


COMMENTARY

# Which rights, and for whom? What relational rights mean in an era of immigrant exclusion

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Dr Laura Beth Nielsen’s compelling Presidential Address directs law and society scholars toward a sociolegal vision rooted in “relational rights,” which she defines as concern for how the law emphasizes, privileges, and protects important social relationships.<sup>1</sup> In foregrounding social relationships, Nielsen rejects that state-provisioned rights exist in a vacuum, that the law circumscribes individuals’ life chances with little to no bearing on the people, communities, and places to which those individuals are connected. Nielsen instead makes the empirically defensible claim that individual rights take on added meaning because the people imbued with those rights interact within a given context. Hardly doing away with individual rights, Nielsen’s vision demands that sociolegal scholars examine “the connections between rights and the relationships we seek to create, bolster, and preserve for all members of society” as part of a larger, public-facing move toward social justice.

I welcome President Nielsen’s vision of relational rights. It offers a generative path for sociolegal scholars to specify the law’s role in enabling or constraining valuable social relationships that impact the life chances of both privileged and subordinated populations in a range of empirical settings. Yet this framework also evokes in me several foundational questions that could be further explicated. To put them simply: which rights should be centered, and for whom should they be made available? Whereas the former concerns political questions about how sociolegal scholars understand weighty ideas like social justice, the latter considers how these understandings implicate the provision of individual and relational rights. I pose these questions not as a contrarian or defeatist but as a scholar with deep interests in executing Nielsen’s vision of theoretically informed, empirically rigorous scholarship with public impact. Interrogating how scholars define or understand social justice, and whose rights are encompassed or protected given those definitions or understandings, is fundamental.

There are many empirical settings in which law and society scholars may consider the dual questions of which rights should be centered and with regard to which relationships they should be made available. Here, I draw on the interdisciplinary literature on immigration enforcement, primarily as it relates to the situation of

undocumented immigrants in the United States. I do so both because this is my area of specialization and, as I will show below, because immigration scholars and advocates have grappled with something akin to relational rights for decades (though without naming them as such). Relational rights certainly offer a productive vision for understanding the contemporary situation of undocumented immigrants settled in the country. Depending on law and society scholars' vision of social justice, relational rights nonetheless come up against systems-based limitations that may short-circuit their pursuit of the same.

### Relational rights: the case of undocumented immigrants

About 11 million undocumented immigrants live in the United States, with half coming from Mexico. Given their lack of authorization from the federal government to reside in the country, it may seem odd to suggest that relational rights help explain some fraction of this large population's existence. But relational rights do just that, albeit in ways ostensibly unintended by lawmakers.

To summarize a much longer history (Massey et al. 2002): A binational agreement between Mexico and the United States in 1942 created a state-mediated relationship between US agriculturalists and Mexican farmworkers, allowing agriculturalists to recruit farmworkers with short-term work visas. Over 20 years, systemic issues – among them, that demand eclipsed the supply of available visas – undermined this relationship (Calavita 1992). Agriculturalists encouraged their existing farmworkers to recruit relatives and friends to work alongside them without visas. The binational agreement ended in the 1960s, but its demise did not sever these relationships. Mexico–US labor migration became institutionalized as a pathway to socioeconomic mobility for many undocumented immigrants. This institutionalization reflected not just the binational agreement that mobilized much movement to the United States but also the social dynamics that propelled this movement (Garip 2016): household heads, usually men, migrated first, but over time, their eldest sons, partners and other children would migrate too.

The US federal government struggled to interrupt these relational dynamics. By the 1980s, more than 2 million undocumented immigrants from Mexico called the United States home (Passel and Woodrow 1987). Politicians, immigration officials and the media campaigned to regulate this population. The result was a large-scale legalization program (i.e., “amnesty”), as well as an unprecedented securitization of the Mexico–US border to dissuade future undocumented entries. Yet these efforts backfired in two ways (Massey et al. 2016). First, legalization conferred previously unavailable relational rights to undocumented immigrants-turned-permanent residents, who could now sponsor their immediate relatives for visas to live in the United States with authorization under the Immigration and Nationality Act's “family reunification” provision. Second, border securitization did not alter the relational dynamics producing undocumented immigration; it simply dissuaded new undocumented immigrants from leaving the United States once they crossed an increasingly dangerous border. Similar relational dynamics can be identified in explaining why other populations, including people from countries in Central and South America and Asia (Kim and Yellow Horse 2018; Menjívar and Abrego 2012; Warren 2021), account for a growing fraction of the undocumented population in the country.

