

CONTINGENCIES OF PROSECUTORIAL AND IMMIGRANT AGENCY

PONENCIA

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I want to begin by thanking UNIBE, as well as the LatCrit organizers for a wonderful conference. Also I want to apologize for my lack of Spanish linguistic capabilities; I'll be speaking in English.

The revised title of my presentation is 'Contingencies of Prosecutorial and Immigrant Agency'. I've been fascinated by the dynamics of social hierarchies since first starting out as a social and political philosopher in the 1970's, a time when gender hierarchies were undergoing some dramatic transformations. I found that an analytical framework of agency relations, referring to individual capacities for significant action, was helpful in explaining both enduring hierarchies and rapid changes in those hierarchies.¹

As an immigration attorney today, doing removal defense, I am faced with a volatile new social hierarchy between aliens and citizens. On a daily basis, a removal defense attorney is confronted with the disconnect, the utter disjuncture between the personhood, or agency and agency relations of her clients, and their Removability, and sometimes their Removal. An agency relations framework provides insight into this volatile, contingent feature of immigrant life in the United States today. I will begin by offering examples of three clients who were deported in a recent two week period.

Two clients had similar profiles. They were husbands, fathers and business owners who had lived in NYC since the early 1990's. One, Wang Zhao Nuan, had a United States Citizen (herein after USC) wife and three USC children. He owned an auto repair shop, threatened with bankruptcy by his detention. The other, Lin Shu

¹ Patricia S. Mann, *Micro-Politics: Agency in Postfeminist Era* 14 (University of Minnesota Press 1994). See also, Patricia S. Mann, *Meanings of Death*, in *Physician Assisted Suicide: Expanding the Debate*, 11, 19 (Margaret P. Battin et al. eds., Routledge 1998); an analysis of agency relations between patients, their families, and doctors and other health care providers provides a framework for comprehending the implications of a policy of legalized assisted suicide.

Gen, owned a restaurant and his wife had withholding. He had two USC children. His wife did her best to keep the restaurant going after he was detained.

Both these men had arrived in the United States early in the 1990's and applied for a C-8 employment card through a travel agency. Travel agencies in those years typically obtained the C-8 card by doing an asylum application. The asylum cases were adjudicated in Immigration Court without the applicant's presence, typically. The unwitting immigrant received an *in absentia* removal order, but it had little impact on his life for many years. Such immigrants married, worked very hard, saved their money, opened their own restaurant or other small business, had USC children, and generally lived a well rounded, successful American life.

But because of the old deportation order, these men were Removable, implacably, enduringly removable. Sadly, we have no statute of limitations for old removal orders in the United States.² For many years, it did not matter. Productive, well behaved aliens with removal orders were not bothered by the U.S. government. However, things have changed. Due to aggressive and extremely well funded new "enforcement" efforts, both men were apprehended in January 2011.

Until recently, our Chinese clients were lucky; China was not issuing travel documents for such individuals. So they would be detained, and we would be retained to do a parole letter. After 90 days, if there were no prospects for imminent travel documents, post *Zadvydas v. Davis* regulations say that such aliens must be released, usually on an order of supervision.³

Unfortunately, China has recently begun to issue travel documents in some cases. In these two cases, I had spoken with their deportation officers a week or two before the 90 day period was up, and release appeared imminent, none too soon to stave off bankruptcy of their businesses caused by their three month imprisonment. Then one morning one wife called and said her husband was being deported. Later that day he was. The same thing happened with the other client. These were just 2 of the 200,000 non criminal aliens deported in the past year, fairly typical I assume. Fathers of USC kids, husbands of USC or legal permanent resident wives, busi-

² Jack Wasserman, *Grounds and Procedures Relating to Deportation*, 13 San Diego L. Rev. 125, 126 (1975). Wasserman states that beginning with the Immigration Act in 1891 and continuing until the McCarran-Walter Act creating our current Immigration and Nationality Act in 1952, there was a statute of limitations on deportation. Richard Boswell, *Crafting an Amnesty with Traditional Tools: Registration and Cancellation*, 47 Harv. J. on Legis., 175, 180, 183 (2010). Boswell reasons that "registry," providing a "blanket lawful permanent residency to non-citizens without status who can prove that they have been in the country since before an established statutory cutoff date," may be seen as a statute of limitations. However, while the original registry cutoff date was set in 1929 as June 3, 1921, the registry cutoff date is currently set at January 1, 1972, and so has little functional significance as a statute of limitations.

