AFTERWORD

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> I speak an open and disengaged language, dictated by no passion but that of humanity. . . . My country is the world, and my religion is to do good.
> —Thomas Paine, *The Rights of Man*

> I said, "They deported a citizen." He said, "They can't do that."
> —Johann "Ace" Francis

Diogenes ("the Cynic"), when asked where he came from, was said to have answered, "I am a citizen of the world" (he used the term now rendered in English as "cosmopolitan") (Laertius 1979 [1925], 6:2:64). Over the centuries, of course, much has been made of this as a theoretical matter. But, after reading this powerful collection of observations about the theory, practice, and forensics of modern citizenship, I thought of a different (and, so far as I am aware, a unique) question about Diogenes's assertion: What if he had been asked to prove it?

Such a hypothetical interrogation seems facetious, if not absurd. Who, apart perhaps from an extraterrestrial immigration agent, would ever have asked such a thing? Why *would* anyone ask for such proof? What sort of proof could there possibly be? The answers all reduce to the most salient point of this book: nation-state citizenship is not only a theoretical construct about identity, rights, membership, the "right to remain," and the like. Unlike the

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claims of the aspirational cosmopolitan, in the real world it is often a *problem of proof.* And because of this it is much more accessible to some than to others and much more subject to invidious discrimination and to government manipulation than is generally understood. Heisenberg's famous indeterminacy principle produces abstract, paradoxical constraints on knowledge. But citizenship law—in virtually every modern legal system—has a very different rule: *that which cannot be known and proved does not exist*. Those who cannot prove that they are citizens fall into and inhabit the abyss of this indeterminacy: the residual, marginalized, and pejorative category of "aliens." Indeed, for them, the very idea that citizenship is part of (if not the apotheosis of) the "rule of law," with its attendant requirements of consistency, transparency, and predictability, becomes bitterly questionable. And such proof is often quite complicated and sometimes impossible. Are these cases outliers or anomalies about which it is unfair to make too much fuss? If this book proves anything, it is that the answer to that question must be no.

The forensic problem of citizenship proof is, of course, deeply entwined with questions about membership in the nation-state and rights. Our imagined interrogation of Diogenes illustrates this, too. Indeed, his namesake, Diogenes Laertius, reported that Diogenes himself did not embrace the (unprovable) cosmopolitan variant of citizenship willingly, but from exile. He was born in Greek Sinope on the south coast of the Black Sea, around 410 BC. Thus, Diogenes's citizenship was of that city. But, in a twist that is similar to some of the modern case histories recounted in this volume, Diogenes was banished from Sinope, reportedly due to allegations of debasement or adulteration of currency. As Diogenes Laertius put it, "All the curses of tragedy, he used to say, had lighted upon him. At all events he was 'A homeless exile, to his country dead. A wanderer who begs his daily bread' " (Laertius 1979 [1925], 6:2:38–39).

Thus, when he made his famous idealistic protocosmopolitan declaration, Diogenes had already been denationalized and deported. In effect, his assertion of cosmopolitan citizenship was a robust, if perhaps Quixotic, attempt to defend himself against what Hannah Arendt (1966, 295) would later describe as the "calamity" of the stateless, whom she denominated as effectively "rightless." Diogenes sought to make lemonade from the lemons he had been given by the people of Sinope.

In the modern world, however, problems of denationalization have recurred on a massive scale, with horrific consequences. "The calamity of the rightless," Arendt wrote, "is not that they are deprived of life, liberty, and the pursuit of happiness, or of equality before the law and the freedom of opinion—formulas which were designed to solve problems within given communities—but they

