# LOOKING AHEAD AT VAGUENESS CLAIMS IN THE IMMIGRATION CONTEXT POST-*DIMAYA*

By Jennifer Lee Koh*

*Sessions v. Dimaya* was a groundbreaking decision, finding that one portion of the "crime of violence" definition in immigration law–a basis for deportation–was unconstitutional.[1] The Supreme Court found the definition invalid under the void for vagueness doctrine.[2] This was a significant move, given that in general, the Court rarely outright invalidates immigration provisions.

I am going to focus on the purposes of the void for vagueness doctrine, and how those purposes map on to the broader immigration system. I will also provide one example of where I think we might go from here.

First, to provide some background of the void for vagueness doctrine, the doctrine is known to have two primary goals. The first is to ensure that the law provides proper notice of legal penalties to affected individuals. The second goal is to avoid arbitrary and unfair enforcement.[3] The vagueness doctrine is rooted in the procedural due process clause of the U.S. Constitution.[4]

With respect to notice, as early as 1926, courts stated that vagueness doctrine forbids laws that are "so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application."[5] It is hard to imagine a world, as some critics have said, where the law allows every single person to anticipate the consequences of the law. Some have said that more accurately, the notice required by the void for

* Visiting Professor of Law, UC Irvine School of Law, 2019-20; J.D. Columbia Law School; B.A., Yale University.

1. Sessions v. Dimaya, 138 S. Ct. 1204 (2018).

2. *See id.* at 1223.

3. *See generally* Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, WIS. L. REV. 1127, 1134 (2016).

4. *See id.*

5. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

vagueness doctrine is something like "lawyer's notice;"[6] that is, "a reasonable lawyer should at least be able to figure out what the law means and what the consequences should be."[7]

With respect to fair enforcement, this prong appeared a little bit later on in the jurisprudence. In the 1970s, the courts recognized that vague laws are problematic because they delegate too much discretionary power to law enforcement actors like police, prosecutors, judges, and even juries.[8] There is a separation of powers element to the fair enforcement goal as well.

I have argued (as have others) that the vagueness doctrine should take into account the broader social context in which laws operate.[9] Excessive impact on disempowered groups and individuals, for example, should lead to a stronger application of the vagueness doctrine. *Dimaya* was interesting because the government had argued that because immigration is civil in nature, a fully robust vagueness doctrine should not apply.[10] The Supreme Court rejected that argument.[11] The Court noted that the immigration consequences of a crime have become an integral part of the criminal justice system, and the Court also acknowledged that the consequences of deportation are so severe that a watered down application of vagueness doctrine is not appropriate.[12]

Having laid the background for vagueness doctrine, I will turn to the immigration enforcement system and what the broader context, with respect to cases like *Dimaya* and others, might suggest. I have argued elsewhere that these purposes—notice and fair enforcement—should apply with exceptional force in the immigration context.[13]

Notice to non-citizens plays a critical role in the fair functioning of the immigration system. The risk of arbitrary enforcement and discrimination by immigration enforcement actors is acute and recurring, and exists at multiple levels throughout the system.[14] In the current administration, these conditions are particularly true, and exacerbated in recent months and years. With respect to notice, the Supreme Court has now recognized multiple times, particularly in *Padilla v. Kentucky*,[15] that non-citizens entering guilty

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6. *See* Koh, *supra* note 3, at 1135.

7. *See id.*

8. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 165-67 (1972); Koh, *supra* note 3, at 1135-37.

9. *See* Koh, *supra* note 3, at 1135-37.

10. *See* Sessions v. Dimaya, 138 S. Ct. 1204, 1213 (2018).

11. *See id.*

12. *See id.*

13. *See* Koh, *supra* note 3, at 1130-32.

14. *See id.* at 1131-32.

15. Padilla v. Kentucky, 559 U.S. 356 (2010).

pleas in the criminal justice system need to have some adequate notice of the immigration consequences of their pleas.[16]

*Padilla* held that there is a Sixth Amendment right to accurate advice about known immigration consequences.[17] But *Padilla* arguably gives right to something more. It arguably creates a duty for criminal defense counsel to actively negotiate favorable outcomes from an immigration perspective. Here in California, we can and do see a stronger version of that codified in statutory law.[18] The problem in immigration is: what if even counsel does not know? That should lead us to ask, "Are there certain categories of criminal activity that persistently cause problems for even lawyers to predict the immigration consequences?"