³ 533 U.S. 678, 701 (2001). Referring to post-removal confinement, the Court held that the Attorney General was only allowed to detain aliens for a period reasonably necessary to secure the aliens removal. Release under supervision was required once there was no significant likelihood of removal in the reasonably foreseeable future. 8 C.F.R. § 241.4 (2012).

ness owners, plucked from a decades old productive web of family and community relations, and removed, not for any particular reason, but just because they were removable.

The last case is, if possible, even more viscerally upsetting. Client Huang Xin Na, was married to a USC husband, with three USC kids, one of them under a year old and nursing. Huang Xin Na was under an order of supervision in NYC. However, she and her husband bought a restaurant in Minneapolis and they moved, without reporting their change of address to Immigration and Customs Enforcement.⁴ and without properly requesting a transfer of her order of supervision. She was deemed a fugitive, and when tracked down, she was detained, back in October 2010. Her husband hired a local attorney to do a parole letter, submitting information about the fact that she was the mother of a nursing baby. But Ms. Huang was not released, despite a recent 2011 Morton memo about I.C.E. detention priorities, asserting that except in “extraordinary circumstances,” nursing mothers are not to be detained.⁵ After 90 days she was still not released, so her family retained our firm. I spoke to her Deportation Officer, then to his Supervisor. I emphasized that insofar as my client was a nursing mother, her detention was directly contrary to the policy of the Morton Memo of March 3, 2011. The Supervisor responded coolly, “ Oh, that’s a shame about her nursing. . . But I have a travel document here in front of me, so the baby is irrelevant. She is being deported.” And she was deported on a plane the next morning. Leaving little time for her attorneys to aid Ms. Huang’s angry and shocked US citizen husband in attempting to generate negative publicity with the hope of obtaining a stay and reassessment of Ms. Huang’s proposed removal.

Removing the two husbands and fathers was cruel and pointless; Wrenching the mother and her breast from her nursing baby is somewhere very far beyond cruel and pointless. In all these cases, almost 400,000 last year, the highly developed agency relations, the bonds of family and community developed over decades count for nothing.⁶ Each of these individuals had an old removal order, and was legally

⁴ Herein after I.C.E.

⁵ Memo. From John Morton, USCIS Director, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, (Mar. 2, 2011). “Absent extraordinary circumstances... field office directors should not expend detention resources on aliens...who are disabled, elderly, pregnant, or nursing...”

⁶ Hiroshi Motomura, *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States*, 15-62, 80-114 (Oxford U. Press 2006). This author has suggested two ways for unauthorized migrants to make membership claims based upon their past history within the United States. “Immigration as affiliation” relies upon the migrant’s history of work and family (USC children), while “immigration as contract” refers to “expectations and understandings” between newcomers and their new country. Hiroshi Motomura, *Immigration Outside the Law*, 108 Colum. L. Rev. 2037, 2067- 2068 (2008). Most relevantly, Motomura points to Justice Stevens’ argument in *Fernandez-Vargas v. Gonzalez*, 548 U.S. 30, 52 (2006) (J. Stevens, dissenting), regarding the implications of the government’s decision not to enforce Fernandez-Vargas’s prior removal order for over twenty years. Justice Stevens’ dissent “amounts to an argument that those involved in enforcement today must be allowed to defer to equities created in the past by decisions not to enforce immigration law,” according to Motomura.

removable. At the whim of the Department of Homeland Security, they were removed.⁷

We all say enforcement doesn't work because in any rational analysis it doesn't.⁸ In a time of globalization, with a huge global flow of capital and goods and a correspondingly ineluctable global flow of bodies across our borders, it is not possible to seal our borders, whether with a fence or by any other means. Internal enforcement efforts, no matter how well funded, will not root out 11-12 million "illegal" aliens living peaceably and productively amongst us. If the criterion is comprehensiveness, then enforcement does not work.

But perhaps we are not using the correct metric. As concretely terrifying acts of government power to remove, as horrific family sundering of wives, mothers, husbands, fathers and children, these symbolic acts of enforcing our borders may be said to work. Perhaps, systematically arbitrary and capricious enforcement makes up in cruelty, what it lacks in comprehensiveness and consistency. As a public relations effort, each cruel deportation may be intended to announce our sovereignty, the membership requirements of a desirable community trumping the bonds and productive agency relations of an alien amidst us.⁹

As mentioned earlier, I find a multi-dimensional agency framework helpful in analyzing the dynamics of social hierarchies. I posit three basic dimensions of agency, or capacity for significant actions: (1) Desiring agency; (2) Dutiful agency, responding to the needs of others; and (3) Actions taken out of the expectation of Recognition and Reward.¹⁰

Traditional social hierarchies, whether of master/slave, employer/servant, man/woman, exhibit predictable patterns, distributing the dimensions of agency in characteristic ways. The dominant social agent is presumed to have Desiring agency and well-founded Expectations of recognition and reward. Whereas, the subordinate social agent is presumed to act primarily out of concern for the needs of others, the

⁷ Department of Homeland Security, Fact Sheet, Dec. 21, 2010. "In fiscal year 2010, Immigration and Customs Enforcement set a record for overall removals of illegal aliens, with more than 392,000 removals nationwide."

