

Sovereign Bias, Crimmigration, and Risk

Robert Koulish

Abstract This chapter is part of a larger research project. It examines the proenforcement tilt of crimmigration with reference to sovereign bias. Sovereign bias alludes to how the nation-state wields extraordinary power over noncitizens at territorial borders and within boundaries. It favors politics over law, and the state over immigrants. It occurs where political actors have final say over legal matters, and governmental authority is nearly unconstrained by constitutional norms. As much as plenary powers have tempered in recent years, sovereign bias continues to drive an exceptional path for immigration at the intersection of law and crime. Following a brief examination of crimmigration enforcement and detention, the chapter documents sovereign bias in ICE's risk classification assessment for detention, where secret computer algorithms are responsible for recommending the mass detention of hundreds of thousands of noncitizens without due process.

1 Sovereign Bias

The pro-state anti-immigrant tilt in immigration law originates in the Court's early examinations of federal immigration policy. The Court could have and in my opinion should have found a basis for regulating immigration in the Constitution but instead linked immigration to the ambiguous international law concept sovereignty, which provides very few limits on state power.

To preserve its independence, and give security against foreign aggression and encroachment, it is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. . . (*Chae Chan Ping* 1889, 623).

As the Courts constructed federal powers over immigration that derived from sovereignty, they decided on plenary powers, which means congress would have unlimited power over immigration (Legomsky 1984). In *Wong Wing v. U.S.* (1896), the Court reaffirmed plenary powers over government decisions to detain. The Court in the 21st century continues to defer to the plenary powers that derive

R. Koulish

MLAW Programs and the Department of Government and Politics, University of Maryland,
College Park, MD, USA

e-mail: rkoulish@umd.edu

from sovereignty particularly when it comes to immigration detention and removal. Whether it's the Court minority in *Zadvydas v Davis* (2001) or the Court majority in *Demore v Kim* (2003), pro-state anti immigrant arguments continue to refer to these early cases that recognize congress' nearly unrestrained power to regulate the admission of migrants into the USA (Benson 1997). Hence congress can still discriminate against noncitizen in the immigration context on the basis of race from *Chae Chan Ping*, gender from *Fiallo v. Bell*, and political opinion from *Kleindienst v Mandel*. Presumably, congress retains the power to exclude on the basis of religious affiliation as well. As discussed in this chapter, sovereign bias also informs immigration detention practices.

Justice Brandeis' dissent in the non-immigration case *Olmstead v United States* warns of the consequences of such unchecked government power. "If the Government becomes lawbreaker," he said, "it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy." Brandeis' warning clearly applies to the immigration apparatus that oppresses immigrants almost per whim, due to the sovereign bias that washed over the Court more than a century ago.

In terms of immigration law it is the government—not the immigrant—that has subverted the rule of law. The rule of law would have required procedural safeguards for immigrants subject to crime control measures and perhaps would ensure the decriminalization of what are ostensibly civil offenses. At the intersection of crime and immigration, crimmigration law ensures neither.

2 Crimmigration

Crimmigration is a term of art coined by Juliet Stumpf in 2006. It applies to the intersection of immigration law and criminal law and embeds criminal enforcement authority within a civil regulatory regime (Legomsky 2007). Stephen Legomsky recognized the politicalization of immigration law when he observed, "Those features of the criminal justice model that can roughly be classified as enforcement have indeed been imported. Those that relate to adjudication—in particular, the bundle of procedural rights recognized in criminal cases—have been consciously rejected" (Legomsky 2007, p. 472).

Mitsilegas (2015) understands it in Europe as "the threefold process whereby migration management takes place via the adoption of substantive criminal law, via recourse to traditional criminal law enforcement mechanisms including surveillance and detention, as well as via the development of mechanisms of prevention and preemption." Cesar Cuauhtemoc Garcia Hernandez observes that crimmigration law reimagines people as deviants and security risks in the absence of an existential threat. "They are people to be feared, their risk assessed, and the threat they pose managed" (2014, p. 1457). The term crimmigration also serves as an organizing tool for critical immigration scholarship about immigration structures, processes, interactions, and norms giving rise to the criminalization of immigrants and immigration.

