

IMMIGRATION AND REFUGEE LAW AND POLICY

SIXTH EDITION

STEPHEN H. LEGOMSKY
CRISTINA M. RODRÍGUEZ

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IMMIGRATION AND REFUGEE LAW AND POLICY

SIXTH EDITION

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*To Lorraine, Annie, Katie, Kai, and Baby on the Way,
and in loving memory of my parents, Jack and Pauline*
SHL

Para mi familia
CMR

PREFACE TO THE SIXTH EDITION

In the United States of America, immigration touches everyone. The vast majority of us are either immigrants ourselves or the recent descendants of immigrants. Some Americans, and some of our ancestors, fled hopelessness and poverty. Others came to escape tyranny. A great number sought to unite their families or came in search of economic and professional opportunities. Still others were brought here forcibly, as slaves.

But whether one's own immigrant heritage is centuries-old or more recent, all who live here now are part of a national community whose character has been sculpted by generations of immigrants. History aside, the law by which a nation selects its members speaks volumes about the nation's values and about the society those values will produce.

That United States immigration policy permeates every aspect of American life and affects millions of people in far-off lands might alone explain the fervor with which immigration issues tend to be argued. But there are other explanations. Debates in this field ignite core values that excite passion—fundamental beliefs about sovereignty, national security, race, personal autonomy, equal economic opportunity, freedom of association, national community, civil rights and human rights, taxes, jobs, education, welfare, law enforcement, labor policy, the environment, foreign relations, war, and the distribution of wealth. Those issues and passions are not uniquely American and neither, therefore, is the debate over immigration. The United States has its own distinctive immigration history, but globalization, transportation, technology, armed conflict, and rapid economic change have brought the immigration issue to sending and receiving states all over the world.

The first edition of this book appeared in 1992. Its preface described the surging public interest in immigration policy and frenetic change in immigration law. Since then, public interest has only grown and the law has continued to lurch forward, rapidly and at times clumsily. The present edition reflects a number of important developments that altered the content, and to some extent the organization, of the materials in this coursebook. Throughout 2013, policymakers seriously debated the prospect of “comprehensive” legislative reform of immigration. As of this writing, fervent debate over the legal limits and wisdom of executive action and President Obama's broad exercise of prosecutorial discretion to provide relief to certain categories of noncitizens continues. Since the fifth edition, scholars, commentators, and government officials have paid considerable attention to the issues of *illegal* immigration and law enforcement. These developments, combined with the more assertive roles that state and local governments have played in the last decade, have required a reorganization of chapters 2 (constitutional law), 10 (reshaped to focus on enforcement generally rather than national security specifically), and 12 (undocumented immigrants). The intervening years have also seen other fundamental changes to the legal, political, economic, and cultural landscape of immigration and refugee law and policy. These changes have related to same-sex marriage, unaccompanied children, “crimmigration,” and asylum claims based on particular social group—especially with respect to domestic violence and other gender-related claims.

Such is the life of immigration law. The public mood is ever-changing, and so are the resulting rules. Through it all, two venerable traditions have taken hold. One has been to admit immigrants in plentiful numbers. The other has been to complain, every step of the way, that today's immigrants just aren't of the same caliber as yesterday's. The irony, of course, is that today's immigrants eventually become the role models to whom tomorrow's immigrants invariably suffer by comparison.

Something else is different. In the past, Congress typically enacted major immigration legislation every ten to twenty years and let things simmer in between. Starting in the 1980s, federal (and state) legislation in this field became more frequent; recent years have also seen a good deal of major executive branch action. The "immigration issue" is now, and almost certainly will remain, a perennial.

Law school curricula have kept pace with that trend. Thirty years ago, the law school that offered a course in immigration was the exception rather than the norm. Today, almost every law school in the United States offers a course on immigration law. Many law schools also offer immigration clinics and specialized courses in refugee law, citizenship law, or business immigration. Scholarship in this once esoteric field is now abundant, sophisticated, and diverse. And in our information age, exchanges of ideas now routinely occur across both national and disciplinary boundaries.

