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IMMIGRATION IN BETWEEN

Robin Jacobson*

HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* (OXFORD UNIVERSITY PRESS 2014) Pp. 360. HARDCOVER \$31.95.

NATALIA MOLINA, *HOW RACE IS MADE IN AMERICA: IMMIGRATION, CITIZENSHIP, AND THE HISTORICAL POWER OF RACIAL SCRIPTS* (UNIVERSITY OF CALIFORNIA PRESS 2014) Pp. 232. HARDCOVER \$65.00. PAPERBACK \$27.95.

Systems of immigration are not simply national policies about who is admitted and under what conditions, but also comprise choices made by communities and people in the context of ongoing political contestation. We cannot understand the challenges or trajectories of immigration, according to Hiroshi Motomura and Natalia Molina, by looking solely at the laws of a nation; we must also consider the enactment, circumvention, and contestation of those laws, as well as laws that were never even passed. Motomura's book, *Immigration Outside the Law*,¹ pushes us to think about the construction of our nation's immigration system between the words on the legislative page and the actions of police, judges, immigration agents, and employers; he wants us to understand that the US immigration regime evolves from the distance between law and practice. Through a wide-ranging examination that takes us across time and topic in the contemporary immigration debate, he crafts a strong argument that the way forward must be grounded in the lived immigration system. Molina, in her book *How Race Is Made in America*,² offers us insight into a particular historical period in order to dig deeply into the contested practices of the immigration regime. Her intense focus includes enforcement, rhetoric, and rejected proposals, as much as immigration laws.

These two books complicate and expand the idea of immigration policy as an expression of a nation-state exercising sovereignty. They ask us to put the state's voice, its declarations and attempts to control movements of people, in conversation with other states and with immigrant and native-born communities and individuals,

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1. HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* (2014).

2. NATALIA MOLINA, *HOW RACE IS MADE IN AMERICA, IMMIGRATION, CITIZENSHIP, AND THE HISTORICAL POWER OF RACIAL SCRIPTS* (2014).

brimming with constructive agency. We see the state, not as a unitary actor, but as one fragmented between federal and state policies, between legislative and executive mandates, and between policy makers and street level bureaucrats. Recognizing how immigration happens in these in-between spaces, forces us to reconsider the notion of any agreement or contracts between immigrants and the nation state. It also prompts second thoughts about the utility of border fictions. As we come to understand more fully what and who really guides our current system of immigration, we are able to approach the question of what we want our future immigration system to look like with greater clarity and broader options.

Motomura crafts a strong argument about the direction the United States should take on the controversial and sticky problem of undocumented immigration. The phrase “outside the law” in his title refers as much to the government and American employers, as it does to migrants who travel across the border without inspection or overstay visas. The immigration regime is not just what is written on paper, but is actualized between our formal policies and our real-world practices. He points to the range of actors that exercise discretion over immigrants’ lives. The “gap between law on the books and law in action”³ is at the heart of our immigration system, one that is currently “opaque, deceptive, and lawless.”⁴ A fuller understanding of the system in law *and* in practice, he suggests, is essential for a successful revamping of our immigration system.

Using the 1982 Supreme Court decision *Plyler v Doe*,⁵ which established the right to a public education regardless of immigration status, he sets up a framework for approaching policy and legal questions for undocumented immigrants that acknowledges the complexities of the immigration system in practice. This case, he argues, points us towards three central concerns: the difficulty of defining unlawful presence, integration efforts extended to those unlawfully present, and the role of state and local governments in our immigration regime.⁶

Through a careful, yet accessible, analysis, the author works his way through these issues to propose changes to immigration policy that he thinks would make our system more equitable and consistent with the rule of law. He concludes with a set of proposals including enhanced discretion over relief from deportation, a new set of targeted legalization policies, and temporary worker programs with a pathway to citizenship (constructed with domestic economic needs, as well as international development, in mind).

Motomura uses legal reasoning, historical evidence, political theory, and moral arguments to speak to a wide audience, both in terms of their background and in terms of their politics, about these thorny immigration questions. His book does an excellent job of providing a primer on key issues for the uninitiated, while at the same

3. MOTOMURA, *supra* note 1, at 5.

4. *Id.*

5. *Plyler v. Doe*, 457 U.S. 202 (1982).

6. MOTOMURA, *supra* note 1, at 10-11.

time providing a deep and nuanced argument for those more immersed in immigration politics and law.