In the first volume of this series, Stumpf summarized “two horns” of crimmigration, which subverts rule of law principles (2013). The first horn extends the net of removable offenses for noncitizens, it justifies rounding up, mandatorily detaining, and then removing noncitizens as criminal aliens and aggravated felons even with nonviolent offenses committed long ago, including minor drug or comparative offenses for which they have already paid their criminal debt. The second horn criminalizes civil offenses, jailing people, for example, for “improper entry by an alien” offenses that are no more serious than a misdemeanor for underage tobacco chewing (8 U.S.C. 1325; Lydgate 2010). Similarly under the *Secure Communities* initiative and its successor *Priority Enforcement Program* (PEP) (Morton 2014), noncitizens can be detained almost any time law enforcement stops their car and runs a search.

Their vulnerability as foreigners and racial and ethnic minorities is exacerbated by exaggerated state powers and a paucity of rights at the intersection of crime and immigration.

3 Securitization Frame

Securitization introduces a useful frame for exploring sovereign bias. (Welch 2007). It suggests that within this enforcement machinery *naming* the threat to public safety rather than the threat itself can trigger the deployment of immigration enforcement machinery (Simon 2007).

As Ole Waever observes,

What then is security? With the help of language theory, we can regard “security” as a speech act. In this usage, security is not of interest as a sign that refers to something more real; the utterance itself is the act. By saying it, something is done (as in betting, giving a promise, naming a ship). By uttering “security” a state representative moves a particular development into a specific area, and thereby claims a special right to use whatever means are necessary to block it” (1995, p. 55).

Securitization puts a postmodern spin on immigrant dangerousness and immigration crises. It does not refer to something necessarily real. Rather, as Ulrich Beck suggests, it is not about actual sources of danger but the perceptions of it. “Is it not spies, communists, Jews, Turks, or asylum seekers from the Third World who are ultimately behind it?” (1992, p. 75). Following Beck’s idea, the concept sovereign bias is about: 1) naming the crisis; 2) blaming immigrants as (dangerous) perpetrators; 3) complaining about ineffective government controls; 4) deploying additional enforcement and control measures; and 5) disempowering immigrants. Sovereign bias has as much to do with a politics and culture of exclusion as with law.:

Consider the following examples of naming, blaming and complaining in recent news headlines.

In summer 2014, when I first heard about a crisis at the US–Mexico border, caused by thousands of Central American minors and mothers arriving at the border to escape organized violence in northern triangle countries, I thought the Administration was

naming a crisis caused by violence in Central America. It wasn't until I read several news articles that it became clear that the crisis was the arrival of the refugees themselves, who, rather than fleeing violence, were being perceived as threatening public safety in the USA. Feeling both cynically amused and horrified at my country's lack of empathy and its trigger happy responses to human rights tragedies, the administration expedited the children's and their mothers' return to the violence in Central America, where many people subsequently died at the hands of gang violence.

It was mind boggling to see a humanitarian tragedy morph into a failure to adequately enforce laws and the border, victims were misidentified as criminal aliens, gang members, and rapists, with no empirical evidence to support these the rationale for these mass removals.

In July 2015, Karen Steinle was shot and killed in San Francisco. Her death triggered a political campaign against 'sanctuary cities,' a pejorative term constructed by anti-immigrant activists. Within 3 weeks of Karen Steinle's unfortunate death, the House of Representatives introduced and passed H.R. 3009, referred to as Enforce the Law Against Sanctuary Cities Act, sponsored by Duncan Hunter (R-Ca).

The legislation would freeze federal allocations to a state or local government with a law or procedure that undermines provisions of the Immigration Reform and Immigration Responsibility Act (IIRIRA) of 1996. The House passed the bill, which at the time of writing, is in the Senate. At about the same time Donald Trump's presidential campaign gained steam as the candidate fueled anti-immigrant panic by referring to Mexicans as "rapists," and calling for removal of 11 million undocumented immigrants from the USA—within 18 months.

Both H.R. 3009 and Trump's calls for draconian immigration restrictions, which as of fall 2015 are driving the GOP presidential race, rest upon misleading claims tying undocumented immigrants to criminality.

