

INTRODUCTION: IMMIGRATION IN THE TRUMP ERA SYMPOSIUM ISSUE

By Beth Caldwell *

Southwestern Law Review's *Immigration Law in the Trump Era* symposium issue highlights concerns about the current state of U.S. immigration law in light of the "aggressive immigration initiatives"¹ of the Trump Administration. Speakers at the symposium the Southwestern Law Review hosted on February 1, 2019 provided a broad overview of the stark realities of immigration law and enforcement in the Trump era, describing harsh policies targeting youth, asylum-seekers, workers, and immigrants with criminal convictions.

But, more unexpectedly, the speakers at the symposium also highlighted numerous reasons to have hope for the future of immigration law. Almost every panelist spoke about the actions of courts, states, and individuals to push back against the current wave of initiatives that restrict immigrants' rights. While highlighting problematic changes to immigration law in recent years, the articles in this issue also describe resistance to these policies and identify signs that point to a future where U.S. immigration law is more just.

THE CURRENT STATE OF IMMIGRATION LAW & ENFORCEMENT

There are many reasons to be deeply troubled by the current state of immigration law and policy in the United States. Derogatory and demeaning rhetoric about immigrants is regularly employed at the highest levels of government. The United States currently incarcerates immigrants,

* Beth Caldwell is a Professor of Legal Analysis, Writing, and Skills at Southwestern Law School and was formerly an attorney in the Los Angeles County Office of the Public Defender.

1. See Kevin R. Johnson, *Keynote to Immigration in the Trump Era Symposium: Judicial Review and the Immigration Laws*, 48 SW. L. REV. 463, 471 (2019).

including young children, in “detention centers” at unprecedented rates.² Children who are too young to speak are incarcerated in jail-like facilities after their parents have requested asylum. Hundreds of thousands of people, including long-term residents of the United States, are deported each year, resulting in U.S. citizen children being separated from their parents, and spouses from one another.³ The federal government has increasingly been conducting workplace raids to arrest immigrant workers, spurring a pervasive sense of fear among immigrant communities.⁴ Furthermore, some localities have passed “anti-sanctuary laws” designed to require law enforcement officers to target immigrants for arrest, detention, and removal.⁵

Much of the groundwork for this enforcement apparatus was laid far before Donald Trump took office. Over three million people were deported under President Obama’s leadership as immigration detention rates skyrocketed.⁶ As César Cuauhtémoc García Hernández remarked at the symposium, “The most liberal president in recent history stood watch while the number of people confined pending a decision on their ability to remain in the United States reached 380,000, then 420,000, before peaking just shy of 478,000 . . . [W]here President Obama left off, Trump picked up.” The workplace raids the federal government is currently conducting are also nothing new; the government has conducted these kinds of raids for years. Although Obama’s administration curtailed their use, they were commonplace under George W. Bush.⁷

While acknowledging that this path was paved under the leadership of past presidents, the speakers’ remarks highlight many ways in which

2. See Geneva Sands, *This Year Saw the Most People in Immigration Detention Since 2001*, CNN (Nov. 12, 2018), <https://www.cnn.com/2018/11/12/politics/ice-detention/index.html> (reporting that ICE detained an average of over 42,000 people each day throughout fiscal year 2018, which is more than ever registered since ICE began tracking this information in 2001).

3. See BETH C. CALDWELL, *DEPORTED AMERICANS: LIFE AFTER DEPORTATION TO MEXICO* (2019) (documenting the experiences of long-term residents of the United States who have been deported, and the consequences their U.S. citizen children and spouses face when a relative is deported).

4. See Kati L. Griffith and Shannon Gleeson, *Trump’s ‘Immigration’ Law Agenda: Intensifying Employment-Based Enforcement and Un-Authorizing the Authorized*, 48 SW. L. REV. 475, 480-87 (2019).

5. See Pratheepan Gulasekaram, Rick Su & Rose Cuisson Villazor, *Anti-Sanctuary & Immigration Localism*, 119 COLUM. L. REV. 837, 839-42.

6. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SEC., *YEARBOOK OF IMMIGRATION STATISTICS* 103 tbl.39 (2017), <https://www.dhs.gov/sites/default/files/publications/2016%20Yearbook%20of%20Immigration%20Statistics.pdf> (reporting the total number of immigrants removed each year, which totals 3,080,195 from 2009 to 2016).

7. Griffith & Gleeson, *supra* note 4, at 477, 480-82.

immigration law and enforcement *has* changed rather dramatically during Donald Trump's presidency. Now, alongside these aggressive enforcement policies, we are witnessing the active erosion of protections that have shielded vulnerable groups from removal in recent years.

Asylum protections for victims of domestic violence, for which Karen Musalo battled in the courts for eighteen years, as she describes in this issue, were eviscerated by a unilateral opinion former Attorney General Sessions issued on June 22, 2018.⁸ According to Andrea Ramos, Director of Southwestern's Immigration Law Clinic, the government's process for considering Special Immigrant Juvenile Status (SIJS) cases has changed so dramatically under the Trump Administration that she has not had a single case approved in the past two years, whereas before they were regularly approved.

These policies, combined with pervasive anti-immigrant rhetoric, have created a climate of intense fear among immigrant communities, including among people with lawful immigration status. Kati Griffith and Shannon Gleeson's research documents a widespread sense of fear among immigrants with lawful Temporary Protected Status ("TPS") and Deferred Action for Childhood Arrivals ("DACA").⁹ As they explain, "[t]he threat of deportation causes immigrants fear and stress, and also disrupts family relationships, erodes health outcomes, and creates barriers to claims-making."¹⁰

SIGNS OF HOPE

While acknowledging these major problems in the current state of immigration law, the authors whose work appears in this symposium issue also acknowledge signs of hope. Two trends emerge in the more optimistic comments of the contributors: (1) courts have taken a more active role in limiting government power in immigration cases than in the past; and (2) states and localities have enacted sanctuary policies designed to protect immigrants.

8. *Matter of A-B-*, 27 I. & N. Dec. 316, 320 (U.S. Att'y Gen. 2018) ("Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.").

9. Griffith & Gleeson, *supra* note 4, at 491-98.

10. Griffith & Gleeson, *supra* note 4, at 495.

Judicial Checks on Government Power in Immigration Cases

Lower courts have intervened to check the government's power by issuing injunctions to prevent the enforcement of the initial travel ban,¹¹ to limit the practice of family separation at the border,¹² and to prevent the implementation of former Attorney General Sessions's unilateral decision that victims fleeing domestic violence no longer qualify for asylum protections.¹³ A federal District Court recently prevented the implementation of a change to the government's policy regarding Special Immigration Juvenile Status that previously prohibited the policy's application to youth between the ages of eighteen and twenty-one.¹⁴

And, as Dean Kevin Johnson argues in this issue, the Supreme Court is now far more willing to apply constitutional review to immigration laws than ever before.¹⁵ For example, in *Dimaya v. Sessions*, a case that originated in Southwestern Law School's Appellate Litigation Clinic, the U.S. Supreme Court invalidated a provision of immigration law because it was void for vagueness.¹⁶ This was remarkable because of the long history of judicial deference to the plenary power of the federal government to regulate immigration matters. The high court's willingness to apply constitutional norms to immigration cases has transformative potential.

Dimaya was also an important decision because the Supreme Court stood up for the rights of immigrants with criminal convictions despite the widespread dehumanization of this group of people in public discourse. As Jennifer Koh argues in this issue, the case could open the door for challenges to other laws governing crime-based removals.

Sanctuary Policies

State level sanctuary laws designed to protect immigrants from harsh federal immigration enforcement policies also offer signs of hope for the future of protecting immigrants' rights. Rose Villazor and Alma Godinez-Navarro specifically discuss sanctuary legislation passed in California and New Jersey, comparing the provisions of these two state laws.¹⁷ Panelists at

11. See Richard Pérez-Peña, *2nd Federal Judge Strikes Down Trump's New Travel Ban*, N.Y. TIMES (Oct. 18, 2017), <https://www.nytimes.com/2017/10/18/us/travel-ban-blocked.html>.

12. *Ms. L v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018).