Central to Motomura's persuasive argument is that unlawful presence is "inconclusive" in multiple ways, caused by and causing unpredictable discretionary enforcement of our immigration system.⁷ While it is politically easier to think of a clear, clean line separating legal from "illegal" immigrants, there is, in fact, a large "gray area"⁸ between these two where many people reside: people, for example, who are in process with their visas or who may have avenues of relief unknown to them. Additionally, immigration status can change over time as future legislation or executive actions move someone from outside to inside the law (or the reverse). The consequences and significance of unlawful status is also uncertain.⁹ In some areas of the law, an undocumented immigrant is inside the law (such as police protection), while in others, s/he is outside. Finally, inconclusiveness is produced by unpredictable discretionary enforcement, resulting in removal for some immigrants, while others are permitted to remain and even work in the United States.

Rather than seeing these gaps between law and practice as part of all politics, or as a part of the compromise around a controversial issue that attracts strange bedfellows,¹⁰ Motomura suggests there is an expression of intention in this seemingly arbitrary system, one that suggests certain obligations the nation-state may have to undocumented immigrants. He argues that the "national policy of acquiescence means that unauthorized migrants come to the United States as part of a tacit agreement that is mutually beneficial. . . . this arrangement amounts to an invitation extended by the combination of willing employers, limited enforcement, and legal mechanisms that allow unauthorized migrants to stay as a matter of government discretion."¹¹

This arrangement is depicted as something akin to a contract between the nation, and the unlawfully present that requires some extension of integration opportunities by the state. Motomura proposes that, even without intention, the system's consistent inconsistency calls for certain policies of welcome and integration because people make life choices based on the immigration regime as it functions, not just on its legislative wording. However, behind this logical suggestion, is the larger, more sweeping argument Motomura points to throughout his detailed exploration of immigration from the 1800's to today: his repeated assertion that the system is "inconclusive by design,"¹² that there have been, historically, and remain, currently, economic advantages to an inconsistent system of immigration enforcement for the United States. His persuasive appeal to those who might not already agree with a pathway to legalization is dependent, then, on the idea that the gap between law and practice has been built into our immigration system to benefit the nation.

7. *Id.* at 15-16.

8. *Id.* at 25.

9. *Id.* at 52.

10. ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 8 (2006).

11. MOTOMURA, *supra* note 1, at 107.

12. *Id.* at 21.

Motomura suggests that, historically and into the present moment, discretion is used at the intersection of race and economic needs. Looking at differences in treatment between Asians and Mexicans, he notes that discretion became “the hallmark of US policy toward unauthorized migration from Mexico. . . that fluctuated from acquiescence to raids, arrests, and other visible and harsh enforcement.”¹³ Today, he notes, there is a tension between the laws congress writes and the impossibility of full enforcement; there is a mismatch between legislation and demands for labor and international trade. Selective enforcement and discriminatory discretion, he suggests, rectifies this mismatch.

Motomura forms his arguments about federalism and immigration, as well as his proposals for reforming the system, around what he sees as persistent discriminatory discretion. Considering if states should be involved in immigration enforcement, he argues that the demands for transparency created by a highly discretionary enforcement system with a long history of racial discrimination, suggest that power should be lodged in the federal government, not in “50 different states and countless local governments”¹⁴ that could easily “elude detection or remedy.”¹⁵

However, he notes, states can and should be involved in providing integrative services to unlawful immigrants.¹⁶ Since the harm of extending services to the undocumented is more diffuse than the harm of racially discriminatory enforcement, Motomura suggests there is no inconsistency between arguing that states can be involved in integration or inclusion efforts but not in enforcement.¹⁷ An analysis of discretion is key to his approach to currently unlawful immigrants. He distinguishes between discretion which is uncertain and unreliable and works against the rule of law, and discretion which is consistent with the rule of law.¹⁸ This distinction allows him to call for enhanced judicial discretion for relief from deportation.¹⁹

To weigh the full rhetorical and political value of Motomura’s powerful idea that there exists a contract between immigrants and the nation, established through practice rather than law, we need to ask some crucial questions about what shapes discretionary activity over time: To what extent can the gap between law and practice be seen as intentional rather than a consequence of bad policy? Is the gap bigger than in other policy domains that rely on a range of street-level bureaucrats or embeds discretion into enforcement practices? Does that gap always push in the same direction?

Economic incentives are the central answer Motomura provides to explain the cyclical nature of immigration enforcement. However, this does not help us explain why we have seen rising restrictionist sentiment and policy during times of economic

13. *Id.* at 41.

14. *Id.* at 144.

15. *Id.*

16. MOTOMURA, *supra* note 1, at 146-54.

17. *Id.* at 165-71.

18. *Id.* at 203.

