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STUDYING IMMIGRATION: A BORDER CROSSED

*Lynda S. Zengerle**

IMMIGRATION: PROCESS AND POLICY. By *Thomas Alexander Aleinikoff* and *David A. Martin*. St. Paul, Minn.: West Publishing Co. (American Casebook Series). 1985. Pp. 1xxxiv, 1042. \$30.95.

Areas of the law can become fashionable and trendy, just like wine spritzers or Bruce Springsteen. Unlike light cocktails and rock stars, however, a hot legal issue usually does not fade into obscurity within a brief period of time. For the past several years, the issue of immigration has come increasingly into the nation's consciousness as an extremely important subject. The general perception of immigration law has concurrently evolved to view the field as more complex and challenging than previously recognized. And, in apparent response to this new interest and attention accorded an area of the law based on a statutory scheme second in complexity only to the Internal Revenue Code, Professors Aleinikoff and Martin have written the first widely used immigration casebook. The very fact that such a substantial casebook has been published signals a recognition that what was once commonly seen as the purview of form fillers is now an attractive area of practice for attorneys seeking intellectual and legal stimulation and challenge.

At the outset, the difficulties in reviewing a casebook should be emphasized.¹ A casebook is written as a teaching tool, a springboard for debate, and a basis for lectures. Aleinikoff and Martin have been animated by this tradition, but it is just that animation that creates headwinds for any critique prepared by one who reads in isolation. The book is peppered with rhetorical and practical questions as well as presentations of both sides of an argument through well-excerpted articles and speeches. Indeed, the authors even bring their own differences to light by quoting dueling law review articles they have written.² Without the benefit of discussion following study, however,

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1. In recently preparing a review for the American Bar Association of a book in the same subject area, I found the requirement to evaluate a work written primarily for practitioners a much easier mandate to fulfill. See Zengerle, Book Review, A.B.A. J., Sept. 1985, at 76 (reviewing B. HING, *HANDLING IMMIGRATION CASES* (1985)).

2. See, e.g., p. 710 of the text, where the reader is directed to both Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165

the full value of the specific questions asked throughout the text is difficult to assess. The publication of this book makes me wish that I could return to the classroom and engage in the debate that the authors so clearly wish to provoke.

Perhaps that incitement to debate — or at least illumination of the controversy currently raging — is the hallmark of this book. The authors underscore the importance of studying a topic that has long been ignored in law schools across the country. They point out that in the study of immigration law, “[m]ajor public policy issues appear repeatedly, posing deeper questions concerning national identity, membership, moral philosophy, constitutional interpretation, public law, public administration, international relations, and the limit of practical politics. Immigration law also furnishes a vital setting for studying the interaction of our three branches of government” (p. xvii). They go on to state their objective of familiarizing the reader with an “exceedingly complex statute” and exposing the student to “the current debates in American immigration and refugee policy” (p. 1).

The organization of the material reflects these objectives. The first subject addressed is the arguable source of the federal immigration power. Working through an analysis of *The Chinese Exclusion Case*,³ we are asked to consider whether the power to regulate the flow of aliens into our country, as exercised by Congress, is delegated by the Constitution or inherent in the concept of sovereignty. Chapter One ends with lengthy selections from several philosophical articles and treatises about immigration, such as *Immigration from Developing Countries: Some Philosophical Issues*,⁴ *Social Justice in the Liberal State*,⁵ and *Spheres of Justice: A Defense of Pluralism and Equality*,⁶ and with the authors’ question: “[W]hat is and should be the relationship between American immigration and foreign aid policies?” (p. 80). The authors’ use of these particular sources and their linking of immigration and foreign policy typifies the type of thought-provoking presentation found throughout *Immigration: Process and Policy*.

Similarly in Chapter Two, we are given a brief overview of the federal agencies responsible for the implementation of immigration law and the complexities that result from the involvement of not one but four separate cabinet departments.⁷ In forecasting problems aris-

(1983), and Aleinikoff, *Aliens, Due Process, and “Community Ties”: A Response to Martin*, 44 U. PITT. L. REV. 237 (1983).

3. 130 U.S. 581 (1889).

4. King, *Immigration from Developing Countries: Some Philosophical Issues*, 93 ETHICS 525, 525-31 (1983).

5. B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 89-95 (1980).

6. M. WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 31-34, 37-40, 45, 47-49, 61-62 (1983).

7. The Department of Justice (of which the Immigration and Naturalization Service is a constituent part), the Department of State, the Department of Labor, and the Department of

ing from the operation of the Immigration and Naturalization Service (INS) within this framework, the authors observe:

Administering any complex statute . . . often requires the administrators to counsel affected individuals regarding their possible rights, liabilities, and future actions In large measure, these functions involve *service* to the public. *Enforcement* of a statute, however, particularly one that is frequently violated, might probably call forth an attitude of tough-mindedness and suspicion on the part of the officials involved. [p. 82; emphasis added]

They offer advice concerning the need to be alert to conflicts and confusion of roles stemming from these seemingly incompatible tasks, and they sensitize the reader to the basis for the occasionally monumental struggles faced by the INS today.

