

## COMMENTARY

# "Judging Extreme Hardship:" An In-Class Activity for Teaching Critical Interrogation of Discursive Frames in U.S. Im/migration Law

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### Abstract

*A key element in teaching the anthropology of im/migration is fostering critical analysis of the discursive frames used in conversations about im/migrants. In this article I describe an in-class activity I use to foster critical thinking about discursive frames on im/migration—specifically those which are embedded into U.S. immigration law. Students are asked to play the role of an immigration judge deciding on a de-identified version of an actual "hardship waiver" case—a petition for relief from deportation. By putting themselves in the shoes of an immigration judge, students must work to disconnect from their own biases and assumptions in order to attempt to apply immigration law. In the process, students learn about the inner workings of the immigration system and interrogate how discursive frames shape the application of immigration law.*

**Keywords:** *immigration discourse; immigration law; immigration judge; hardship waiver; deportation*

### Introduction

A key element in teaching the anthropology of im/migration is fostering critical analysis of the discursive frames used in conversations about im/migrants. Students are likely to be exposed to discursive frames about im/migration such as those that construct im/migrants as unassimilable (Ngai 2005), as criminal threats (Chavez 2013), or as economic drains on the U.S., through news and social media, as well as interpersonal interactions. They may not, however, have had the opportunity to examine these frames from a critical perspective: to interrogate the myths and assumptions underlying normative constructions of "good" and "bad," "deserving" and "undeserving" immigrants (Willen and Cook 2016).

Here I describe an in-class activity I use to foster critical thinking about discursive frames on im/migration—specifically those which are embedded into U.S. immigration law. Students are asked to play the role of an immigration judge deciding on a de-identified version of an actual “hardship waiver” case—a petition for relief from deportation. By putting themselves in the shoes of an immigration judge, students must work to disconnect from their own biases and assumptions in order to attempt to apply immigration law. In the process, students learn about the inner workings of the immigration system and interrogate how discursive frames shape the application of immigration law.

## Activity Description

In this activity, students work in groups of two or three to assume the role of an immigration judge who is overseeing the removal hearing of an undocumented immigrant named Rebeca, a single mother who has applied for cancellation of removal.<sup>1</sup>

In U.S. immigration law, cancellation of removal is one of the last options undocumented immigrants in removal proceedings may have if they want to stay in the U.S (Gomberg-Muñoz 2017). It does not grant legal immigrant status, but if granted, allows an immigrant to remain in the country in a liminal legal state (Menjívar 2006).

To qualify for cancellation of removal undocumented immigrants must be able to demonstrate three things: that they have been continuously physically present in the United States for 10 years or more, that they are a person of “good moral character,” and that the immigrant’s qualifying relatives (children, spouse, or parents with U.S. lawful permanent resident status or citizenship) will experience “extreme and unusual hardship” in the event of her/his deportation.<sup>2</sup>

In the activity, students must work together to review Rebeca’s story, the statute, and two guidance documents explaining how the requirements for cancellation of removal are measured, and decide if she meets these three requirements.<sup>3</sup> Students are instructed to make their determinations based on the statute, not based on moral notions

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<sup>1</sup> “Rebeca” is modeled after the defendant in *Matter of Recinas* (2002), an actual Board of Immigration Appeals case. For more information, see:

<https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3479.pdf>

<sup>2</sup> For more information about Cancellation of Removal, see:

[https://www.ilrc.org/sites/default/files/resources/non\\_lpr\\_cancel\\_remov-20180606.pdf](https://www.ilrc.org/sites/default/files/resources/non_lpr_cancel_remov-20180606.pdf)

<sup>3</sup> I recommend Chapter 5 of Ruth Gomberg-Muñoz’s *Becoming Legal: Immigration Law and Mixed-Status Families* (2017) as a companion to this activity. The chapter examines a similar hardship waiver process from the perspective of the families undergoing it. It includes excellent ethnographic description of the minutiae of the process, like assembling a 700+ page dossier of documents to support the application, and how the process distorts immigrant family dynamics by forcing them to perform certain kinds of relationships and exploit their own suffering. The chapter also discusses the notions of “good moral character” and different kinds of hardship.

about what they think should happen.<sup>4</sup> They are also instructed to write down some notes about how and why they come to their final decisions, including what aspects of the statute/guidance documents they focused on.

