IMMIGRATION LAW AND SOCIAL JUSTICE

EDITORIAL ADVISORS

Aspen Casebook Series

IMMIGRATION LAW AND SOCIAL JUSTICE

SECOND EDITION

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Wolters Kluwer

Published by Wolters Kluwer in New York.

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Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-5438-1981-6

Library of Congress Cataloging-in-Publication Data

Names: Hing, Bill Ong, author. | Chacón, Jennifer, 1972- author. | Johnson, Kevin R., author.
Title: Immigration law and social justice / Bill Ong Hing, Professor of Law and Migration Studies, Director of the Immigration and Deportation Defense Clinic, University of San Francisco School of Law; Jennifer M. Chacón, Professor of Law, University of California, Berkeley School of Law; Kevin R. Johnson, Dean and Mabie-Apallas Professor of Public Interest Law and Chicana/o Studies, University of California, Davis, School of Law.
Description: Second edition. | New York : Wolters Kluwer, [2022] | Includes bibliographical references and index. | Summary: "Casebook focusing on immigration law and social justice for second- and third-year law students."—Provided by publisher.
Identifiers: LCCN 2021028314 (print) | LCCN 2021028315 (ebook) | ISBN 9781543819816 (hardcover) | ISBN 9781543826708 (ebook)
Subjects: LCSH: Emigration and immigration law—Social aspects—United States. | Immigration enforcement—United States. | Aliens—United States. | Deportation—United States. | Social justice—United States. | United States—Emigration and immigration—Government policy. | LCGFT: Casebooks (Law)
Classification: LCC KF4819 .H56 2022 (print) | LCC KF4819 (ebook) | DDC 342.7308/2—dc23
LC record available at https://lccn.loc.gov/2021028314
LC ebook record available at https://lccn.loc.gov/2021028315

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For my wife, Lenora, and my granddaughters,
Madeline and Penelope, with love.

BOH

With love, to Mary Ann Cancellare Chacón and Felipe Guillermo Chacón.
Thank you for everything.

JMC

To my mother, Angela Gallardo, who traveled many borders.

KRJ

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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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August 2021

ACKNOWLEDGMENTS

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IMMIGRATION LAW AND SOCIAL JUSTICE

CHAPTER 1

AN INTRODUCTION TO IMMIGRATION LAW THROUGH A SOCIAL JUSTICE LENS

I. INTRODUCTION

Immigrants and immigrant rights advocates knew we were in trouble when Donald Trump got elected President of the United States. His platform included a call to build a wall along the southern border and to ban Muslims from entering, while labeling some Mexican immigrants "rapists" and claiming others bring "drugs" and "crime." Indeed, the Trump administration wreaked havoc on noncitizens and their families inside and outside U.S. borders. But immigrants and immigrant rights advocates also knew we were in trouble in 2014 when a Ku Klux Klan "knight" called for shooting unaccompanied children (UACs) arriving at the border and the Barack Obama administration expedited removal proceedings of UACs and women with children arriving at the border. Although the White House initially labeled the influx of UACs a "humanitarian crisis," the Department of Homeland Security and Department of Justice responded by sending a "surge" of immigration judges and government attorneys to the border to start deportation hearings immediately, while sending similar messages to immigration courts around the country that UAC-related cases should be prioritized. The Joe Biden administration was immediately challenged with a surge in UACs and responded with new detention facilities, but at least worked furiously to limit detention time and turn the children over to responsible adults quickly.

The enforcement of U.S. immigration laws over the past few decades should make us wonder about the cost we are willing to pay to enforce the nation's immigration laws--not simply in terms of the billions of dollars spent on enforcement, but also the cost in terms of our basic humanity. Under Ronald Reagan's administration, the nation turned away refugees fleeing Haiti, Guatemala, and El Salvador, while accepting similarly situated Cubans and

Nicaraguans. In the name of border integrity and uninformed economic claims, hundreds of migrants die each year attempting to cross our southern border due to the expanded militarization of the border that began under Bill Clinton with Operation Gatekeeper in 1994. Hardworking immigrants were victimized by George W. Bush–era ICE raids, and thousands more lost their jobs each year because of the Obama administration's silent raids. The Obama administration also took a page from the Bush era, instituting raids of workplaces frequented by Latinos in New Orleans and other parts of the country. The result was family separation—often involving U.S. citizen family members. Such destruction to families also resulted from the expansion of the so-called Secure Communities program under the Obama administration's watch, as well as the deportation of refugees and longtime lawful permanent residents convicted of aggravated felonies—in spite of an acknowledgement in criminal justice communities that engaging in rehabilitation efforts would be wiser. Of course among the worst of the Trump administration's anti-immigrant efforts, perhaps the separation of children from their parents at the border without a plan for reunification stands out as the most inhumane.

In this text, we will learn that U.S. immigration law is a complicated field. From the basic selection system to the requirements for asylum and U.S. citizenship, the coverage in this book will more than satisfy those students who simply want to "learn immigration law." The policy choices made by lawmakers can be thought-provoking, while many anachronistic provisions seem to make little sense in today's challenge of displaced persons around the world and interconnected global economy.

While the intricacies of the law are challenging enough, we also will discover that many of the policies and rationales that underlie the law and procedure are difficult to accept from a social justice perspective. The text thus seeks to include information and strategies for those students who are attracted to the subject matter from a public interest perspective. This may take the form of additional information or the presentation of standard immigration information that has been influenced by a social justice strategy. Our hope is that students whose goal is to practice immigration law with a commitment to social justice and/or to work with a community-based or public interest organization are inspired by strategies and ideas filtered throughout the text.

This introductory chapter includes materials that highlight the economic and social factors that drive contemporary migration, including the effects of globalization. Historical patterns of migration from Mexico as well as a brief history of U.S. immigration policies also are included. We then review the vast "plenary" power that Congress has to regulate immigration, and finally consider issues of national security, racism, and morality.

To begin our exploration of immigration law through a social justice lens, consider these four actual cases.

Case No. 1

Oscar Martinez is a 55-year-old native of Mexico who entered the United States without inspection 25 years ago. Oscar, who first entered the United

States in 1985, was married to his first wife for 17 years, until she died of heart problems. After the death of his first wife, Oscar met and married his current wife, Zoila, in March 1996. Zoila, coincidentally, was a widow, and she had two young children from her first marriage: Donovan and Lorena. Mr. Martinez took on a complete parenting role with both children, helping to provide a stable and loving home for Donovan and Lorena, who had lost their biological father. Lorena, a U.S. citizen, was six years old when Mr. Martinez became her stepfather. Lorena is now 21 years old. Zoila is undocumented.

Oscar and Zoila have a biological son of their own, Oscar Jr., who also is a U.S. citizen by birth. Oscar Jr. is 13 years old. As the children's mother, Zoila, states, her husband is a real "family man" who cares for nothing more than to "spend time with his loved ones." One of his "great joys over the years has been the countless hours bonding with Lorena and Oscar [Jr.] while driving them to soccer practices and watching them play in games."

Oscar has been an integral part of both Lorena and Oscar Jr.'s education and upbringing. Oscar is very proud of Lorena and, despite not sharing a blood tie, has been her father for 14 years. He shares a strong bond with both Lorena and Oscar Jr. Despite his heavy work schedule, Oscar happily took both children to school in Berkeley from their home in Oakland, and took the time to make sure that they applied themselves to their studies. Oscar is proud to have helped Lorena become the first person in the family to attend college, and proud that Oscar Jr., a top student in his middle school, aspires to follow in Lorena's footsteps. His other great joy over the years has been the countless hours spent bonding with Lorena and Oscar Jr. while driving them to soccer practices and watching them play games. Oscar has contributed to his children's love for soccer; this has been an important aspect of his children's lives—one that has contributed to Lorena and Oscar Jr.'s academic success. Oscar loves nothing more than to spend time with his loved ones.

He has lived and worked in the United States for over 25 years, lacks a criminal history, has a solid record of community service, and has served as an excellent role model for his U.S. citizen daughter and son. Oscar is a good father and a devoted husband who has garnered the support of a wide array of neighbors, friends, co-workers, and community leaders.

Oscar worked full-time at the same hotel for 25 years. Although the wages were not high, when combined with additional income from a part-time job they enabled Oscar to make payments on a home in a safe neighborhood. His hotel job provided health benefits for the entire family.