The remaining chapters deal with the specific questions of admission into the United States and the various aspects of the law addressing the issues tied to an alien's desire to remain here, that is, exclusion, deportation, judicial review, asylum, undocumented aliens, and citizenship. Although I do not have a firm basis for comparison, my impression is that with less than a third of the book devoted to actual case presentation, Aleinikoff and Martin concentrate proportionally more on secondary materials than do many, if not most, other casebook authors. This may reflect the minimal resources that the typical immigration litigant can bring to bear in developing the relevant issues as contrasted, for example, with the typical corporate tax litigant. There is nothing comparable in immigration law to the layers of sophisticated judicial opinions, treatises, hornbooks, and law review articles which have been written about tax law. The comparative paucity of carefully crafted legal decisions may explain what seems to be the need to rely on commentary rather than judicial material. The book's Table of Authorities (pp. 1iii-1xi) lists 289 different secondary authorities and while some are cited only in passing, others are quoted at considerable length. One of the important contributions of this effort is the amassing of so much informative background material in one place. There is, however, some difficulty in ascertaining when the authors are advocating their own positions and when they are quoting someone else's work within the text, a style that causes some degree of confusion.⁸

Health and Human Services (of which the Public Health Service is a constituent part), all have specific responsibilities under the Immigration and Nationality Act.

8. For example, in Chapter Eight, Section D (pp. 726-43), in addition to citing or briefly quoting from a number of sources such as public laws, judicial decisions, INS Staff Studies, *Interpreter Releases* (the standard service in the field), and law review articles, the authors provide lengthy excerpts from hearings before the House Committee on the Judiciary; an editorial by a U.S. Senator; a response to that editorial; and testimony before the House Committee on the Judiciary by one of the authors. Such an array of sources, interspersed with editorial comments, can be disconcerting to the reader who wishes to remain cognizant of when the authors are voicing their own opinions and when they are airing the viewpoints of others.

Despite such occasional ambiguities, it is clear that throughout their book, Aleinikoff and Martin help readers understand the evolution of U.S. immigration law, assess the current national situation, and ask whether our present statutory scheme actually "makes sense" (p. 35). They begin their book, and its discussion of the foundations of the immigration power, by asking:

[W]e believe that it is important first to explore possible moral bases for, or constraints upon, exercise of the immigration power. If our presence in the United States is essentially an accident of birth, what gives us the right to keep others from entering? What is the nature of our moral claim to the territory of the United States? What is our responsibility to needy people living in other parts of the world? To needy people in the United States? [pp. 61-62]

They end their chapter on citizenship, also the end of the book itself, with the question: "What *does* it mean to be a *citizen* of the United States?" (p. 938; emphasis in original). Bracketed by these searching interrogatories is a comprehensive presentation of the evolution of immigration policy in the United States and a general description of what the law is and why.

The foregoing discussion has sought to present a coherent overview of the casebook. The review would be incomplete without also identifying several of the important stylistic features that distinguish it. To begin with, the emphasis of the casebook is on theory and principles, not practical applications. In their treatment of admission and exclusion, for example, the authors categorically state that they "will not explore the requirements for the various nonimmigrant categories in any detail in this book, but those desiring more information can find useful treatments in *G & R*⁹ §§ 2.6-2.16B and National Lawyers Guild, *Immigration Law and Defense*, Chapter 3 (1983)" (p. 101). In each chapter there are similar helpful references for those who want to know "how to," but the book's real target is those who want to know "why" and "why not."

Some of the instructional techniques used in this book work particularly well. For example, the authors present the kinds of practical problems an attorney might well encounter (pp. 110, 192-93); they pose questions clearly formulated to stimulate lively classroom debate (p. 113); they present ticklish hypotheticals and suggest specific cases as helpful in arriving at creative solutions (pp. 145-46); they give a test to see if the reader can determine what constitutes the statutorily undefined crime of moral turpitude, and provide the judicial answers later on in the chapter (pp. 391-92, 398-99); they set forth a chart delineating the divergence of civil regulatory procedures from criminal due process and illustrating the impact of these different procedures on deportation proceedings (p. 450); they create a transcript of an asylum

9. C. GORDON & H. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* (rev. ed. 1984).

hearing both as excellent preparation for the practitioner and thought-provoking material for those concerned more generally with public policy (pp. 682-700); and they choose certain cases to highlight petty distinctions relied upon by the courts to allow some individuals to retain their citizenship while others are forced to relinquish it (pp. 869-83). Aleinikoff and Martin also present significant portions of dissents in important decisions and then contrast those dissents not only with the holding of the majority but also with historical developments and practical considerations, leaving the reader to weigh the merits of the court's holdings in a context broader than the opinion alone provides. These teaching methods encourage the student to develop independent thought and opinion.

