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The creation of immigration detention: from free movement to regulated borders in America and the United Kingdom

Alien friends and alien enemies in the early modern period: libertarian equality and open borders

Until there was immigration control, there could be no immigration detention. Looking at liberal states in the mid-nineteenth century, we can see a relative lack of concern about 'the border' as a site of regulation.[1] The crucial distinction was between 'enemy' and 'friend'. Wars created 'enemy aliens' who were dealt with under the government's war powers and according to customary international law with its reciprocal arrangements for prisoner exchange. Thus, outside wars, aliens were not generally subject to controls on movement. As regards internal law relating to friendly aliens, there was a trend towards repealing former protectionist restrictions on their economic activities.[2] The emerging global capitalist economy sought to find the highest rates of return and the commercial

1 Indeed, as early as 1215 Magna Carta, the Great Charter of King John of England, had proclaimed that 'All merchants may enter or leave England unharmed and without fear, and may stay or travel within it . . . for purposes of trade . . . This however does not apply in time of war to merchants from a country that is at war with us. Any such merchants found in our country at the outbreak of war shall be detained without injury to their persons or property, until we or our chief justice shall have discovered how our own merchants are being treated in the country at war with us. If our own merchants are safe they shall be safe too' (Art. 41).

2 In Britain, growing equal civil status was not without reverses. 'In Tudor times the position of aliens was that they could not own land but could own chattels. They were encouraged to come but measures were taken to limit them taking in alien lodgers, apprentices and entering certain trades. There were no general Acts but by the royal proclamation of 1554 all were required to leave save for merchants and ambassadors servants. They numbered several thousand in London . . . They were not deemed to be "freeman" for Magna Carta purposes but they were able to bring personal actions and were protected by criminal law.' J. Baker, *The Oxford History of the Laws of England 1483–1558*, vol. VI, Oxford University Press, 2003, 611–17.

rights to trade became the new basis for international law.[3] Free labour migration, within and between friendly nations, based upon wage competition, was a crucial element in supporting capital formation and this underpinned the 'right' of movement for aliens.[4] Furthermore, in the new revolutionary governments of America and France, this was underpinned by the emerging idea of 'inalienable' Rights of Man, stripping away the former distinctions based upon rank or religion. Alienage appeared as another such arbitrary characteristic too.

These cosmopolitan times were reflected in significant juristic and public opinion disparaging discrimination against aliens.[5] The libertarianism of the era was also suspicious of executive interference with civil rights, regardless of nationality. The distinction between alien friends and alien enemies was, however, fragile. As we shall see, the birth of the idea of immigration control largely destroyed this division; war powers in respect of enemy aliens mutated, sometimes through emergency powers, into a new general power over all aliens.

Early debates on expulsion and exclusion of aliens: habeas corpus, banishment and denial of asylum

The remedy of habeas corpus was the central guarantee against arbitrary arrest and detention within the common law world.[6] Importantly, it was

3 Schmitt notes: '[t]he prevailing concept of a global universalism lacking any spatial sense certainly expressed a reality in the economy distinct from the state – an economy of free world trade and a free work market, with the free movement of money, capital and labor. Liberal economic thinking and global commercialism had become hallmarks of European thinking since the Cobden Treaty of 1860, and were now the common currency of thought . . . In short: over, under, and beside the state-political borders of what appeared to be a purely political international law between states spread a free i.e., non-state sphere of economy permeating everything: a global economy.' C. Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, New York: Telos Press, 2006, 235.

4 L.P. Moch, *Moving Europeans: Migration in Western Europe since 1650*, Bloomington: Indiana University Press, 1992.

5 Indeed, the great English scholar, Holdsworth, went so far as to say that due to 'this closer connection between the nations, arising mainly from the growth of international trade, and the social changes which have come in its train, have set in motion a course of legal development which has in relation to civil rights and liabilities substituted for the old lines of division between subjects and aliens and alien friends and alien enemies . . . a new line of division which is based on enemy character'. W.S. Holdsworth, *A History of English Law*, vol. IX, London: Methuen, 1926, 99. As one prescient judge put it in an early case: 'Commerce has taught the world humanity.' *Per Wells* v. *Williams* (1697) 1 Ld. Raym. 282.

6 See Holdsworth, *A History of English Law*, at 104–25. For the position in the United States, see W.F. Duker, *A Constitutional History of Habeas Corpus*, Westport, CT: Greenwood

also, for many years, the main safeguard against unlawful immigration measures. As late as 1890, a leading liberal English scholar could say '[t]he Crown has no prerogative to interfere with the free ingress or exit of any alien friend . . . any attempt at such interference can be stopped by Habeas Corpus or action of false imprisonment'.[7] Physical control over the body of aliens was a precondition to availability of the remedy, even though the main object was to challenge the legality of any immigration decision behind it.