Given that students must review several pages of information, I usually allow for at least 25-30 minutes of group work before checking in with them about how far they have gotten. During this time, I also walk around the room to answer questions.

Once all students indicate they have reached a decision, I ask students to raise their hands to indicate if they decided to approve or deny Rebeca's claim. Interestingly, I often get quite polarized results with this activity—roughly half of the students approve the waiver and half deny it. I foster a discussion of their decisions by asking probing questions. We start with basic questions about the physical presence and good moral character requirements. I pose the following discussion questions to the class:

What is the physical presence requirement? Does Rebeca qualify? If so, why? How did you determine this?

What is the "good moral character" requirement? Does Rebeca qualify for it? How did you determine this?

As readers who review the details of the case (Appendix 2) will note, Rebeca is arguably a very "normal" person. She is a single mother working hard to support her children in difficult circumstances. Her case reflects the reality of most immigrants in that she can neither be identified as a hero, nor a villain. Thus, Rebeca's case forces students to eschew their internalized narratives of "good" and "bad" immigrants in their decision-making processes.

Discussion of the first two parameters usually takes between five and ten minutes, depending on how much consensus there is amongst students.<sup>5</sup> After establishing that Rebeca does, in fact, meet the legal standards of these two requirements, the remainder of the discussion turns to the third, and much more contentious requirement—extreme and unusual hardship. I start by asking students to explain "extreme and unusual hardship," as defined by the statute. Here it becomes important to highlight a few key caveats.

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<sup>4</sup> Information in the Guidance Documents is adapted from the following websites:

<http://mikebakerlaw.com/blog/2014/10/23/cancellation-removal-non-lprs-ina-section-240ab1/> (Guidance Document 1); <https://www.bataraimmigrationlaw.com/cancellation-of-removal-hardship-factors> (Guidance Document 2); <https://www.bataraimmigrationlaw.com/modern-guide-immigration-deportation-hardship-factors> (Guidance Document 3). These documents are provided in a packet which I print and hand out to each student.

<sup>5</sup> Most students agree that Rebeca qualifies as having "good moral character," according to the statute. However, I have occasionally had students indicate that she is somehow irresponsible for allowing herself to become a single mother with limited financial resources. This can produce another important conversation around moralistic definitions of "good" character and gendered deservingness frames in im/migration discourse (Chavez 2013; Willen and Cook 2016).

### 1. Whose hardship counts?

According to the statute, it is the hardship of “qualifying family members”—exclusively the “alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence” (Cancellation of Removal; Adjustment of Status 2020)—that counts for the purposes of evaluating eligibility for cancellation of removal. The hardship of family members without these legal statuses, or U.S. citizen and lawful permanent resident family members with other kin ties, does not count in the hardship calculation. Additionally, the suffering of the person subject to removal also doesn’t count. In Rebeca’s case, this means that students may only consider the hardship of her four U.S. citizen children, and not her two eldest children who are citizens of Colombia (these children presumably lack legal status in the United States). Instructors may facilitate a discussion with students about the implications of creating what might be described as a “legal hierarchy of suffering,” in which a family member’s citizenship status is used to determine whether or not their hardship is legally relevant.

### 2. How bad does the hardship have to be?

This is perhaps the most difficult part of this exercise for students, since the standard of “extreme hardship” is not clearly defined in the statute.<sup>6</sup> Students must make their own interpretations of the statute and the guidance documents in order to make a decision about whether or not Rebeca meets the standard. It is important to highlight in discussion with students that the hardship of an immigrant’s qualifying family members must be extreme *relative to what would be usually expected* in this scenario. In other words, they must suffer *more* than would be ordinarily expected in the event of a family member’s deportation. Mental health concerns like depression and anxiety, and economic strain on the household, are understood to be normal and therefore *not* indicative of extreme or unusual hardship. Issues like medical hardship related to a serious health problem, or struggles related to a disabled family member’s care, on the other hand, may help an immigrant reach the required threshold (Gomberg-Muñoz 2017). Student contemplation of the degree of suffering required to meet the “extreme and unusual hardship” threshold often provokes serious internal reflection about the moral implications of having these kinds of subjective and often arbitrary discretionary mechanisms embedded in our immigration system.