⁸ See, Bill Ong Hing, *Thinking Broadly About Immigration Reform By Addressing Root Causes*, in *Legal Briefs On Immigration Reform from 25 of the Top Legal Minds in the Country*, (Mona Parsa & Deborah Robinson eds., 2011) for a very reasonable discussion of the failure of U.S. enforcement approaches, and possible alternatives.

⁹ See Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* 28-34 (Basic Books, Inc. 1983). The author argues that a state's right to enforce boundaries against strangers is grounded in the value communities place in defining and distributing membership to one another, membership being a good that can only be distributed by taking people in or by refusing to take them in. See also Linda Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. Rev. 1047, 1073 (1994). Bosniak explains that Walzer's Membership principle is paired with a contrary "Metic" principle, holding that once immigrants reside within a political community and labor there, they must be treated as members of that community. She emphasizes the unresolved tension between these two principles.

¹⁰ Mann, *supra* n.1, at 14.

agency of Responsibility. Subordinate agents receive negative recognition or punishment, should they manifest independent economic ambitions or sexual desires of their own. While all traditional hierarchies exhibit similar patterns of agency distribution, the volatile contemporary hierarchies currently existing between Citizens and Aliens do not conform to such patterns. Immigrants arrive in this country with full three dimensional agency. They are desiring, ambitious selves, and also responsible agents, sending remittances home and caring for spouses and children in this country. They also achieve considerable recognition and reward within their communities here and in their country of origin.

However, immigrants who are not yet citizens are Removable, ineradicably Removable. This means that their agency relations, as well as agency relations of their relatives and friends, are subject to disruption and even total destruction. The social subordination of non-citizens within the U.S. is expressed in the lack of legal recognition accorded to these non-citizens. But even more profoundly, in the lack of sympathy, respect, or even basic acceptance of the significance of the familial, professional agency relations, in which they are embedded. That is, when ICE determines that a non-citizen is removable, not only are his or her agency relations denied recognition, but so are all those of his USC relatives and friends. Their love for this removable individual, their possible economic dependency upon this removable individual, all of their varied connective ties and social relationships to this removable individual, count for very little. While American case law lacks a strong tradition of articulating individual rights of familial association, existing case law conceptualizing rights of spouses, as well as parent/child relationships provides at least a starting point for developing a powerful critique of this egregious denial of rights of U.S. citizens when a close relative is summarily deported.¹¹

An immigrant may live a peaceable, productive life, indistinguishable from any USC neighbors, for two decades or more; then, one day they are stopped, perhaps at a random traffic stop, a check is run and their old removal order, a long ago criminal conviction or even DUI is discovered. They are detained, and I.C.E. seeks travel documents. Then they are deported, gone. Not only is their own history of rich three dimensional agency completely for naught; but their agency relations, their relations of love and responsibility to spouses, children, business partners, church communities, all mean nothing. A nursing mother and her breast are deported leaving her suckling USC baby behind.

How is this cruel, inhumane treatment possible in a supposedly advanced, civilized country like the U.S.A.? I heard this question repeatedly yesterday from audience members.¹² How can I.C.E., the Department of Homeland Security and the

¹¹ For good reviews of the available case law and its limitations, see, Maria Pabon Lopez, *Tale of Two Systems: Analyzing Treatment of NonCitizen Families in State Family Law*, 11 Harv Latino L.R. 229 (2008); and see, Kif Augustine-Adams, *Plenary Power Doctrine After September 11*, 38 UC Davis L.Rev. 701 (2005).