The Pedagogy

Immigration courses are taught in a variety of ways that reflect both the instructors' pedagogical goals and their preferred methodologies. Our goals for a course in immigration and refugee law include those that we consider fundamental to legal education generally—honing students' abilities to analyze, evaluate, and synthesize difficult materials; challenging them to think about broader questions of law and social policy; training them to work with, and to develop confidence in their abilities to work with, traditional legal materials such as statutes and cases; sharpening problem-solving skills; enhancing communication skills; and fostering social and ethical responsibility. We also believe a survey course in immigration law should strive to accomplish other things: It should expose students to the core principles of immigration law; force them to think critically about immigration policy and the theory that underlies it; require them to use the comprehensive and intricate Immigration and Nationality Act to refine their statutory interpretation skills; and enable students to acquire a feel for the administrative process so central to immigration. Above all, a successful immigration course should appeal to students' imaginations, encouraging them to embrace ideas from other nations, from other disciplines, and from polar opposite ideologies.

This coursebook, therefore, walks a middle ground. It mixes theory, policy, and politics with practice-oriented materials that deal in doctrine, planning, and problem-solving. There is enough of both kinds of material that instructors will be able to give their courses whatever emphasis they think appropriate.

A few distinctive features of the book are worth mentioning:

(1) There is heavy use of fact problems. They generally call upon the student to plan a strategy for helping a hypothetical client or analyze how a case is likely to come out.

(2) There are a number of “Simulation Exercises.” Students play the roles of legislative drafters, witnesses testifying for or against proposed reform legislation, immigration lawyers advising clients, lawyers engaged in oral argument before an appellate court, dissenting judges, and members of Congress debating bills on the House floor. The most ambitious of the simulation exercises are a mock removal hearing (chapter 9) at which the students play the roles of government trial attorneys and the immigrant’s counsel, and a simulated attorney-client asylum interview (chapter 11). Student enthusiasm for these simulations has been especially keen and the preparation levels unusually high.

(3) Immigration lawyers know that this area of practice involves much more than statutes and appellate court decisions. The materials here attempt, within reasonable limits, to impart the flavor of the administrative process. Substantial space is devoted to the decisions of the Board of Immigration Appeals (BIA), to important principles of administrative law, and to the interplay between the statute and the regulations.

(4) The Notes and Questions are more extensive than in many law school coursebooks. Whatever classroom methods a teacher uses—Socratic dialogue, group discussion, lecture, simulation, or a combination—the educational gains are greatest when the students have done some hard thinking before they walk into the classroom. Those of us who teach Socratically have a particular problem: The Socratic method achieves its goals only if the questions are provocative and challenging. If they are, however, students who hear the questions in class for the first time will rarely be able to provide spontaneous answers that do the questions justice. To address that dilemma, this book contains the kinds of questions and fact problems—ranging from highly theoretical to highly practical—that can be used as the basis for classroom discussion to the extent the instructor wishes. Spontaneity has its benefits, but too often the flip side is a superficial level of analysis devoid of any lasting educational benefit. When students think critically about specific questions and problems before class, their thoughts can be more contemplative and the resulting class discussion more vibrant and sophisticated. At any rate, most of the questions generate differences of opinion that preserve a good deal of spontaneity.

This book is intended to be used in conjunction with the text of the Immigration and Nationality Act. Several excellent statutory supplements (which also include the texts of the 1951 Refugee Convention, 1967 Protocol, and miscellaneous other documents) are available.

STEVE LEGOMSKY
CRISTINA RODRÍGUEZ

ACKNOWLEDGMENTS

BY STEVE LEGOMSKY

It is customary for an author to thank the many people without whose efforts the book could not possibly have been written. That tribute is traditionally followed by a gracious acknowledgment that any errors are, of course, solely the responsibility of the author.

I have always dreamed of writing a book in which I could say: “No one helped me with this book. And there are no errors, but if there were, they would be somebody else’s fault.”

Over the years, a great number of people have shattered that dream. A few deserve special mention. Since the fifth edition I have been fortunate to have Cristina Rodríguez as a co-author; her contributions have been immeasurable, and she has been a joy to work with. When I wrote the first edition I was just getting my feet wet in refugee and asylum law; Deborah Anker came to my rescue and vastly improved what is now chapter 11. Maria Frankowska provided endless encouragement and ideas. Arthur Helton, killed in Baghdad while continuing his life’s work of human rights for all, was and remains a source of ideas and inspiration; his friendship was a gift. Peter Schuck’s prolific and provocative feedback has been especially generous. I am grateful to the Honorable Gene McNary for educating me about the immigration bureaucracy and Capitol Hill at monthly meetings during his four-year term as Commissioner of the former INS. I owe a similar debt to my dedicated former colleagues at the Department of Homeland Security—especially the incomparable Dea Carpenter, who taught me more than she realizes and cleaned up after all my mistakes. It was a privilege to serve in the Obama Administration as USCIS Chief Counsel from 2011 to 2013. I also thank two other special people—Kevin Johnson and Michael Olivas—for their continuing commentary, for alerting me to a glaring (and embarrassing) omission in the first two editions, and most of all for their lasting friendship.