With no concept of a wide power to control the entry and stay of friendly aliens, perhaps there were 'constitutional' limits on their treatment? In the United States, an important illustration of this was the debate over the Alien Act 1798, enacted in a climate of fear over European, particularly French Jacobin, radicalism and justified as a measure to protect national security.[8] It gave power to the president to order aliens to depart where he judged them to be treasonable or dangerous to peace or safety.[9] A person convicted of remaining in breach or returning after removal could be detained for as long as, in the president's opinion, public safety required.[10] This excited considerable disquiet at the time. The government had contended that expulsion was not a punishment, but rather preventive and required no trial. No less an eminent constitutional architect and jurist than James Madison replied that 'if a banishment of this sort be not a punishment, and among the severest punishments, it would be difficult to imagine a doom to which the name can be applied'.[11]

Press, 1980. For a comparative examination of commonwealth countries, see D. Clark and G. McCoy, *The Most Fundamental Right*, Oxford: Clarendon, 2000. See for a modern review R.J. Sharpe, *The Law of Habeas Corpus*, 2nd edn, Oxford: Clarendon, 1989, 97.

7 W.F. Craies, 'The Right of Aliens to Enter British Territory' (1890) 6 *LQR* 28, 39.

8 The historical context and political debate is set out in D. Kanstroom, *Deportation Nation*, Cambridge, MA: Harvard University Press, 2007, Ch. 2.

9 Section 1.

10 Section 2. This first appearance in American federal law of executive detention specifically aimed at friendly aliens revealed a doctrinal uncertainty with its unhappy mixture of criminal and executive elements. The courts were to determine if the crime of remaining in breach of the deportation order had been committed, whilst the government assessed if deportation was justified and how long detention should last after conviction (a kind of internment). Whilst nowadays the criminal and executive powers are distinct, in 1798 the idea of wholly administrative detention powers allied to border control had not yet been conceived of.

11 Madison spoke of the 'banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness, – a country where he may have formed the most tender connections; where he may have invested his entire property, and

Madison's view reflected the contemporary view that friendly resident aliens had a right to stay that should not be revoked without due process. Although he grounded this in banishment amounting to 'punishment', this was not essential. Denial of personal liberty would have been sufficient to trigger due process concerns. The government's case was anyway unconvincing, as the same logic might support preventive detention of seditious citizens. A further argument was required – that aliens had an inherent, if ill-defined, lesser status – to support their expulsion without trial. One suggestion was that aliens were not parties to the constitution and therefore derived no protection from it. Madison replied that if that were so 'they might not only be banished, but even capitally punished, without a jury, or the other incidents to a fair trial'.[12] This is a central question that will recur throughout this study. What limits are there on the state's powers over aliens?

Neuman argues that there were in fact profound contradictions in the early American jurists' ideas, influenced as they were by social contract theories when framing the US Constitution. They conceived of a contract between pre-existing members of a society – apparently not encompassing outsiders. Nevertheless, they also believed that any government so created was constrained by adherence to fundamental laws derived from natural rights theory, rights that belonged to every human being regardless of the social contract.[13] Madison had raised fundamental issues which, as Kanstroom notes, 'illustrate a major unresolved tension in U.S. constitutional history: between a robust rule-of-law version of the nation of immigrants ideal . . . and the categorical, status-based distinctions that legitimize government action against non-citizens that would be unacceptable if applied to citizens'.[14]

acquired property of the real and permanent as well as the movable and temporary kind; where he enjoys, under the laws, a greater share of the blessing of personal security and personal liberty than he can elsewhere hope for . . . ' J. Madison, *Report on the Virginia Resolutions*, 4 Elliot's Debates, 544, 555.

12 *Ibid.*

13 G. Neuman, *Strangers to the Constitution*, Princeton University Press, 1996, Ch. 1, 9–15. He shows that Vattel's writings on the nature of the social contract was a strong influence upon the framers of the US Constitution. Writing about the law of nations, Vattel was ambiguous on the position of aliens, saying that they were bound by the laws of territory upon which they entered, but the sovereign was only bound 'internally' (morally) to respect their natural rights. States had a right to select whom to admit in its own interests except in cases of 'absolute necessity'. Violation was not something that 'externally' could generate a right to take action by the alien's state of nationality unless it concerned a clear case of injustice or discrimination for persons already admitted.

