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A CHECK ON THE REAL REALITIES OF IMMIGRATION: A REFLECTION

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The symposium sponsored by the *University of Maryland Law Journal of Race, Religion, Gender and Class* on November 10, 2005 featured two panels of excellent speakers who identified important issues about the need for, possibilities for, and adequacy of current proposals for national immigration reform. The conversation created in the spaces between the speakers' presentations—and in the different perspectives of the first, “policy” panel and the second, “impact” panel—provoked in me additional thoughts about the conceptual frameworks we use to think about immigration and how those frameworks shape the issues addressed (or not addressed) in reform proposals. These thoughts have been further sharpened in the light of action being taken as of this writing by the United States House of Representatives on HR 4437, a bill sponsored by Representative James Sensenbrenner of Wisconsin. Whatever comes of Mr. Sensenbrenner's proposed legislation¹ (which focuses exclusively on enforcement, criminalizes virtually all immigration violations, and could permanently ban any immigration violator from ever re-entering the United States), it is illustrative of a way of thinking about immigration issues that is self-defeating and dangerous, but nonetheless potent in our current political climate.

Much of the current rhetoric about immigration is caught up in a politics that seeks—sometimes subtly, sometimes not—to divide the world into clearly definable groups of “Us” and “Them.” These politics have long been part of the discussion about immigrants and immigration in the United States, and periodically flare up together

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1. The House Committee on the Judiciary sent the Bill to the House for debate on December 8, 2005; the House approved the Bill, after being heavily amended, on December 16, 2005.

with anti-immigrant sentiments. This is usually in conjunction with a perceived or projected threat of some kind to the economic or general welfare of the country.

As highlighted by symposium panelists Shoba Sivaprasad-Wadhia, Susan Akram and Lory Rosenberg, a wave of polarizing rhetoric regarding immigrants has been evident in the United States for at least the last decade and a half. This began noticeably with the increasing criminalization of immigration law in the reforms of the 1990s:² ever broader categories of convictions rendered individuals removable from the United States, and more and more immigration violations became crimes themselves. The rhetoric of “us versus them” became even more pointed through the reaction of the Bush Administration to the terrorist attacks of September 11, 2001, and continues up into many of the current reform proposals. In the current context, this rhetoric often casts the immigrant as a criminal or a terrorist, though earlier versions in our history have cast the immigrant “Other” as lazy, dirty, filled with disease, or anxious to take your job. What has not changed from earlier versions is the emphasis on the Otherness of the immigrant—and the dangerousness.

The Bush Administration at times appears to have attempted to use the war on terrorism as a justification for very unrelated policies and decisions in the area of immigration. A striking example was mentioned by panelist Lory Rosenberg. In the case of *In re: D--- J---*,³ then Attorney General John Ashcroft used the threat of terrorism to justify the detention of an asylum seeker from Haiti. Ordinarily, the question of detention of asylum seekers turns on whether the individual is a security threat or a flight risk.⁴ However, in this case, the Attorney General overturned the Immigration Judge’s grant of bond, which had been upheld by the Board of Immigration Appeals (BIA), and held that the respondent needed to be detained, but not because he showed any signs of being a terrorist or security threat himself or because he was likely to flee.⁵ Rather, the Attorney General

2. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990); Immigration Reform Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

3. *In re D--- J---*, 23 I. & N. Dec. 572 (BIA Apr. 17, 2003).

4. See 8 C.F.R. §236.1(c)(8) (2005) (“Any officer authorized to issue a warrant of arrest may, in the officer’s discretion, release an alien . . . provided that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding.”) (emphasis added).

5. The Attorney General’s primary holding in this case was that bond should be denied for reasons of national security; he also held, in addition, that the respondent was a flight risk,

argued that releasing Mr. Joseph ran the risk of encouraging more Haitians to brave the open seas to come to the United States, which would in turn require the government to expend more Coast Guard resources to patrol the shores, which would then take resources away from efforts to exclude terrorists.⁶ In the course of this line of reasoning, it thus became a matter of national security that the respondent be held in detention while awaiting the outcome of his application for asylum—for reasons that had nothing at all to do with the individual himself. The identification of immigrants with terrorists, and references to national security on a rhetorical level, were transformed into concrete justification to deny relief to an individual seeking refugee protection.