In addition to encouraging independent thought on issues such as how to resolve "the conflict between the twin goals of establishing clear rules to limit executive branch discretion and creating avenues of relief flexible enough to respond to the particular facts of each alien's case" (p. 559), the authors are prescient in touching upon certain topics that have become increasingly vital since publication of their book. In the chapter on exclusion, for example, they discuss the current Administration's increased dependence on sections of the Immigration and Nationality Act¹⁰ to bar certain controversial aliens from entering the United States and the possible problems arising from such regulatory activity (pp. 204-05). Earlier this year, the *Washington Post* carried both an article by a U.S. Senator and an editorial calling for a repeal of those precise sections of the Act, the former stating that "the persistence of Section 212(a)(28) investigations, waivers and exclusions amounts to a perversion of our most cherished beliefs in free speech and the open marketplace of ideas."¹¹ In addition, the authors call attention to the Sanctuary Movement (p. 739), which has claimed considerable public and governmental attention and prompted heated and occasionally bitter debate, as illustrated by the recent federal prosecution and conviction of some of its members.¹² Consideration is also given to the issue of sham marriages (pp. 149-151), the discouragement of which has become one of the top priorities of the INS today.¹³

10. 8 U.S.C. § 1182(a)(27)-(29) (1982).

11. Mathias, *A Purity Test We Don't Need*, Wash. Post, Jan. 12, 1986, at D7, col. 1.

12. United States v. Maria del Socorro Pardo de Aguilar, No. CR 85-8-PHX-EHC (May 1, 1986) (D. Ariz.). For a sampling of the debate, see Floch, *Shelter from the Storm*, THE PROGRESSIVE, Mar. 1983, at 20; Ostling, "Betray Not the Fugitive," TIME, Apr. 25, 1983, at 118; Gibney, *Seeking Sanctuary: A Special Duty for the U.S.?*, COMMONWEAL, May 18, 1984, at 295; Doan, *Sanctuary: Churches' Way to Protest*, U.S. NEWS & WORLD REPORT, Sept. 24, 1984, at 45; *Sanctuary Movement Grows More Active as U.S. Cracks Down*, Christian Science Monitor, Jan. 23, 1985, at 6, col. 1; *From the Pulpits to the Barricades*, N.Y. Times, Feb. 10, 1985, § 4, at 6, col. 3; Slimp, *Gimme Sanctuary*, NATL. REV., May 17, 1985, at 24; *When is a Criminal Conspiracy Also an Act of Conscience?*, N.Y. Times, Nov. 24, 1985, § 4, at 4, col. 1.

13. See, e.g., *The Sham "Ticket to America"*, Wash. Post, July 27, 1985, at D1, col. 3; *Single Mothers Are the Targets in Marriage Fraud*, N.Y. Times, June 13, 1985, at C1, col. 1; *Marriages of Convenience: Some Aliens Take Spouses to Get Resident Status*, Wash. Post, Oct. 21, 1984, at

In addressing the problem presented by sham marriages, the authors further touch upon the question of the ethical responsibilities of an attorney. This is one subject that might have benefited from greater attention. Some immigration lawyers have been accused of engaging in less than ideal ethical practices; the authors include an article which refers to "shady immigration lawyers" (p. 774), and the impression is conveyed that there are a number of practitioners who do little to uphold the standards of their profession. The casebook's treatment of the question of adjustment of status also includes a professional responsibility problem, but this presentation is too brief and cursory. Newspaper headlines have brought to our attention indictments of immigration lawyers across the United States for various alleged fraudulent practices.¹⁴ The moral dilemmas facing the immigration practitioner rival the most difficult situations faced by criminal lawyers and the answers are much less obvious. A more thorough analysis of the problems the practitioner must address in trying to provide effective representation while staying within the boundaries of this labyrinthine law would have been helpful.

It seems clear that in writing this casebook, Aleinikoff and Martin sought to provoke thoughtful consideration of an area of law that has not been treated with appropriate scholarly attention in the law schools or with a consistently high level of craftsmanship in the profession. It is also possible that the authors recognized the growing importance of immigration law in the international business setting. The number of foreign businesses established in the United States grows each year. The need to move both foreign executives and laborers into and out of the United States has increased correspondingly. The financial stakes associated with the practice of immigration law are rising; not surprisingly, the interest in immigration law similarly grows.

By providing a framework of intellectual debate founded on insightful analysis of cases and statistics, as well as a careful selection of informative and well-written articles, the authors have made an important contribution to a potentially more reasoned and less reactive immigration bar. By encouraging students to think about the complex issues of admission to or exclusion from the United States and the ramifications of granting or withholding U.S. citizenship, Aleinikoff and Martin will also have produced a quantum leap in the number of well-informed citizens, whose views could ultimately lead to the adoption of better immigration policy. Law schools have long had the po-

A1, col. 5. In addition, recognized television shows such as "Sixty Minutes" have presented segments dealing with the pervasiveness of sham marriages as a means to obtain immigrant visas to the United States.

14. *Federal Officials Assert Lawyers are Aiding Immigration Frauds*, N.Y. Times, Oct. 21, 1985, at A1, col. 3; *Firms Prey on Hopes of Immigrants*, Wash. Post, Feb. 22, 1984, at 1, col. 4.

tential within their faculties to elevate the profession's understanding of immigration law and to attract students to a subject too long dismissed as robotic and unimportant. With the publication of *Immigration: Process and Policy*, the tool to realize that potential is at hand.