Chapter 16

EXCEPTIONALITY AND COMMON FEATURES OF MIGRATION LAW IN THE AGE OF MASS MIGRATION *

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ABSTRACT: *This chapter suggests that the tensions and arguments underlying migration law at the turn of the 20th century were mainly driven by two key ideas: the priority of state sovereignty over individual freedom and the extraordinariness of mass mobility. Common features of the development of migration law in the age of mass migration in different Western countries will be explored, including: the exceptionality of migration law and its derogation from constitutional rules; the administrativisation of migration law; the criminalisation of migrants; and the key role played by racial identities in the building of border control regulations.*

1. Migration and law in a historical perspective

The legal regulation of migration, at least in the Western world, is strictly interwoven with the formation of modern states in the 16th and 17th centuries, the definition of their borders, and the resulting juridical divide between citizens and foreigners. [1] From the mid 19th century to the 1930s, the

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[1] See, e.g., Mavroudi E., Nagel C. (2016), *Global Migration. Patterns, Processes, and Politics*, London-New York, Routledge, 28-30; Benton L. (2010), *A Search for Sovereignty. Law and Geography in European Empires, 1400-1900*, Cambridge-New York, Cambridge University Press, ch. 6 279 ff.; for a critical account of the relationship be-

level of cross border mobility and its impact on socio-economic conditions became a key political issue in many countries, both sending and receiving ones.[2] As concerns grew about social problems, the legal system was expected to provide solutions. Even though the rules governing departures and entries were not included in Ravenstein's 1885 push-and-pull laws of migration, among which the economic factors were considered as the main cause of mobility,[3] migration law nonetheless played an important role in driving individual choices and shaping conditions and consequences of migration waves.

As the chapters of this volume have shown, a diachronic and comparative approach unveils an original power asymmetry between the migrant and the state. Historically, migration law has been characterised by deep contradictions: it mirrors inclusive or exclusionist political orientations and, by regulating the individual freedom to cross borders, it also aims to ensure public order, internal security and citizens' welfare. Parallel to economic policies determined by labour supply and demand trends, as well as by international mobility of workforce driven by conditions of economic backwardness or development and cycles of expansion or contraction, legal mechanisms have contributed to representing migration as an acquisition or a detriment, to making it perceived by public opinion as a risk or an opportunity. The idea that migrants' choices and expectations might be limited by reason of the prominence of the public interest have become mainstreamed.

This chapter will comparatively explore how the freedom of mobility was regulated in some Western and Latin American countries (i.e., Italy, Germany, the United States, the United Kingdom, and Argentina) between the late-19th and early-20th centuries, as well as whether and to what extent it was effectively recognised. Two interpretive keys will be adopted to shed light on the tensions inherent in the history of migration law, namely the contrast between individual liberty and state sovereignty and the juxtaposition between individual migration and mass migration. In so doing, the chapter suggests that some common features can be identified in how countries of departure and destination governed mobility – features which are all are embedded in the idea of the special character of migration law. Indeed, the 'exceptionalism' of immigration law was not a peculiarity of the

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tween mobility, law and nation-state, see Kmak M. (2023), *Law, Migration, and Human Mobility. Mobile Law*, London, Routledge.

[2] See, e.g., Gozzini G. (2006), *The global system of international migrations, 1900 and 2000: a comparative approach*, "Journal of Global History", 1, 321-341.

[3] Ravenstein E.G. (1885), *The Laws of Migration*, "Journal of the Statistical Society of London", 48, 167-235.

United States.[4] As we shall see, migration law was theorised and applied as a field subject to peculiar rules departing from the ordinary principles of the legal system. The reasons, of course, were different: countries of departure, such as Italy for instance, implemented a special para-judicial court to provide emigrants quicker and more case-specific justice (see the chapters by Vinci and Di Stefano). As Tomaso Perassi – professor of international law and public law – put it, the singularity of emigration law "was born under the exclusive impulse of facts and experience (…) historically motivated by actual social need".[5] The Poles' mass expulsion from Prussia in 1885 was admittedly considered as an exception to international law, yet justified by the specific danger posed by the Polish question.[6]

By considering migration such a peculiar subject as to deserve and require exceptional rules, it will be argued that legal discourse was not simply describing the singularity of mass migration as a social phenomenon, but was strategically paving the way to exemptions from the ordinary rights to which citizens were entitled. The recurring characteristics of migration law that will be highlighted in the chapter are (1) the derogations from (and the violation of) constitutional rules regularly applied to citizens; (2) the administrativisation of migration law; (3) the criminalisation of migrants; and (4) the racialisation of legal mechanisms and legal reasonings targeting aliens.

2. State sovereignty vs. individual freedom

The tension between state sovereignty over border control and individual freedom of movement lies at the basis of the contradictory references often made to the natural right of migration. An example thereof can be seen in the debate in parliament and among legal scholars on the passing of the two Italian laws on emigration in 1888 and 1901. Some scholars considered the right to migrate "a human right (…) that the State does not confer, but simply recognises as belonging to the citizen,"[7] namely an inherent and in-

[4] See, among others, Rubenstein D.S., Gulasekaram P. (2017), *Immigration exceptionalism*, "Northwestern University Law Review", 111(3), 583-654; the subject is discussed in Malpassi's chapter in this volume.

[5] Perassi T. (1921), *I lineamenti del diritto italiano dell'emigrazione*, "Bollettino della emigrazione", 3, 137.

[6] See Fitzpatrick M.P. (2015), *Purging the Empire. Mass Expulsions in Germany, 1871–1914*, Oxford, Oxford University Press, 111-112.

[7] Contuzzi F.P. (1895-1898), *Emigrazione*, in *Digesto italiano*, X, Torino, Unione Tipografico Editrice Torinese, 346-400 (369).

alienable right that human beings possess regardless of any previous attribution by positive law. Others maintain, by contrast, that there is a natural right of emigration but soon after point out that there may be possible limitations to its exercise,[8] or, more openly, argue that a citizen has a right to leave the country only as a consequence of the state's self-limitation, as a reflected and derivative right, which can always be revoked and restrained by the legislator.[9]

Art. 1 of both the pieces of legislation, basically unaltered,[10] reveals the impossibility of reconciling the two opposing views in the ambiguous formula "[e]migration is free, notwithstanding the obligations imposed on citizens by the law". At the very moment in which the freedom of mobility is sanctioned, it is also constrained by limitations such as military obligations, bureaucratic requirements, and government policies. As Rocco de Zerbi – the drafter of the 1888 Law – put it, the rationale of Art. 1 is grounded on the idea that "every freedom is restrained by necessity" and that "the right of the homeland has precedence over the right of the individual".[11] Even those who uphold the freedom to leave the home country never entirely exclude the scope for public intervention, as "granting freedom of emigration does not mean removing all interference by the state over it".[12]

In 1893 the US Supreme Court issued its decision in the landmark deportation case *Fong Yue Ting v. United States*.[13] In delivering the majority ruling, Justice Horace Gray held deportation to be constitutional as a legitimate expression of the federal government's plenary power:[14] like the power of exclusion, upheld in the 1889 *Chinese Exclusion Case*,[15] the con-

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[8] De Zerbi R. (1887-88), Relazione al d.d.l. Crispi, in Atti Parlamentari. Camera dei Deputati. Legislatura XVI, II sess. 1887-88, Documenti – Disegni di legge e relazioni, no. 85-A, Relazione della Commissione. Sulla emigrazione, 7-8.