Oscar was arrested during an Immigration and Customs Enforcement (ICE) raid of the hotel where he worked. His arrest has caused great turmoil in the family. Oscar Jr. has started having migraines, he cannot concentrate on school, and he no longer socializes with his friends or takes part in school activities. Lorena is worried about how the family will be able to support itself without her father, and is concerned that they will lose their health benefits. She is thinking of dropping out of college to work full-time and help support the family.

1. Why is Oscar deportable?
2. Should Oscar be deported? Why or why not?

Case No. 2

Rudina Demiraj and her minor son, Rediol, entered the United States without inspection in October 2000. Mrs. Demiraj timely filed an application for asylum, withholding of removal, and protection under Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture"). Mrs. Demiraj named Rediol as a derivative beneficiary of her application. In her application, filed on September 28, 2001, Mrs. Demiraj asserted that she was entitled to the relief requested because of her and her family's political involvement in opposing Albania's former communist regime and current socialist party and consequent fear of reprisal and torture in Albania. Mrs. Demiraj and her son were placed in removal (deportation) proceedings before an immigration judge (IJ). The IJ denied all relief and ordered that they be removed. Mrs. Demiraj appealed to the Board of Immigration Appeals (BIA), claiming that the court's interpreter was ineffective; the BIA dismissed the appeal in October 2003.

In February 2004, the BIA allowed Mrs. Demiraj to reopen her case based on changed circumstances. After the IJ's initial disposition of Mrs. Demiraj's case, her husband, Edward Demiraj, was shot in Albania by Bill Bedini, an Albanian wanted in the United States for human smuggling.

Mr. Demiraj's trouble started a decade earlier, after he agreed to be a witness against Mr. Bedini in a human-smuggling case. Mr. Demiraj, then an undocumented immigrant, thought he had a deal: testify for the government in return for its protection. But Mr. Bedini fled to Albania.

The U.S. government decided it had no further use for Mr. Demiraj and deported him to Albania. After Mr. Demiraj was deported to Albania, Bedini kidnaped, beat, and shot Mr. Demiraj because of his cooperation with the United States' efforts to prosecute Bedini. After Mr. Demiraj recovered from the shooting, local police in Albania took his statement but intimated that they would not investigate the crime. Bedini threatened Mr. Demiraj again, and Mr. Demiraj fled to the United States. Mr. Demiraj was granted withholding of removal in a separate proceeding, which means he will not be deported. But his protection does not extend to his wife and son. During the same time period and in retaliation for Mr. Demiraj's cooperation with U.S. prosecutors, three of Mr. Demiraj's nieces were also kidnaped by Bedini and his associates, who trafficked them to Europe and forced them into prostitution. Bedini explained to each of them that their persecution was "payback" for the assistance their uncle provided the U.S. government authorities.

Each niece miraculously escaped to the United States and successfully applied for asylum based on the persecution she suffered.

These new facts, along with evidence of the interfamilial "blood feud" culture in Albania, were presented to the IJ following the BIA's order to reopen

Mrs. Demiraj's proceedings. None of the testimony or evidence presented by Mrs. Demiraj was disputed, but the IJ found nevertheless that she was not entitled to any of the relief she sought. The BIA affirmed the IJ's decision and ordered that Mrs. Demiraj and her son be removed.

The Fifth Circuit Court of Appeals approved that order concluding, as a matter of law, that the INA only protects individuals from persecution on account of membership in a particular social group "*as such*."[1] In other words, the court interpreted the law to exclude petitioners who fear persecution on account of retaliation against a family member because those attacks are based on family *ties* as opposed to family *identity per se*. The court concluded that family ties, such as those between Mr. and Mrs. Demiraj, are indistinguishable from those between unrelated friends or lovers, such as those between Mr. Demiraj and a girlfriend. The court noted, for instance, that the petitioners failed to point to the persecution of *distant* family members—relatives in name only—as evidence of their persecutor's attempts to terminate a line of dynastic succession, which would be "on account of" family membership. Because their persecution was retaliation against Mr. Demiraj, and not the family itself, the court concluded as a matter of law that it fell outside the scope of federal protection.

1. Would you feel safe in Albania if you were Mrs. Demiraj?
2. What is the rationale for the Fifth Circuit's rejection of Mrs. Demeriz's claim? Does the rationale make sense?

Case No. 3

Kim Ho Ma was a happy man on July 9, 1999. After more than two years in state prison and several more months in the custody of immigration authorities, Kim Ho was released by court order. In his own words, "I can work. I pay the taxes. I just want to live the American life." Within three years, however, the United States would deport Kim Ho to a country he had left at the age of two, where he would be unable to speak the language and would be ill-equipped for a completely foreign environment.

Kim Ho was born in Cambodia in 1977, in the midst of the Khmer Rouge regime's sinister oppression and genocide. Kim Ho's mother, eight months pregnant, was sentenced to dig holes in one of Pol Pot's work camps. The idea was to teach her humility, and when she collapsed from exhaustion, she expected to be killed. Instead, the guards walked away. When Kim Ho was two, his mother carried him through minefields, fleeing the oppression of the Khmer Rouge, first to refugee camps in Thailand and the Philippines, and eventually to the United States when he was seven.

Kim Ho's first home in America was a housing project in Seattle, where he and other Cambodian refugees had the misfortune of being resettled in the middle of a new war—one between black and Latino gangs. Both sides

1. Demiraj v. Holder, 631 F.3d 194, 199 (5th Cir. 2011), see Chapter 13.

taunted Kim Ho and his friends, beating them up for fun. Still affected by the trauma she experienced in Cambodia and preoccupied with two minimum wage jobs, his mother did not understand what was happening to her son. Determined that they would not be pushed around, Kim Ho and his friends formed their own gang.

In 1995, at age seventeen, Kim Ho and two friends ambushed a member of a rival gang; Kim Ho was convicted of first-degree manslaughter. With no previous criminal record, he was sentenced to 38 months' imprisonment. Earning time off for good behavior, Kim Ho was released after serving 26 months. However, his conviction was classified under federal immigration laws as an "aggravated felony," so he was released to the custody of ICE officials. He was ordered deported after a brief hearing where evidence of his rehabilitation and how deportation would affect his parents and other family members was deemed irrelevant.

1. Why is Kim Ho Ma deportable?
2. Should Kim Ho Ma be deported? Why or why not? Should it matter that he entered as a refugee as opposed to as an immigrant?
3. Should evidence of his rehabilitation or the hardship on his family be relevant to whether he is deported?

Case No. 4

Tatyana Mitrohina was born in Russia with heart defects and deformed hands. She was rejected by her parents for many years, spending her infancy in hospitals and institutions. Later she was abused by her parents, then abandoned by them. She immigrated to the United States as a young teen, adopted by U.S. citizens. After more than a decade, she had a child of her own, whom she abused. Tatyana was diagnosed with mental illness. Although she was convicted of child abuse, the state court recommended medication, counseling, and a chance to regain custody of her child. But Immigration and Customs Enforcement (ICE) took over, and Tatyana was removed from the country. Her child was taken away permanently.

Tatyana was born in Russia in 1978 with multiple health problems, including heart defects. Both of her hands are small and partially deformed. She has a similar problem with her feet. Tatyana's parents abandoned her immediately after birth. She spent the first ten years of her life in hospitals, rehabilitation facilities, and a boarding school for disabled children without contact with her parents. She underwent several surgical procedures to correct her birth defects, but the abnormalities of her hands and feet were never fully corrected.

As with most children, these first ten years of Tatyana's life had profound impact on her emotionally and psychologically. She had multiple caretakers but had no one to whom she felt attached. She felt rejected and abandoned by her biological family. When asked about the effect this period of her life had on her, Tatyana explained: "I didn't like to be touched, I couldn't stand to be touched or hugged." A psychologist who evaluated Tatyana observed: "Ms.

Mitrohina demonstrates a range of psychopathology frequently observed as a sequel of early neglect, abandonment and institutionalization, emotional rejection, and physical trauma."

When she was about seven years old, after she was released from the hospital, Tatyana's maternal grandmother took responsibility for her. At the time, Tatyana had been unaware that she had a family. A year or so later, her father began to visit, and about three years later, he decided to bring Tatyana back into the family.