4 Immigration Detention Case-Study

Evidence of sovereign bias in mass immigration detention exists in the fact immigration detentions top the list of federal imprisonment generally. Naming, blaming and complaining about the dangerousness of immigrants helps rationalize mass detention. Expedited removal procedures assure the daily detention of thousands of immigrants, along with bed quotas that assure detention of tens of thousands daily, and other mandatory detention policies that assure the detention of thousands more for prior crimes regardless of when the crimes were committed or whether they connote dangerousness. Those mandatorily detained have no right to a bond hearing even though many are not risky. In many ways, as discussed in this section, mandatory detention is triggered by little more than sovereign bias. The following brief case study which is part of a larger research project examines sovereign bias in ostensibly risk based detention determinations that contribute to this well documented crisis in mass detention.

In FY 2012, DHS detained a record 477,523 adult noncitizens, an over fivefold increase since the enactment of IIRIRA (Department of Homeland Security (DHS)

2012; Meissner et al. 2013). The annual number has increased by nearly 25 % since the Obama Administration began in 2009 (Meissner et al. 2013).

In fiscal year (FY) 2014, ICE spent nearly \$2 billion on detention in approximately 250 detention facilities across the country, including county jails, privately run contract facilities, and federal facilities (Department of Homeland Security 2014, p. 39). ICE has estimated the average cost of detaining an immigrant, not accounting for personnel and operational expenses, to be \$119 per day (or over \$43,000/year). The allocation for immigration enforcement is greater than allocations for all other federal criminal enforcement combined; large numbers of immigrants rounded up in the process are actually long-term residents, many of them with families and jobs and who pose no risk to public safety. Contracts with Corrections Corporation of America (CCA) and GEO Group, the two largest private immigration detention corporations, enhance financial incentives to grow immigration detention.

ICE detention priorities converge with securitizing rationales to detain “violent criminals, felons, and repeat offenders as ICE’s highest immigration enforcement priority” (Morton 2011, pp. 1–2). In November 2014, DHS Secretary Johnson clarified ICE detention priorities further. Today, Priority One includes those convicted of “aggravated felonies” or a state felony (other than an offense containing immigration status as an element); Priority Two includes those convicted of three misdemeanors arising out of separate incidents or a “significant misdemeanor,” generally including convictions for over 90 days, or certain domestic violence, DUI, burglary, firearms, sexual abuse, and drug crimes. Priority Three includes those with recent removal orders issued after January 1, 2014 (2014 Johnson Priorities Memo at 3–4). Such priorities are similar to those the Court referred to in *Demore v Kim* (2003) invoking the shadow of plenary powers in deciding for mandatory detention without a bond hearing. While circuit courts in *Demore* (2003) determined it was unconstitutional to detain without a bond hearing, the Supreme Court reinforced—post 9/11—sovereign bias as it supported mandatory detention that for pretrial immigrants would be unacceptable if applied to citizens.

5 Mandatory Detention

In 1996, Congress mandated in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) that ICE “shall take into custody” pending removal individuals who have committed a broad category of crimes, “when the alien is released” from criminal custody (INA § 236(c); 8 U.S.C. § 1226(c); see 8 C.F.R. § 236.1(d)(3)). Based on the mandatory detention provisions in Section 1226(c) in Title 8 of the United States Code, certain noncitizens who are deportable or inadmissible to certain crimes are mandatorily detained pending proceedings to remove them from the USA. These crimes include “aggravated felonies” and “crimes involving moral turpitude” under immigration law (8 U.S.C. §

1226(c))—some of which can be quite minor¹—as well as controlled substance offenses. This mandatory detention provision potentially applies to any noncitizen, including lawful permanent residents (8 U.S.C. § 1226(a), (c)).

Once detained, certain noncitizens may ask an immigration judge to reconsider the applicability of the mandatory detention statutes (see 8 C.F.R. 1003.19(h)(2) (ii)), but such review, called a Joseph Hearing, is limited in scope and addresses only whether the individual's criminal history fits within the scope of the mandatory detention statute. It is widely contended that prolonged detention under mandatory detention without the possibility for review of the government's justification of the detention by a neutral magistrate reinforces plenary powers and raises important constitutional concerns.