19. *Id.* at 189-91, 203.

growth that may have benefited from increased access to immigrant labor. For example, the restrictive National Origins Quotas passed in 1924 during a time of relative prosperity.²⁰ Clearly there are competing pressures. While the economic needs of the nation are part of the answer, there are certainly other forces that impact our immigration system, including experts in immigration politics and nativist or reformist movements.²¹ Moreover, there is no single site that responds to these pressures. As Motomura's extended analysis shows, the United States' immigration regime is fragmented among federal, state and local governments, as well as multiple branches and agencies.²² The evolving and contested practices of our immigration system come from individual discretionary decisions made by many actors with competing demands: Border Patrol agents in different sectors with different commands, responding to varying local context;²³ immigration judges lodged in a different bureaucracy altogether, with different norms of behavior.²⁴

This patchwork or fragmented nature of the immigration regime and the complex role of economic motives in producing our immigration practices mandate a deeper exploration of the nature and practice of immigration enforcement. Further, as Motomura suggests, we also need to explore how immigrants have interpreted and acted on that practice to understand what is a fair approach to "unlawful presence."²⁵ Molina's historical work is one-step toward understanding both the gap between law and practice and how people have understood and negotiated that gap.

In the other book considered here, Molina focuses on the US immigration regime as it addressed Mexicans between 1924 and 1965, looking at a range of archival sources that provides unique insights into the complexity of the lived reality of the immigration regime. She notes that "Bills did not simply pass quietly through the legislature and people did not simply live according to their dictum once they were enacted. Instead immigrants contested them, nation-states challenged them, politicians clashed over them, and low-level bureaucrats called their validity into question."²⁶ Through an exploration of the archives of the Immigration and Naturalization Service, both nationally and regionally, as well as papers of immigrant rights groups and local government records, Molina is able to reveal much about the complicated lived experiences of the immigration regime and the creation of the gap Motomura notes as crucial to understanding our way forward. Central to her examination is the key category of race.²⁷

Molina illuminates key insights about the construction of race and racial theory in America through her exploration of this key period. She argues that the evolving

20. *Id.* at 37.

21. *See generally*, DANIEL J. TICHENOR, *DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA* (2002).

22. MOTOMURA, *supra* note 1, at 165-71.

23. *Id.* at 50-52.

24. *Id.* at 189.

25. *Id.* at 52, 53-55.

26. MOLINA, *supra* note 2, at 11-12.

27. *Id.* at 13-16.

racializing of Mexicans allows us to see two important and interrelated phenomenon: the power of enduring “racial scripts”²⁸ and the “relational process”²⁹ of making race. She introduces the term racial scripts to push Omi and Winant’s concept of racial projects towards relational, rather than comparative, analysis of racialized groups.³⁰ The word, “scripts,” she tells us, helps us to see how ideas about race are transferred to different groups or across time.³¹ Once a racial script, which seems to entail a characterization of racialized others and/or policy “solutions,” are developed in one moment, Molina argues, they become available for use in different contexts.³² Scripts, once they enter the collective consciousness, have an aura of “common sense,” she says, and are more easily adopted in the future.³³ She uses the idea of racial scripts to investigate different centers in the immigration regime, asking about the political discourse around Mexicans and immigrant admissions, naturalization, birthright citizenship, and deportation. Examples she cites of racial scripts that reappear and are applied to different groups in similar debates, include concerns over eugenics and fertility in debates over admissions and citizenship, and assertions about disease and criminality as premises for exclusion or deportation.³⁴ She urges us to look, not just at the formal policies implemented around these scripts, but also policy contestation in legislatures, courts, agencies and on the ground.³⁵ Highlighting scripts and counter scripts, she attempts to compare the racialization of different groups, as well as the possibilities for cross-racial alliances that are opened up by the shared experiences of different groups.³⁶

From this theoretical foundation, Molina builds two central claims, one about the durability of race, and one about possibilities for interrupting that persistence. First, she claims that race and racism “succeed by repetition,”³⁷ referring to the easy transferability of racial scripts to new groups or in new political contestations. Racial scripts, once introduced, she says, seem natural and can be used or adopted more easily in the next round of racializing immigration politics. She suggests that this “common sense” appeal of racial scripts allows them to be transferred repeatedly (p. 38-39; 140; 152).³⁸ While there is evidence that people and courts used “common sense” to define racial categories and to argue for racially discriminatory policy, evidence of the psychological mechanism that allows transference is beyond the scope of the historical work she has done here. She can show that certain scripts reappear, but we do not know the degree to which familiarity makes them more psychologically acceptable. She can lay out the presence of the different scripts, but not their workings; or why, in repetition, some win and some lose out to counter-scripts.

28. *Id.* at 6.

29. *Id.* at 5.

30. *Id.* at 8.

31. MOLINA, *supra* note 2, at 8.

32. *Id.* at 86.

33. *Id.* at 3.

34. *Id.* at 109.

35. *Id.* at 13-16.

36. MOLINA, *supra* note 2, at 5-6.

37. *Id.* at 139.

38. *Id.* at 38-39, 140, 152.