Her father brought Tatyana home to live with family because that made the family eligible for a better apartment in Russia. The atmosphere in the home was hostile, chaotic, and filled with conflict. Tatyana's mother was opposed to her return and was openly hostile and critical of Tatyana. Tatyana was constantly beaten by both parents. Her parents continually told her that she was "inadequate and worthless." The psychological evaluation reported a "history of neglect, physical and verbal abuse as a child and one attempted molestation between the age of 8 and 10."

The tense home life led to the disintegration of the family. Her parents divorced when Tatyana was twelve. Her father departed, and Tatyana was left with her mother, who did not want her. So when Tatyana turned 14, her grandmother, who had legal custody, signed adoption papers. Oldrich and Ruth Gann, who were then 68 and 63 years old, respectively, adopted Tatyana and brought her to the United States in 1993.

Tatyana had difficulty adapting to her new family. She constantly felt that she could not live up to her adoptive parents' expectations. Her dislike of being touched or held persisted into her late teens. She had difficulty addressing her new parents as "mom" and "dad." To Tatyana, the relationship was a "mismatch" and she did not get along with her adoptive parents from the start.

Concerned with the conflict, Tatyana's adoptive parents had her evaluated by a psychologist. The psychologist prescribed medication, and her parents threatened to send Tatyana back to Russia if she did not take the medication. Tatyana did not appreciate the psychological treatment and argued with her parents; her parents often called the police after these altercations erupted. Tatyana felt trapped and became depressed and angry. An argument in 1999 led to a call to the police. When the police arrived, Tatyana was so upset that she kicked her adoptive father in the leg in front of the police officer. Tatyana was taken into custody, but charges were later dismissed.

In 2000, while still living with her adoptive parents, Tatyana threatened to kill herself. She was not arrested, but she was taken to a mental health facility for three days. She eventually moved out of her parents' house. Since then, Tatyana's adoptive father has passed away and she has not maintained contact with her adoptive mother.

After moving out, Tatyana rented a room from a young man with whom she later became emotionally involved. She soon noticed that he mistreated his six-year-old son. On one occasion, the child was complaining about a stomach pain, and the father refused to do anything. Tatyana called an ambulance.

After that, the landlord was abusive toward her for 18 months. In 2002, after an argument, Tatyana kicked him several times. He called the police, and she was arrested and pled guilty to a misdemeanor battery. Tatyana received 36 months' formal probation, and was ordered to pay fines and fees, complete a 52-week batterer's program, maintain employment, and complete community service. She successfully completed all the terms of her sentence.

Tatyana held a variety of jobs in the United States and attended junior college. She worked at the Sonoma Market, worked at Baskin-Robbins, and provided care for the elderly through an agency. She lost these jobs because of anger management problems. (For a time, she worked caring for elderly residents at an assisted living facility.) Tatyana admitted that she had kicked an elderly patent three or four times while working at this facility. The patient did not report the incident because she suffered from Alzheimer's disease. Tatyana took classes at a junior college over a two-year period from spring 2005 to spring 2007.

Tatyana became pregnant by a man named John Carter Goode. The baby was born on October 17, 2005. Although Tatyana tried to get Goode involved, he was never involved in the child's life. Tatyana had no one to rely on for financial help or other assistance in the child's upbringing. Her probation officer noted that Tatyana lacked "a support system for parenting and when she needs a break, she has been unable to secure a reliable babysitter." Although Tatyana was eventually convicted of child abuse, the child protective services investigator observed that the child was "healthy, had suffered no long-term injury, and appeared to be slightly advanced for his chronological age." When her son was a year and a half old, Tatyana got a job at Metro PCS, a wireless phone company, in an attempt to get off of welfare assistance. She lost that job when she was arrested in June 2007.

On June 26, 2007, when the child was just under two years old, the child spilled some water and then grabbed a roll of paper towels to clean up the mess. He scattered paper towels all over the floor. According to a presentence report:

> Mitrohina then grabbed the victim, took him to the bedroom, and threw him on the bed to give him a "time out." She then began to slap the victim with her hands, on his head and legs, approximately ten times. Mitrohina stated: "I was yelling at him like he was 20," even though she knew he could not understand. The defendant explained that she did not stop when she should have, and left a bruise and mark on his face. Victim John Doe was screaming and crying as she hit him.
>
> Mitrohina commented that the instant matter was not the first time she slapped victim Joe Doe, but indicated that it was the worst because it left a mark. She said she would become angered when John Doe, as a newborn, "threw up" or "pooped" too much. She admitted that she had been hurting victim John Doe since he was born, and had become more physical with him as he grew older. At times, she slapped him and threw him on the ground. She also admitted that approximately one year earlier, she had hit John Doe in the face and caused a large, visible bruise under his eye.

Tatyana then took her child to a day care center and explained to an employee there that she had become frustrated with her son at home and had struck him with her bare hands. She left the child at the day care and went to her job. The child was visibly bruised on his left temple. A county worker interviewed Tatyana later that day, noting that she "did not cry, and appeared very cold and nonchalant about the abuse. She was only concerned about being arrested and not about the condition of her son, and never once asked if he had gone to the hospital or if he was alright."

As a result of this incident, the child was removed from Tatyana's care, and child abuse charges were brought. Tatyana pled guilty and was sentenced to 120 days in jail and four years on probation. Ultimately, she was only required to serve about a month in jail. A probation officer who interviewed Tatyana while she was in custody noted that she was very remorseful and forthcoming throughout the interview, noting that she "has struggled with shame and guilt while in custody, and has spent much time in introspection." When she was first taken into custody, Tatyana was very upset and she cried a lot. The mental health staff in the county jail determined that she was likely suffering from depression, perhaps due to a chemical imbalance in her brain. So she was prescribed Zoloft (an antidepressant drug, used to treat depression, obsessive-compulsive disorder, panic disorder, anxiety disorders, and post-traumatic stress disorder (PTSD)).

While she was in jail for the child abuse conviction, Tatyana was on a "no mix" status, and was unable to avail herself to counseling and other resources normally offered to inmates. In spite of that status, she sought to participate in anger management correspondence courses. She took responsibility for her actions and was remorseful. She was committed to doing whatever was required to successfully reunite with her son. She testified, "My baby is first in my life now. I know I need to get help myself in order to take care of my baby."

The child was placed into foster care and became the subject of juvenile court proceedings. In early October 2007, the juvenile court ordered that family reunification services be offered to Tatyana. The court's goal was to reunify Tatyana with her child. Tatyana was ordered to participate in a number of different services, including counseling and domestic violence programs. The problem was that by then, Tatyana was in ICE custody, unable to comply with the juvenile court's order.

If Tatyana had been a U.S. citizen, after her month in jail, she would have been released from custody. However, she was a lawful permanent resident alien who now had committed a deportable offense. So ICE officials took custody of Tatyana upon her release from jail and kept her in custody pending removal proceedings. By the time her removal hearing took place, she had been in custody for four months.

Tatyana wanted to abide by the juvenile court's mandate because she had the utmost desire to resolve her personal problems and regain custody of her son. The problem, of course, was that Tatyana was in ICE custody facing

removal proceedings, so she could not follow the juvenile court's order. Being out of ICE custody would have given her the opportunity to straighten out and have a chance at reunifying with her son. If she had been able to do that, her posture in the deportation case would have been far different.

1. Tatyana was eventually deported. What do you think of that result?
2. How do you think Tatyana's deportation could have been prevented?
3. Based on these facts, are there procedural changes to the deportation process that you would suggest?

II. BACKGROUND AND BRIEF RACIAL HISTORY OF IMMIGRATION FLOWS AND POLICIES

Bill Ong Hing, Defining America Through Immigration Policy (2004)

Introduction

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We are a nation of immigrants. However, the simplicity of that statement conceals the nation's consistent history of tension over who we collectively regard as "real Americans" and, therefore, who we should allow into our community. . . . Thus, while we are a nation of immigrants, we are a nation that debates immigration policy, and that debate reflects the battle over how we define who is an American.

Although immigration laws did not become a permanent fixture in federal statutes until the mid-1800s, debate over newcomers was a part of the political and social discourse even before the Declaration of Independence. As early as 1751, no less an icon of the New World than Benjamin Franklin opposed the influx of German immigrants, warning that "Pennsylvania will in a few years become a German colony; instead of their learning our language, we must learn theirs, or live as in a foreign country." He later expanded his thoughts:

> [T]hose who came hither are generally the most stupid of their own nation, and as ignorance is often attended with great credulity, when knavery would mislead it, and with suspicion when honesty would set it right; and few of the English understand the German language, and so cannot address them either from the press or pulpit, it is almost impossible to remove any prejudices they may entertain. . . . Not being used to liberty, they know not how to make modest use of it.