Another very graphic illustration of the politics of Otherness is found in the new billboard campaign proudly announced recently by the New York-based Coalition for a Secure Driver's License. The new billboard, which will be posted in North Carolina and New Mexico in December 2005 and January 2006, portrays heavily armed men in military dress and traditional Arab headgear and urges, "Don't license terrorists, North Carolina."⁷ The campaign clearly uses ethnic stereotypes to paint all Arabs—and, by implication, all immigrants—as terrorists. It is hard to imagine how the image could be more Other, more alienating or more frightening. This is no co-worker who needs to drive to work or neighbor who needs to drive her children to school—this is not one of Us, who might need a driver's license for any number of innocuous, transportation-related reasons, but one of Them, who will use the license to hurt us and our loved ones. (Incidentally, in addition to very graphically uniting the question of immigrant access to driver's licenses with terrorism and security, this campaign illustrates well the phenomenon pointed out by CASA of Maryland's Kim Propeack at the Fall Symposium of outside anti-

but this factor did not enter into the reasoning behind the primary basis for the decision. *In re D---* J---, *supra* note 3, 23 I. & N. Dec. at 574.

6. *Id.*

7. Coalition for a Secure Driver's License Billboard Campaign, at <http://www.securelicense.org/site/PageServer?pagename=BillboardCampaign>. The group has removed the image from its website, but continues forward with its campaign to run the billboards in December 2005 and January 2006 in North Carolina and New Mexico. Donna Leinwand, *Billboard's Arab Images Sparks Accusation of Racism*, USA TODAY, Dec. 13, 2005, available at http://www.usatoday.com/news/nation/2005-12-13-billboard-outrage_x.htm. Michael Easterbrook, *Billboard Takes State to Task: Lax Driver's License Rules Aid Terrorists, Group Claims*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 9, 2005, available at <http://www.newsobserver.com/102/story/375972.html>.

immigrant groups influencing local and state debates about issues relating to immigrants.)

Representative Sensenbrenner's HR 4437 is a further dramatic example of this conceptual framework and its resulting emphasis on attempts to exclude and remove non-citizens and to be able to draw a bright-line "secure border" between Us and Them. The bill is entitled the "Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005," and its stated purpose is "to amend the Immigration and Nationality Act to strengthen enforcement of the immigration laws, to enhance border security, and for other purposes."⁸ It contains a broad array of provisions intended to strengthen the government's hand in controlling movement across the border and in removing and excluding individuals for many different reasons. Perhaps its most telling provision is one that would make illegal presence in the United States a federal felony, regardless of how brief the illegality may have been or whether it was intentional, inadvertent, or even unknowing.⁹ Furthermore, in conjunction with other provisions in the bill, being in the United States illegally could be, in immigration terms, an aggravated felony which would render the individual ineligible for virtually any relief from removal, and bar him or her from ever returning to the United States.¹⁰ This bill essentially makes *any* immigration violation a federal crime, thus bringing to actuality the rhetoric that tells us that all "illegal aliens" are criminals.

The problem with a rhetoric or politics of Us and Them with regard to immigration is that it is doomed to failure because its premise of two separate, exclusive groups is invalid. Immigrants, by their very nature, defy the exclusivity of these two groups and move between them, going from Them to Us (and sometimes back again). The artificiality of separation is particularly striking in the United States, where colonial and post-colonial practices decimated the native populations, and the vast majority of our population today is either immigrant or descended from immigrants who at some point, in some way transgressed the boundary between "Them" and "Us." At one point, most of us are, or were, Them.

This movement from outside to in has always been a part of the reality of our national life. It is a healthy movement that benefits us all when family members, workers, visitors, neighbors and others join our society with all their contributions. In addition to its role as enforcer

8. H.R. 4437, 109th Cong. (2005).

9. H.R. 4437, 109th Cong., §203 (2005).

10. H.R. 4437, 109th Cong., §201(a)(2), §604(b) (2005).

of borders, the United States immigration system has always also had the role of facilitating certain individuals' crossing from one side of the divide to the other by adjudicating applications for temporary and permanent residence and naturalization. Indeed, the Immigration and Naturalization Service and now the Department of Homeland Security have long struggled to make sense of their dual mandate, working to keep the outsiders out while simultaneously deciding which of them have the right to become insiders, *i.e.*, Us.