[9] Raggi L. (1903), *L'emigrazione italiana nei suoi rapporti con il diritto*, Città di Castello, Lapi, 45-50.

[10] Art. 1, L. 30 December 1888, no. 5866; Art. 1, L. 31 January 1901, no. 23.

[11] Atti Parlamentari. Camera dei Deputati. Legisl. XVI, II sess., Discussioni. Tornata del 7 dic. 1888, 5827.

[12] Ellena V. (1876), *Della emigrazione e delle sue leggi*, Estratto dall'Archivio di Statistica, Roma, Tipografia Elzeviriana, 50.

[13] See Hernandez, K.L. (2017), *City of Inmates: Conquest, Rebellion, and the Rise of Human Caging in Los Angeles, 1771-1965*, Chapel Hill, University of North Carolina Press, 76 ff.; Neuman G.L. (1996), *Strangers to the Constitution. Immigrants, Borers, and Fundamental Law*, Princeton, Princeton University Press, esp. 119-125.

[14] See, e.g., Legomsky S.H. (1984), *Immigration Law and the Principle of Plenary Congressional Power*, "The Supreme Court Review", 255-307.

[15] See Henkin L. (1987), *The Constitution and United States Sovereignty: A Century of 'Chinese Exclusion' and Its Progeny*, "Harvard Law Review", 100(4), 853-886.

gressional power of expulsion was considered "absolute and unqualified".[16] Moreover, the Court declared deportation proceedings as an administrative process subject neither to due process protections nor to judicial review. The decision was in accordance with the prevailing international law doctrine of the time,[17] and rested on a paradoxical use of the idea and language of natural rights in reference to the state's power to control borders rather than individual freedom of mobility: "the right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace is an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare".[18]

Parallel to this state-centric approach, opposing humanitarian and cosmopolitan interpretations of mobility rights survived, particularly in legal philosophy and international law. The duty of hospitality has recently attracted scholarly attention as a fundamental principle upon which a radically different history of migration law – from Francisco de Vitoria to the Law of Nations – could have been built and written.[19] As alternative and revolutionary as the concept of hospitality may be, especially in terms of its potential to deconstruct and critically challenge the contemporary architecture of border control,[20] it should not be overlooked that it was (and maybe still is) typically disregarded by rulers, policymakers, and legislators. Though the concepts of hospitality and the right of abode reflect a desired freedom of movement independent of the privileges of citizenship rights, their history is mostly that of the road not taken. Even when some more liberal and enlightened jurists within the Institute of International Law took a stand against the racialisation of migration policies and the legitimacy of the mass expulsions which became widespread in the 1880s, they were forced to

[16] *Fong Yue Ting v. United States*, 149 US 707 (1893).

[17] See, e.g., Phillimore R. (1854), *Commentaries upon International Law*, Philadelphia, T. & J.W. Johnson, vol. I, 192-193: "It is received a maxim of International Law, that the Government of a State may prohibit the entrance of strangers into the country, and may therefore regulate the condition under which they shall be allowed to remain in it, or may require and compel their departure from it".

[18] 149 US 711 (1893).

[19] See, in particular, Chetail V. (2016), *Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel*, "The European Journal of International Law", 27(4), 901-922; Augusti E. (2022), *Migrare come abitare. Una storia del diritto internazionale in Europa tra XVI e XIX secolo*, Torino, Giappichelli; see also Augusti's chapter in this volume.

[20] See, e.g., Di Cesare D. (2017), *Stranieri residenti. Una filosofia della migrazione*, Torino, Bollati Boringhieri; Derrida J. (2001), *On Cosmopolitanism and Forgiveness*, London, Routledge.

recognise the supreme authority of the state in matters of emigration and immigration.[21]

3. Individual migration vs. mass migration

The migration of individual persons was, theoretically, less problematic, whereas mass mobility was perceived as a threat for the receiving community. The quantitative distinction was a classic topic that had already been sketched out by Hugo Grotius in the 17th century. Drawing off water from a river is different from diverting a stream: while citizens as individuals are allowed to leave the country (*discessio singulorum*), albeit under certain conditions, the departure of a large group of people (*generatim*) should not be permitted, as it would endanger the very existence of a community.[22] Though this distinction was later criticised by other jurists,[23] it openly revealed the difficulty of conceiving (and the menace posed by) mass mobility across modern states' borders.

Similarly, at the end of the 19th century, Ferdinando Laghi conceived the alien's right of abode in the Italian legal system as a natural and civil right included among the rights that Art. 3 of the 1865 Civil Code granted to all foreigners, regardless of the principle of reciprocity.[24] His view, however, was based on the situation of the Kingdom of Italy at that time: it was a country of large-scale emigration and very low immigration and, above all, it was the destination of individual arrivals and certainly not of mass entries. Laghi, indeed, argues that one of the four grounds for lawful expulsion is "the invasion of foreigners, who, due to their numerosity, their special economic moral or political conditions, would cause much damage to the host state".[25] Therefore, while one individual would enjoy the civil

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[21] See Rygiel P. (2021), *L'ordre des circulations? L'Institut de Droit international et la régulation des migrations (1870-1920)*, Paris, Éditions de la Sorbonne, 181-218.

[22] Grotius H. (1646), *De iure belli ac pacis libri tres*, Amsterdam, apud Iohannem Blaeu, 157-158.

[23] See, e.g., Pufendorf S. (1688), *De iure naturae et gentium libri octo*, Amsterdam, apud Andream ab Hoogenhuysen [ed. Carnegie Institution of Washington, Oxford, Clarendon Press, 1934] 919; Barbeyrac J. (1724), H. Grotius, *Le droit de la guerre et de la paix*, nouvelle traduction par J. Barbeyrac, Amsterdam, Pierre de Coup, 307 nt. 5.