As *Demore* (2003) demonstrated, mandatory detention policies detain without bond those who have a right to be in the country—legal permanent residents—and are still fighting their case. Many of these individuals have stable families, jobs, and strong community ties, which suggest they are neither a flight nor a public safety risk (Koulish and Noferi 2015). The circuit courts in *Demore* (2003) applied rule of law norms to assess the request for bond hearing. A recent study on immigration risk assessment demonstrates that a bond hearing for those mandatorily detained could likely result in widespread release for low-risk immigrants currently in bricks and mortar detention (Koulish and Noferi 2015).

6 Bed Quota

Sovereign bias exists in the immigrant detention bed quota where political actors have the final say over how many immigrants get detained. Each year, Congress appropriates moneys for ICE's detention budget (H.R. 5855, Rep. No. 112–492, 112th Cong., 2d Sess. 81 (2012)). In 2007, Congress created language in the Senate Appropriations Bill introducing the bed mandate for immigration detention. Originally, the bed mandate was for about 27,000 beds. Since FY 2012, Congress has mandated detention of 34,000 noncitizens on any one day (Department of Homeland Security (DHS) 2014), a fivefold increase in detention since FY 1995 (then 7475 on average).

When considering how the plenary power doctrine may inform the bed quota, consider the following quote from an editorial posted by Bloomberg, which suggests that the bed quota policy for immigrants would not be acceptable if applied to citizens:

Imagine if Congress mandated that an arbitrary number of jail cells be filled with prisoners—regardless of the crime rate. Authorities would be required to incarcerate people, no matter the circumstances or the affront to human rights. That's basically the state of immigration detention in the United States (The Editors of Bloomberg View, September 26, 2013).

¹ An “aggravated felony” could encompass marijuana possession, a bar fight, or shoplifting, while a “crime involving moral turpitude” could encompass subway turnstile jumping or a disorderly persons offense. 8 U.S.C. §§ 1226(a), (c).

The sovereign attribute of applying laws to immigrants that could not be applied to citizens is in full display as members of congress toy with bed quotas as if immigrants were little more than the “alien horde” the Court named in 1889.

7 Expedited Removal

Sovereign bias is also present in expedited removal proceedings as the government hastily removes immigrants, without providing access to an immigration judge or counsel. Expedited removals constituted 44 % of all removals from the USA in FY 2013 (193,032 individuals) (Department of Homeland Security (DHS) 2013). Statutes mandate detention of those subjected to expedited removal until they are actually removed (8 U.S.C. § 1225(b)(1)(B)(iii)(IV)).

Expedited removal is perhaps the most direct way in which ICE mandatorily detains and removes nonviolent offenders, almost per whim. Expedited removal applies to “arriving aliens” DHS encounters at or within 100 miles of a border with insufficient or improper documents (8 U.S.C. §§ 1225(b)(1) (A)(i), 1182(a)(6)(C), (7)(A)(i)(I)). It defines “arriving aliens” as those “who have not been admitted or paroled into the United States, and who are unable to prove continuous physical presence in the United States for the 2-year period immediately prior to the date of the determination of inadmissibility.” Expedited removal gives immigration authorities discretion to remove certain “arriving aliens” “without further hearing or review.” The decision whether to apply expedited removal is in the sole and unreviewable discretion of the Attorney General, referring back to *U.S. ex rel Knauff v Shaughnessy*’s statement that it is “due process as far as an alien entry is concerned” (at 44, 1950).

8 The Immigration Risk Classification Assessment (RCA)

The Risk Classification Assessment (RCA) is a computerized tool, adapted from analogous criminal justice tools. It is designed to set priorities for and standardize ICE’s use of detention. The risk tool assesses public safety and flight risk and recommends detention or release, the amount of bail (if any), and detention or supervision levels. It makes determinations in an ostensibly objective manner.