13. See *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.C. Cir. 2019).

14. *R.F.M. et al. v. Nielson*, 365 F. Supp. 3d 350, 377-80 (S.D.N.Y. 2019).

15. See Johnson, *supra* note 1.

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

17. Rose Cuison Villazor & Alma Godinez-Navarro, *Sanctuary States*, 48 SW. L. REV. 503 (2019).

the symposium also discussed innovative California legislation that goes beyond that which is normally covered by sanctuary policies.

Hiroshi Motomura's remarks highlighted the importance of AB 450, which restricts the authority of ICE to access immigrants while they are at work by limiting the capacity of private employers to consent to ICE access. Under AB 450, employers are required to provide employees with notice that ICE plans to inspect workplace records. Employers are also restricted from re-verifying an employee's immigration status after the initial verification that is conducted at the time of hiring. According to Professor Motomura, AB 450 is particularly important because it seeks to limit the actions of a private individual rather than a government official, which he views as significant because a great deal of immigration enforcement occurs through "private enterprise."

Ingrid Eagly also spoke about innovative sanctuary policies California has employed specifically to protect immigrants with criminal convictions from removal. This is remarkable given the widespread demonization of "criminal aliens" and a past willingness to exclude immigrants with criminal convictions from many proposals for immigration reform.¹⁸

THE FUTURE OF IMMIGRATION LAW

By recognizing these positive signs, the authors of the papers in this issue are not blindly optimistic. For example, Professor Chin cautions that the implications of *Dimaya* are fairly limited because Congress could just revise the law to pass another statute that is not vague, but that would nonetheless trigger *Dimaya*'s deportation.¹⁹ In her remarks, Yolanda Vázquez reminded the audience that anti-immigrant policies flow directly from the anti-Latinx rhetoric regularly employed in current political discourse, which shows no sign of stopping.

Further, just as some courts are acting to protect immigrants, others are acting to undermine these protections. The hope people place in judicial interventions is tapered by some court decisions that block protections for immigrants. For example, a California District Court issued a preliminary injunction that currently blocks the implementation of parts of California's AB 450.²⁰ And when courts uphold sanctuary policies at the state or local

18. See generally Ingrid V. Eagly, *Criminal Justice in an Era of Mass Deportation: Reforms from California*, 20 NEW CRIM. L. REV. 12 (2017).

19. Gabriel Chin, *Some Preliminary Thoughts on Dimaya*, 48 SW. L. REV. 539, 539-40 (2019).

20. See *United States v. California*, No. 2:18-cv-490-JAM-KJN, 2018 WL 3361055 (E.D. Cal. July 9, 2018).

level, this could ultimately undermine protections for immigrants because the same reasoning can be employed to uphold anti-sanctuary policies.²¹

Despite these very real challenges, I am inspired by participants' ideas about reimagining the future of immigration law. In his talk about immigration detention, César Cuauhtémoc García Hernández encouraged the audience to “dare to dream” that immigration detention can be abolished. Angélica Cházaro argued for deportation abolition, and for civil disobedience to protect people from the government's deportation efforts. Leticia Saucedo reimagines workplaces as healthy environments where people do not need to live or work in fear of deportation or exploitation.²²

How will we get from the current reality to these dreams of a more just immigration system? Activism and innovative clinical work, such as that done by speakers Ingrid Eagly, Kathy Khommarath, Andrew Knapp, Annie Lai, Karen Musalo, Gowri Ramachandran, Andrea Ramos, and Julia Vazquez, is more important than ever. We should also be mindful about taking an inclusive approach to re-imagining immigration reform by extending protections to immigrants with criminal convictions rather than treating this population as expendable. And, as Dean Kevin Johnson suggests, the Supreme Court's (slow) movement to abandon the plenary power doctrine, and to apply the same constitutional standards in immigration cases as it applies in all other areas of the law, would bring immigration law much closer to justice than it currently is.

21. Gulasekaram et al., *supra* note 5.

22. Leticia Saucedo, *The Legacy of the Immigrant Workplace: Lessons for the 21st Century Economy*, 40 T. JEFFERSON L. REV. 1 (2018).