Immigration Law's "Shadow Dockets"

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Shalini Bhargava Ray, *Immigration Law's Arbitrariness Problem*, 121 **Colum. L. Rev.** __ (forthcoming, 2021), available at SSRN.

The "law in books" is often not the same thing as the "law in action." And in administrative law, the reason for that disjoint is often because some agency has decided to interpret, apply, or enforce the written law in a way that changes its on-the-ground meaning. In immigration law, the "law in books"—the Immigration and Nationality Act—takes a hard line on violators: it "specifies deportation as the sanction for nearly all transgressions of immigration law, no matter how minor, and regardless of the personal circumstances of the immigrant" (P. 3.) But when we look at how that law is applied, a different picture comes into view—"a system of shadow sanctions" (P. 4) that takes the place of deportation for vast numbers of noncitizens.

Shalini Bhargava Ray maps and critiques this "shadow"[1] world of immigration law in an absorbing recent article, *Immigration Law's Arbitrariness Problem*. In the article, Professor Ray sets out how the immigration bureaucracy stops, or indefinitely postpones, the issuance and execution of huge numbers of removal orders through the use of various administrative devices, including deferred action, administrative closure, and orders of supervision (P. 4.) She then explains the problematic feature of these discretionary tools as a rule-of-law matter: though these shadow sanctions mitigate the harshness of deportation, they are still doled out in an entirely opaque and often arbitrary way.

Ray's article begins by describing a much-critiqued aspect of immigration law: that the punishment (deportation) often does not fit the crime. The INA imposes deportation as a blanket sanction for a slew of offenses that bear little in common—everything from overstaying a visa to engaging in terrorism (P. 6.) Immigration law's formal lack of proportionality has elicited myriad calls for reform, but these have mostly fallen on deaf ears. Congress has not enacted statutory revisions to the INA that meaningfully distinguish between various types of deportable immigrants, and courts have rejected arguments that the Constitution requires removal orders to be proportional.

Given these dead ends, Ray turns instead to the executive branch and its extensive immigration bureaucracy as a "potential locus of proportionality" (P. 18.) The immigration bureaucracy, she explains, does more than simply deport. It also necessarily prioritizes some noncitizens for deportation, while using "discretionary tools of lenience" (P. 24) to defer or halt deportation against others. One of these tools (the DACA program) has drawn an overwhelming share of public attention and litigation in recent years. Yet other discretionary tools, though far more obscure, are nonetheless both ubiquitous and significant—among them, deferred enforced departure, extended voluntary departure, and a suite of reprieves that are granted in the course of removal proceedings, including administrative closure, stays of removal, and orders of supervision. Frequently, such reprieves are accompanied with "benefits such as work authorization" or, at times, "the ability to obtain a driver's license" (P. 25.) Ray estimates that, taken collectively, these "shadow sanctions" mean that millions of deportable noncitizens have "received a punishment other than deportation"—a number that makes up a "sizeable share of the deportable population" (P. 35) presently in the United States.

Ray then turns to critique this regime on rule-of-law grounds. This system of shadow sanctions appropriately leavens the harshness of the INA's scheme, she contends, but it does so in an arbitrary fashion. Noncitizens often lack lawyers, and therefore frequently do not know to ask for deferred action, orders of supervision, or other discretionary reprieves. Moreover, agency policy for granting some of these shadow sanctions "remains internal" to the agency and is not publicly available (P. 37.) Ray urges the immigration bureaucracy to become more transparent and consistent in its use of shadow sanctions, as well as to "create opportunities for reason-giving, to promote line-officers' and

adjudicators' ability to draw meaningful distinctions among removable immigrants" (P. 48.) Once that foundation for public reason-giving is built, she contends, public scrutiny will follow (P. 51.) Drawing lessons from European law, she concludes that "even in the absence of a legal right to lenience, deportable noncitizens are entitled, under proportionality, to a fair procedure, more than a cursory analysis of their interests, and more than a conclusory decision" (Pp. 53-54.)

In this era of whiplash and litigation concerning immigration law's enforcement priorities, the vast, uneven, and ill-understood system of sanctions and lenience examined by Ray will continue to play a major role, whether the public knows about it or not. Immigration law's system of shadow sanctions, she shows, is both inevitable and imperfect—but the tools of administrative law may fruitfully be harnessed to improve it. In seeking to narrow the gap between immigration law and ordinary administrative law, Ray's exploration and critique of these discretionary tools of immigration enforcement places a much-needed spotlight on the immigration bureaucracy's own "shadow dockets."

1. Immigration law, it seems, is full of shadows. Jennifer Lee Koh used the term "shadow removals" to encompass removal proceedings that occur outside of immigration courts through summary proceedings at the border and elsewhere—a phenomenon that Shobha Sivaprasad Wadhia has called "speed deportation."

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