Once we complete our discussion, I reveal the actual decision reached by the court in *Matter of Recinas* 2002, the case upon which “Rebeca’s” case is modeled. Initially, cancellation of removal was denied because the judge determined that she had failed to

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<sup>6</sup> Immigration courts have engaged in an ongoing reinterpretation of the threshold that must be met to qualify for the “extreme hardship waiver.” In general, the standard has increased over time, such that the threshold is now quite high, and very few people are awarded cancellation of removal (Gomberg-Muñoz 2017).

meet the threshold of extreme and unusual hardship. However, that decision was overturned on appeal, and the court ultimately granted Recinas cancellation of deportation. If there is time, students may review the full text of the judge's decision statement.<sup>7</sup> Alternatively, the instructor may summarize the key points for students.

At this point, students may want to discuss the moral dilemmas they encountered while carrying out the activity. I usually ask students to talk about how it felt to go through the process of making such a consequential decision about a person's life with limited information within the confines of the law. This is a good time to ask students whether or not they agree morally/ethically with the legal decision they made. Instructors may opt to lead students into a follow-up activity where they work together to redesign the cancellation of removal process, including outlining what they think are more appropriate measures of hardship—or perhaps eliminating the hardship evaluation system altogether.<sup>8</sup>

## Conclusion

Through this activity, students engage in multiple levels of critical thinking as described in Bloom's Taxonomy (Anderson and Krathwohl 2001). First, they must *understand* the law—they must read a complex legal statute and discern its meaning. Then, they must *apply* the law to the facts of Rebeca's case in order to make a decision about whether or not to approve her request. The next step requires students to *analyze* both the law and Rebeca's case, as they *compare* Rebeca's case to other cases to see if she meets the requirements for cancellation of removal. Then, they must *evaluate*. In group discussions, students justify the decisions they made about whether or not to grant Rebeca cancellation of removal and discuss whether or not they agree with the way the legal system awards cancellation of removal. Finally, they may also *create*. Based on their evaluations of the process, students may work together to reform or redesign the cancellation of removal hardship waiver process.

Through this multi-layered thinking, students learn important lessons about the subjectivity and discretion inherent to immigration law and its enforcement. They also engage in a critical analysis of the discursive frames used to paint im/migrant groups as "good," "bad," "deserving," and "underserving"—an essential aspect of developing students' anthropological sensibility.

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<sup>7</sup> The full text of the *Matter of Recinas* appeal decision is available here: <https://justice.gov/sites/default/files/eoir/legacy/2014/07/25/3479.pdf>

<sup>8</sup> Alternatively, instructors could opt to carry out this activity in a "debate" style by splitting the class into two groups—one in which students play the role of Rebeca's lawyer, and another that presents the state's case against her. The instructor could serve as the immigration judge.

## References

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## Appendix 1: Activity Instructions

“Judging Extreme Hardship” Case Study: Cancellation of Removal Through an Extreme Hardship Waiver

Today you will be contemplating the case of Rebeca, a Colombian immigrant who is facing removal (deportation). She is seeking cancellation of removal under INA 240A(b), which is a defense used when all other options fail. This “last chance” defense requires the immigrant facing removal to prove three things:

1. Physical presence for at least 10 years
2. Good moral character
3. That removal would result in “exceptional and extremely unusual hardship” to the alien’s spouse, parent, or child, who is a citizen or LPR of the US

Your task is to assume the role of an **immigration judge** who is overseeing Rebeca’s removal hearing. As a group you must review Rebeca’s story, the statute, and the details about how “exceptional and extremely unusual hardship” is measured, and decide if you will approve or deny her application. **You must make this decision based on the statute, not based on what you think should happen.**

I suggest that you first read carefully through the facts of Rebeca’s case, then read the statute and the explanation of extreme hardship, and return to Rebeca’s case to determine to what degree she meets the criteria. **Jot down some notes about why/how you came to your decision (including what aspects of the statute/guidance document you focused on).**

Please put away your laptops. You should have everything you need to do this activity in this packet.