Still, Molina's work could point us to structural mechanisms that can help us clarify when and to whom racial scripts are applied. For example, we can see how both economics and available racial scripts became key reinforcing mechanisms. Labor needs in the southwest changed during the period of her study and combined with proximity to the homeland to create a recurring trope that Mexican laborers were "birds of passage." This, in turn, resulted in racial scripts being applied differently to Mexicans than to others. Molina notes that "structural forces," including ease of return and different marriage patterns, are key to explaining why Mexicans in the Imperial Valley became associated with the dangers of contagious diseases. She contrasts this with Asian immigrants: "While Asian immigrants were not targeted in 1940, medical racialization served and would serve to stigmatize these same groups in the future, thus demonstrating how similar racial scripts could affect groups at different moments."³⁹

Readers are left with intriguing questions: We know these scripts get applied to Asian immigrants in the future, but we do not know what structural forces change as a result, and how? Molina opens a doorway for further study of the limits of the transferability of racial scripts; and of the specific conditions that allow for transference across time and groups.

Molina's second central claim is that cross racial alliances are formed around shared histories of racialization. This interesting and novel historical exploration of shared fate and political protest has two faces, possibilities and actualities. Molina illuminates moments when some groups did consciously recognize the power of racial scripts and their shared fate and create cross racial alliances. She also argues that the common sources of oppression *could have* served as a useful foundation for cross racial resistance. Careful dissection of the instances where this happened—as well as those where it did not—could open room for fruitful theories about racial alliances and shared goals.

For example, looking at deportation round ups and the detention of Mexicans in Los Angeles in 1954, Molina provides some evidence that African Americans could have had a sense of shared fate with Mexicans. African Americans in Los Angeles, she notes, had encountered problems with policing and could have had a shared sense of fate because the Chief of police and other local officials were involved in immigration enforcement. However, we do not see such a recognition leading to African Americans mobilizing against the detention and deportation of Mexicans. She does note some push back expressed by individual African American workers, but their quotes do not indicate a sense of shared fate, but a focus on justice aspects unique to Mexicans. (Quotes include black workers asking how Mexicans can be called foreigners, and why they are subject to deportation when the country was originally theirs⁴⁰.)

While she wants to conclude it was "affinities" between racialized groups that led to this push back, the evidence Molina supplies, like the quotes cited above, could be read as focusing on the distance between their circumstances, or a slippery slope

39. *Id.* at 93.

40. *Id.* at 125.

of injustice on the American racial hierarchy—a worry that if people who had previously owned the land could be treated like this, there was worse in store for other racialized groups. This raises the possibility that the process of transferring racial scripts to new and different settings can sometimes occlude historical similarities and thus lessen the possibilities of vibrant cross racial alliances. More clearly distinguishing between evidence that points to places where a sense of shared fate could have developed from evidence that actors were consciously organizing around such an understanding allows us to more consciously theorize under what conditions cross racial alliances can be built effectively.

Molina begins to explore this possibility when she investigates the silence of Japanese Americans around the same events, the detentions of Mexicans in Los Angeles. Conscious comparisons between the treatment of the Japanese during internment and the treatment of Mexicans during Operation Wetback, informed some messages of resistance from allies.⁴¹ These allies, however, did not include the Japanese American community, the group with whom the shared racial script was most clear. Molina attributes this silence to Japanese American strategies to minimize the distance from “American” identity and questions of loyalty in the post war period. She opens up a great line of inquiry for future work in this critical historical period to explore how similar racial scripts, applied in different combinations or different political moments, can sometimes lead to different “racisms,” closing the door to a recognition of shared fate; while at other times, they serve as a foundation for cross racial alliances. Molina’s insights are a valuable contribution, prodding others to do similar work that will help to tell a more fully theorized tale of how race is made in America.

While Motomura’s study points us to the importance of considering the gap between practice and law, Molina’s book provides us some insight into what fills that gap: the key role of race in mediating the economic incentives of immigration and the ways racial scripts developed around that nexus get transferred and used, even possibly when the economic incentives have changed. These racial scripts form a key connective tissue in Motomura’s fragmented regime with its multitudinous sites of discretion. Molina’s work on racialization not only reinforces Motomura’s conclusions about the dangers of state and local enforcement, but also supports the importance of local integration efforts.

Thus, with more investigation into the forces that permit for extensions of racial scripts (and limit the ability to extend those scripts), we might craft more particular arguments about when and how to lodge the discretion that Motomura wants to see used towards egalitarian ends that fulfill our “contract” with all immigrants. Both books are important contributions the scholarship on immigration, but also to thinking carefully about how to proceed towards a just system, and how to craft political arguments and alliances towards those ends.

41. MOLINA, *supra* note 2, at 125.