¹² The first day of the 2011 LatCrit South-North Exchange on Theory, Culture and Law, May 12,

Justice Department treat peaceable, productive human beings this way? From an agency relation's perspective, while aliens in the USA demonstrate three dimensional agency, they have a serious recognition deficit. Specifically, the quality of their legal recognition leaves much to be desired.¹³ Ever since the Supreme Court enunciated the Plenary Power doctrine in 1889 in *Chae Chan Ping v. United States*, where it gave Congress a virtual blank check to formulate Immigration Law policy, immigration law has developed as a fabric of administrative agencies issuing discretionary decisions.¹⁴

While everyone realizes that the United States Citizenship and Immigration Services (herein after, USCIS) is an administrative agency, many people forget that when immigrants are put in "proceedings," the Immigration Court and the Board of Immigration Appeals in which their cases are litigated, are part of EOIR, the Executive Office of Immigration Relations, also an administrative agency. While immigrants have the right to legal representation and Immigration Judges wear robes and expect everyone to rise upon their entrance into their "courtroom", the immigration courts and the Board of Immigration Appeals (the immediate appellate body) are administrative agencies. Therefore, they do not operate

2011, at UNIBE, in Santo Domingo, Dominican Republic, had several panels on Human Rights and International Law. The stark contrast between International Law's universalist principles of dignity and respect for individuals, and current U.S. immigration policies of deportation and exclusion evoked repeated expressions of audience indignation.

¹³ See Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L. J. 545 (1990); and Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 Colum. L. Rev. 1625 (1992), for a very detailed historical analysis of the constitutionally deficient quality of immigrant legal recognition by our highest courts.

¹⁴ *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), often referred to as "the Chinese Exclusion Case, held that a returning resident non-citizen could be excluded if Congress determined that his race was undesirable, or for any other reason. Four years later, in *Fong Yue Ting v. United States*, 149 U.S. 698 (1993), the Court held that such non-citizens could also be deported because of their race, or for any other reason. See Gabriel J. Chin, *Chae Chang Ping and Fong Yue Ting: The Origins of the Plenary Power*, in *Immigration Law Stories* (David A. Martin, Peter H. Schuck eds., Foundation Press 2005). Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 Tex. L. Rev. 1615 (1999-2000). Legomsky emphasizes the significant complementary role of what he calls "consular absolutism" as part of this discretionary fabric of agency control over immigration.

Robert Pauw has argued that in the aftermath of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) enacted by Congress in 1996, with its draconian requirements for mandatory detention and deportation, the plenary power doctrine does not justify a failure of courts to intervene to protect fundamental human rights of noncitizens, involving "liberty interests and family interests." Pauw analogizes to cases of the European Court of Human Rights (ECHR), applying Article 8 of the European Convention on Human Rights, requiring an individual analysis of the person's "threat to the community balanced against his or her family ties" and refusing to allow deportation in many such cases. Robert Pauw, *Plenary Power: An Outmoded Doctrine That Should Not Limit IIRIRA Reform*, 51 Emory L.J. 1095, 1128-1129 (2002).

according to the rule of law and universalistic principles of justice that operate within Article Three trial and appellate courts.¹⁵ Instead, Immigration Courts and the Board of Immigration Appeals issue discretionary decisions, subject in some cases to review by Article Three Appellate courts. Indeed, the legal legitimacy of such an administrative system relies upon maintaining or achieving some sort of balance between the exercise of Agency discretion and judicial review, enforcing the rule of law over these discretionary bodies.¹⁶ That is, the legitimacy of our immigration system of administrative law relies, in part, upon achieving a certain quantity and quality of judicial review. This is why so many legal commentators have commented very critically upon the long legal history of plenary power deference of the Supreme Court and lower federal courts, as well as upon the judicial review stripping clauses contained in the 1996 statutes, the Illegal Immigration Reform and Immigrant Responsibility Act, and the Antiterrorism and Effective Death Penalty Act.¹⁷

However, with the huge increase in funding for various harsh immigration agency enforcement measures since 9/11, another variable affecting the balance between agency discretion and judicial rule of law has become evident. That variable is the sheer quantity or magnitude of Administrative Agency enforcement activity. As we all know, the volume of immigration agency enforcement activities, particularly those of I.C.E. detention and removal operations, has increased hugely since September 11, 2001. With all the money poured into C.B.P. (“Customs and Border Protection”) interdiction, Fugitive Operation (FUG Op) teams knocking

¹⁵ See Michael J. Churgin, *Immigration Internal Decisionmaking: A View of History*, 78 Tex. L. Rev. 1633 (2000), for a historical review of the Bureau of Immigration from 1909-1913, an agency within the Department of Commerce and Labor under the Immigration Act of 1907. Churgin emphasizes the absolute and unreviewable authority of the Secretary of Commerce and Labor, when cases were finally appealed to him. However, what is most noteworthy is the extremely small proportion of aliens excluded, primarily for medical reasons. In fiscal year 1910, 786,094 aliens were admitted at Ellis Island, 90% allowed to enter after a first inspection. After a further review by an immigration panel, only 3,979 appealed to the Secretary of Commerce, Charles Nagel, for final review. 1,290 of those who appealed were successful, so approximately 2,700 aliens were excluded, out of roughly 790,000 applicants.