[24] Laghi F. (1888), *Il diritto internazionale privato nei suoi rapporti colle leggi territoriali*, I, Bologna, Zanichelli, 285. Similarly, see also Bianchi F. (1881), *Un quesito sull'art. 3 del Codice civile italiano*, Siena, Bargellini, 9-11; Cipelli B. (1875), *Questione: Se lo straniero possa prendere residenza…*, "La Legge. Monitore giudiziario ed amministrativo del Regno d'Italia", 247-253.

[25] Laghi (1888), *Il diritto internazionale*, 312.

right of residence, mass immigration could be prohibited due to the prevailing need to ensure the welfare of the state, which would be threatened by "an invasion of foreigners greater than the economic capacity of the country" and by the arrival of groups of people who have "habits in sharp contrast with our civilisation, our moral religious and political sentiments".[26]

As we shall see, the legal discourse at the end of the 19th century presented migrants as a wave, a collective body that by invading the receiving country endangered its institutions, social cohesion, and racial identity.[27] Human beings were identified through stereotypes based on different nationalities and divided into racial, religious, and anthropological categories which made them more vulnerable in relation to mechanisms of exclusion and discrimination.

Within the framework defined by these two binary oppositions – individual freedom vs. state sovereignty and individual vs. mass migration – in different countries and socio-economic contexts migration law developed along similar lines, both theoretically and practically. Exceptional solutions were designed by judges and jurists for the purpose of governing the mobility of millions of people. In what follows I shall briefly explore these recurring characteristics of migration law by providing some comparative examples.

4. Exceptions to constitutional rules

The 1891 US Immigration Act sanctioned the administrative detention of would-be immigrants. Inspection officers could go on board vessels to verify nationality, place of last residence, destination, and the requirements for the admissibility of arriving aliens, or they were allowed to order "a temporary removal of such aliens for examination at a designated time and place, and then and there detain them until a thorough inspection is made. But such removal shall not be considered a landing during the pendency of such examination".[28] Rather than on board, examinations could be made

[26] *Ibidem*.

[27] See, e.g., Warne F.J. (1913), *The Immigrant Invasion*, New York, Dodd, Mead & Co.; White A. (1888), *The Invasion of Pauper Foreigners*, "The Nineteenth Century", 23, 414-422; Wilkins W.H. (1892), *The Alien Invasion*, London, Methuen & Co.; evocative of this cultural approach in the United States is the cartoon of L. Dalrymple, *The High Tide of Immigration – A National Menace*, published in "Judge" on August 22, 1903.

[28] *Immigration Act*, March 3, 1891, Sect. 8.

in specific immigrant inspection and processing stations, but detained immigrants had to be treated "as if [they] never had been removed from the steamship".[29] Section 8 of the Act introduced the entry fiction, a legal fiction whose purpose was to exclude the migrants detained in prison-like conditions in Ellis Island (since 1892) and Angel Island (since 1910) – pending their admission, exclusion or deportation – from the constitutional protections granted by the 5th and 14th Amendments to all persons within the jurisdiction of the United States. Considering the immigrants physically restrained within US borders as if they were legally not there actually put them in a kind of limbo, an extra-legal place exempted from constitutional norms.[30] The fiction implied that custody in immigration centres was not comparable to incarceration and consequently could be imposed, without granting due process or a jury trial, by an administrative body, whose decision was not subject to judicial review. As a result, detained immigrants were not entitled to file a habeas corpus petition.

The constitutionality of the entry fiction provision was doubtful and called into question. In the cases *In re Jung Ah Lung* and *In re Jung Ah Hon*, for instance, Justice Ogden Hoffman, district judge of the District Court of California, claimed that the denial of the immigrant's right to disembark actually turned the steamship on which he was forced to stay pending repatriation into a prison-house and, therefore, it could not but be considered a restriction of his liberty in violation of the Constitution. Hence it appeared that the Court could not dismiss the immigrant's petition for habeas corpus, as any abrogation of such right, "which has always been considered among English-speaking peoples the most sacred monument of personal freedom, must be unmistakably declared by congress before any court could venture to withhold its benefits from any human being, no matter what race or color".[31] If, then, the Chinese, as well as every other human being who was on the domestic soil of the United States, were entitled to habeas corpus rights, asking the Court to be bound in its investigation to the decision of an administrative officer "would be an anomaly wholly without precedent, if not a flagrant absurdity".[32]

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[29] *Nishimura Ekiu v. United States*, 142 US 651(1892), 661.

[30] See Wilsher D. (2012), *Immigration Detention: Law, History, Politics*, Cambridge, Cambridge University Press; Park J.S.W. (2008), *On Being Here and Not Here. Noncitizen Status in American Immigration Law*, in Buff R. I. (ed.), *Immigrants Rights in the Shadows of Citizenship*, New York-London, New York University Press, 26-39.

[31] 25 Federal Reporter 141 (D. Cal. 1885), 143.

[32] *Ibidem*. See Fritz C.G. (1988), *A Nineteenth Century 'Habeas Corpus Mill': The Chinese Before the Federal Courts in California*, "The American Journal of Legal History", 32, 347-372; Salyer L.E. (1991), *'Laws Hars as Tigers': Enforcement of the Chinese*

As recounted by Malpassi in his own chapter in this volume, in 1905 Oliver Wendell Holmes delivered the majority opinion in *United States v. Ju Toy*. In upholding the entry fiction, the Supreme Court ruled that the decisions of executive officers in matters of immigration were final and conclusive, and that the writ of habeas corpus should be dismissed unless the immigration officers and – upon appeal – the Secretary of Commerce and Labor failed to grant a proper hearing, abused their discretion, or acted in any unlawful or improper way upon the case presented to them for determination. Even assuming that "to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require judicial trial" and, in any case, as affirmed in *Nishimura Ekiu v. US*, the immigration officer's decision "is due process of law".[33]

The 1905 Aliens Act was the first law to restrict the entry of 'undesirable aliens' into the UK.[34] It provided for the possibility of aliens' administrative expulsion subsequent to their legal entry and their custody in prison facilities pending their deportation. It was broadly censured during the parliamentary debate. Though expulsion was presented by the PM Henry Campbell-Bannerman as "a matter of administration and not of justice", to other MPs (e.g., Allan Heywoodits Bright and Winston Churchill) the implications for fundamental rights were clear, as was the risk of betraying traditional rule of law principles.[35] The opponents of the bill deemed it inconsistent that expulsion and banishment, which were among the severest punishments historically provided for under common law, were imposed for behaviours that were not prosecutable as criminal offences.[36] Inspec-

Exclusion Laws, 1891-1924, in Chan S. (ed.), *Entry Denied. Exclusions and the Chinese Community in America, 1882-1943*, Philadelphia, Temple University Press, 57-93; Pifferi M. (2017), *Controllo dei confini e politiche di esclusione tra Otto e Novecento*, in Augusti E., Morone A. M., Pifferi M. (eds.), *Il controllo dello straniero. I "campi" dall'ottocento ad oggi*, Roma, Viella, esp. 91-97.