Relational dynamics also explain the rights available to undocumented immigrants settled in the United States. To be sure, undocumented immigrants' experiences are increasingly bifurcated by whether and what kinds of social relationships they have with US citizens – especially spouses and children. About 1.3 million undocumented immigrants have US citizen spouses, and 3.5 million have citizen children (Migration Policy Institute 2018). Despite fearing deportation (Asad 2020a; 2020b; Lai et al. 2023; Waldinger et al. 2023), undocumented parents to citizen children must regularly interact with institutional authorities, such as teachers and social workers, who monitor their parenting (Asad 2023). These routine interactions on behalf of their kids can confer material resources (e.g., public assistance for eligible citizen children), but they can also bring about punishment (e.g., family separation, police intervention and even deportation). Assuming these interactions do not escalate into punishment, in the long run, evidence of these interactions may also facilitate undocumented parents' formal societal membership in one of two ways: by allowing them to submit a legalization petition that demonstrates their positive societal contributions once their eldest citizen child reaches age 21 or, if they are shuffled into removal proceedings before that time, by petitioning to have their removal “canceled” based on the “exceptional and extremely unusual hardship” it would cause to their citizen parent, spouse or child (Family 2016).<sup>2</sup>

If undocumented immigrants with citizen spouses or children have some modicum of relational rights, then undocumented immigrants without these relationships have next to none. About 2.8 million undocumented immigrants are married to other undocumented immigrants, and 6.2 million have no children (Migration Policy Institute 2018). In the current system, their social relationships are not likely to facilitate their access to mainstream societal institutions that promote their health or well-being. Nor are they likely to facilitate their legalization because, under current law, there are few pathways available for undocumented immigrants without immediate relatives who are US citizens or permanent residents – even for those who complete 21 years in the United States. Lacking immediate relatives who are US citizens will also afflict them if immigration authorities initiate removal proceedings against them, regardless of whether they meet all other eligibility criteria for relief from removal. As one prosecutor for the Department of Homeland Security I observed in immigration court put it to an undocumented defendant when explaining why an immigration judge could not cancel the defendant's removal, “You just don't have any qualifying relatives [who can sponsor your legalization]” (Asad 2019: 1237). An immigration judge ordered the defendant deported to Mexico shortly thereafter.

The bifurcated experiences of undocumented immigrants with different kinds of social relationships illuminate the possibilities and limitations of a relational rights framework. On the one hand, relational rights offer a pathway through which prized relationships – here, for undocumented spouses or parents of US citizens – can counterbalance some of the unequal effects of the immigration system. On the other hand, relational rights require buy-in from the state that social relationships beyond the nuclear family and/or families not containing US citizens should matter. For undocumented immigrants without citizen spouses or children, relational rights may have a harder time intervening in these inequalities. Whether they can ever intervene will depend on law and society scholars' understandings of social justice and,

given those understandings, which rights should be centered and with regard to which relationships they should be made available.

### Which rights?

Two core aspects of Nielsen's relational rights framework are that it presumes "the basic humanity of all people" and "offers a public vision of law and society scholarship that engages with broader audiences than just the academy" in pursuit of social justice. Both are laudable foundations on which to build a theoretical framework, but they require that sociolegal scholars define to what forms of social justice they hope their theoretically driven, empirically rigorous scholarship contributes. As Nielsen acknowledges, law and society scholarship has always sought to "combine rigorous empirical research with normative argumentation about creating a more fair, just, and equitable society." But this task of combining the empirical with the normative is quite difficult in practice, and a relational rights framework underscores the need to be explicit about how such a task is to be accomplished and with what aim. Different normative goals can lead to divergent decisions about which relationships we – scholars, policymakers, advocates, and the broader public – value and the rights claims that support those relationships.

Although there are many possible definitions of social justice, for my purposes here, they can be simply divided into a "liberal" and "progressive" typology.<sup>3</sup> Whereas a liberal vision may seek to leverage the law to reduce the harms of prevailing social systems without fundamentally altering their structure, a progressive vision may seek to transform or otherwise dismantle the systems producing harm. In the sociolegal literature, this distinction arguably has been developed best with respect to the criminal legal system. To offer a simple example: should efforts be made to make criminal courts "fairer" by reducing racial disparities in conviction or sentencing, or should criminal courts be eliminated altogether because they inherently reflect multiple forms of inequality (for extended discussions, see Akbar 2022; Clair and Woog 2022)? Of course, these are not wholly incompatible visions, but they are not the same – and they imply meaningful differences in the goals of research and any advocacy that may emanate from that research.