In October 2009, Dr. Dora Schriro issued a report recommending that ICE implement risk assessment, as part of a larger reform of the immigration detention system (Schriro 2010). Schriro envisioned that risk assessment would improve the uniformity of ICE detention. Then DHS Secretary Janet Napolitano adopted Schriro’s recommendation. ICE implemented the risk assessment in several stages. It piloted the RCA in summer 2012 in Baltimore and Washington, D.C., and completed national deployment in January 2013. ICE subsequently made changes to the RCA process, scoring, and decision logic in August 2013 and January 2014.

Congressional members of both parties have stated support for DHS' introduction of risk assessment. Internal ICE objections to risk assessment have been muted. Immigrant and human rights advocates have largely supported risk assessment as well. Some NGOs, though, have raised concerns that the tool is overweighted towards detention. Others have expressed concern regarding asylum seekers subjected to expedited removal and recommended that ICE perform RCA again after an individual passes a credible fear interview and is transferred into a judicial removal proceeding. Recently, DHS' Inspector General called RCA "not effective in determining which aliens to release or under what conditions" and expressed concerns that ICE is not improving RCA's predictive capabilities, among others.

The risk tool operates a computerized risk-based recommendation whether to detain. There is no review of the risk determination before an immigration judge. The logic of risk suggests the risk tool surveys the population of immigrants and compares it against the norm, assesses those in custody through abstract data points, and then makes a recommendation that is binding on most immigrants. The purpose of the risk tool is to detain "outliers from the norm," to be removed from the country.

Risk recommendations are computed by an algorithm that is designed to track, flag, and analyze risk profiles (Noferi and Koulish 2014). The lack of transparency in the risk assessment increases the likelihood that risk profiles discriminate. On the basis of political whim, and securitized naming of existential dangerousness. The secret algorithm shares characteristics of sovereign bias as it tilts towards state power to undermine immigrant rights in a manner that lacks accountability, transparency and predictability (Noferi and Koulish 2014). Because of the secrecy of the algorithm, researchers can only speculate on the potential direction this new plenary power might take.

For example, recent research about the immigration risk tool reveals that it is responsible for ICE overdetaining immigrants. Every immigrant is categorized as a risk. The computer recommends the release of only 1 %. Only 2 % are categorized as a low risk, and 83 % of immigrants in custody are detained (Koulish and Noferi 2015).

Risk is computed in terms of both public safety and flight. Only 5 % are categorized as low flight risk, and 95 % are medium or high risk. In the public safety category, 38 % are low risk, 41 % are medium risk, and 58 % are high risk. There is little difference in risk factors between those detained and released (Koulish and Noferi 2015).

Of particular interest is how risk correlates to mandatory detention, ostensibly the category for the most dangerous immigrants. But no correlation exists between risk and mandatory detention. Those mandatorily detained have much lower flight risk and only a slightly higher public safety risk. For 60 % of those in mandatory detention, the criminal conviction responsible for mandatory detention is not the reason immigrants are in ICE custody, raising the question whether those mandatorily detained immigrants are indeed dangerous. Not only are those mandatorily detained not more dangerous than nonmandatorily detained immigrants, but also

there are substantial mitigating factors that should be accounted for. Of all the categories of immigrants in ICE custody (mandatory detention, discretionary detention, and release), those mandatorily detained have the highest percentage of long-term residency, family in the USA, work authorizations, and property ownership (Koulish and Noferi 2015).

The findings suggest that risk is disaggregated from dangerousness. Worse, there is no way to ensure that the RCA's legal analysis is correct. Since the algorithm is secret, researchers cannot discern whether the RCA is correct in naming those mandatorily detainable.

The RCA must engage in complicated legal analysis. Consider that even a straightforward analysis of the violent offense of murder, rape, or sexual abuse of a minor under INA subsection 101(a)(43)(A), for example, would require distinguishing among at least 150 different ways of being subject to mandatory detention under this one subsection.² In the state of Maryland, for example, there are at least ten different ways to commit murder in the first degree. The complexity of analysis required is sure to test the algorithm's rigor.

Next, the algorithm must compare the state offense against federal law. A state offense amounts to a charged federal offense if it (1) is indivisible and a strict categorical match or (2) is divisible and is matched under a modified categorical approach (see *Matter of Chairez-Castrejon* 2014). In the Fourth Circuit, for example, for a state offense to be considered an aggravated felony, all elements of the state offense must be the same as or narrower than the elements of the generic federal offense (*U.S. v Royal* 2013).