14 Kanstroom, *Deportation Nation*, 48.

Turning to British thinking of the time, writing in the mid-nineteenth century, the renowned constitutional expert Erskine May said: 'Nothing has served so much to raise, in other states, the estimation of British liberty, as the protection which our laws afford to foreigners.'[15] He noted that as well as granting 'inviolable asylum to men of every rank and condition', 'they were equally free from molestation by the municipal laws of England'. Habeas corpus had always been available for the protection of non-citizens in England, the most famous example being the freeing of an American slave held on board a ship in the Thames.[16] The equal protection of the liberty of foreigners within Britain and the tradition of granting political asylum were seen as markers of British civilization.

The period around the French Revolution had challenged this as fear of aliens became rife amongst the British ruling classes, with rumours of spies and saboteurs intent on overthrowing the monarchy. This led to proposed laws to restrict alien entry through executive powers. This would have denied asylum to some without due process. The parliamentary debates on the Bill show conflicting attitudes toward the political status of immigrants in the minds of parliamentarians.[17] Thus, on the one hand, some saw aliens' entry rights as limited during times of emergency:

> An hon. Member has said much about the rights of aliens: no man was more ready to respect them than he was; but his first object was to secure the safety of the state: and that being once out of danger, he would be happy to see aliens in the fullest enjoyment of every right which the law and constitution of England allowed them.[18]

On the other side of the debate were the civil libertarians who viewed the use of powers against aliens as the precursor to a gradual erosion of liberty more generally. As one Member put it:

> The principle of the bill appeared to him of the most dangerous tendency. If once established, he did not well see where it was to stop, or why it might not be extended to British subjects as well as foreigners and lead to a total repeal of the Habeas Corpus Act, upon grounds of danger totally ideal or at least unsupported by any evidence.[19]

15 T. Erskine May, *The Constitutional History of England Since the Accession of George III*, vol. III, Boston: Corsby and Nichols, 1862, Ch. XI, 50.
16 *Sommersett's Case* (1772) 1 State Tr 1 at 20. The law of England, as opposed to the colonies, did not recognize slavery.
17 Debates on the Aliens Bill, Hansard Parliamentary Debates XXX 1792–4 (1817) Hansard: London.
18 *Ibid.*, Lord Fielding. 19 *Ibid.*, M.A. Taylor, 195.

Apart from this danger of sliding towards wider authoritarianism, the proposed law was attacked because 'it violated the rights of aliens. It left them entirely in the power of the king'.[20] Denial of asylum could indeed result in death without any judicial oversight.

Erskine May looking back from the mid-nineteenth century was clear about the aberrant nature of the measures:

> Such restraints upon foreigners were novel, and wholly inconsistent with the free and liberal spirit with which they had been hitherto entertained. Marked with extreme jealousy and rigour, they could only be justified by the extraordinary exigency of the times. They were, indeed, equivalent to a suspension of the Habeas Corpus Act, and demanded proofs of public danger no less conclusive.[21]

Habeas corpus was seen as synonymous with due process. In the migration context, to deny asylum or banish aliens without trial was arguably to deny due process. If not unconstitutional, this was considered politically immoral by many. As we shall see, however, as the aliens power became established such concerns largely diminished. Aliens came to be seen as set apart, a group to be politically and administratively managed, not judicially protected. Exclusion and expulsion were redefined as state security or social policy choices, not punishments or arbitrary inferences with rights of movement.

During these early debates, detention had never been separately considered from the issue of expulsion, despite the habeas corpus context. This failure to unhinge detention from expulsion decisions has, however, proved to be a crucial omission. As alien entry and expulsion became 'bureaucratized', detention pending expulsion became seen as an incident of migration management. This was so despite the fact that imprisonment raised distinct legal and moral concerns. Madison had anticipated the potential for abuse by noting that the logic of excluding a group of persons from constitutional protection knew no limits; detention might then proceed to occupy a central place in alien controls without proper safeguards.

The creation of alienage and establishing the border as a site of political control

The emergence of more modern regulatory nation-states in the later nineteenth century saw the development of centralized power over all

20 *Ibid.* 21 Erskine May, *The Constitutional History of England*, 51–2.

aliens. This entailed the emergence of techniques for identifying and controlling migrants, including through their administrative detention. Torpey charts the evolution in Europe and the United States of centralized immigration laws during the nineteenth and early twentieth centuries and characterizes this as the 'monopolization of the legitimate means of movement'.[22] The new centralized state claimed sole power to determine who could enter and remain though the imposition of laws requiring the presentation of passports and other documents.[23] The border also came to have symbolic importance in enforcing loyalty to the new nation states because '[t]he state tried to homogenise the inside where neighbours are by definition fellow-countrymen; it created a friend/foe division where the enemy is normally to be found outside the territory . . . the borders are frontiers of identity and "otherness", of solidarity and security, of law and order and of military confrontation'.[24] The alien became someone outside this order, subject to the laws of war, if any.