These critical statements by one of the framers of our constitution should be contrasted with the sentiments of George Washington, who in 1783 proclaimed, "The bosom of America is open to receive not only the opulent and respectable stranger, but the oppressed and persecuted of all nations and religions." His words are strikingly reminiscent of the famous lines of the Jewish American poet Emma Lazarus engraved at the base of the Statue of Liberty in 1886:

Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore,
Send these, the homeless, tempest-tost to me.
I lift my lamp beside the golden door!

Immigration prior to restrictions set the stage for debate. Those "original" people who populated the country in its initial years formed the basis for what many would regard as "real Americans." This wave was primarily an eighteenth-century undertaking that lasted until 1803 and brought with it white, predominantly English-speaking, mainly Protestant Europeans. By contrast, the next wave, which began in the 1820s and lasted until the immigration restriction laws of the 1920s, was a more diverse and controversial phenomenon. That current brought more Catholics and Jews, more Southern Europeans and non-English speakers. The restrictions of the 1920s succeeded in drastically reducing that diversity through 1965. The latest wave after 1965 has fueled a new diversity from Asia and Latin America that makes one wonder if the Statue of Liberty might be facing the wrong direction.

Thus, immigration data from 1820 to 2000 tell much of the story about how immigration policies have affected the makeup of the country. From 1820 to 1850, about 2.5 million immigrants came to the United States. Almost 90 percent were European (87 percent alone from France, Germany, Ireland, and the Great Britain). Only 132 Asians entered at that time, and 14,688 (less than 1 percent) were Mexican during that 31-year period (of course much of what we know as the southwestern part of the United States was actually Mexico during that time). The discovery of gold in California in 1848 contributed to an influx of Chinese immigrants until 1882, when the Chinese Exclusion Act was passed. From 1851 to 1880, 228,899 Chinese entered, but this still represented less than 3 percent of the total (7.7 million) number of immigrants during that period which remained dominated by Europeans (88 percent). Obviously after Chinese laborers were excluded in 1882, the number of Chinese entering declined; from 1891 to 1900, less than 15,000 entered out of a total of 3.7 million immigrants for the decade.

During the first two decades of the twentieth century, southern and eastern Europeans entered in large numbers. Of the 14.5 million immigrants who entered, 60 percent were from Italy, Austria, Hungary, and the area that became the Soviet Union. A literacy law was enacted in 1917 specifically targeting southern and eastern Europeans, and from 1921 to 1930, immigrants from those areas declined to about 14 percent of all immigrants. The national origins quota system of 1924 that restricted the same groups had even greater impact. For example, from 1951 to 1960, those groups made up only 6 percent of all immigrants.

Since 1965, when the national origins quota was finally repealed, the face of immigration has become even more diverse. For example, of all immigrants in fiscal year 2000, 65 percent were from Asia and Latin America. The 2000 census found that one-third of the foreign born population in the United

States was from Mexico or another Central American country, and a quarter was from Asia. Fifteen percent were from Europe. As a result of the immigration policies since 1965, including new refugee laws in 1980 and a legalization (or amnesty) program for undocumented immigrants in 1986, the ethnic makeup of the country is changing. While 75 percent of the nation claimed European heritage in the year 2000, the proportion dropped from 80 percent in 1990. In contrast, the Latino proportion increased from 9 percent to 12.5 percent during the decade; and Asian Americans increased from 2.8 percent to 3.6 percent.

There have always been two Americas. Both begin with the understanding that America is a land of immigrants. One America has embraced the notion of welcoming newcomers from different parts of the world, although depending on the era, even this more welcoming perspective may not have been open to people from certain parts of the world or of different persuasions. This America has understood that Americans are not necessarily of the same background or tongue. The other America largely has remained mired in a Eurocentric (originally Western Euro-centric) vision of America that idealizes the true American as white, Anglo-Saxon, English-speaking, and Christian. For the most part, this America has opposed more immigration, especially immigration from regions of the world that are not white nor supportive of our brand of democracy.

The history of United States immigration policy reflects the tension of the two Americas that has been a part of the national debate since the founding of the country. As some colonists frowned upon German speakers, others attacked Catholics, and Quakers. By the time the nation's second president, John Adams, took office, the debate was on between the two visions of America—one nativistic and xenophobic, the other embracing of immigrants. The tug-of-war between the two visions has been constant ever since. As such the country has generally moved forward with policies that fall somewhere in the middle. The battle is constant because the country knows, just as Truman's veto message implied, that our immigration policy defines our character. As such, major changes to our immigration and refugee laws and decisions on enforcement policies represent defining moments in our history.

Thus, "who is an American" has been defined and redefined throughout our history. When restrictionists—the standard bearers of the Eurocentric *real* American concept—have had their way, exclusionist rationales have been codified reflecting negative views toward particular races or nationalities, political views (e.g., communists or anarchists), religions (e.g., Catholics, Jews, Muslims), or social groups (e.g., illiterates, homosexuals). Those grounds for exclusion are every bit about membership in a Eurocentric American standard that requires that undesirables are kept out. Other times, broader visions of America have prevailed, as restrictions are beaten back, and more egalitarian language is made part of the law, as in the case of the 1965 Amendments and the Refugee Act of 1980. So in spite of its billing as a "nation of immigrants," the United States has constantly struggled with the "impact" of immigrants socially and

economically. Influxes of immigrants at different times have provided fodder for anti-immigrant sentiment within national and local communities and for the anti-immigrant cottage industry. The last third of the twentieth century was a particularly heated time. As diversity among immigrants increased, the sheer number of immigrants and refugees admitted suggested a generous system. In truth, enforcement mechanisms were often extreme.

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Kevin R. Johnson, A Brief History of U.S. Immigration Law and Enforcement

Opening the Floodgates: Why America Needs to Rethink Its Borders and Immigration Laws (2007)

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The cyclical nature of immigration politics—and thus immigration law and policy—often has been directly linked to the overall state of the U.S. economy and the perceived social evils of the day. A wider divergence in popular opinion about immigration and immigrants has contributed to the wild fluctuations in U.S. policy. War, political and economic turmoil, and other tensions affect the nation's collective attitude towards immigration. Social stresses, like terrorism in modern times, find a ready and unimpeded outlet in immigration law and its enforcement. Immigration law, unlike the vicissitudes of the economy or the whims of terrorists, can be controlled (even if enforcement might not work).

In a similar fashion, policies directed at *immigrants* in the United States have varied dramatically over time. The noncitizen in the U.S. society is vulnerable. The United States has consistently afforded fewer rights to immigrants than to U.S. citizens. Immigrants are denied the right to vote and access to public benefits (even for those which they contribute tax dollars) for which citizens ordinarily are eligible. At times, federal state, and local governments have adopted harsh policies towards immigrants including engaging in efforts at coerced assimilation, attempting to force people to speak English, and invidiously discriminating against noncitizens living in the United States. In these and other ways, noncitizens are denied full membership in U.S. society. To make matters worse, deportation from the country is always a possibility facing noncitizens.

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Immigrants become easy targets for harsh treatment because they have a distinctively negative image in popular culture. Although not officially found in the omnibus immigration law, the Immigration and Nationality Act of 1952, the emotion-laden phrase "illegal aliens" figures prominently in popular debate over immigration. "Illegal aliens," as their moniker strongly implies, are law-breakers, abusers, and intruders, undesirables we want excluded from our society. The very use of the term "illegal aliens" ordinarily betrays a restrictionist bias in the speaker. By stripping real people of their humanity, the terminology helps rationalize the harsh treatment of undocumented immigrants under the immigration laws.

Immigrants, as noncitizens, have little direct input in the political process, a process that ultimately controls their destinies. Unlike other minority groups, they cannot vote. Although interest groups, such as Latina/o and Asian-American advocacy groups, advocate on behalf of immigrants along with citizen minorities, they have limited political clout in arguing for fair treatment of people who cannot vote. Politicians generally do not court the "immigration vote." In the end, immigrants' interests can be ignored by law- and policymakers in ways that other citizen minorities' simply cannot be.

