
PREFACE

We are living in a time that requires new immigration social justice lawyers. The Trump administration wreaked havoc in immigrant communities, striking immediately with a Muslim ban, turning ICE agents loose, attempting to terminate DACA and Temporary Protected Status programs, separating children from their parents at the border, insisting on building a border wall, and using the cover of the pandemic to close the southern border. Trump appeared on the heels of mainstream media and immigrant rights advocates branding Barack Obama “The Deporter-in-Chief” for his administration’s record-setting removal numbers, but Trump wrestled that title away without doubt. The election of Joe Biden created great hope among immigrants and immigrant rights advocates, but let’s face it: Trump set a low bar. Biden started out with a flourish by canceling many of Trump’s executive orders and sent broad, progressive legislation to Congress, but Republicans in the filibuster-proof Senate declared his U.S. Citizenship Act of 2021 dead on arrival. Meanwhile, although ICE enforcement priorities have refocused on so-called “criminal” aliens, removals continue and the asylum seekers from violence-ridden countries like Honduras, Guatemala, and El Salvador are not much better off.

While difficult to quantify, the election of Donald Trump unleashed ICE officers bent on greater enforcement who may have felt constrained under the Obama administration. Clearly, many ICE agents did not like the prosecutorial discretion memos issued by the Obama administration. For example, the ICE union unsuccessfully tried to sue the Obama administration over the DACA program, arguing that the deferred action program undermined their duty to enforce the law. Even the border patrol union—an organization that had never before endorsed a presidential candidate—threw its support behind Trump twice. Those enforcement-minded ICE and border patrol agents remain on the job under the Biden administration.

For reasons not that complex, Trump and his ICE cadre wanted to disrupt the lives of immigrants and their families. They sought to create confusion and chaos, even if not legally justified, and succeeded. The Trump White House instilled a get-tough attitude among the ICE officers and normalized raids and stopping asylum seekers at the border. Trump’s immigration-savvy advisors used old dormant INA provisions (like expansion of expedited removal) and the Attorney General’s authority to overrule progressive Board of Immigration Appeals decisions to cause a complete nightmare. Meanwhile, although

the Supreme Court (now with three Trump appointees) told Trump to go back to the drawing board on his attempt to terminate DACA, the Court upheld the third iteration of his Muslim ban, ruled against TPS holders on a technical interpretation of the ability to apply for permanent residence in the country, and will likely consider a constitutional argument against DACA soon.

Although President Biden ended the Muslim ban immediately, the truth is we've all lived through the anti-Muslim aspect of the Trump rhetoric in the aftermath of 9/11. In fact, it's very possible that we still are in the anti-Muslim aftermath of 9/11, and Trump's travel bans, extreme vetting language, and anti-Syrian refugee position were a crescendo of that aftermath. The same could be said of his anti-Mexican/undocumented rhetoric. The Trump era was starkly reminiscent of the period through which we lived and practiced—the anti-Mexican/undocumented era, especially during the Prop 187 debate in California in the 1990s.

As we contemplate the subjective as well as objective basis for fear in the immigrant community, it's important to keep in mind that things are always worse when something is taken away. Obama's prosecutorial discretion policy and public pronouncements provided non-priority immigrants (e.g., those without criminal records) with a sense of relief and stability and the sense that they could come out of the shadows and go about their lives. That was taken away. There had been hope that migrants fleeing severe gang and domestic violence would qualify for asylum, but those hopes were diminished by Trump's Attorneys General, Jeff Sessions and William Barr. The threat of terminating DACA continues to be real, especially where politics seems to be standing in the way of passing the Dream Act. Those take backs produce a whiplash feeling that is worse than before those opportunities were available.

Even during the worst periods of the 1970s to the early 1990s, being undocumented was not a long-term or indefinite life circumstance. It was more typically a period of several years. Most people who stayed long enough could find ways to adjust through registry, suspension of deportation relief, the old section 212(c) relief for aggravated felons, employers, or marriage/family. But changes in immigration law did away with that, especially with the creation of Operation Gatekeeper in 1994 and the 10-year bar in 1996. Living in undocumented status has become a longer way of life for more people who are now much more rooted. As such, they have much more to lose than ever before.