Detention represents another feature of this power. States tended to give wide authority to officials to detain migrants. The emphasis given by Max Weber to rationalization as the basis for many activities of the modern state is clearly apparent here.[25] Executive detention was, from the bureaucratic perspective, a rational means of aiding the new immigration checks. The potential clash with liberty, a moral and jurisprudential question, was less important than pragmatic policy-making.[26] In any event,

22 J. Torpey, *The Invention of the Passport*, Cambridge University Press, 2000.

23 This draws upon the studies made by Max Weber at the time which described the modern state:

> The primary formal characteristics of the modern state are as follows: It possesses an administrative order subject to change by legislation, to which the organized activities of the administrative staff, which are also controlled by legislation, are oriented. This system of order claims binding authority not only over the members of the state, the citizens, most of whom have obtained membership by birth, but also to a very large extent over all action taking place in the area of its jurisdiction. It is thus a compulsory organization with a territorial basis. Furthermore, today, the use of force is regarded as legitimate only so far as it is either permitted by the state or prescribed by it . . . The claim of the modern state to monopolize the use of force is as essential to it as its character of compulsory jurisdiction and of continuous operation.
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> M. Weber, *Economy and Society*, Berkeley: University of California Press, 1978, 56.

24 M. Anderson and D. Bigo, 'What are EU Frontiers For and What Do They Mean?' in K. Groenendijk, E. Guild and P. Minderhound (eds), *In Search of Europe's Borders*, The Hague: Kluwer Law International, 2003, 8–25.

25 R. Brubaker, *The Limits of Rationality: An Essay on the Social and Moral Thought of Max Weber*, London: Allen and Unwin, 1984.

26 For influential studies of the development of institutions of control and incarceration see those by Foucault relating to prisons. M. Foucault, *Discipline and Punish: the Birth of the*

the emerging idea of a system of sovereign states comprised of national communities whose membership was determined by the government, left little room for aliens to assert rights through courts. Judges tended to defer to the political branches. They viewed control over borders as akin to matters of national security and nation building, issues requiring maximal government discretion. Despite the common law dislike of executive detention, interference with personal liberty was widely assumed to be a necessary part and parcel of immigration control. As such, the government was afforded wide discretion here, too.[27]

We shall explore these developments in the United States and United Kingdom in more detail in this chapter. These countries developed some of the first recognizably modern systems of immigration control and provide important evidence of the interaction of legal theory and political practice in relation to the detention of immigrants. Given both countries' strong historical attachment to habeas corpus, their experiences are particularly significant. During this formative period, the organs of state in the United States and United Kingdom, through these emerging ideological, legal and bureaucratic systems, created aliens as a distinct group set apart from the rest of society with few, if any, safeguards against legislative or executive action remotely linked to controls on movement.[28]

United States of America: the evolution of immigration law and the status of aliens

The history of immigration into the United States is one of the defining stories of the modern world. There is no doubt that the vast migration to the United States was a key factor in that nation's rise to global superpower

Prison (trans. A. Sheridan), New York: Vintage, 1979. We can see some overlaps between Foucault's view about these institutions and control over migrants, as both form part of the process of creating deviant groups that became the object of new manifestations of state power.

27 The failure to develop tools of judicial control over the emerging state bureaucracy was also part of a much wider crisis in legal doctrine caused by a shift from judicial to executive adjudication. In a classic commentary Dickinson said: 'That government officials should assume the tradition function of courts of law, and be permitted to determine the rights of individuals, is a development so out of line with the supposed path of our legal growth as to challenge renewed attention to certain underlying principles of our jurisprudence.' J. Dickinson, *Administrative Justice and the Supremacy of Law in the United States*, Cambridge, MA: Harvard University Press, 1927, 1.

28 Detention powers were, however, very much ancillary aspects of this monopolization over the legitimate means of movement compared to other provisions such as head taxes and measures to ensure shipowners did not allow undesirable migrants to embark.

status. Although mass migration did occur, the idea that migration was unrestricted is in fact far from the truth.[29] From the late nineteenth century, federal legislation began a process of selection inspired by anti-Chinese elements on the West coast and concern about pauperism and disease on the East.[30] Throughout this period, however, there was always ambivalence about immigration controls at the political level. Although there were permanent immigration committees in Congress and virtually continuous legislative initiatives, large-scale migration continued with the full encouragement of powerful political interest groups. The major exception was the exclusion of Chinese labourers on the West coast which resulted in wholescale restriction, including lengthy incarceration in some cases.