At various times, the U.S. government has attempted to coerce immigrants and people of color to assimilate into the mainstream and adopt "American" ways. Coerced assimilation of noncitizens was particularly popular early in the twentieth century. In a time when U.S. society openly suppressed domestic minorities and racial segregation was the norm, such measures were much easier to put into place. The national rise of a civil rights consciousness, and a public commitment to respect and tolerance for different cultures and peoples, changed everything. Today, it is much more difficult, although not impossible, to adopt coercive measures that mandate assimilation or to criticize as somehow inferior the culture of people of Mexican ancestry.

The forced assimilation of immigrants is inconsistent with the nation's modern sensibilities and commitment to multiculturalism. Nonetheless, demands for immigrant assimilation, and complaints about the failure of today's immigrants to assimilate, reappear in the public debate with remarkable consistency. Such demands, however, tend to be more refined than in the past. Relatively few claims are made—at least, in polite company—that the *radical* inferiority of today's immigrants makes assimilation next to impossible.

The claim that immigrants fail to assimilate has led to two consistent policy responses that often find much political support in the United States. The near-instinctive response has been to call for increased restrictions on immigration and to heighten border enforcement. A second response has been to demand policies that encourage, and at times coerce, immigrants to assimilate into the mainstream.

However, these responses to immigrants' so-called failure to assimilate are inconsistent with the United States's stated commitment to individual rights. As a nation, we take pride in being "the land of the free" and regularly condemn other nations that lack a similar commitment to individual rights. The depth of the commitment of the United States, however, has been placed in serious question throughout U.S. history by the nation's immigration policies and coercive efforts to mandate assimilation into the Anglo norm.

Immigration regulation has led to some of the most regrettable chapters in all of U.S. history. Intolerance, particularly in the form of racism and nativism, has deeply and indelibly influenced U.S. immigration law and policy. To make matters worse, the courts have rarely intervened to halt the raw excess of the political process. Consequently, periodic waves of harsh exclusions and deportation campaigns dominate the history of immigration law and its enforcement. Restrictionist measures, such as the Chinese exclusion laws,

the anti-Semitic national-origins quota system, and sporadic deportation campaigns that targeted Mexican nationals, are monuments to times when anti-immigration sentiment dominated the political process and carried the day. These sordid chapters in U.S. immigration history are exceedingly difficult to square with the nation's commitment to equality under the law. Few modern defenders attempt to justify them.

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The 1990s saw nothing less than a momentous shift toward aggressive immigration enforcement in the United States. Border enforcement became one of the nation's highest priorities and received great increases in funding. Greater immigration enforcement was consistent with the tough stance on crime adopted by the Democratic president Bill Clinton, which included congressional passage of a comprehensive crime bill that, among other things, authorized the imposition under federal law of the death penalty for certain felonies.

In 1996, Congress enthusiastically joined the fray. Bent on curbing undocumented immigrants, deporting criminal aliens, protecting the nation from terrorists, and guarding the public fisc, Congress passes a serious of "get tough on immigrant" laws. Detention of many aliens became mandatory, with the number of immigrants detained increasing dramatically in local jails, federal penitentiaries, and privately run detention facilities. "Criminal aliens," the vast majority from Mexico and Central America, have been detained and deported in record numbers since 1996. The U.S. government vigorously enforced the 1996 reforms with little regard for the rights of immigrants.

Congress also in 1996 greatly expanded the definition of "terrorist activity" that could subject a noncitizen to deportation and other immigration consequences. An apparatus, including a procedure for holding secret evidence hearings, was established to fight terrorism. It was fortified and expanded by the U.S. Congress in the form of the USA PATRIOT Act, increased funding, and other laws and regulations affording the Executive Branch even greater authority to act in the name of national security. Many of the immigrants adversely affected in the "war on terror" were people of color, which historically has been the case with immigration responses to the perceived crisis of the day.

The antiterrorism policies after September 11, 2001, dramatically—and negatively—affected the civil rights of immigrants in the United States. Muslims and Arab communities in particular have been under siege. They have been targeted for arrest, detention, and interrogation. They face an entire array of onerous immigration requirements that target individuals on the basis of racial, national-origin, and religious profiles rather than any specific suspicion of wrongdoing by the individual. As government effectively labeled them terror suspects and, thus, enemies of the United States, hate crimes against Arabs, Muslims, and others followed in the wake of the government's frequently proclaimed "war on terror."

Other immigrant groups have also suffered the ripple effects of the "war on terror." Immigrants generally were adversely affected. The deportation of

Mexican and Central American immigrants, which had increased to record levels after the 1996 immigration reform measures kicked in, escalated dramatically in the days after September 11, 2001. Nor were the harsh immigration policies something that emerged only after that fateful day.

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Since 1965, with the abolition of racial exclusions, many more immigrants from Asia have come to the United States than had previously. This "mass migration" has worried restrictionists concerned about maintaining the American way of life—now generally coded in terms of national identity—as well as by those concerned about immigration's impact on labor markets and wages.

Even though the law is colorblind on its face, the modern U.S. immigration laws continue to have discriminatory impacts. People of color from the developing world, especially those from nations that send relatively large numbers of immigrants to the United States, are the most disadvantaged of all groups, especially those of a select few high-immigration nations. They suffer disproportionately from tighter entry requirements and heightened immigration enforcement. For example, under certain visa categories, many noncitizens from India, the Philippines, and Mexico face much longer waits for entry into the United States than similarly situated noncitizens from other nations. Consequently, although there are no express racial limits on immigration to the United States, disparate racial impacts remain. The disparate impacts of the immigration laws are no surprise to the people affected or to many of the restrictionists who press for immigration reform. In this important way, the tune has changed, but the song remains the same.

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Gerald P. López, Undocumented Mexican Immigration: In Search of a Just Immigration Law and Policy

28 UCLA L. Rev. 615 (1981)

What is now the southwestern United States was a destination of Spanish explorers a decade after Hernan Cortes's conquest of the Aztecs in 1519. Over the following centuries, these early explorers were followed by setters who located primarily in present-day New Mexico and to a lesser degree in areas which now comprise California, Texas, and Arizona. In 1821, Mexico took control of the entire territory (including all of California, Texas, New Mexico and Arizona, and parts of Colorado, Utah and Nevada) when it declared its independence from Spain. Within twenty-five years, however, present day Texas had been annexed by the United States, and by 1849, the end of the Mexican-American War, the remaining areas were ceded to the United States.

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In view of the surrounding circumstances, it is almost inconceivable that the emerging pattern of migration from Mexico was not, in significant part, attributable to recruitment and promotion. Before this period, migration had

been largely restricted to the cross-migration in economically integrated border regions and to the excursions of certain Mexican miners, particularly from the state of Sonora. Despite substantial economic disparity between source regions in the central plateau of Mexico and destination regions in the southwestern United States, migration for other American jobs was virtually unknown. With the exclusion of the Chinese, widespread and long-distance Mexican migration began. Expansion of agriculture, particularly in the Rio Grande Valley of Texas and the central valley of California, created the demand. Large numbers of central Mexican workers found their way to jobs in the United States with an elaborate system of recruitment and support.

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Events following the crash of 1929 exposed this national sentiment in the extreme. Xenophobic notions surfaced almost immediately following the crash and forced the deportation and repatriation of hundreds of thousands of documented and undocumented Mexicans working and living in the United States as well as the removal of U.S. citizens of Mexican descent. During the 1930s, poor white farmers from Oklahoma, Arkansas, and Texas, whose desperate migration to the southwest has been passionately described, filled most of the slackened demand for labor in large agricultural enterprises.

As the economy grew stronger with the approach of World War II, most of the "Okies" and "Arkies" relocated to better paying industrial jobs. Their exodus and the new agricultural expansion renewed the domestic need for cheap labor. Under the authority of the Ninth Proviso, the federal government immediately moved, with almost amoral aplomb, to allow employers to initiate a new recruitment of Mexican labor.

Shortly thereafter, in 1942, the United States negotiated a treaty with Mexico in the form of the Labor Importation Program, providing for the use of Mexicans as temporary workers in U.S. agriculture. The Labor Importation Program is more commonly referred to as the Bracero Program, a colloquial allusion to the men of strength. Unlike previous measures, the treaty purported to regulate the employment of Mexicans as temporary agricultural workers through qualitative and quantitative provisions. Many of these provisions were mandated by new Mexican law enacted in response to the pernicious effects of the previous decade's repatriation; others were included to safeguard the two nations' national interests.

