe, "Framing U.S. History: Democracy, Nationalism, and Socialism," in *Rethinking American History in a Global Age*, ed. Thomas Bender (Berkeley: University of California Press, 2002), 239. For the process in France, see Gerhard Noiriel, "The Identification of the Citizen: The Birth of Republican Civil Status in France," in *Documenting Individual Identity: The Development of State Practices in the Modern World*, ed. Jane Caplan and John Torpey (Princeton, N.J.: Princeton University Press, 2002), 29-47.
17. Arendt, *The Origins of Totalitarianism*, 296.
18. "Petition of the Africans, Living in Boston, 1773," in James Oliver Horton and Lois E. Horton's *Slavery and the Making of America* (New York: Oxford University Press, 2005), 51. In a 1792 debate in the French Assembly, a deputy would say, "Slaves have no civil status. Only the free man has a city, a fatherland."
19. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).
20. A. S. Hitchcock to Provost Marshal General of the Department of the South, August 25, 1864, in *Freedom: A Documentary History of Emancipation 1861-1867*, ser. 1, vol. 3, ed. Ira Berlin et al. (New York: Cambridge University Press, 1982), 316-17.

21. John Torpey, *The Invention of the Passport: Surveillance, Citizenship, and the State* (Cambridge: Cambridge University Press, 1999), 95–96.
22. Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill: University of North Carolina Press, 1995), 247–48; and see John R. Wunder's review in the *American Historical Review* 102 (1997): 889–90.
23. See *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).
24. Mae Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton, N.J.: Princeton University Press, 2004), 37–50. The key cases were *Takao Ozawa v. United States* 260 U.S. 178 (1922) and *United States v. Bhagat Singh Thind* 261 U.S. 204 (1923).
25. *Ex parte (Ng) Fung Sing* 6 F.2d 670 (D.C. Wash. 1925). See Candice Lewis Bredbenner, *A Nationality of Her Own: Women, Marriage, and the Law of Citizenship* (Berkeley: University of California Press, 1998), 136.
26. Christina Duffy Burnett, "The Edges of Empire and the Limits of Sovereignty: American Guano Islands," in this issue, 798, 799.
27. *Downes v. Bidwell* 182 U.S. 244 (1901); note Justice John Marshall Harlan's eloquent dissent.
28. Sarah H. Cleveland, "Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth-Century Origins of Plenary Power over Foreign Affairs," *Texas Law Review* 81.1 (2002): 211.
29. A good place to start is Sanford Levinson, "Why the Canon Should Be Expanded to Include the Insular Cases," *Constitutional Commentary* 17 (2000): 241ff; and see Burnett, "The Edges of Empire."
30. I am indebted to Amy Kaplan for conversations on this point.
31. *Martin v. Commonwealth*, 1 Mass. 347 (1805).
32. H. R. Joint Resolution No. 238, 55th Cong., 2nd sess., 30 Stat. 1496 (May 18, 1898). John L. Cable, *Decisive Decisions of United States Citizenship* (Charlottesville, Va.: Michie Co., 1967), 41–42. I have discussed this point in chapter 1 of *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (New York: Hill and Wang, 1998).
33. See *Mackenzie v. Hare* 239 U.S. 299 (1915), upholding the denationalization of American women who married aliens. I discuss this case at some length in *No Constitutional Right to Be Ladies*.
34. Seckler-Hudson, *Statelessness*, 23–99.
35. Bredbenner, *A Nationality of Her Own*, 157.
36. See the splendid treatment of these matters in Bredbenner, *A Nationality of Her Own*, 98–102, 157, 170–94.
37. For the Nansen Passport, see Arendt, *The Origins of Totalitarianism*, 281, n. 30, and *passim*; and Torpey, *The Invention of the Passport*, 127–29. When the Germans occupied France, they used the Nansen passport for their own purposes, detaining all the Russians with a Nansen passport. White Russians were released; Jews with Nansen passports were deported to their deaths.
38. Despite the severity of U.S. immigration restriction policies in the 1920s and thereafter, Catheryn Seckler-Hudson estimated that some eighteen and a half million immigrants entered the United States in the first third of the twentieth century. Seckler-Hudson, *Statelessness*, 1.
39. Richard W. Flournoy Jr., "Nationality Convention Protocols and Recommendations Adopted by the First Conference on the Codification of International Law," *American Journal of International Law* 24 (1930): 467, quoted in Seckler-Hudson, *Statelessness*, 2.
40. I am indebted to Mae Ngai's remarkable essay, "The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921–1965," *Law and History Review* 21 (2003): 69–107, especially notes 11 and 14. In her analysis, immigration restriction makes the illegal alien; she gives relatively little attention to statelessness, although it is implicit in the situation.
41. See the moving testimony by a man himself stateless, Marc Vishniac, *The Legal Status of Stateless Persons* (New York: American Jewish Committee, 1945), 34; and David S. Wyman, *Paper Walls: America and the Refugee Crisis 1938–1941* (Amherst: University of Massachusetts Press, 1968).
42. The original agenda of the UN Commission on the Status of Women expressed a grave concern for the risks of statelessness, and a fear for the fragility of married women's nationality. See Linda K. Kerber, "I Was Appalled: The Invisible Antecedents of Second Wave Feminism," *Journal of Women's History* 14.2 (summer 2002): 86–97.
43. Bhabha, "More Than Their Share of Sorrows," 253.
44. Hannah Arendt pointed out the irony that the test of statelessness is when you have more rights as a criminal: "A West Coast Japanese-American, who was in jail when the army ordered internment . . . would not have been forced to liquidate his property at too low a price; he would have remained right where he was, armed with a lawyer to look after his interests." *The Origins of Totalitarianism*, 287, n. 42.