The first federal powers over the reception and selection of immigrants

Before 1882 there were no significant federal immigration controls of note. Matters were left to the states using police, anti-destitution and public health powers.[31] Throughout the 1870s some sections of public opinion was becoming hostile to some groups of immigrants deemed to be either dangerous, burdensome or not integrating into the community. Federal judicial opinions during this period had, however, reflected a strong preference for open migration.[32] Indeed, in *Henderson* v. *Mayor of*

29 Even before federal regulation of immigration took hold, there was extensive state control over migrants through recourse to police powers, disease control and racial laws. See Neuman, *Strangers to the Constitution*, Ch. 1.

30 D. Tichenor, *Dividing Lines: The Politics of Immigration Control in America*, Princeton University Press, 2002, 51. For a detailed consideration of the development of federal controls see Kanstroom, *Deportation Nation*, Ch. 3.

31 Generally see E.P. Hutchinson, *Legislative History of American Immigration Policy 1798–1965*, Philadelphia: University of Pennsylvania Press, 1981. The Immigration Act 1875 created excludable aliens if prostitutes, orientals without their consent or felonious criminals and criminalized bringing them.

32 *Smith* v. *Turner, Health Commissioner of Port of New York* and *Norris* v. *City of Boston* (1849) 48 U.S. 282. 'Twelve States of this Union are without a seaport. The United States have, within and beyond the limits of these States, many millions of acres of vacant lands. It is the cherished policy of the general government to encourage and invite Christian foreigners of our own race to seek asylum within our borders, and to convert these waste lands into productive farms, and thus to add to the wealth, population and power of the Nation. Is it possible that the framers of our Constitution have committed such an oversight, as to leave it to the discretion of some two or three States to thwart the policy of the Union, and dictate the terms upon which foreigners shall be permitted to gain access to the other States?', per Grier J., 458.

New York,[33] the Supreme Court declared unconstitutional the imposition of head taxes upon migrants by the state of New York to fund a migrant asylum and hospital. The courts had noted the need to separate out the desirable from the undesirable migrants, but ruled that the states had no power to do this in ways that impeded the flow of desirable labour. The seaboard states complained bitterly that the *Henderson* decision deprived them of funds from immigrants to pay for the care of the sick and destitute among their number. In an address to the Senate on 6 December 1881, the president said of the Supreme Court decision in *Henderson*:

> Since this decision the expense attending the care and supervision of immigrants has fallen on the States at whose ports they have landed. As a large majority of such immigrants, immediately upon their arrival, proceed to the inland States and Territories to seek permanent homes, it is manifestly unjust to impose upon the States whose shores they first reach the burden which it now bears. For this reason, and because of the national importance of the subject, I recommend legislation regarding the *supervision and transitory care* of immigrants at the ports of debarkation.[34]

A Congressional Committee investigation of the time concluded that federal reception facilities would also be better able to protect immigrants from abuse by fraudsters upon arrival.[35] Furthermore, the improvement of the reception facilities from the perspective of immigrants would increase the attraction of the United States as a destination. On the other hand, the concern about the dumping of destitute immigrants from Europe on America demanded a solution. This also suggested a surveillance and enforcement mechanism for doing so.[36] From the outset the system of reception facilities was thus conceived of in contradictory

33 (1875) 92 U.S. 259. 'The man who brings with him important additions to the wealth of the country, and the man who is perfectly free from disease, and brings to aid the industry of the country a stout heart and a strong arm, are as much the subjects of the tax as the diseased pauper who may become the object of the charity of the city the day after he lands from the vessel.'

34 Congressional Record, vol. 13, Part 1, 47th Cong., 1st Sess., 31.

35 Report of 9 Dec. by Committee on Foreign Affairs to accompany bill, House Report (H.R.) 2408: 1934 H.R. 46/1–2, 1879–80 Report, 1.

36 The cases of the time appear to accept that the states retained a concurrent state police power to expel undesirable persons generally, including certain immigrant groups. They were competent 'to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts' as well as persons carrying disease. *Mayor of New York* v. *Miln* 36 U.S. (11 Pet.) at 142–3. See the discussion in Neuman, *Strangers to the Constitution*, at 46–9.