Braceros were tied to American private employers by contracts guaranteed by the federal government. The law qualitatively controlled transportation, wages, and working and living conditions. The treaty, supplemented and slightly amended by subsequent legislative acts and international agreements with Mexico, governed the emergency farm and industry program through December 31, 1947. Throughout this period, the federal government supervised the program and actively assisted U.S. employers in the recruitment of the Mexican workers.

From 1947, when the special wartime legislation expired, until 1951, when Public Law 78 was passed, the temporary worker program continued

unabated, again pursuant to the authority of the ninth proviso. During these years the federal government abdicated its supervisory role. Contracts were made directly between employer and worker without government guarantees and absent qualitative and quantitative control. Taking advantage of the government's non-intervention, employers recruited more vigorously than before from the interior of Mexico and swiftly legalized undocumented workers already in the United States.

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In 1954 over a million undocumented Mexicans were deported as part of an INS initiative dubbed *Operation Wetback*. Southwestern employers who probably saw the operation as little more than a temporary setback, responded by making more extensive use of workers under the Bracero Program. Federal government statistics indicate that, after remaining constant at about 200,000 from 1951-53, the number of Braceros admitted increased by 105,000 during 1954 (the year of Operation Wetback), by another 100,000 in 1955, and leveled off at about 450,000 for the years 1956-59. As a result of effective border patrol enforcement, the number of undocumented aliens apprehended decreased gradually to a low of 30,272 in 1962. Some have attributed the rise in the number of Braceros from 1954-59 to agriculture's growing confidence in the economic and political feasibility of the program. True only in part, this observation overlooks the fact that during these years enforcement of immigration law was so effective that the Bracero Program was the only viable method to recruit workers.

While Operation Wetback temporarily relieved national hysteria, criticism of the Bracero Program continued to mount. In particular, organized labor continued to argue that Braceros depressed wages and working conditions. Labor's conviction was supported by government reports indicating that in Bracero-dominated areas the prevailing wage was set by Braceros and remained stationary. So strong was the criticism, President Kennedy directed the Secretary of Labor to establish "adverse-effect" rates for each state employing Braceros. Adverse-effect rates were the minimum wage rates that employers had to offer and pay Braceros to prevent an adverse effect on wages of domestic workers similarly employed.

Despite the continuing assault on the Bracero Program's legitimacy, the "emergency wartime measure" survived twenty-two years through 1964 and employed nearly five million Mexican workers. The program's longevity is largely attributable to the political bond between employers, particularly in southwestern agriculture, and congressional leaders. This bond, formidable throughout, was particularly so during the final decade of the embattled program; yet, as always, employer strategy remained flexible.

A. Enslavement of African Workers as Forced Immigration Policy

The genocide of Native Americans and African enslavement should not be erased in the study of immigration law. Professor Rhonda Magee writes convincingly that the notion of immigrant must include the forced immigration

system of chattel slavery and that the law and policy of chattel slavery is a relevant historical antecedent to today's immigration law. She points out:

> [S]lavery was, in significant part (though hardly exclusively), an immigration system of a particularly reprehensible sort: a system of state-sponsored forced migration human trafficking, endorsed by Congress, important to the public fisc as a source of tax revenue, and aimed at fulfilling the need for a controllable labor population in the colonies, and then in the states, at an artificially low economic cost.

See Rhonda V. Magee, *Slavery as Immigration?*, 44 U.S.F. L. Rev. 273, 277 (2009). Professor Magee concludes:

> Viewing immigration as a function of slavery helps us articulate an important irony: that with respect to immigration, slavery—our racially based forced migration system—laid a foundation for both a racially segmented labor-based immigration system, and a racially diverse (even if racially hierarchical) "nation of immigrants." These legacies which the founders may not have set out to leave, are among the United States' most pernicious and most precious gifts to civilization. *Id*. at 289-99.

Scholars generally trace the beginning of racially restrictive U.S. immigration policies to laws directed at various immigrant groups. Prior to 1870, the subordination of people of African descent was further underscored by the fact that people from Africa could not become U.S. citizens through naturalization. The Nationality Act of 1790 limited naturalization to "free white persons" and specifically excluded African Americans and Native Americans. However, in 1870, Congress extended naturalization rights to anyone of African descent.

For more on African migration to the United States, *see* Bill Ong Hing, *African Migration to the United States: Assigned to the Back of the Bus*, in *The Immigration and Nationality Act of 1965: Legislating a New America*, eds. Gabriel Chin & Rose Cuison Villazor (Cambridge Univ. Press 2015).

B. A Brief Chronology of U.S. Immigration Laws[2]

The Naturalization Act of 1790. First uniform rule of naturalization established under Article 1 of the Constitution. "Free White persons" who have resided in the U.S. for at least two years may be granted citizenship if they demonstrate "good moral character" and swear allegiance to the Constitution.

Alien and Sedition Acts of 1798. In response to fears of an imminent French invasion and spies infiltrating American society, the Adams administration pushed through laws authorizing the President to apprehend, restrain, and remove noncitizens who are citizens or subjects of countries with which the U.S. is at war and deport any noncitizen who is "dangerous to the peace and safety of the United States." The laws also extended the residence requirement for naturalization to 14 years.

2. See generally, Bill Ong Hing, Defining America Through Immigration Policy (2004).

Chinese Exclusion Act of 1882. Suspended the immigration of Chinese laborers for ten years. Subsequent laws extended the exclusion permanently. Chinese exclusion was not repealed until 1942, in part because of the World War II alliance between China and the United States.

Gentlemen's Agreement of 1907. In response to anti-Japanese sentiment, Japan agrees to limit Japanese emigration to the United States and in return, the Theodore Roosevelt administration permits Japanese brides to join husbands already in the U.S. and convinces San Francisco to end the segregation of Japanese students from White public schools.

Immigration Act of 1917. Establishes a literacy requirement for immigrants entering the country and halts immigration from most Asian countries through the establishment of the "Asiatic Barred Zone."

National Origins Quota Act of 1924. Extending a 1921 law, establishing that immigration quotas will be calculated based on 2 percent of each nationality's proportion of the foreign-born U.S. population in 1890. The 1890 census was used to discriminate against southern and eastern Europeans who had arrived in the U.S. in great numbers after 1890.

Bracero Agreement of 1942. Labor shortages during World War II prompted the United States and Mexico to establish the Bracero Program, which allowed Mexican agricultural workers to enter the United States temporarily. The program lasted until 1964. Over this period, more than 4.5 million workers participated. Although the Bracero agreement contained stipulations with regard to health, housing, food, wages and working hours, most were disregarded by both U.S. government and the growers. The braceros suffered all types of abuses.

Refugee laws. Displaced Persons Act of 1948 allows over 200,000 refugees displaced from their European homelands by Nazi persecution. Refugee Relief Act of 1953 authorizes admission of 205,000 refugees fleeing persecution from Europe. Migration and Refugee Assistance Act of 1962 passed to assist Cubans fleeing Communism by authorizing funds to assist those fleeing because of persecution.

Immigration and Nationality Act of 1952. Repeal of the Asiatic Barred Zone but immigration numbers for Asian countries were limited because of the continuation of the national origins quota system. On the heels of World War II, the law provided for the exclusion of anarchists, and those affiliated with Communism or any other totalitarian party.

Immigration and Nationality Act of 1965. The national origins quota system is replaced with a seven-category preference system primarily emphasizing family reunification and limited numbers of employment visas for eastern hemisphere immigrants. Numerical limitations are placed on those preference catagories, however, no caps are placed on immediate relatives of U.S. citizens: spouses, parents and minor children. Western hemisphere immigrants are provided with one quota of 120,000 to share.

Immigration and Nationality Act Amendments of 1976. The "preference categories" of the 1965 Act are applied to immigrants from Western Hemisphere

countries as well as per country limitations of 20,000. In the process, Mexico's annual visa usage rate (which had been about 40,000) was virtually cut in half overnight, and thousands more were left stranded in the old's system's waitlist.

Refugee Act of 1980. The law provides a framework for admitting refugees from overseas and asylees who enter the United States and apply for asylum. Both asylees and refugees must demonstrate a "well-founded fear of persecution" on account of race, religion, nationality, membership in a particular social group, or political opinion.

Immigration Reform and Control Act of 1986. Almost one million undocumented immigrants are granted legalization under two programs: one for special agricultural workers and the other for those who have resided in the United States since 1982. For the first time, employer sanctions are imposed on any employers who knowingly hire undocumented workers.