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Before writing the first edition, I had the advantage of teaching for several years from an excellent casebook by Alex Aleinikoff and Dave Martin. Since then, the additions of Hiroshi Motomura, Maryellen Fullerton, and Juliet Stumpf have only enhanced their fine book. I value their friendship and continue to appreciate their huge positive impact on our field.

In the first edition I thanked my little daughters, Annie and Katie, for their superb assistance with the cutting and pasting. By the time of the second edition, alas, they had grown too old for cutting and pasting. By then, technology and downsizing had eliminated that job anyway. They still contribute nonetheless, in countless ways that I knew they would not fully appreciate until they were blessed with children of their own, as Katie now is. Expressing proper appreciation to them, and to my loving wife, Lorraine, is not possible in a few words. They have all tolerated my ridiculous work hours and my mood swings with much more grace than I deserve, and they have provided the love and encouragement that have sustained me through the most grueling periods.

So much for my dream.

The author thanks the many people without whose efforts this book could not possibly have been written. Any errors are, of course, solely the responsibility of the author.

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BY CRISTINA RODRÍGUEZ

I first engaged the subjects of immigration and citizenship in historical and theoretical perspective as a student at Yale College, under the guidance of Rogers Smith, whose work continues to shape my thinking profoundly, and whose early mentorship still means the world to me. Harold Koh supervised my first attempt at immigration law scholarship when I was a student at Yale Law School, and I count his example and encouragement as crucial to my development as a teacher and scholar. I also encountered the work and ideas of Peter Schuck and Mike Wishnie while still a law student, and I attribute my eventual gravitation to this field in large part to their influence.

When I joined the legal academy in 2004, many of the established figures of the immigration law world extended crucial intellectual and personal support. I have benefitted, in particular, from the warm welcomes and ongoing engagement of my co-author, Steve Legomsky, as well as Hiroshi Motomura and Michael Olivas. David Abraham, Alex Aleinikoff, Dave Martin, Ruth Rubio-Marín, Ayelet Shachar, Peter Spiro, and Leti Volpp also have been invaluable interlocutors. The lively and frequent conversations I have had with my outstanding cohort in the field, which happily keeps growing, also have been vital to my research and writing. I have benefitted in particular from the examples and intellectual friendship of Kerry Abrams, Muneer Ahmad, Adam Cox, and Juliet Stumpf, as well as Jennifer Gordon, Pratheepan Gulasekaram, and Joseph Landau. Without my collaborations over the last several years with the Migration Policy Institute and, especially, Muzaffar Chishti, my understanding of the political economy of immigration law and my conceptions of what is truly at stake in the migration debates of our time would be impoverished.

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TECHNICAL CONVENTIONS AND ABBREVIATIONS

Deletions from reprinted materials are indicated by three asterisks. If an entire paragraph is being deleted, the asterisks are centered. Footnotes and citations, however, are deleted without notation.

There are three kinds of footnotes in this book—original footnotes in reprinted materials, our own footnotes to reprinted materials, and our own footnotes to our own text. In each chapter we use one continuous sequence of footnotes, regardless of whose footnote it was. The reader will still be able to distinguish author footnotes from original footnotes in reprinted materials. If the footnote is part of the original reprinted material, the footnote will start with the phrase “[Footnote x in original.]” If the footnote is added by the authors to reprinted material, the abbreviation “Eds.” will appear at the end of the footnote.

The Immigration and Nationality Act (INA) has been codified as title 8 of the United States Code (8 U.S.C.). Title 8 has not yet been enacted into positive law. The INA and 8 U.S.C. use different sequences of section numbers, and there is no systematic conversion formula. For example, INA §§ 101 and 212 correspond, respectively, to 8 U.S.C. §§ 1101 and 1182. For the sake of uniformity (and because DOJ and DHS regulations are pegged to the INA section numbers that they implement), this book uses only the INA section numbers. References to sections of 8 U.S.C. in the reprinted materials have generally been changed to INA section numbers without any notations to that effect. Students using this book should not need the parallel citations to 8 U.S.C., but a conversion chart is provided at the front of each volume of 8 U.S.C.A. for anyone who wants it.

