COMMENT ON CALAVITA: IMMIGRATION RESEARCH—WORDS OF CAUTION

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Like Professor Kitty Calavita, I too endorse the 1978 call of Ernest Cashmore for case studies in the field of immigration. After a period of dormancy, the study of the immigration process has become a growth industry. Much of the impetus for this revival has been the national debate on the subject and the long gestation period of the Immigration Reform and Control Act of 1986. The Act itself has fostered calls for studies of its implementation, and major empirical efforts are now under way by the Urban Institute and the Rand Corporation, underwritten by the Ford Foundation. In addition, the Immigration and Naturalization Service, General Accounting Office, and Department of Labor have all engaged in or have funded studies on aspects of the immigration process.

I do not share Professor Calavita's enthusiasm for broad theory as a way of understanding immigration policy. The legal framework and the enforcement efforts reflect the vicissitudes of changing national interests and prejudices concerning aliens. I do not see immigration policymaking as driven by any one overarching purpose or ideology. Rather, there are conflicting interests reflected in the law and its administration throughout American history. Often, it seems that different agencies involved in the process (or even different branches of the same agency) are working at cross purposes.

Misconceptions about the state of the law occasionally adversely affect the quality of immigration research. Classifications that might be unconstitutional in other contexts pass constitutional muster in the world of immigration. As the United States Supreme Court stated in 1976, "[P]ower over aliens is of a political character and therefore subject only to narrow judicial review" (*Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 101–102, n. 21, 1976). The Supreme Court has not been sympathetic to claims by aliens vis-à-vis the federal government, with the exception of a few years during the mid-1960s. There is basically an unbroken history of extreme deference to Congress in constitutional cases beginning with decisions of the nineteenth century.

Fiallo v. *Bell* (430 U.S. 787, 1977) is an illustrative case. One of the plaintiffs was a naturalized citizen who attempted to obtain admission for his son, born out of wedlock. However, even though there was no question as to parentage, the illegitimate son was not

LAW & SOCIETY REVIEW, Volume 23, Number 5 (1989)

admissible. The biological father's name appeared on the birth certificate, and the father had supported the son from birth. However, since the biological mother had married another man, no legitimation proceedings were possible under local domestic law. Under the then-existing law, only mothers could successfully petition for admission for illegitimate offspring. If the child had been born in wedlock, either parent could have petitioned for admission. In a nonimmigration context, a statute permitting such discrimination based on gender and legitimacy would have been declared unconstitutional. The statute in question denied a visa to an individual because the petitioner was a male rather than a female citizen, and the beneficiary was an illegitimate rather than a legitimate child. In 1977 the Supreme Court upheld the constitutionality of this statutory discrimination.

The Court majority was emphatic in its deference to Congress. "This Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens" (*Fiallo* v. *Bell*, 430 U.S. 787, 792, 1977). Quoting from an earlier decision, the Court noted that Congress with some frequency both allocates benefits and makes determinations concerning aliens based on classifications which would be unconstitutional if applied to citizens. Just two years ago, the Court cited with approval a decision from 1952 that upheld detention of long-time permanent resident aliens pending deportation proceedings; the basis for deportation in each instance was membership in the Communist Party (*United States* v. *Salerno*, 481 U.S. 739, 748, 753–754, 1987). Keeping an alien in custody pending deportation is administrative detention, not punishment.

A further example of the power accorded Congress concerns the establishment of new grounds for deportation. Depending on the will of Congress, these grounds can be fully retroactive. A new basis, popularly known as the Holtzman amendment, was added in 1978 for those who had participated in Nazi war persecutions during World War II. Congress determined that this provision would apply to persons who already had been admitted as lawful permanent residents to the United States. Attempts to attack the retroactivity of the new law were met with a judicial back of the hand. Previously, in a parallel situation, the Supreme Court had held that the addition of membership in the Communist Party as a ground for deportation was not in violation of the Ex Post Facto Clause of the Constitution. That change trapped many aliens who had been in what they thought was lawful status for years; membership was not against any law at the time, and the Communist Party appeared on election ballots in some states (*Galvan* v. *Press*, 347 U.S. 522, 1954). Similarly, all attempts to characterize the Holtzman amendment as a bill of attainder have been unsuccessful. Following precedent of 100 years, courts have con-

cluded that deportation is not punishment, but merely a civil penalty. (*Linnas* v. *INS*, 790 F.2d 1024, 2d Cir. 1986).

The degree of deference given Congress by the federal courts in the immigration field has a parallel in the degree of deference given the attorney general. Recently, in a ruling concerning the scope of judicial scrutiny of INS decisions to deny a motion to reopen, the Supreme Court emphasized the broad discretion given this agency:

> . . . INS officials must exercise especially sensitive political functions that implicate questions of foreign relations, and therefore the reasons for giving deference to agency decisions on petitions for reopening or reconsideration in other administrative contexts apply with even greater force in the INS context. (*INS* v. *Abudu*, 485 U.S. 94, 108 S. Ct. 904, 914–915, 1988)

The attorney general has delegated his authority in most immigration matters to the Immigration and Naturalization Service and the Executive Office of Immigration Review. The thirty-three district directors of INS have extensive discretionary authority over most questions concerning admission and deportation of aliens. Decisions can be reviewed by regional commissioners in some instances or litigated *de novo* before immigration judges and appealed to the Board of Immigration Appeals, but each district director exercises significant decisionmaking power. Processing procedures and the exercise of discretion vary widely from district to district. Focusing one's research on the central office in Washington can give one a very skewed view of the operation of the immigration laws.

One of the major issues confronting the INS today concerns the handling of applications for asylum. Large numbers of individuals from Central America have been entering the United States with the hope that asylum will be their ticket to permanent residence status. There has been no national policy on how to process these applications, and procedures vary from district office to district office. In the Rio Grande Valley of Texas, asylum claims are adjudicated immediately. Upon denial, the deportation process is initiated, and the alien is placed in detention. Meanwhile, in other areas of the country, the alien is at liberty pending consideration. At still other locations, work authorizations are issued so aliens can work while applications are pending. In some districts individuals from Nicaragua are not deported, while in other districts they are. Studying the national office or the regulations as written will present only a very limited version of reality.

Detailed empirical studies of the INS and of the activities of immigration judges are a recent phenomenon and are much needed. One fine example is Janet Gilboy's study of the conflicting decisionmaking of the district directors and immigration judges in bail determinations (Gilboy, 1987, 1988). She is now observing

the exercise of discretion by inspectors at a point of entry. As Professor Calavita has noted, obtaining access to documents sometimes is time-consuming and frustrating. While certain agency records have been deposited with the National Archives and Federal Records Centers or are accessible by subject at the central office, individual case files remain with the INS and generally are accessible only by name and record number, no matter how old.

The law school world now has recognized the importance of the subject matter, and courses on immigration law are now taught at schools throughout the United States. Professors T. Alexander Aleinikoff and David Martin have written a superb casebook (Aleinikoff and Martin, 1985). They focus on major policy issues and include a smorgasbord of relevant legal and social science literature along with the traditional judicial opinions. Researchers in the field of immigration will profit by consulting this book. Professor Martin has also written a succinct book on immigration law for the Federal Judicial Center that is a rich source of references to judicial decisions on a wide range of legal issues (Martin, 1987). It contains an annotated bibliography that should prove helpful to anyone contemplating a project touching on immigration law.

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