Anti-Drug Abuse Act of 1988. A new "aggravated felony" ground of deportation is added. Although the term is initially limited to serious crimes, the list of aggravated felonies is expanded many times in subsequent legislation.

Immigration Act of 1990. The number of employment immigrant visas is nearly tripled from 54,000 to 140,000 annually. New employment categories are created, as well as a visa for those who can invest $1 million in an enterprise that creates ten jobs. The H-1B nonimmigrant category is created for nonimmigrants entering "in a specialty occupation."

Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Creates 3- and 10-year bars of inadmissibility for noncitizens who have resided unlawfully in the United States; expedited removal procedures are added; those seeking asylum must file within oneyear of entry; judicial review of deportation decisions is reduced; law is amended ("section 287(g)") to permit agreements with state and local officers to enforce immigration laws.

REAL ID Act of 2005. States required to verify applicant's legal status before issuing identification card for federal purposes; immigration judges can use minor inconstancies to find removable noncitizens not credible.

Secure Fence Act of 2006. Mandates construction of more than 700 miles of double-reinforced fence along U.S. southern border. Completed in 2015 for $2.3 billion, maintenance is costly.

NOTES AND QUESTIONS

1. Is there anything in the foregoing excerpts on immigration history that surprises you?
2. Are the effects of historical U.S. immigration policies apparent today? If so, how?
3. Is there anything in the history that relates to immigration or debates over immigration today?

III. RACIALIZATION OF IMMIGRATION LAW

As we saw in the history section, some immigration laws, such as the Chinese exclusion laws, were explicitly racist. We also saw that some enforcement efforts have focused on certain ethnic groups, such as Operation Wetback focusing on Mexicans and post-9/11 targeting of Muslims and Arabs. Some laws can be neutral on their face, but applied in a racialized manner.

In *De Reynoso v. INS*, 627 F.2d 958 (9th Cir. 1980), Mr. and Mrs. Reynoso-Gonzales (Reynoso) petitioned for review of an order denying suppression of their deportation proceedings. At the time, for a deportable alien to be eligible for suspension of deportation under 8 U.S.C. §1254(a)(1), one of the things they had to show was that they would face "extreme hardship, resulting from deportation, to the alien, or to his spouse, parent, or child who is a citizen of the United States, or an alien lawfully admitted for permanent residence." Mr. and Mrs. Reynoso both had several family members already legally living in the United States, including Mr. Reynoso's elderly parents, who depended on the petitioners for $100 a month to supplement their Social Security payments. Mrs. Reynoso would be forced to give up gainful employment if deported, and Mr. Reynoso would have to give up his $250/week carpenter job and return to being a stoop laborer. Additionally, Mrs. Reynoso, who suffered from poor health due to an automobile accident, had better access to needed medical care in the United States.

The majority stated:

> The only real hardship caused by repatriation in this case, however, would be the change in the personal standard of living that occurs any time a person without substantial wealth or property is forced to move from the United States to Mexico.
>
> In this case, *there is nothing to distinguish the hardship of these petitioners from that of any of the thousands of other Mexican nationals who annually enter the United States illegally* and who then accumulate seven years of good time in this country. The resulting changes in their standard of living and the resulting widening disparity between their standard of living here and that which remains the lot of their fellow countrymen who continue the struggle for existence in Mexico do not, per se, create extreme hardships. It is the disparity between the standards of living in the two adjoining countries which provides the magnet for the illegal immigration which flows steadily northward. If this court were to grant relief in this case we would be holding that the hardship involved in returning to a former, lower material standard of living automatically requires a remand in every deportation case that fits the residential and character requirements of [8 U.S.C. §1254]. We are satisfied that Congress did not intend, in granting discretion to the Attorney General, to burden that officer with the numbers of hearings that would be required if the discretion conferred by the statute were to be as limited as the petitioners' contentions would limit it.

De Reynoso v. Immigration & Naturalization Serv., 627 F.2d 958, 959-960 (9th Cir. 1980) (emphasis added).

But the dissent in *De Reynoso* noted:

> The majority ignores the totality of facts that relate to the Reynosos and, instead, invokes a floodgates argument in characterizing their situation as similar to that of "any of the thousands of other Mexican nationals who annually enter the United States illegally and who then accumulate seven years of good time in this country." The evil in this approach is its stereotypical treatment of all Mexican aliens who seek to remain in this country. Moreover, this approach flouts the long established rule that each hardship case must be decided on its own facts.. . .In reviewing the Board's decision denying an application for suspension of deportation, our role is to examine each case on its own merits, rather than to speculate about "thousands" of other matters not before us.

De Reynoso v. Immigration & Naturalization Serv., 627 F.2d 958, 963 (9th Cir. 1980).

NOTES AND QUESTIONS

1. At the time of this decision, the available deportation relief for undocumented immigrants required seven years of continuous residence, good moral character, and a showing that deportation would result in extreme hardship to the applicant or lawful relatives. We will see in Chapter 11 that the relief currently available imposes an even more rigorous hardship requirement. Do you agree with the majority in *De Reynoso* that because there is "nothing to distinguish the hardship of these petitioners from that of any of the thousands of other Mexican nationals who annually enter the United States illegally" the resulting economic hardship should be regarded as insufficient?
2. Is race a factor in the outcome in the case?
3. What's the effect of race or ethnicity in the next case?

De Avila v. Civiletti

643 F.2d 471 (7th Cir. 1981)

This is an appeal by the United States Government and by the plaintiffs, a group of Mexican visa applicants, from an amended final order and permanent injunction against the application by the State Department of its interpretation of the [1976 Amendments].

The 1976 amendments imposed a limitation of 20,000 per fiscal year on immigration from any Western Hemisphere country. The government's fiscal year runs from October 1 to September 30, but the 1976 amendments did not become effective until January 1, 1977, after one full quarter of fiscal year 1977 had expired. During that first quarter, 14,203 visas were issued to Mexicans pursuant to the immigration system which prevailed in the Western Hemisphere before the new law became effective. The State Department nevertheless charged those visas against the newly-imposed national quota of 20,000, leaving only 5797 visas available for Mexican immigrants between January 1 and September 30, 1977, of which 5435 were actually issued.

A group of Mexican visa applicants and their sponsoring relatives ("the applicants") filed a class action in the United States District Court for the Northern District of Illinois, claiming that the State Department's application of the per country quota resulted in an underallocation of visas to them in fiscal year 1977, in that the first quarter visas should not have been charged against Mexico's annual allotment. The applicants sought "recapture" of 13,366 unissued visas for the benefit of class members currently on the immigrant waiting list.

. . .

Immigration System Prior to the 1976 Amendments

To understand the action of the State Department and its adoption of the challenged construction of the 20,000 per country limit, it is necessary to appreciate the context of the problem through a brief history of the provisions of the Immigration and Nationality Act, 8 U.S.C. §§1101 et seq. ("the Act") both before and immediately after 6 the effective date of the 1976 amendments thereto, January 1, 1977. Prior to that date, immigration to this country was governed essentially by the Act of October 3, 1965, 79 Stat. 911-922 ("the 1965 amendments") which amended the basic Immigration and Nationality Act of 1952. Under the 1965 amendments what amounted to a dual system applied to immigration from the Eastern and Western Hemispheres respectively.

Immigration from the East was subject to an overall annual limitation of 170,000, 8 U.S.C. §1151(a) (1970), while the annual fiscal year quota from the Western Hemisphere was 120,000. Section 21(e) of the 1965 amendments. The law also accorded different preferences to eight categories of Eastern Hemisphere visa applicants according to their familial relationship with United States citizens or permanent residents, possession of certain professional skills, or refugee status. 8 U.S.C. §1153(a)(1)-(8). 7 Each of seven so-called "preference" categories was allocated a percentage of the overall hemispheric quota, and those preferences based on family ties to United States citizens or permanent residents were also entitled to unused visas from a higher category. The eighth, so-called "non-preference" category received only visas unused by the seven preference groups. In addition to the 170,000 limit on immigration from the Eastern Hemisphere as a whole, the 1965 amendments provided that the number of immigrants from any Eastern country not exceed 20,000 per fiscal year. 8 U.S.C. §1152(a) (1970).