¹⁶ Daniel Kanstroom, *The Better Part of Valor: The Real ID Act, Discretion, and the “Rule” of Immigration Law*, 51 N.Y. L. Sch. L. Rev. 161 (2007). Kanstroom states that “the constitutional legitimacy of the administrative state rests upon a balance between (potentially unreviewable) agency discretion and the judicially enforced Rule of Law.”

¹⁷ See Peter Schuck, *The Transformation of Immigration Law*, 84 Colum. L. Rev. 1 (1984); Stephen Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 S. Ct. Rev. 255; Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 Harv. L. Rev. 853 (1987); T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 Am. J. Intl. L. 862 (1989); Sarah H. Cleveland, *Powers Inherent In Sovereignty: Indians, Aliens, Territories and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 Tex. L. Rev. 15 (2002).

on doors at 6 A.M., seeking to round up people in the community, the creation and deployment of accessible and comprehensive new data bases, and with the construction of detention facilities, with 400,000 removals last year, twice the number a decade ago, and ten times the number two decades ago, the volume of agency discretionary cruelty is huge and unprecedented today.¹⁸

The question is whether the huge quantity and cruel quality of current agency discretionary decisions currently is such as to create an evident imbalance, and accordingly a lack of legitimacy in our system of immigration enforcement. It is not that judicial review has disappeared. , In 2001, *Zadvydas v. Davis* provided the basis for meaningful regulatory limits on post-order detention.¹⁹ *St. Cyr v. INS.*, also in 2001, makes 212(c) waivers available for the surprisingly large number of legal permanent residents who become removable through data base discovery of criminal convictions from the 1980's and early 1990's.²⁰ But as an attorney doing removal defense in 2011, it is very clear to me that I am operating in a system ruled by arbitrary, capricious and cruel varieties of agency discretion.²¹

For my clients, for the 400,000 immigrant aliens removed each year and their families, this is a system with the trappings of the rule of law. As a lawyer, I am a trapping. Immigration judges, administrative agents in robes, they too are trappings of the rule of law. But a system that rips a mother and her breast from a USC baby's mouth without blinking an eye is obviously a system that "shocks the conscience". It is a system where waivers of inadmissibility, merciful grants of asylum and other forms of relief are regularly granted in Immigration Courts and by the USCIS. However, it is a system that currently operates with little pretension to either substantive or procedural due process, or any sense of overarching justice as demanded by various international bodies and their declarations of universal human rights.²²

¹⁸ *Immigration Enforcement Actions: 2004*, Office of Immigration Statistics, Department of Homeland Security, November 2005, reports that total removals in 2001 were 178,026. In 1994, total removals were 45,674. It is often assumed that the increased numbers of deportations today corresponds with greater numbers of undocumented immigrants within the U.S. However, Austin T. Fragomen, in *Searching for Illegal Aliens: The Immigration Service Encounters the Fourth Amendment*, 13 San Diego L. Rev. 82, 84 (1975), reported that in 1975, the Service estimated that "at the present time there are approximately 12 million aliens without proper documentation," a number comparable to today, while deportations were certainly not comparable.

¹⁹ 533 U.S. at 701.

²⁰ 533 U.S. 289 (2001).

²¹ Kanstroom, 51 N.Y. L. Sch. L. Rev. at 167- 175, 179-180, 193, 196.

²² The Due Process Clause of the Fifth Amendment provides that "No person shall. . . be deprived of life, liberty, or property, without due process of law . . ." U.S. Const. amend. V. The Supreme Court has held that this clause protects individuals against two types of government action. "Substantive due process" prevents the government from engaging in conduct that "shocks the conscience," *Rochin v. California*, 342 U.S. 165, 172 (1952), or interferes with rights "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937). While government action depriving a person of life, liberty, or property may survive substantive due process scrutiny, it must also be imple-

For an attorney practicing within this system, its legitimacy does not currently present itself as a question for reasonable discussion and debate.

mented in a fair manner, according to “procedural due process” requirements. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *U.S. v. Salerno*, 481 U.S. 739, 746 (1987). In *Motomura*, 92 Colum. L. Rev. at 1652, 1665, *Motomura* discussed cases in which the Supreme Court has articulated procedural due process rights of immigrants, maintaining that procedural due process reasoning operates as a surrogate for substantive constitutional claims foreclosed by the plenary power doctrine. Still hoping in 1992 for further erosion of the plenary power doctrine, *Motomura* recognized the power of Congress “to limit the group of aliens entitled to invoke it [procedural due process],” as Congress dramatically did with AEDPA and IIRIRA, four years later. *Motomura*, 92 Colum. L. Rev. at 1701.