Notice matters for all kinds of reasons in the immigration context. There is really no level playing field in immigration court. The right to government-appointed counsel does not exist.[19] A chronic and excessive use of immigration incarceration exists, as does the use of summary removal proceedings in which the majority of non-citizens who received removal orders actually receive no court hearing at all.[20] In the Trump administration, we have seen the loss of prosecutorial discretion on the part of immigration prosecutors. Once a charge is leveled, typically drafted by a frontline immigration officer, the likelihood of it simply being dropped—even in the face of compelling equities—is low.[21]

With respect to arbitrary enforcement, unfair enforcement arguably already existed in the immigration system well before the election of Donald Trump. Any kind of immigration law that is vague and difficult to predict should receive particular scrutiny under the vagueness doctrine. In addition, others have written extensively about the impact of immigration enforcement on communities of color.

Arbitrary enforcement exists in the immigration courts.[22] We well know that terms like "refugee roulette" describe the nature of immigration adjudication. Strong geographic disparities exist across the country and impact the quality of adjudication that one might receive. Now that we

16. *See id.* at 373-74.

17. *See id.* at 374.

18. *See* CAL. PENAL CODE § 1016.3 (2012) (requiring that defense counsel provide accurate and affirmative advice about the immigration consequences of a disposition).

19. *See* 8 U.S.C. § 1362 (1996) (providing that defendants only have a *privilege* to counsel during removal proceedings); Koh, *supra* note 3, at 1157.

20. *See* Koh, *supra* note 3, at 1157-58.

21. *See* Anna Miller, *"The Prevailing Muddle": Revising 8 C.F.R. §1239.2(F) to Bridge the Gap Between Naturalization and Removal*, 54 GONZ. L. REV. 99, 119-20 (2018).

22. *See* Koh, *supra* note 3, at 1160.

have ICE officers proclaiming that the "shackles have been taken off," the risk of arbitrary enforcement is even greater.[23]

Looking ahead, I want to focus our attention on where *Dimaya* and a strong version of the vagueness doctrine might make a difference in other parts of immigration law. In immigration law, the definition of "crimes involving moral turpitude" is influential. Crimes involving moral turpitude are yet another one of dozens of categories that can cause a non-citizen to face adverse immigration consequences, namely, deportation, detention, and disqualification from immigration relief. Yet the immigration statute does not define what a crime involving moral turpitude is. The courts have said that crimes involving moral turpitude require a culpable mental state and vile or reprehensible conduct.[24]

What is reprehensible and what is vile? I think intuitively, most people would say, "Well, that seems really subjective; it is hard to predict and hard to know." The reality is that there are thousands of cases that have developed over time discussing, confusing, and disagreeing over what those terms actually mean.[25] I believe the legal authorities, in particular at the Board of Immigration Appeals (BIA), have done a particularly poor job in the past couple of years of defining what a crime involving moral turpitude is.

In an essay in the *Stanford Law Review Online*, I examine recent legal developments with respect to crimes involving moral turpitude, in particular at the BIA.[26] The BIA is an agency that is a place of first appeal after an immigration court's decision. It is part of the Department of Justice and the Executive Branch.[27] Therefore, the Attorney General is the ultimate head of the same agency.[28] I observe that over the past two years the BIA has quietly but quite radically expanded the scope of what it believes it means when it identifies moral turpitude.[29] It has done this through various decisions, involving issues like chicken fighting, shoplifting, and burglary.[30] The BIA has unilaterally issued surprising pronouncements on

23. *See id.* at 1160-61; *See also* Nicholas Kulish, Caitlin Dickerson, & Ron Nixon, *Immigration Agents Discover New Freedom to Deport Under Trump*, N.Y. TIMES (Feb. 25, 2017), https://www.nytimes.com/2017/02/25/us/ice-immigrant-deportations-trump.html.

24. *See* Nunez v. Holder, 594 F.3d 1124, 1130 (9th Cir. 2010).

25. *See, e.g., id.;* Koh, *supra* note 3, at 1117-19; Jennifer Lee Koh, *Crimmigration Beyond the Headlines: The Board of Immigration Appeals' Quiet Expansion of the Meaning of Moral Turpitude*, 71 STAN. L. REV. ONLINE 267 (2019).

26. Koh, *Crimmigration Beyond the Headlines, supra note 25.*

27. *See* 8 C.F.R. § 1003.1(a)(1) (2015).

28. *See id.*

29. Koh, *supra* note 26.

30. *Id.*

what it believes to be socially repugnant behavior. It is worth noting that this agency is fairly immune from public accountability.

The net effect of these developments at the BIA are to ultimately widen the net of ICE's immigration enforcement powers, which has particular importance in the current political climate and given the immigration priorities of the administration. The good news is that lawyers have raised vagueness claims in the crimes involving moral turpitude context to challenge the constitutionality of the definition.[31] The bad news is that so far, the Federal Courts of Appeal have largely rejected these claims.[32] I think still that history tends to set the course right. Accordingly, I believe the history of the vagueness doctrine and its broader context suggest a different future for crimes involving moral turpitude—and potentially other crime-based provisions in immigration law.

31. *Id.*
32. *Id.*