The following abbreviations are used throughout the book:

1951 Convention	Convention Relating to the Status of Refugees, accepted by U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, signed at Geneva, July 28, 1951
1967 Protocol	United Nations Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, 19 U.S.T. 6223, T.I.A.S. No. 6577, done at New York, Jan. 31, 1967
AEDPA	Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104–132, 110 Stat. 1214 (Apr. 24, 1996)
AILA	American Immigration Lawyers Association (the main national organization for immigration lawyers in the private sector)
Anker	Deborah E. Anker, <i>Law of Asylum in the United States</i> (2014 ed.) (the leading treatise on U.S. asylum law)

BALCA	Board of Alien Labor Certification Appeals (within Dept. of Labor)
BIA	Board of Immigration Appeals (within EOIR, below)
BIB	Bender's Immigration Bulletin
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (adopted 10 Dec. 198
CBP	Customs and Border Protection (within DHS, below)
DACA	Deferred Action for Childhood Arrivals (DHS, June 15, 2012)
DHS	U.S. Dept. of Homeland Security
DHS Annual Flow Report 2013	U.S. Dept. of Homeland Security, Office of Immigration Statistics, Annual Flow Report, U.S. Lawful Permanent Residents: 2013 (May 2014), http://www.dhs.gov/sites/default/files/publications/ois_lpr_fr_2013.pdf
EBSVERA	Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. 107–173, 116 Stat. 543 (May 14, 2002)
EOIR	Executive Office for Immigration Review (adjudicative tribunal within Dept. of Justice)
FAM	U.S. Dept. of State Foreign Affairs Manual
Gordon, Mailman & Yale-Loehr	Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, <i>Immigration Law and Procedure</i> (the leading treatise on immigration law; multiple volumes updated regularly)
HSA	Homeland Security Act of 2002, Pub. L. 107–296, 116 Stat. 2135 (Nov. 25, 2002)
I. & N. Dec.	United States Dept. of Justice, Administrative Decisions under Immigration and Nationality Laws (bound volumes reporting decisions of BIA, AG, and sometimes USCIS or former INS)
ICE	Immigration and Customs Enforcement (within DHS, above)

IIRIRA	Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. 104–208, 110 Stat. 3009, Div. C (Sept. 30, 1996)
IJ	Immigration Judge (within EOIR, above)
IMFA	Immigration Marriage Fraud Amendments, Pub.L. 99–639, 100 Stat. 3537 (Nov. 10, 1986)
Imm. Act 1990	Immigration Act of 1990, Pub.L. 101–649, 104 Stat. 4978 (Nov. 29, 1990)
INA	Immigration and Nationality Act, Pub.L. 82–414, 66 Stat. 163 (June 27, 1952), as amended
INS	U.S. Immigration and Naturalization Service (now defunct agency replaced by several agencies within DHS)
IR	Interpreter Releases
IRCA	Immigration Reform and Control Act, Pub.L. 99–603, 100 Stat. 3359 (Nov. 5, 1986)
LPR	Noncitizen admitted as “lawful permanent resident” of the United States
NACARA	Nicaraguan Adjustment and Central American Relief Act, Pub.L. 105–100, Title II, 111 Stat. 2160, 2193 (Nov. 19, 1997)
OCAHO	Office of the Chief Administrative Hearing Officer (within EOIR, above)
REAL ID Act	REAL ID Act of 2005, Division B of Pub. L. 109–13, 119 Stat. 231 (May 11, 2005)
S.744	Senate Bill 744, 113th Cong., 1st Sess., passed by Senate June 27, 2013 [not enacted]
UNHCR	Office of the United Nations High Commissioner for Refugees
UNHCR Handbook	UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, Sept. 1979)

USA PATRIOT ACT	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub.L. 107–56, 115 Stat. 272 (Oct. 26, 2001)
USCIS	U.S. Citizenship and Immigration Services (within DHS, above)
Welfare Act	Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104–193, 110 Stat. 2105 (Aug. 22, 1996)

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