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no longer belong to any community whatsoever" (1966, 295–96). Those of us who study or practice human rights law in the context of deportation also cling to the aspirations of Diogenes and find strong versions of Arendt's formula especially problematic. Indeed, it has often been overstated and misunderstood. This is particularly true of a famous passage written by Chief Justice Earl Warren, who—implicitly channeling Arendt—once referred to citizenship as "the right to have rights." This was a formulation that worked passably well in the context in which it was written: a dissent in a case involving the involuntary deprivation of citizenship. But it raises all sorts of problems if taken seriously as a general assertion.[1] Still, it is clearly true that many powerful rights claims—especially the "right to remain"—often depend on proof of citizenship status. What is the character of citizenship rights today, amid conundrums caused by citizenship's elusiveness to proof? As Johann "Ace" Francis's address in the preface poignantly notes, lack of proof is the linchpin of absurdity and contradiction. We move from the completely understandable: "When you grow up and you think of yourself as an American, you don't really think otherwise" to the illogical and absurd: "I've been deported from the U.S. and I'm a citizen." Any lawyer who reads this latter sentence knows that it is impossible. U.S. citizens cannot be deported. The relevant statute could not be clearer. In fact, in its very first sentence, it says the word "alien" *four times*: "Any *alien* (including an *alien* crewman) shall, upon the order of the Attorney General, be removed" if the *alien* is within one or more of the following classes of deportable *aliens* (8 U.S.C. §1227). When we speak of citizenship, then, we must live with contradiction, paradox, and, sometimes, tragedy—all of which the very idea of citizenship as a provable, bounded legal category ostensibly is designed to mitigate.

The introduction to this book provocatively asks "whether the citizenship they are discussing actually exists." Of course, it does. It must. But what may seem a bright line in theory is inevitably a forensic continuum in practice, more like the boundary between energy and matter than it is like matter itself. Jacqueline Stevens, in her impossibly but truly titled chapter, "The Alien Who Is a Citizen," explains with great clarity how this is so as she highlights a series of legal, political, and interpretive paradoxes with which we must come to grips.

Interestingly enough, ambiguity and paradox about citizenship have historically run both ways. We have seen poignant examples of the fragility (and sometimes the irrelevance) of citizenship status. On February 19, 1942, President Franklin D. Roosevelt issued Executive Order 9066, authorizing the army to control *all* persons of Japanese ancestry in four western states. This is well known. What is perhaps less well known is that the subsequent "civilian exclusion orders" issued by General John DeWitt applied to a rather peculiarly

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defined group: "all persons of Japanese ancestry, *both alien and non-alien*."[2] This strangely inverted citizenship phrasing ("non-alien") was a clear indicator not only of how " 'foreignness' was imposed on U.S.- born citizens of Asian descent" (Saito 2001, 1n44). It also demonstrated the potential fragility of citizenship status as a guarantor of rights in hard times and the inevitable relevance of such (aspirationally) irrelevant factors as race, national origin, and class.

Indeed, contrary to what most would suspect, it is not always advantageous to prove one's U.S. citizenship. Consider, for example, *Perez v. Brownell* (1958), in which Chief Justice Earl Warren channeled Hannah Arendt's assertion about citizenship being the "right to have rights." The case involved a jus soli U.S. citizen who had lived most of his life in Texas but who had voted in Mexico and also apparently stayed outside the United States to avoid military service.[3] By the time the case got to court, Mr. Perez was strenuously trying to defeat deportation by proving that Congress could not constitutionally deprive him of his birthright citizenship for his alleged offenses. But here is a little-known, interesting twist: Perez had actually previously reentered the United States *three times* as a laborer (a "Mexican alien railroad worker" pursuant to the 1942 bracero program), by falsely claiming to be a *Mexican* citizen.[4] The government highlighted this point during oral argument. In fact, Oscar H. Davis mocked Perez as saying, once he was caught but not before: "I am not really a Mexican, I am an American citizen. I want to adjust my status [*sic*]." He concluded, "And of course they began deportation proceedings."[5] But, as those who read this book now understand, there is no such thing as "really" Mexican or "really" an American citizen. We cannot escape the rigors of proof or the requirements of constitutional normativity. As Sara Friedman nicely puts it in her chapter in this volume: "Documents do not affirm legal recognition or sovereign claims so much as they reproduce the uncertain status of contested borders and the individuals who journey across them." Moreover, as Kamal Sadiq piquantly notes in this volume, "State papers, documents, and formats tell us more about membership, nationality, belonging, and identity than formal rules alone. . . . The document manifests society."