Furthermore, as highlighted during the symposium, especially by Ryan Ellis of Americans for Tax Reform and Jeanne Butterfield of the American Immigration Lawyers Association, the number of non-citizens working—legally and illegally, in skilled and unskilled positions—reflects the realities of Twenty-first Century globalization and a market that demands labor beyond what United States workers can provide. These immigrant workers are essential to the United States economy. The reality is that they are here, that we need them and that they are already, with or without government permission, our neighbors, co-workers, and employees.

Indeed, many of "Them" (the non-citizens and non-legal residents) are also our family members. Immigrant families often confound dichotomous thinking by having both citizen (or resident) and non-citizen, non-resident members. The number of families straddling the divide is huge, and is currently made much larger than it need be by the tremendous backlogs of a family visa processing system that has become overburdened and broken down.

The realities of interconnection, as opposed to the rhetoric of separation, give rise to a different perspective, of course; which acknowledges that many non-United States citizens and residents are part of Us already—vital members of our families, our communities and our economy. In our ever shrinking, globalizing world, it is hard, indeed, to imagine that the social and economic pressures that create these realities will change anytime soon. Rather, it is likely that the human, economic and family ties we have with other nations (and individuals from those nations) will continue to grow stronger and will continue to defy laws that attempt simply to legislate them into insignificance or illegality. It is also worth saying that issues of immigration are likely only to continue to grow in importance in the years to come, and it is incumbent on us to address them seriously for their own sake and not to use them as political tools for other purposes.

It is crucial that we acknowledge what is really happening with regard to migration. To make any progress toward an immigration

system that makes sense, we need to start from a solid basis in reality, even if that reality is messy. We will never “solve” the immigration issue—that is, we will never have a workable immigration system—unless and until we acknowledge our connectedness across borders, stop trying to demonize and separate ourselves from would-be immigrants, and devote resources and imagination enough to develop a system that allows for the realities of our interconnected world and for a reasonable flow between Us and Them. To do this, we must release ourselves from the conceptual tyranny of the border as a mythical line that will absolutely protect us from the dangerous Other, if we can only get it to “work” right. In reality, the border can only work to hold out the unauthorized and undocumented if we have a system that reasonably accommodates those who have legitimate family, employment and human rights claims to being in the United States.

I offer as a re-focusing point the practical approach to the question of undocumented immigrants taken by Justice Brennan in the 1982 Supreme Court case of *Plyler v. Doe*,¹¹ which recognized for undocumented immigrant children an Equal Protection right to a free public education as provided to other children. In deciding whether the Fourteenth Amendment protected the undocumented, the Court stated plainly, “Whatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of the word.”¹² A simple enough statement, but one I am not sure the Court—or at least the Congress—would have such an easy time making today. Even more telling, the Court did not try to argue that undocumented persons did or did not “deserve” a public education as a theoretical matter based on the legality or illegality of their entry, but rather simply acknowledged the practical reality that millions of people live in the United States without documents.¹³ Indeed, the Court’s characterization of the situation sounds rather familiar: “This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents.”¹⁴

It was from that starting point—the point of acknowledging a difficult but nonetheless real reality—that the Court then considered

11. 457 U.S. 202 (1982).

12. *Id.* at 210.

13. *Id.* at 218-19.

14. *Id.*

the effect of denying a public education to the children who were part of that group.

Virtually everyone considering immigration reform today agrees that the current system is broken and in need of overhauling. If we are truly going to have a chance of fixing it, though, we need to start by acknowledging the real reality of immigration: that it is complex, that it is nuanced, that the forces behind migration are deep and strong and will not be corralled by a legislative policy that simply refuses to acknowledge them, and that those forces are not going to go away anytime in this day or age. The urge to demonize those whom our current system does not reasonably accommodate, to criminalize them, to seek to separate ourselves from “Them,” may be politically expedient, but it is not constructive in the sense that we need to build a new immigration system that will deal with the realities of today and of the foreseeable future. Until our policy makers acknowledge and begin to work from the reality that immigrants do—and should, for our sake and theirs—cross over between the categories of Them and Us, we will find no real solution to the dilemma of trying to manage that movement.