In recent interviews with US immigration advocates, I have learned how distinct visions of social justice can imply distinct visions of rights provision for the populations they serve. Liberal visions seek to reduce systemic harms, but liberally oriented advocates I interviewed are aware that they risk further institutionalizing or otherwise reproducing the prevailing system by rendering it "less harmful" on its face. One example in this setting regards "access to justice." Defendants facing removal in immigration court have no constitutional right to a public defender. A voluminous literature shows that, on average, defendants in immigration court without attorney representation fare significantly worse on a range of court outcomes when compared with similarly situated defendants with attorney representation (Eagly and Shafer 2015). Programs piloting attorney provision in immigration courts have sought to mitigate these harms. But, in doing so, it is prudent to ask whether access to an attorney itself constitutes justice in an unequal system (Clair 2020). Liberally oriented advocates I interviewed are aware of this broader tension, but, as they summarized to me, it is

perhaps beside the point of their day-to-day work that requires them to mitigate harm within the confines of a harmful system.

For the immigration advocates I interviewed with more progressive visions of social justice, rights that risk further institutionalizing (or legitimizing) the existing system are not the goal. Strictly speaking, they describe working toward rights that transform or otherwise upend the prevailing system. To extend the prior example, rather than make public defenders available to all defendants in immigration court, a progressive vision may push for the elimination of detention based on administrative and/or civil immigration violations. The rub, as the progressively oriented advocates I interviewed explain, is that achieving their preferred vision of social justice may take many years. In the meantime, they find it prudent to ask whether there are more intermediate steps they can take that align with their long-term vision, such as decriminalizing undocumented entry or reentry to the United States.<sup>4</sup> Sometimes these short- and long-term strategies create difficult choices for advocates, such as when some progressive advocates I interviewed must decide whether to call for immigrants' greater healthcare access in immigration detention at the risk of institutionalizing immigration detention.

What do these distinctions between liberal and progressive visions of social justice mean for law and society scholars interested in relational rights? To my mind, they invite greater self-reflection and dialogue. What vision(s) of social justice, if any, should our scholarship advance? What rights are merely a means to an end, and which are ends in and of themselves? The answers to these questions are hardly settled, and they demand both academic introspection and dialogue with broader audiences outside the academy – including advocates and system-impacted people – in order to avoid representational hierarchies within social movements and to align on legal or policy goals (see Fiorito and Nicholls 2023 for an interesting example of this in the context of the undocumented immigrant youth movement). Sociolegal scholars do not have to agree on a single vision of social justice, and neither should we take for granted that such an agreement exists. Without considering sociolegal scholars' definitions or understandings of social justice and which rights are associated with those definitions or understandings, we may limit the effectiveness of related public-facing efforts to advocate for relational rights.

### Whose relationships?

Sociolegal scholars must specify our understandings of social justice because they delineate both the rights for which we are likely to advocate and the social relationships deemed important for the law to promote and protect. As Nielsen articulates, individual rights matter, and they also matter in interaction with others. Depending on the vision of social justice underlying our scholarship and eventual public-facing advocacy, there is a risk that whose rights and relationships are protected, and whose are left behind, may reinforce the very inequalities we hope to interrupt on the quest toward social justice.

We need not look far to discover how these dynamics have played out in US immigration enforcement. In 2011, the Obama administration began a yearslong project of prioritizing some, and deprioritizing other, noncitizens' removal (Hausman 2022). The embattled Deferred Action for Childhood Arrivals (DACA), announced in June 2012, exemplifies these efforts. It effectively deprioritizes the removal of

some undocumented immigrants who have lived in the country since childhood and who meet certain eligibility criteria. The related Deferred Action for the Parents of Americans and Lawful Permanent Residents (DAPA), announced in November 2014, would have done something similar to DACA but for the undocumented parents of some US citizens and permanent residents.<sup>5</sup> In announcing DAPA, President Barack Obama noted, “[W]e’re going to keep focusing enforcement resources on actual threats to our security. Felons, not families. Criminals, not children. Gang members, not a mom who’s working hard to provide for her kids” (The White House 2014). We observe here that, even in a system that ostensibly privileges family relationships to US citizens, there is a limit to the protection that these relationships confer to undocumented immigrants – such as those state authorities label “felons,” “criminals” and “gang members.” We are also reminded that those without these family relationships have very few rights available to them.<sup>6</sup>

As a strategy for social change, it makes sense to emphasize relationships palatable to political officials and the public. This is perhaps especially true for immigration enforcement, which is prone not only to politicization rooted in xenophobia and racism but also stagnation in terms of meaningful reform, let alone transformation. Study after study shows that a large-scale amnesty or legalization program centered on undocumented immigrants’ family relationships with US citizens enjoys broad bipartisan support (Bloemraad et al. 2016; Oliphant and Cera 2022). This dynamic is not unique to the United States either; studies in other Western countries likewise show greater public support for legalization programs when undocumented immigrants have family members who are citizens of that country (Hainmueller and Hopkins 2014). When the question is how to move the needle even slightly for at least some undocumented immigrants, emphasizing relationships with US citizens may very well prove useful for expanding undocumented immigrants’ rights.