[33] *United States v. Ju Toy*, 198 US 253 (1905), 263. See the comment in Post L.F. (1916), *Administrative Decision in Connection with Immigration*, "The American Political Science Review", 10, 251-261. Predictably, the decision raised criticisms: according to Dickinson J. (1927), *Administrative justice and the supremacy of the law in the United States*, Cambridge, Harvard University Press, 293, *Ju Toy* ruling, "if consistently applied, would obviously open a dangerous door to executive oppression".

[34] See Henriques H.S.Q. (1906), *The Law of Aliens and Naturalization Including the Text of the Aliens Act 1905*, London, Butterworth & Co.; Fahrmeir A. (2000), *Citizens and Aliens. Foreigners and the Law in Britain and the German States, 1789-1870*, New York-Oxford, Berghahn Books, 193-196.

[35] The lively discussion in the House of Commons can be seen, e.g., in "Hansard" HC Deb 3 July 1905 vol 148 cc. 847-76.

[36] Sibley N.W., Elias A. (1906), *The Aliens Act and the Right of Asylum*, London, William Clowes & Sons, 69.

tion operations and decisions were all delegated to administrative officers; however, a proceeding leading to detention, even without any crime having been committed, could hardly be considered as 'merely administrative'. For critics, expulsion (and the ensuing detention) was certainly "an act of administration" which "clearly infringe[d] the principle of the Common Law and Magna Carta": detained aliens, therefore, should be granted the writ of habeas corpus.[37]

Despite resistance to it, the Act was passed and had a symbolic meaning in British history, not only because it marked the end of the traditional open-door policy,[38] but also insofar as it inaugurated a regime of deliberate uncertainty in the rejection and expulsion system.[39] The blurred boundaries between judicial and administrative prerogatives; administrative sanctions and punishments; rule of law protections, right of asylum and diminished legal position before administrative orders, were, as has been observed, an intentional outcome of the 1905 Act. Indeed, its flexibility and the variety of stated goals were designed to reconcile the conflicting expectations driven by restrictionist fears, on the one hand, and free-market needs, on the other hand.[40]

5. The administrativisation of migration law

Bypassing fundamental rights went hand-in-hand with assigning migration law, its normative limits and jurisdictional competence to the sphere of administrative law. In the period considered in this chapter, the prevailing rationale in many countries consisted in denying the migrant the legal right to cross borders, a right which, if recognised, would have entailed the right of action before an ordinary court in case of alleged unlawful curtailment or violation. By contrast, courts often resorted to the idea of the inherently administrative character of expulsion orders and proceedings to confirm the highly discretional and unappealable content thereof. In 1893, for instance, the Italian Court of Cassation stated that deportation orders were "left to the cautious will and discretion of political power" and, therefore, they were not "judicially reviewable without overstepping the boundaries

[37] *Ivi*, 71.

[38] See Panayi P. (2010), *An Immigration History of Britain. Multicultural Racism Since 1800*, Harlow, Pearson Education Limited, 213.

[39] See Bashford A., McAdam J. (2014), *The Right to Asylum: Britain's 1905 Aliens Act and the Evolution of Refugee Law*, "Law and History Review", 32, 309-350.

[40] Wray H. (2006), *The Aliens Act 1905 and the Immigration Dilemma*, "Journal of Law and Society", 33, 302-323.

of their jurisdiction and usurping the attributions of political power".[41] At that time administrative law was conceived as the legal space of unbalanced positions, within which the individual claim of freedom of movement was always subordinated to overriding general interests of public order assessed by the executive branch.

Besides the administrative detention of migrants mentioned above,[42] another example of such an approach can be seen in the Italian debate on the right of abode. At the beginning of the 20th century, Oreste Ranelletti, a leading administrative law professor, clearly maintained that "the right of the foreigner is subordinate and dependent on the requirements of the public interest (…), and, accordingly, a discretionary power of the authority is recognised for the appreciation of what the protection of public order requires".[43] A foreigner's claim with regard to residency was not a legal right but rather fell within the category of the "weaker rights" that he defined as "legitimate interests", namely an interest whose recognition is subordinated to the satisfaction of a general interest and whose protection by the law is, therefore, "only occasional, indirect and mediated".[44]

Administrative constraints likewise affected the freedom of emigration of national citizens. Sidney Sonnino, MP and later Prime Minister, criticised the excess of formalities and bureaucratic requirements which, under the 1888 Law of Emigration, needed to be fulfilled in order to lawfully exercise the freedom of movement. They were redundant administrative requirements leading – he argued – to a growth of illegal emigration. The need to obtain a licence from the Ministry of War, the repatriation provid-

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[41] Court of Cassation, II, 13 October 1893, "La Legge. Monitore giudiziario ed amministrativo del Regno d'Italia", 1894, 96.

[42] For its thematisation, also in a historical perspective, see Wilsher D. (2012), Immigration Detention; Bosworth M. (2014), *Inside Immigration Detention*, Oxford, Oxford University Press; Campesi G. (2013), *La detenzione amministrativa degli stranieri. Storia, diritto, politica*, Roma, Carocci.

[43] Ranelletti O. (1904), *La polizia di sicurezza*, in Orlando V.E. (ed.), *Primo trattato completo di Diritto amministrativo*, vol. IV, pt. I, Milano, Società Editrice Libraria, 1006; see also Esperson P. (1896), *Espulsione degli stranieri secondo la legislazione italiana e le legislazioni straniere*, "Rivista Penale", XLIII, 5-21 (17). For a comment see Savino M. (2012), *Le libertà degli altri. La regolazione amministrativa dei flussi migratori*, Milano, Giuffrè, 89-92.