This, I think, brings us to the most important implicit leitmotif of this work. We are ultimately talking not about status but about the rights (or at least the rights claims) of the stateless. Contrary to Chief Justice Warren's implication, Arendt's position was *not* that citizenship *should be* the right to have rights. Rather, as she put it: "The Rights of Man, supposedly inalienable, proved to be *unenforceable* . . . whenever people appeared who were no longer citizens of any sovereign state" (1966, 293). Her primary concern was practical. Stateless aliens lacked any *enforceable* protections.

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Of course, there is also a deeper, substantive question. As Arendt herself worried: "Recent attempts to frame a new bill of human rights, . . . seem to have demonstrated that no one seems able to define with any assurance what these general human rights, as distinguished from the rights of citizen, really are" (1966, 296–97). But *The Origins of Totalitarianism* was first published in 1951. It hardly needs to be said that—despite its evident challenges and deficiencies—the corpus of human rights protections for noncitizens is much more specific, more robust, and more widely enforced today than was the case during the times she considered. As Jacqueline Bhabha notes in this volume, we now see powerful norms of what she terms "regional citizenship" and "global citizenship."[6] There are, to be sure, still major gaps, especially regarding the rights of the deported (see Kanstroom and Chicco 2015). But the concrete difference between the rights of citizens and "the rights of others" is much less than it once was (see Benhabib 2014).

In the end, let us return to the Diogenes of Sinope and then of the world. Though perhaps most famous for being an early cosmopolitan philosopher, he also was acutely aware—as a banished stranger—of the importance of class and power. Indeed, he reportedly suggested that the word "disability" ought to be applied not to the deaf or blind, but to the poor (Laertius 1979 [1925], 6:2:34). Thus, it is undeniably true, as Beatrice McKenzie notes in this volume about today's expensive legal proceedings, that citizenship is a status "more easily defended by some individuals than others." There may be no better way to avoid the Arendtian "calamity of the rightless" than to strengthen citizenship protections and to ease its acquisition and its requirements of proof. But, as this book demonstrates, these goals are in tension with each other. Strengthening the protections of citizenship for future "non-aliens" may inevitably have two perverse consequences. First, it could render citizenship still more precious and thus ever harder to achieve and to prove. Second, it could relegate noncitizens—especially the deported—to a dangerous rightless realm. We must therefore do the harder, more basic work of defining and instantiating meaningful human rights protections for *all* people, regardless of status or location. This, in the end, is the best way to resist "the numerous small and not so small evils with which the road to hell is paved" (Arendt 1994, 271).

NOTES

1. *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

2. See, e.g., Civilian Exclusion Order No. 34, quoted in *Korematsu v. United States*, 323 U.S. 214, 229n6 (1944) (providing that, after twelve o'clock on May 8, 1942, all

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persons of Japanese ancestry, "both alien and non-alien, were to be excluded from a described portion of Military Area No. 1").

3. The 1940 law at issue had been passed largely in response to voting by American citizens in a 1935 plebiscite relating to Hitler's annexation of the Saar region. As one member of Congress put it, the legislation aimed to "relieve this country of the responsibility of those who reside in foreign lands and only claim citizenship when it serves their purposes." *Perez v. Brownell*, 356 U.S. 44, 55 (1958) (opinion of Justice Frankfurter).

4. *Perez v. Brownell,* 235 F. 2d 364 (9th Cir. 1956). The railroad bracero program was negotiated to supply U.S. railroads initially with unskilled workers for track maintenance. It eventually included other unskilled and skilled labor. See "World War II Homefront Era: 1940s: Bracero Program Establishes New Migration Patterns," Picture This, http://museumca.org/picturethis/pictures/bracero-workers-repair-railroad-track-southern-pacific-line-oakland-california.

5. First Oral Argument, *Perez v. Brownell* (May 1, 1957; the case was reargued on October 28, 1957); http://www.oyez.org/cases/1950-1959/1956/1956_44_2 (at 36:53–37:20).

6. The former seems more citizenship-like than the latter, which requires certain categorical points to be proven.

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