The provisions governing immigration from Western Hemisphere nations were markedly different from those in effect with respect to the rest of the world. Although immigration from this hemisphere was limited to 120,000 per fiscal year, this limitation was not incorporated into the Immigration and Nationality Act itself. Moreover, Western Hemisphere immigrants were defined as "special immigrants," 8 U.S.C. §1101(a)(27) (1970), and were not subject to any annual per country quota. 8 U.S.C. §1153(a) (1970). In the absence of such a limitation, Mexico annually accounted for 40-45,000 immigrants per year, or upwards of a third of the overall hemispheric quota.

The eight category preference system set out in section 1153(a) of the Act did not apply to Western Hemisphere visa applicants either. Instead, such applicants were required to obtain a labor certification from the United States Secretary of Labor, or show exemption from this requirement based on certain familial relationships to United States citizens or permanent residents. 8 U.S.C. §1182(a)(14) (1970). Congress did not establish a system for processing special immigrants and the State Department administratively established the policy of processing such visa applicants in strict chronological order according to the "priority date" on which they had either obtained a labor certification or submitted documentation showing exemption therefrom.

Changes by the 1976 Amendments

The Immigration and Nationality Act Amendments of 1976 wrought a number of changes in the Act. In effect, the special legislation that had governed the Western Hemisphere was repealed, and Western Hemisphere immigrants were made subject to the same immigration system that had governed the rest of the world since 1965. The most significant change that the 1976 amendments accomplished was the imposition on the Western Hemisphere of the 20,000 limitation on immigration from any one country and along with it the eight category preference system theretofore applicable only in the Eastern Hemisphere. While the 120,000 Western Hemispheric quota remained in effect, section 1152(a) of the Act, now applicable to both hemispheres, provided that:

> (T)he total number of immigrant visas. . .made available to natives of any single foreign nation under paragraphs (1) through (8) of section 1153(a) of this title shall not exceed 20,000 in any fiscal year.

8 U.S.C. §1152(a) (1976).

This dispute arises from the fact that section 1152(a) did not indicate whether visas issued to special immigrants in the first quarter of fiscal year 1977 were to be counted towards the 20,000 quota. The 14,203 visas issued to Mexicans in that time had clearly not been "made available. . .under. . . section 1153(a)" as that provision was not yet in effect with respect to the Western Hemisphere. The State Department nevertheless adopted a policy (the "cross-systems charging policy") of counting the first quarter visas towards each Western Hemisphere country's national quota. As a result, only 5797 visas were allocated to Mexico in the final three quarters of the fiscal year, of which only 5435 were actually issued. Due to administrative difficulties in implementing the new system in the first year of its operation, actual visa issuances in the Western Hemisphere in fiscal year 1977 fell short by 13,366 of the hemispheric quota. It was these unissued visas that the plaintiffs sought to recapture in their lawsuit.

Discussion

The imposition on Western Hemisphere countries after the beginning of the fiscal year of a quota manifestly intended to apply on a full fiscal-year basis created an ambiguity in the Act as to visas issued in the first quarter of

fiscal year 1977. As the district court noted in its opinion, three solutions to this ambiguity are possible. The approach adopted by the State Department was to charge all visas issued in the fiscal year against the quota, despite the absence of an explicit mandate for doing so. The plaintiffs, on the other hand, advocate giving no effect at all to the quota with respect to the first quarter of the fiscal year. In their view, a full 20,000 visas should have been issued to Mexicans in the last three quarters of fiscal year 1977. The third resolution, and the one adopted by the district court, was to apply the 20,000 quota on a pro rata basis over the portion of fiscal year 1977 during which the 1976 amendments were effective, so that 3/4 of 20,000, or 15,000 visas would be allocated to Mexicans during the last three quarters of the fiscal year.

In choosing among these different approaches, it becomes necessary to ascertain and effectuate the legislative purpose in enacting the 1976 amendments. To that end, it is important to note that the interpretation of the State Department, the agency statutorily entrusted with administration of the Immigration and Nationality Act, 8 U.S.C. §1104, is entitled to substantial deference, and should be followed "unless there are compelling indications that it is wrong.". . .

The State Department's responsibility for administering the Immigration and Nationality Act includes the provisions relating to numerical limitations on immigration. 8 U.S.C. §§1104, 1152(b) & (d), 1153(e). In construing its obligations the State Department relies primarily on the legislative history of the 1976 amendments to support its cross-systems charging policy. It is clear from the following language in House Report No. 94-1553, U.S. Code Cong. & Admin. News 1976, 6073, which accompanied the bill, that Congress intended to eliminate disparities in immigration matters among Western Hemisphere countries and between the two hemispheres, ensuring that all nations be treated alike:

During the 94th Congress, a general consensus has been reached that the 20,000 per country limit should be extended to all countries of the world, including those geographically contiguous to the United States. Such a provision is included in the Administration's immigration bill. H.R. 10323, in contrast to Administration support during the 93rd Congress of a 35,000 allotment for the contiguous countries.. . .

The decision by this Committee to limit all countries to 20,000 has been based primarily on the desire that this legislation mark the final end of an immigrant quota system based on nationality, whether the rationale behind it be the alleged national origins of our citizenry, as it was in the past, or geographical proximity the argument previously advanced for preferential treatment of Canada and Mexico. The proposed legislation rejects the concept of a "special relationship" between this country and certain other countries as a basis for our immigration law, in favor of a uniform treatment for all countries. . .

In considering an earlier bill to amend the Immigration and Nationality Act, the House rejected a provision giving Mexico a 35,000 annual limitation, as opposed to the generally applicable 20,000 limit. 119 Cong. Rec. 31456-64.

The State Department thus argues that it would have violated the clearly-expressed Congressional intent that immigration from no country exceed 20,000 per year, if it had allocated more than 5797 visas to Mexicans in the final three quarters of fiscal year 1977.

The plaintiffs, in support of their position, cite the plain language of section 1152(a), which limits to 20,000 per year only those visas issued pursuant to section 1153(a). They point out that the 14,304 visas issued to Mexicans in the first quarter of fiscal year 1977 were not made available pursuant to section 1153(a), as that provision was not in effect until January 1, 1977, after the first quarter of the fiscal year had expired. Invoking the maxim of statutory interpretation expressio unius est exclusio alterius, they contend that by mentioning only visas issued pursuant to §1153(a), Congress meant to exclude from the 20,000 quota visas issued under the pre-1976 amendments system. They further contend that the State Department's cross-systems charging policy gave retroactive effect to the quota by applying it to visas issued before its effective date, interfering with their "settled expectations" and "antecedent rights" to the issuance of visas. Citing settled immigration practice that numerical limits on visa issuance are also mandatory levels that must be reached, Silva v. Bell, 605 F.2d 978, 988 (7th Cir. 1979), the applicants claim that they were entitled to the issuance of a full 20,000 visas in that portion of fiscal year 1977 during which the 1976 amendments were in effect.

The district court held that the State Department's interpretation of the 1976 amendments was "both unreasonable and contrary to Congressional intent", stressing that the 14,203 visas issued to Mexicans in the first quarter of fiscal year 1977 were not required by the literal language of section 1152(a) to be counted towards the national quotas. The district court reasoned that the quota applied only to those visas "made available" under the preference system as applied to Western Hemisphere immigrants for the first time on January 1, 1977, and thus did not include visas issued between October 1, 1976 and December 31, 1976. Acknowledging that the 1976 amendments' legislative history indicated Congress' desire to limit all countries to 20,000 visas annually, the court concluded that this objective had no effect prior to the amendments' effective date, January 1, 1977. In its view, the cross-systems charging policy amounted to an impermissible retroactive application of the quota.

. . .

Where the problem of interpretation concerns a situation apparently not foreseen by the legislators, it is appropriate to consult those areas covering the same subject where expression of the legislative intent is clear, and extrapolate therefrom. Montana Power Co. v. FPC, 144 U.S. App. D.C. 263, 445 F.2d 739 (D.C. Cir. 1970) (en banc), cert. denied, 400 U.S. 1013, 91 S. Ct. 566, 27 L. Ed. 2d 627 (1971). We believe Congress clearly intended that the 1976 amendments impose the same ceiling on immigration from all countries whether from the Eastern or Western Hemisphere. H.R. Rep. No. 94-1553, supra. By the time the State Department confronted the problem of applying the 1976 amendments to Western Hemisphere immigrants in mid-fiscal year, a large waiting list of