A soon-to-be-published analysis of the mandatory detention cases by Koulish and Noferi suggests that the RCA questionably identifies state offenses as mandatorily detainable offenses under federal immigration law (on file with author).

In one case, a 22-year-old male from India was in custody in Baltimore, Maryland. He had been charged by a state court with robbery and received a 3-year sentence. Once in immigration custody, he was charged as mandatorily detainable for having committed an aggravated felony under INA 237(a)(2)(A)(ii), for the commission of a violent crime of violence under INA 101(a)(43)(F). Robbery in the state of Maryland retains its common law definition, crafted by the Supreme Court of Maryland. The Fourth Circuit never decided whether the Maryland Robbery offense amounts to a crime of violence for the purpose of the INA. The Maryland robbery definition would not always fall within the federal crime of violence definition. In this case, the Fourth Circuit infers only ambiguously that robbery is a crime of violence, and yet the RCA is programmed to provide a binary yes/no response as the basis for mandatory detention recommendation.

A second case involves a 22-year-old male from Paraguay who had been convicted of the crime of larceny, potentially a mandatorily detainable offense involving a crime involving moral turpitude. The RCA algorithm must determine

² Consider multiplying three parts to this offense by 50 state criminal codes.

whether a larceny conviction is a CIME under 212(a)(2)(A)(i) (I).³ Larceny is a common law term defined as fraudulent taking of another's property. The Fourth Circuit has ruled that a fraudulent taking is not included within the federal definition of theft, and therefore a categorical analysis would suggest it does not match the federal definition of theft and therefore does not amount to a CIME under immigration law (*Matter of Silvia-Trevino* 2008; *Omargharib v. Holder* 2014). This immigrant should not have been mandatorily detained.

Clearly the risk tool has failed, in Dora Schriro's words, to better tailor ICE detention to individuals warranting it (2009). She had hoped the risk assessment would help reduce the severity of custody, given immigration detainee's "low propensity for violence" compared to criminal detainees.

The secretive and unaccountable workings of the RCA, along with its pro-enforcement bias, are indicative of sovereign bias. Although it may invite controversy to hold classic immigration cases responsible for bias in a twenty-first century risk tool I believe sovereign bias remains the source of much that seems intractably oppressive in crimmigration law. I refer to the chapters in this volume to help substantiate the role sovereign bias plays as the source of deep patterns of anti immigrant bias throughout the US and other immigration systems. As the chapters in the volume tell different stories, these different depictions of oppression find a shared source in sovereignty. Still, I can imagine more implausible reasons for systemic anti-immigrant bias in immigration law, than alluding to the ghosts of plenary powers and the sovereign bias that persists in reproducing instances of anti-immigrant oppression in one fact of crimmigration after another.

Further, I would argue that until immigration enforcement explicitly removes sovereign bias by directly reversing the doctrine of plenary powers and securing immigration law be judged within the rubric of constitutional norms, sovereign bias is likely to continue to inform risk and other reforms per political whim. Until immigration law is brought inside the juridical, immigration controls will continue to operate both within and outside the juridical.

9 Conclusion

In this chapter, I examined crimmigration through the lens of sovereign bias, defined as actions taken in the shadow of the plenary power doctrine. Immigration is one of the few policy issues and legal fields that share more characteristics from the logic of sovereignty than from the rule of law. This central feature, I believe, establishes a lens for interpreting the exceptional and seemingly aberrant features of

³ Under INA 212(a)(2)(A)(i)(I), a noncitizen committed a crime involving moral turpitude if he is "convicted of, or [] admits having committed, or who admits committing acts which constitute the essential elements of ... a crime involving moral turpitude... or an attempt or conspiracy to commit such a crime."

Immigration Detention, Risk and Human Rights
Studies on Immigration and Crime

Guia, M.J.; Koulisch, R.; Mitsilegas, V. (Eds.)

2016, XVII, 293 p., Hardcover

ISBN: 978-3-319-24688-8