

## SOME PRELIMINARY THOUGHTS ON *DIMAYA*

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By Gabriel J. Chin \*

As much as I support the *Dimaya* decision, and think that it's a wonderful decision, at one level I doubt that it's going to make much difference.

The reason is, it's a procedural decision, and not a substantive decision.<sup>1</sup> It's not saying that people like Dimaya can't be deported, it's saying that Dimaya can't be deported under this statute.<sup>2</sup> As President Trump's tweet suggests, all Congress has to do is pass another law that covers people like Dimaya and could cover Dimaya himself.<sup>3</sup> People in that situation could then be deported.

There is already on the books an indication of a possible workaround to *Dimaya*. We heard that in the *Johnson* case,<sup>4</sup> the vague test at issue in *Dimaya* was invalidated with regard to a mandatory sentencing provision of the Armed Career Criminal Act.<sup>5</sup> *Dimaya* involved this formulation with regard to the aggravated felony definition, which results in automatic deportation.<sup>6</sup> In another Supreme Court case, called *Beckles v. United States*,<sup>7</sup> this exact language was upheld by the Supreme Court, in a five-four decision, as part

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1. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1233 (2018).

2. 18 U.S.C. § 16(b) (2012) (defining "crime of violence" as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.").

3. @realDonaldTrump, TWITTER (Apr. 17, 2018, 2:34 PM), <https://twitter.com/realdonaldtrump/status/986357228306354178?lang=en>.

4. *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015).

5. Armed Career Criminal Act, 18 U.S.C. § 924 (2012).

6. *Dimaya*, 138 S. Ct. at 1207.

7. *Beckles v. United States*, 137 S. Ct. 886, 892 (2017) (holding sentencing guidelines immune from vagueness challenges because they are advisory).

of the U.S. sentencing guidelines.<sup>8</sup> This definition of violent crime can be used as a discretionary factor in imposing sentence. The Supreme Court basically said “That’s okay, because it’s discretionary and not mandatory.”<sup>9</sup> If Congress passed a law saying that anyone convicted of any felony that’s punishable by more than one year in prison is deportable, but the Board of Immigration Appeals can use its discretion to waive that deportability, under *Beckles* they might be able to use this exact same formula in spite of all of its vagueness. According to a decision that’s on the books now, that would probably be okay.

That makes me not quite so excited about the plurality decision in *Dimaya*, but nevertheless I’m going to accept the invitation to dream. I’m going to accept Dean Johnson’s suggestion that we be optimistic.<sup>10</sup> I am going to imagine that the age of miracles isn’t over. I’m going to imagine that when we have new justices on the court, maybe that means the Supreme Court’s jurisprudence can move in a positive new direction. Maybe President Trump is President Eisenhower, and maybe Justices Gorsuch and Kavanaugh are Justices Brennan and Warren.

In that spirit of putting the best possible read on it, there is a lot to like in Justice Gorsuch’s concurring opinion.<sup>11</sup> His opinion was the necessary fifth vote and it has potential consequences not only for immigration, but for due process in general. As Professor Koh mentioned, the Department of Justice argued in *Dimaya* that only criminal statutes were subject to heightened vagueness scrutiny.<sup>12</sup> The plurality decision written by Justice Kagan basically said “No, immigration statutes are quasi-criminal. They’re close enough to criminal that they’re going to be treated as criminal.”<sup>13</sup>

Justice Gorsuch’s concurrence indicated that he did not like either of those formulations.<sup>14</sup> He more than questioned the civil-criminal divide, he really attacked it. He said this isn’t the right framework. This is what he said:

If the severity of the consequences counts when deciding the standard of review, shouldn’t we also take account of the fact that today’s civil laws regularly impose penalties far more severe than those found in many criminal statutes? Ours is a world filled with more and more civil laws bearing more and

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8. *Id.* at 896.

9. *Beckles*, 137 S. Ct. at 894-96.

10. Kevin R. Johnson, Keynote to Immigration in the Trump Era Symposium: Judicial Review and the Immigration Laws, 48 SW. L. REV. 463, 464 (2019).

11. *Dimaya*, 138 S. Ct. at 1223-34 (Gorsuch, J., concurring in part and concurring in the judgment).

12. *Id.* at 1212 (plurality opinion).

13. *Id.* at 1218.

14. *Id.* at 1223-24 (Gorsuch, J., concurring in part and concurring in the judgment).

more extravagant punishments. Today's "civil" penalties include confiscatory rather than compensatory fines, forfeiture provisions that allow homes to be taken, remedies that strip persons of their professional licenses and livelihoods, and the power to commit persons against their will indefinitely. Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes - and often harsher than punishment for felonies. And not only are "punitive civil sanctions . . . rapidly expanding," they are "sometimes more severely punitive than the parallel criminal sanctions *for the same conduct*." Given all of this, any suggestion that criminal cases warrant a heightened standard of review does more to persuade me that the criminal standard should be set *above* our precedent's current threshold than to suggest that the civil standard should be buried *below* it.<sup>15</sup>

Now, this language could have been written by Justice Brennan or Justice Marshall. I like it very much because I believe that in our law, we should see more serious proportionality review under the Eighth Amendment for so-called civil as well as criminal penalties.<sup>16</sup> I think we should have appointed counsel for serious civil deprivations.<sup>17</sup> I think we should have ex post facto restrictions for serious civil deprivations.<sup>18</sup> I think this is true in the immigration context as well as in other important contexts, such as disenfranchisement or loss of public benefits, which are treated as civil.<sup>19</sup>

I think it is conceivable that the words of the Gorsuch concurrence mean something different to me than they did to Justice Gorsuch. I think that the passage applies to laws that, say, retroactively require somebody to be deported for conduct that was legal or at least not deportable at the time it took place<sup>20</sup> and it maybe that Justice Gorsuch is concerned with a different

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15. *Id.* at 1229.

16. Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 EMORY L.J. 1243, 1267 (2013); Jason A. Cade, *Judging Immigration Equity: Deportation and Proportionality in the Supreme Court*, 50 U.C. DAVIS L. REV. 1029, 1029 (2017); Maureen Sweeney & Hillary Scholten, *Penalty and Proportionality in Deportation for Crimes*, 31 ST. LOUIS U. PUB. L. REV. 11, 13 (2011).

17. Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394, 2402 (2013).

18. Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 98 (1998).

19. Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012).

20. *Vartelas v. Holder*, 566 U.S. 257, 267 (2012) (discussing aggravated felony definition applicable to "conviction[s] . . . entered before, on, or after" the statute's effective date).

set of injustices like a law that might retroactively prohibit an innocent corporation from polluting the air or water when it was legal up until now. “How can you change the law all of a sudden to make something illegal?” Maybe that’s the set of problems that he is really concerned about.

But if we take him at his word, he really does seem to be concerned with the rights of ordinary individuals who are caught up in the civil regulatory system. Later in his concurrence, he wrote:

My colleagues suggest that the law before us should be assessed under the fair notice standard because of the special gravity of its civil deportation penalty. But, grave as that penalty may be, I cannot see why we would single it out for special treatment when (again) so many civil laws today impose so many similarly severe sanctions. Why, for example, would due process require Congress to speak more clearly when it seeks to deport a lawfully resident alien than when it wishes to subject a citizen to indefinite civil commitment, strip him of a business license essential to his family’s living, or confiscate his home? I can think of no good answer.<sup>21</sup>

Where might this go? One place to start, is another issue that was addressed by Professor Koh and it was also addressed in the dissenting opinion of Justice Thomas, where he argued that vagueness isn’t a thing.<sup>22</sup> Unconstitutional vagueness is not a cognizable category or concept. Instead, what courts should do when they encounter a law and they don’t understand what it means, is they should construe it strictly to its heartland, what we know Congress meant and then apply that. If Congress wants to expand it, they can.

Justice Gorsuch responded to that specifically, stressing that that’s not what Blackstone did and that’s not our common law tradition.<sup>23</sup> He gave an example of a statute that prohibited stealing sheep or other cattle.<sup>24</sup> The English decision that he praised struck the law down as to cattle.<sup>25</sup> Nobody could tell what it meant at the time. That forced Parliament to say that it meant bulls, cows, and oxen.<sup>26</sup> Later in Justice Gorsuch’s opinion, he

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21. *Dimaya*, 138 S. Ct. at 1231.

22. *Id.* at 1242-43 (Thomas, J., dissenting).

23. *Id.* at 1224-25 (Gorsuch, J., concurring in part and concurring in the judgment).

24. *Id.* at 1225 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 88-89 (8th ed. 1778)).

25. *Id.*

26. *Id.*

explained that this sort of specification would be a good practice.<sup>27</sup> He said the statute in this case fails to specify what crimes qualify for the category of crime of violence and “Congress remains free at any time to add more crimes to its list.”<sup>28</sup>

As Professor Koh mentioned, many collateral consequences, civil penalty, and disability statutes have this quality.<sup>29</sup> They’ll identify a crime by some sort of category, a crime involving moral turpitude, a crime involving dishonesty. Here, a crime involving a risk of violence. Then, they’ll say, “You, the administrative agency,” or “You, the court, you figure it out on a case-by-case basis what we meant.” After years of litigation and years of evaluation, then we know what’s prohibited and what’s permitted or what offenses trigger this particular category and which ones don’t.

There’s another method and that’s the one that Justice Gorsuch endorsed. That is, when a legislative body wants to have a civil consequence triggered by a criminal conviction, it could go through the statutes and identify which ones of those statutes - which of course are all on the books - which specific, particular ones do you want to be an aggravated felony.<sup>30</sup> For example, in the immigration context, don’t give us categories. There’s lots of staff in Congress. It’s possible to pull the 50 criminal codes of the states, put them on your desk and flip through them and say, “Yes, this one, no, not that one,” and debate that in Congress in a specific and concrete way. There are some states that are going to this method for particular collateral consequences.

If Justice Gorsuch is telling the truth when he says that Congress is structured to “ensure fair notice before any deprivation of life, liberty or property could take place,”<sup>31</sup> then saying, as a matter of due process, that legislatures have to do this, they have to tell us what they mean to the extent that it’s reasonably possible to do so, then we wouldn’t have this kind of problem that we had in *Johnson*, *Dimaya* and *Beckles* in the first place. I think that would be a step in the right direction.

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27. *Id.* at 1227.

28. *Id.* at 1233.

29. Jennifer Koh, *Looking Ahead at Vagueness Claims in the Immigration Context Post-Dimaya*, 48 SW. L. REV. 525 (2019).

30. *Id.* at 1227.

31. *Id.* at 1228.