45. On Mexican migrant farm workers and *braceros* in particular, see Ngai, *Impossible Subjects*, chap. 4, and Kitty Calavita, *Inside the State: The Bracero Program, Immigration, and the INS* (New York: Routledge, 1999).
46. Jacqueline Bhabha, "The 'Mere Fortuity' of Birth? Are Children Citizens?" *Differences* 15.2 (summer 2004): 91–117; for the vulnerability of children to statelessness in the 1930s, see Seckler-Hudson, *Statelessness*, 196–243.
47. *Tuan Ahn Nguyen v. INS*, 121 S. Ct. 2053 (2001). I have written about this case in "Top Court Took a Step Backward on Gender Bias," *Boston Globe*, June 23, 2001. See also Kristin Collins, "When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in *Miller v. Albright*," *Yale Law Journal* 109 (2000): 101–42.
48. Brief for the Respondent, 10, December 13, 2000, *Tuan Ahn Nguyen v. INS* (No. 99-2071). This is a development feminists supported, in an effort to strengthen the rights of unmarried birth mothers within the United States. See *Lehr v. Robertson*, 463 U.S. 248 (1983).
49. Brief for the Respondent, 8, *Nguyen* (No. 99-201).
50. *Ibid.*, 19.
51. *Ibid.*, 34.
52. Respondent's Brief, 33–34 and n. 18, *Miller v. Albright*, 523 U.S. 420 (1998) (No. 96–1060).
53. *United States v. Ahumada-Aguilar*, 189 F.3d.1121 (9th Cir. 1999).
54. Oral Argument in *Nguyen v. INS*.
55. Interview by author with Jay Stansell, January 12, 2001; Jonathan Simon, "Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States," *Public Culture* 10.3 (1998): 577–607.
56. Oral Argument, *Zadvydas v. Davis*, 533 U.S. 678 (2001) (Nos. 99-7791, 00–38) (argued February 21, 2001).
57. Oral Argument, *Zadvydas v. Davis*, p. 7.
58. *Shawghnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). Mezei was a permanent resident, a man, Justice Jackson observed, "who seems to have led a life of unrelieved insignificance," who left the United States to visit his dying mother in Romania for a year and a half. When he attempted to return in 1950, he was excluded by an immigration inspector; the attorney general made that ruling permanent "for security reasons." Unable to find a country that would accept him, Mezei was held in indefinite detention on Ellis Island. In his dissent, Jackson observed: "Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. . . . Realistically, this man is incarcerated by a combination of forces which keeps him as effectually as a prison."
59. Deborah Sontag, "In a Homeland Far from Home," *New York Times Magazine*, November 16, 2003, 48ff.
60. See <http://www.ccis.edu/nationwide/newsroom/index.asp?PAFB&story=383> (accessed July 19, 2005).
61. *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); *Rasul v. Bush*, 124 S. Ct. 2686 (2004).
62. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), quoted in Brief of Janet Reno, *Rumsfeld v. Padilla* (No. 03-1027).
63. Neil A. Lewis, "Red Cross Finds Detainee Abuse in Guantanamo," *New York Times*, November 30, 2004; for Abu Ghraib, see Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (New York: New York Review Books, 2004).
64. Joel Brinkley, "From Afghanistan to Saudi Arabia, via Guantanamo," *New York Times*, October 16, 2004.
65. Neil A. Lewis, "Judge Says U.S. Terror Suspect Can't Be Held as an Enemy Combatant," *New York Times*, March 1, 2005, 14.
66. David A. Martin, "Behind the Scenes on a Different Set: What Congress Needs to Do in the Aftermath of St. Cyr and Nguyen," *Georgetown Immigration Law Journal* 16 (2002): 333–38.
67. Rogers Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven, Conn.: Yale University Press, 1997).
68. Center for Constitutional Rights, "The State of Civil Liberties, One Year Later: Erosion of Civil Liberties in the Post 9/11 Era," <http://www.ccr-ny.org> (accessed July 19, 2005).

69. For a detailed report on the leaked document, see <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12234&c=206>, "ACLU Fact Sheet on Patriot Act II," March 28, 2003 (accessed July 19, 2005).
70. Arendt, *The Origins of Totalitarianism*, 269.
71. Judith N. Shklar, *American Citizenship: The Quest for Inclusion* (Cambridge, Mass.: Harvard University Press, 1991); T. H. Marshall, *Citizenship and Social Class* (Cambridge: Cambridge University Press, 1950); Alice Kessler-Harris, *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in Twentieth-Century America* (New York: Oxford University Press, 2001).
72. The Trafficking Victims Protection Act of 2000 recognizes something of the scope of the problem in the United States. See also U.S. Department of State, "Trafficking in Persons Report," June 5, 2002, <http://www.state.gov/g/tip> (accessed July 19, 2005).
73. Aihwa Ong, *Buddha Is Hiding: Refugees, Citizenship, the New America* (Berkeley: University of California Press, 2003), 9.
74. Notably Title VII of the Civil Rights Act of 1964, the Voting Rights Act of 1965, and *Reed v. Reed* (1971).
75. Arendt, *The Origins of Totalitarianism*, 267.