## Appendix 2: Case Study Facts

Rebeca is a 39-year-old native and citizen of Colombia. She is the mother of six children. Four are United States citizens, aged 12, 11, 8, and 5, and two, aged 15 and 16, are natives and citizens of Colombia. Her parents are lawful permanent residents and her five siblings are United States citizens. She is divorced and has no immediate family in Colombia.

Rebeca and her two oldest children entered the United States in 2005 on nonimmigrant visas and stayed longer than authorized. Except for a brief absence in 2009, they have remained in this country since their initial entry. The three of them are facing deportation.

Rebeca and her children have no close relatives remaining in Colombia. Her entire family lives in the United States, including her lawful permanent resident parents and five United States citizen siblings. Rebeca's mother serves as her children's caretaker and watches the children while Rebeca manages her own motor vehicle inspection business.

Rebeca is divorced from the father of her United States citizen children. Although her former husband at one point was paying \$146.50 per month in child support, there is no indication that he remains actively involved in their lives. He is currently out of status and was in immigration proceedings in Denver as of the date of Rebeca's last hearing.

Rebeca has been operating her own business performing vehicle inspections for 2 years. The business has two employees. She reported having \$4,600 in assets, which is apparently the value of an automobile she owns. Rebeca testified that after 2 months in business her proceeds were \$10,000 a month, but she was also repaying her mother and brother money that she and her former husband had borrowed from them. After meeting expenses, her net profits were \$400-500 per month.

Rebeca's four United States citizen children have all spent their entire lives in this country (the U.S.) and have never traveled to Colombia. She and her family live 5 minutes away from her mother, with whom they have a close relationship. According to Rebeca, her children, particularly two of her United States citizen children, experience difficulty speaking Spanish and do not read or write in that language.

Rebeca has no alternative means of immigrating to the United States in the foreseeable future. There is a significant backlog of visa availability to Colombian nationals with preference classification. Therefore, Rebeca has little hope of immigrating through her United States citizen siblings, or even her parents, should they naturalize.

## Appendix 3: Supplemental Materials

*The Statute: INA 240A (or Title 8 U.S. Code 1229b)—Cancellation of Removal*

Students are given a copy of the statute:

Cancellation of Removal; Adjustment of Status, U.S. Code 8 (2020). §1229b.  
<https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229b&num=0&edition=prelim>

*Guidance Document 1: Cancellation of Removal Standards Explained*

Students are given the first three sections of the following document explaining the eligibility requirements of “Continuous Physical Presence,” “Good Moral Character and No Disqualifying Criminal Convictions,” and “Exceptionally and Extremely Unusual Hardship.”

Baker, Mike. “Cancellation of Removal for Non-Lawful Permanent Residents under INA Section 240A(b)(1).” Law Offices of Michael D. Baker, October 23, 2014, <http://mikebakerlaw.com/blog/2014/10/23/cancellation-removal-non-lprs-ina-section-240ab1/>.

*Guidance Document 2: Traditional Factors of Immigration Hardship*

Students are given the section entitled “Traditional Factors of Immigration Hardship” from the following document:

Batara, Carlos. “The Totality of Circumstances Test Under Cancellation of Removal.” Carlos Batara, Immigration Attorney, February 21, 2012, <https://www.bataraimmigrationlaw.com/cancellation-of-removal-hardship-factors>

*Guidance Document 3: A Short Guide to Cancellation of Removal Hardship Factors*

Students are given the section entitled “Thinking About the Unthinkable: A Short Guide to Cancellation of Removal Hardship Factors” from the following document:

Batara, Carlos. “The Challenge of Direct and Indirect Hardship Factors in Cancellation of Removal Cases.” Carlos Batara, Immigration Attorney, February 24, 2012, <https://www.bataraimmigrationlaw.com/modern-guide-immigration-deportation-hardship-factors>