[44] Treves G. (1959), *Judicial review in Italian administrative law*, "The University of Chicago Law Review", 26, 419-435, esp. 422-424, explaining the difference between legal rights and legitimate interests, an offspring of the Italian legal scholarship at the turn of century which is still applied by courts; see also Sordi B. (1985), *Giustizia e amministrazione nell'Italia liberale. La formazione della nozione di interesse legittimo*, Milano, Giuffrè; Miele G., Cotzi G., Falconi D. (1954), *Italian Administrative Law*, "The International and Comparative Law Quarterly", 3(3), 421-453.

ed for those who left without having fulfilled all the bureaucratic obligations, and the many prohibitions on shipping companies' agents acting as intermediaries did nothing to protect emigrants but, on the contrary, increased the number of regulatory transgressions with "artificial offences, created to the detriment of harmless people who have no intention to commit a crime".[45] The proliferation of procedures ostensibly designed to protect would-be emigrants turned out to hinder their departure, leading them to search for quicker and cheaper illegal expedients. The subsequent 1901 Emigration Law, by establishing a General Emigration Commission and other administrative bodies, conferring broader suspensive power over emigration to the ministries of foreign affairs and the interior, and imposing the passport obligation,[46] emphasised the invasive control of the public administration over the right to emigrate even more.[47]

As already mentioned, US deportation proceedings provide a further corroboration of the administrativisation of migration law as a means of enhancing political discretion in controlling borders. By targeting immigrants who had already legally established their residence or abode in the country, the deportation proceedings infringed upon the fundamental rights, liberty, property and family relations of domiciled aliens; nonetheless, they were entrusted to authorities of an administrative rather than judicial character, whose procedures did not provide the same guarantees as those of ordinary courts. In 1931, the National Commission on Law Observance and Enforcement, chaired by George W. Wickersham, published a critical report on the enforcement of deportation law pointing out its "oppression, unfairness, and hardship".[48] The report incorporated and

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[45] Atti Parlamentari. Camera dei Deputati. Legislatura XVI, II sess., Discussioni. Tornata del 6 dic. 1888, 5797.

[46] More broadly, on the invention of passport as a document required to travel abroad, see Torpey, J. (2000), *The Invention of the Passport. Surveillance, Citizenship and the State*, Cambridge University Press, Cambridge; Lucassen, L. (2001), *A Many-Headed Monster: the Evolution of the Passport System in the Netherlands and Germany in the Long Nineteenth Century*, in Torpey J., Caplan J. (eds.), *Documenting Individual Identity: The Development of State Practices in the Modern World*, Princeton, Princeton University Press, 235-255.

[47] See Malnate N. (1899), *Il progetto di legge della Commissione parlamentare sull'emigrazione*, Pistoia, G. Flori. On how the increasing administrative controls over emigration actually distorted the emigrants' care-oriented purpose of the 1901 social law, see Di Giacomo G. (2020), *Dalla tutela alla disciplina dei migranti: la libertà di emigrazione alla prova della Grande Guerra*, "Italian Review of Legal History", 6, 111-143.

[48] National Commission on Law Observance and Enforcement (1931), *The Enforcement of Deportation Laws*, in *Report on the Enforcement of the Deportation Laws in the United States*, Washington, US Government Printing Office, 1-8, at 5.

amply relied on the study on the same subject carried out by Reuben Oppenheimer, a Harvard Law School graduate and member of the Baltimore bar. Oppenheimer's report unveiled all the inconsistencies and constitutional violations of deportation proceedings and clearly concluded that, due to their lack of guarantees and unfairness, they were the last vestige of medieval inquisitorial procedure in the American legal system.[49] "Decisions with respect to deportation – he put it – mark out, within the limits possible under habeas corpus proceedings, the periphery beyond which neither Congress nor an executive branch of the Government can act without violating due process of law".[50]

6. The criminalisation of migrants

The compelling belief, often ungrounded but politically profitable, that any increase in immigration corresponded to a parallel growth of criminality brought about the categorisation of migrants as dangerous and criminal persons. This occurred in different historical contexts on a recurrent basis. Francesco Rotondo's chapter in this volume provides an illuminating example of such an approach in reference to the changing patterns of Argentinian immigration policies.

With regard to the United States, since the 1880s concerns about immigrant criminality had been one of the most effective arguments in support of anti-immigration policies, extensively used by the press and politicians. One fourth of the American prison population – restrictionists maintained – were European alien criminals, that is, immigrants who should not have been admitted and whose prison costs were paid by honest American citizens. Therefore, all the aliens who, by committing crimes, proved to be neither desirable nor assimilable, had to be deported. Moreover, investigative border controls had to be strengthened in the sending countries as well, in order to both reject those who were already criminals and prevent them from leaving.[51] The Congress, to save the nation from the threat of unrestrained immigration and the landing of the "scum of the earth",[52] had the

[49] Oppenheimer R. (1931), *The Administration of the Deportation Laws of the United States. Report to the National Commission on Law Observance and Enforcement*, in *Report on the Enforcement of the Deportation Laws*, esp. 137-143.

[50] *Ivi*, 45.

[51] Lewiston A. (1910), *The Alien Peril. Shall We Go on Crowding Our Prisons with Foreign-Born Convicts? Deportation as a Remedy*, "The Metropolitan Magazine", 32, 279-292.

[52] *Ivi,* 290.

duty to "enforce a discrimination as to who shall be admitted into social and political fellowship".[53]

There were, however, also analyses "contrary to the popular impressions, and contrary to the apparent showing of the census on a superficial view".[54] Both the 1910 report of the Dillingham Commission on Immigration and Crime[55] and studies commissioned by the American Institute of Criminal Law and Criminology painted a very different picture of the situation from that cunningly manipulated by restrictionists. At the very beginning, the Dillingham Commission's report stated that "no satisfactory evidence has yet been produced to show that immigration has resulted in an increase in crime disproportionate to the increase in adult population";[56] on the contrary, collected data proved that immigrants were "less prone to commit crime than are native Americans".[57] A higher crime rate could be found in the second generation of immigrants compared to the children of natives, so a broader juvenile delinquency was found among aliens.[58] The Commission clarified that if immigration had manifestly caused a significant increase in personal crimes and crimes against the public order, crimes against property were mostly committed by Americans.[59]

The American Institute of Criminal Law and Criminology appointed a committee, chaired by Kate Holladay Claghorn, to study immigrant criminality in the light of a sociological evaluation of data gathered through medico-psychiatric examinations. Such a methodological approach relied on the Institute's dedication to criminology as an interdisciplinary science

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[53] Boies H.M. (1893), *Prisoners and Paupers. A Study of the Abnormal Increase of Criminals, and the Public Burden of Pauperism in the United States; the Causes and Remedies*, New York, G.P. Putnam's Sons, 49.