The rhetoric around the border wall and massively increased border enforcement signal to migrants that if they are caught and deported, they may never be able to return. In that sense, especially for people with family here who need to return, the consequences of deportation appear higher than before. And they may not know it, but after deportation, they fall into a bigger trap of criminalization for reentry that was little enforced in the past.

The United States is more diverse than ever. Of course, increasing diversity is a trend that has been emblematic of the United States since the founding of the nation. But increased diversity of any significance in the first 150 years of the country was primarily European in nature, except of course for the millions

of Africans who were transported to the nation as slaves. Thus, until Mexicans (in the 1950s) and Asians (after 1965) began arriving in significant numbers, the phrase “we are a nation of immigrants” and *e pluribus unum* (from many, one) captured the essence of a largely Euro-centric society.

The dominance of the Euro-centric culture and race—in no small part the result of immigration policies—has resulted in a Euro-centric sense of who is an American in the minds of many. Many of that mindset have developed a sense of privilege to enforce their view of who is an American in vigilante style. The de-Americanization of Americans of Muslim, Middle Eastern, and South Asian descent in the wake of 9/11 and hate crimes perpetrated on Asian Americans is a manifestation of this sense of privilege and the perpetual foreigner image that Euro-centric vigilantes maintain of people of color in the United States. The privileged perpetrators view themselves as “valid” members of the club of Americans, telling the victims that some aspect of their being—usually their skin color, accent, or garb—disqualifies them from membership.

Sadly, the de-Americanization process is capable of reinventing itself generation after generation. We have seen this exclusionary process aimed at those of African, Jewish, Asian, Mexican, Haitian, and other descents throughout the nation’s history. De-Americanization is not simply xenophobia, because more than fear of foreigners is at work. This is a brand of nativism cloaked in a Euro-centric sense of America that combines hate and racial profiling. Whenever we go through a period of de-Americanization like what is currently happening to Asian Americans, South Asians, Arabs, Muslim Americans, and Latinos, a whole new generation of Americans sees that exclusion and hate is acceptable; that the definition of who is an American can be narrow; that they too have license to profile. That license is issued when others around them engage in hate and the government chimes in with its own profiling. This is part of the sad process of implicit bias and institutionalized racism that haunts our country.

The nation’s public relations position is that we are a proud nation of immigrants and multiculturalism that is inclusive of all. Yes, we take steps in the direction of inclusiveness. But we take steps backwards in that regards as well. We learn and unlearn, and in the process, the bad behavior of vigilante racism is reinforced. In the process, we de-Americanize many communities of color, perpetuating their image as immigrant or partial Americans rather than full Americans.

We are presenting this casebook on immigration law and policy from a social justice perspective. We believe that most law students interested in taking a course on immigration law are motivated by social justice/public interest. We think you are interested in representing immigrants who face deportation or fear deportation to their home country for social, economic, or political reasons. You also likely have a strong interest in the public policy debate over immigration visa reform, enforcement, or legalization because of the injustices you sense in current policies. You may also be aware that climate

change is already affecting migration patterns. Many instructors who teach immigration law (regular faculty members and adjunct professors) also come from a pro-immigrant perspective that regards the practice of immigration law squarely within social justice/public interest practice. We hope this casebook provides materials and a format that will enhance the classroom experience for students and instructors who approach the topic from that perspective.

The content and organization (outlined in the table of contents) is broad and contains new topics such as detention, public interest/rebellious lawyering theories, lessons for public interest lawyers, and background on migration, globalization, criminalization, and racialization of immigration law. We have elected to de-emphasize business-related and investor-related immigration issues. Our goal is to inspire our public interest students while providing a solid way to analyze immigration law through a political and social lens and the foundation to practice effectively. Our pedagogy combines standard cases, but also stories of the lives of immigrants, transcripts, training manuals, academic articles, news articles, and other tools that social justice lawyers use. Our rationale in editing cases is to hone in on the parts of the cases that are necessary for an understanding of the court's rationale and some aspects of important dissenting opinions. We avoid repetitive passages or parts that are not relevant to the section of the book in which they are placed. Notes, questions, and problems are presented throughout the book.

We know that most of you come to the course already inspired to do good, socially-inspired work. Much of what has evolved within the world of U.S. immigration law and policy will disappoint and leave you upset. But hopefully, we have asked the right questions and pointed in particular directions that can help us take some steps forward in achieving justice for immigrants, refugees, and their families.

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