My hesitation, though, centers on what an emphasis on relationships means for the goals of social justice. In a liberal vision of social justice, expanding the range of relationships the immigration system considers valuable or otherwise worthy of protection – such as extended relatives and even friends who are US citizens – is a meaningful reform. Doing so may help reduce this system’s harms for the most typical of undocumented immigrants: those without citizen parents, spouses, or children. But, almost four decades on since the last amnesty, a cascade of research and advocacy predicated on undocumented immigrants’ relationships with US citizens has yet to move the political needle on another legalization program. Meanwhile, even among ostensibly protected social relationships, the structure of the immigration system continues to be punishing. Undocumented immigrants with immediate relatives who are US citizens continue to be deported with enough frequency that about 500,000 US citizen children now live in Mexico (Masferrer et al. 2019). Those who are not deported continue to endure overlapping legal, material and social hardships associated with the immigration system (Asad 2023). Some long-term undocumented immigrants and immigration advocates, increasingly frustrated by congressional inaction on legalization, are willing to settle for work authorization from the federal government that would leave their legal subordination largely unchanged (Gamboa 2023).

Some of these hesitations may be obviated if the goal of social justice is not only to reduce systemic harms but also to transform or otherwise dismantle the systems producing those harms, regardless of one’s relationships. In a progressive vision of

social change, relationships may be limiting dimensions on which to predicate access to rights. A focus on relationships may leave unexamined and, therefore, uninterrupted aspects of the immigration system that enforce undocumented immigrants' exclusion. We may instead consider whether the systems that allow the state to create distance between people – for example, citizenship status or deportation – are themselves just. To do so would mean working toward the elimination of artificial or otherwise socially constructed distinctions between people that condition their societal membership and associated rights on who they are related to or who they know. For example, absent employer or family sponsorship, prospective immigrants have few pathways available for permanent immigration to the United States.<sup>7</sup> Promoting people's freedom of movement across national borders would mean not tethering international migration to employer or social relationships (Carens 1987). The Diversity Visa Program, which uses a lottery to award a limited number of visas to qualified applicants from countries with historically low rates of US immigration who are likely to lack these relationships, is an example of this idea whose scope may be expanded.

All considered, how sociolegal scholars link their visions of social justice to the relational rights for which we advocate matters. It matters for how we approach the research questions we ask. It matters for how we interpret the data we analyze. It matters for the implications of our findings outside the academy. Attention to whose rights and relationships are protected by the visions of social justice we hold, and who is left behind, is needed.

**Conflict of interest.** The author declare no conflicts of interest.

## Notes

- 1 I prepared this commentary based on President Nielsen's slides and notes from her address to the 2023 Annual Meeting of the Law and Society Association.
- 2 Neither of these pathways to formal societal membership is guaranteed for any undocumented immigrant, and they are often far harder to achieve than what this basic summary suggests.
- 3 Conservatives, too, may be considered to have their own vision of social justice, perhaps rooted in ideas like individual responsibility, "traditional" family values, a free market, a race-neutral society, and the like. Their advocates have espoused these ideas in a range of social movements (e.g., Yazdihya 2023), often to counter structural changes that would bolster the life chances of subordinated populations. To the extent that they meaningfully exist to promote social justice, I do not consider conservative visions of social justice here.
- 4 Black feminist thinkers call these intermediate steps "non-reformist reforms," defined as those that "reduce the power of an oppressive system while illuminating the system's inability to solve the crises it creates" (Berger et al. 2017; see also Davis 2016; Kaba 2021). For examples of other possible non-reformist reforms to the immigration system, see Koh (2021).
- 5 A federal court granted injunctive relief to several states challenging DAPA's legality; DAPA was never implemented and, ultimately, rescinded by the Trump administration.
- 6 To be sure, undocumented immigrants without citizen relatives are also protected by immigration enforcement priorities, especially if these priorities render immigration enforcement more predictable.
- 7 Exceptions include humanitarian (e.g., refugee or asylum) claims.

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