[54] Hart H.H. (1896), *Immigration and Crime*, "The American Journal of Sociology", 2, 370. Hart's article, openly critical of F.W. Hewes's "Delinquents" published on 7 March, 1896 in *The Outlook*, showed that immigrants committed proportionally less crimes than natives.

[55] Zeidel R.F. (2004), *Immigrants, Progressives, and Exclusion Politics. The Dillingham Commission, 1900-1927*, DeKalb, Northern Illinois University Press; Benton-Cohen K. (2018), *Inventing the Immigration Problem. The Dillingham Commission and Its Legacy*, Cambridge-London, Harvard University Press.

[56] *Reports of the United States Immigration Commission* (1907-1910), v. 36, *Immigration and Crime*, (Senate Document no. 750, 61st Cong., 3rd sess.), Washington, Government Printing Office, 1911, 1.

[57] *Ibidem*.

[58] The second generation, however, was inclined to commit offences different from those committed by their parents and more similar to the ones committed by natives (*ivi*, 14).

[59] *Ivi,* 2.

aimed at gaining a better understanding of the social causes of crime and, despite the lack of reliable information on migrants' personal and socio-economic background, the committee came up with some interesting findings: foreign-born citizens not only showed a lower tendency to reoffend than natives, but were also much less prone to break the law; many revealed a "deviation from average normal mentality" and should have not been permitted entry due to mental abnormalities; the vast majority did not apply for naturalisation, showing a lack of interest in acquiring citizenship status; a lower cultural level corresponded to crimes of passion committed mostly by accidental offenders (this is also the case with Italians) while those with a higher level of education committed crimes against property and were more often recidivists (Germans for example, as well as natives). [60] Analysed from this different perspective, the simplistic causal relationship between immigration and crime vanished, replaced by a more critical understanding of the peculiar quality (rather than quantity) of aliens' offences. [61]

Starting from the last decades of the 19th century, many receiving countries criminalised the simple fact of illegal entry, e.g., by imposing punishment on those who crossed borders without permission or in violation of any immigration rule. [62] Countries of departure, too, introduced minor offences for those who left (or attempted to) without authorisation. These legal strategies greatly contributed to strengthening the interconnection of migration control and criminal law, fuelled by the absurd paradox that "border crossers were criminals, though, circularly, their crime was crossing the border". [63] Moreover, and perhaps even more effectively, though, the criminalisation of migrants consisted in the application to them of legal

[60] Claghorn K.H. (1917-1918), *Crime and Immigration*, "Journal of the American Institute of Criminal Law and Criminology", 8, 688-690.

[61] I have elaborated more on this point in Pifferi M. (2009), *La doppia negazione dello ius migrandi tra Otto e Novecento*, in Giolo O., Pifferi M. (eds.), *Diritto contro. Meccanismi giuridici di esclusione dello straniero*, Torino, Giappichelli, 64-72.

[62] On the criminalisation of unregistered/undocumented immigrants by the 1892 Geary Act in the United States, see Hernandez (2017), *City of Inmates*, 72 ff.; more broadly Chomsky A. (2014), *Undocumented. How Immigration Became Illegal*, Boston, Beacon Press; Ngai M.M. (2004), *Impossible Subjects: Illegal Aliens and the Making of Modern America*, Princeton-Oxford, Princeton University Press. The British 1905 Aliens Act, Art. 1(5), provided that "Any immigrant who lands, or any master of a ship who allows an immigrant to be landed, in contravention to this section shall be guilty of an offence."

[63] Chacón J.M. (2022), *Criminal Law & Migration Control: Recent History & Future Possibilities*, "Dædalus, the Journal of the American Academy of Arts & Sciences", 151 (1), 121-134, (125); see also De Koster M., Reinke H. (2017), *Migration as Crime, Migration and Crime*, "Crime, History & Societies", 21(2), 63-76.

narratives, institutions, and techniques that typically belonged to the penal archipelago and whose foundation rested on the simple fact of their being a migrant, regardless of the commission of any crime. The examples of carceral-like immigrant detention centres and banishment-like deportation orders, both targeting non-offender aliens, are perhaps the most paradigmatic. The use of criminological concepts and categories to legitimise the classification of Italian immigrants in Argentina as potentially dangerous political offenders, as well as the many American cartoons grotesquely depicting the landing of hordes of would-be criminals from foreign countries, strengthened the popular belief that migrants were (actual or potential) criminals. The overlap between these two identities were clearly felt by the immigrants themselves. We only have to read the inscriptions left by the Chinese held on Angel Island on the wood of their barracks to understand how unfair they perceived their condition of being imprisoned without having committed any crime.[64] The discrepancy between the formal administrative nature attributed by law to the detention of migrants, on the one hand, and the migrants' own perception of the punitive nature of their custody, on the other hand, has historical roots dating back to the late 19th century and still lingers on in contemporary immigration centres.[65] Immigrants were not (just as they are not nowadays) detained for the commission of an offence, but they were (and still are) in actual fact imprisoned; outside the remit of criminal law, they could not (and still cannot) even rely on the guarantees offered by criminal law to citizens.[66] Despite the lack of any scholarly conceptualisation or critical questioning by means of heuristic tools such as the contemporary notions of "crimmigration",[67] "criminology of mobility",[68] or "crimes of mobility",[69] the penal and para-penal control of migration was already in place more than one century ago.

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[64] See Lai H.M., Lim G., Yung J. (eds.) (2014), *Island. Poetry and History of Chinese Immigrants on Angel Island 1910-1940*, 2nd ed., Seattle-London, University of Washington Press, 72, 74, 82, 88, 92.

[65] See Bosworth M. (2013), *Can Immigration Detention Centres be Legitimate? Understanding Confinement in a Global World*, in Franko Aas K., Bowsorth M. (eds.), *The Borders of Punishment. Migration, Citizenship and Social Exclusion*, Oxford, Oxford University Press, 149-165.

[66] For an account of the contemporary situation, see Zedner L. (2013), *Is the Criminal Law Only for Citizens? A Problem at the Borders of Punishment*, in Franko Aas, Bowsorth (eds.), *The Borders of Punishment*, 40-57.

[67] See Stumpf J. (2006), *The crimmigration crisis: immigrants, crime & sovereign power*, "American University Law Review", 56(2), 367-419.

[68] See Pickering S., Bosworth M., Franko Aas K. (2015), *The criminology of mobility*, in Pickering S., Ham J. (eds.), *The Routledge Handbook on Crime and International Migration*, London-New York, Routledge, 382-395; Bosworth M. (2016), *Bor-*

7. Racialising migration

In 1885-86 approximately 32000 Russian and Austro-Hungarian Poles were expelled by Prussia irrespective of whether they had engaged in any personal conduct (e.g., criminal or politically dangerous activities) that could justify such a measure. It was the first case of mass expulsion that aroused concern within the League of Nations and criticism among the members of the International Law Institute.[70] Indeed, although international law recognised expulsion as a legitimate measure that could be adopted by any state by virtue of its sovereignty, it was conceived as legitimate only insofar as it was a measure targeting specific individuals on the basis of their illegal behaviour. Prussian mass expulsion was justified by the right to defend political security, but it was fundamentally driven by biopolitical policies and the fear that the 'Polish element' and 'Slavic flood' could overrun the pure German nationality. Grounded on the idea of racial superiority, and despite its dubious constitutionality, mass expulsion "offered the opportunity of complementing the recent introduction of a state policy of overseas colonialism with a form of inner colonialism".[71]

The role played by racial discrimination in the formation of American citizenship and in shaping immigration policies has been widely investigated. The 1882 Chinese Exclusion Act and the later laws introducing the literacy test (1917), the quota system (1921), and the National Origins Act (1924), formed a socio-political project of invention of the pure American race, which explicitly aimed at excluding immigration not of undesirable individuals but of entire groups identified as inferior and unassimilable on the basis of anthropological and racial characteristics.[72] The juridical narrative assumed, in this framework, an almost submissive, heteronomous role of reception of certainties and values legitimised outside the circuit of the law. The making of 'good Americanism' was mainly driven by scientific

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der Criminologies: How migration is changing criminal justice, in Bosworth M., Hoyle C., Zedner L. (eds.), *Changing Contours of Criminal Justice*, Oxford, Oxford University Press, 213-226.

[69] See Aliverti A. (2013), *Crimes of mobility: criminal law and the regulation of immigration*, London, Routledge.

[70] See Rygiel (2021), *L'ordre des circulations?*, 198-207.

[71] Fitzpatrick (2015), *Purging the Empire*, 93-122, quotation at 121; see also Lucassen L. (2005), *The Immigrant Threat. The Integration of Old and New Migrants in Western Europe since 1850*, Urbana-Chicago, University of Illinois Press, 50-74.

[72] See, e.g., Higham J. (2002), *Strangers in the Land. Patterns of American Nativism, 1860-1925*, New Brunswick-London, Rutgers University Press, 131-157; Lorini A. (1999), *Rituals of race. American public culture and the search for racial democracy*, Charlottesville-London, University Press of Virginia.

knowledge, that is, anthropology, eugenics, biometrics, criminology, craniometry, and the study of evolutionary factors – all disciplines that seemed to ground social hierarchies on unquestionable truths, since they artificially based the typological differences justifying racial discrimination on undisputable (and therefore not morally debatable) pseudo-scientific data.[73] It is worth noting that the legal culture not only failed to oppose the clearly racist and illiberal drift of nationalist and WASP movements on constitutional grounds, but also went along with these orientations by transforming restrictionist tendencies and ethnic discrimination into legal rules and bending without resistance to the demands to 'juridicise' supposedly scientific inequalities. By adopting the racial formation paradigm,[74] immigration law revealed the inconsistencies of American liberalism[75] and emerged as a "dynamic site where ideas about race, immigration, citizenship, and nation were recast".[76] The racialised formation of American national identity rested on the belief in racial hierarchy and the risk of the American race of being 'swallowed up' by the inferior race of immigrants,[77] and on the artificial

[73] See, e.g., Fairchild A.L. (2003), *Science at the Border. Immigrant medical Inspection and the Shaping of the Modern Industrial Labor Force*, Baltimore-London, The Johns Hopkins University Press; Blumenthal S.L. (2022), *Positivism's humbugs: Criminology and its cranks in progressive America*, in Pifferi M. (ed.), *The Limits of Criminological Positivism. The Movement for Criminal Law Reform in the West, 1870-1940*, London-New York, Routledge, 196-230.

[74] Omi M., Winant H. (1994), *Racial formation in the United States. From the 1960s to the 1990s*, 2nd ed., New York–London, Routledge: racial formation is defined as a "sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed" and as "a process of historically situated projects in which human bodies and social structures are represented and organized". The idea of racial formation is linked "to the evolution of hegemony, the way in which society is organized and ruled" (at 55-56).

[75] See King D. (1999), *In the name of liberalism. Illiberal social policy in the United States and Britain*, Oxford, Oxford University Press, ch. 4, 97-134.

[76] Lee E. (2003), *At America's gates. Chinese immigration during the exclusion era, 1882-1943*, Chapel Hill-London, The University of North Carolina Press, p. 7. See also Calavita K. (2000), *The Paradoxes of Race, Class, Identity, and 'Passing': Enforcing the Chinese Exclusion Acts, 1882-1910*, "Law & Social Inquiry", 25, 1-40; Tichenor D.J. (2002), *Dividing Lines. The politics of immigration control in America*, Princeton, Princeton University Press, esp. 87-113.

[77] See Boies H.M. (1893), *Prisoners and Paupers. A Study of the Abnormal Increase of Criminals, and the Public Burden of Pauperism in the United States; the Causes and Remedies*, New York, G.P. Putnam's Sons; Ross E.A. (1901), *The Causes of Race Superiority*, "The Annals of the American Academy of Political and Social Science", 18, 67-89; Id. (1914), *The Old World in the New. The Significance of Past and Present Immigration to the American People*, New York, The Century Co.; Thompson W.S. (1917), *Race Suicide in the United States*, "The Scientific Monthly", 5, 22-35; 154-165; 258-269.

creation of a particularly flexible and selective concept of whiteness,[78] which was applied by the courts relying on "the popular sense of the word" rather than on uncertain scientific meanings.[79]

While mass migration shaped racialised processes of nation building in receiving countries, it also contributed to remodel the notion and the legal implications of national identity and citizenship in sending countries, e.g., by adopting *jus sanguinis* instead of *ius soli* as the criterion for the acquisition of citizenship, or by creating emigrant information bureaus to channel emigrants toward colonial territories.[80] The drafters of the 1888 Italian law on emigration rhetorically presented mass emigration as a means to strengthen Italian national identity also outside the territorial borders, as a process through which, in spite of inevitable departures and remoteness, the sense of belonging to the homeland is lent new vigour, and citizenship is not only not lost but rather strengthened.[81] For a newly established nation like Italy, with vast areas still underdeveloped and a government incapable of offering short-term prospects for economic growth, emigration became not only a "safety valve for society"[82] to decrease demographic pressure and levels of unemployment and poverty, but also an instrument

[78] See Jacobson M.F. (1998), *Whiteness of a Different Color. European Immigrants and the Alchemy of Race*, Cambridge-London, Harvard University Press; see also Fouka V., Mazumder S., Tabellini M. (2022), *From Immigrants to Americans: Race and Assimilation during the Great Migration*, "The Review of Economic Studies", 89(2), 811–842, on how the assimilation of white immigrants was facilitated by black inflows from the US South after 1910 and how the perception of racial threats changed the comprehensiveness of the notion of whiteness.

[79] *U.S. v. Bhagat Singh Thind*, 261 US 204 (1923), 208-209. Similarly, see also *In re Saito* (Circuit Court, D. Massachusetts) 62 F. 126 (1894), 127-128; *In re Ah Yup* (Circuit Court, D. California), 1 F. Cas. 223 (1878), 223-224; *Takao Ozawa v. U.S.,* 260 US 178 (1922). On the legal exploitation of the notion of race with regard to immigration law, see Haney-Lopez I.F. (2006), *White by law: the legal construction of race*, New York-London, New York University Press; Pifferi M. (2012), *Ius peregrinandi e contraddizioni dell'età liberale. Qualche riflessione sulla 'falsa' libertà di migrare in Italia e negli Stati Uniti,* in Meccarelli M., Palchetti P., Sotis C. (eds.), *Ius peregrinandi: il fenomeno migratorio tra diritti fondamentali, esercizio della sovranità e regimi dell'esclusione*, Macerata, EUM, 263-273.

[80] See Gabaccia D.R., Hoerder D., Walaszek A. (2007), *Emigration and nation building during the mass migrations from Europe*, in Green N.L., Weil F. (eds.), *Citizenship and Those Who Leave. The Politics of Emigration and Expatriation*, Urbana and Chicago, University of Illinois Press, 63-90.

[81] See Gabaccia D.R. (2000), *Italy's Many Diasporas*, Seattle, University of Washington Press.

[82] These are Enrico Ferri's words in Atti Parlamentari, Camera dei Deputati, Legislatura XVI, II sess., tornata del 5 dicembre 1888, Discussioni, Roma, Tipografia della Camera dei Deputati, 1888, 5760.

of peaceful colonisation [83] and of expansion of a de-territorialised homeland, an Italianess abroad. [84]

8. Conclusion: What was the real aim of migration law exceptionalism?

This chapter has suggested that many legal systems, when confronted with mass migration, introduced extraordinary measures to try to govern the numbers of arrivals and control their nation's borders. Sending and receiving countries adopted similar regulations or, at least, rules based on an analogous rationale, which emphasised state sovereignty over cross-border mobility. By comparing different countries, this chapter has identified four common features of migration law in the age of mass migration and has suggested that many of the current legal contradictions and loopholes in migration law have roots in late 19th century solutions and narratives.

All this leaves unanswered questions about the reasoning underpinning the special character of migration law and the wide tolerance towards it manifested by both courts and legal scholars, as well as questions about the real effectiveness of those exceptional measures. Then, as now, migration policies of receiving countries facing huge numbers of arrivals were basically driven by fear. [85] Fear of race suicide, fear of criminality, fear for the institutions and values of the receiving countries, fear of social dumping or unemployment among natives, fear of social conflicts, fear of losing welfare privileges, fear of anarchism, etc.: these sentiments bolstered demands for greater state control of mobility and borders among public opinion and politicians and fostered the coalescence of restrictionist interests. [86] Yet, such fears were mostly groundless and misleading. There was a gap be-

[83] Crispi F (1888), D.d.L. presentato dal Presidente del Consiglio, Ministro dell'Interno (Crispi). Sulla Emigrazione, in Atti Parlamentari, Camera dei Deputati, Legislatura XVI, II sess., seduta del 15 dicembre 1887, Documenti – Disegni di legge e relazioni, no. 85, Roma, Tipografia della Camera dei Deputati, 9.

[84] Cazzetta G. (2014), *Patria senza territorio? Emigrazione e retorica dello stato- nazione*, in AA.VV., *Studi in onore di Luigi Costato*, III, *I multiformi profili del giuridico*, Napoli, Jovene, 145-161.

[85] See, e.g., Ceretti A., Cornelli R. (2013), *Oltre la paura. Cinque riflessioni su criminalità, società e politica*, Milano, Feltrinelli; and Alesina A., Miano A., Stantcheva S. (2023), *Immigration and Redistribution*, "The Review of Economic Studies", 90 (1), 1-39 on the economic impact of the percpetion of immigrants.

[86] See Lucassen (2005), *The Immigrant Threat*; Pifferi M. (2019), *Paure dello straniero e controllo dei confini. Una prospettiva storico-giuridica*, "Quaderno di storia del penale e della giustizia", 1, 179-197.

tween the perceived negative impact of immigration and the real data that made the exceptional anti-immigration measures desirable and unquestioned, even though statistics and studies proved they were unnecessary and unjustified. As already mentioned, the Dillingham commission's report confuted the popular belief that more immigration corresponded to more criminality; nevertheless, securitarian arguments continued to be used to legitimise restrictive regulations. Tabellini has demonstrated that immigration in the United States between 1910 and 1920 increased natives' employment and occupational standing, and fostered industrial production and capital utilisation but, despite these economic benefits, it triggered hostile political reactions and anti-immigration laws which were motivated by cultural, rather than economic, considerations.[87] In a similar vein, Fitzpatrick's study shows that the expulsion of Poles was triggered by nationalistic sentiments instead of real economic concerns.

Baseless prejudices often brought about stricter borders control laws, whose effectiveness was in any case very limited. One need only consider the very low percentage of undesirable aliens actually rejected from the United States, or the very flexible and narrow judicial application of the 1905 Aliens Act in the United Kingdom. Mass migration was always considered problematic, dangerous, and destabilising: the fear it generated became the fuel of a political debate feeding on those anxieties and insecurities, as baseless as they might be. The law thrived on this contradiction: measures taken to restore security had to appear effective, though they might not be. Often inconsistent with the constitutional cluster of guarantees and freedoms, border control laws required fear to legitimise their derogatory, exceptional character, and the legal counterbalances to securitarian policies were in the past too weak, as they appear to be today.

[87] Tabellini M. (2020), *Gifts of the Immigrants, Woes of the Natives: Lessons from the Age of Mass Migration*, "The Review of Economic Studies", 87(1), 454-486.