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Introduction: Immigration Law in Pennsylvania: Policy and Practice

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IMMIGRATION LAW IN PENNSYLVANIA: POLICY AND PRACTICE

INTRODUCTION

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On October 29, 2007, the Law & Government Institute ("Institute") of Widener University School of Law hosted a symposium, "Immigration Law in Pennsylvania: Policy and Practice."¹ There were two panels of speakers and four goals. The first panel featured a discussion about immigration law policy in Pennsylvania. This discussion focused on immigration-related

* Associate Professor of Law and Associate Director, Law & Government Institute, Widener University School of Law. The author would like to thank for their help and support in planning this symposium the following people: Dean Linda L. Ammons; Vice Dean, Professor of Law, and Director, Law & Government Institute, John L. Gedid; Associate Professor and Associate Director, Law & Government Institute, Wesley M. Oliver; Mary Allen; and Sandy Graeff. For their role in the success of the program, thanks are also due to: the participants in the symposium; Law & Government fellows Christopher Jones, Matthew Krupp, and Chad Rumsey; and the *Widener Law Journal* members Brian Cagle, Jason Gottesman, Karli Gouse, Robert Hamilton, Jennilee Kemling, Renae Kluk Kiehl, Allison Miles, Amy Quimby, Kenneth Robinson, Elizabeth Schwartz, John Toresco, Melissa Vega, and Cory Winter. Lastly, special thanks to Steve Kwon for organizing the publication of these articles in the *Widener Law Journal*.

¹ Brochure, Law & Government Institute, Widener University School of Law, Immigration Law in Pennsylvania: Policy and Practice (Oct. 29, 2007) (on file with the *Widener Law Journal*).

legislative activity within the commonwealth. The second panel brought together Pennsylvania immigration attorneys to discuss the practice of immigration law in Pennsylvania. The first panel fulfilled goal one: to host a thoughtful, Pennsylvania-focused analysis of state and local efforts to legislate in the area of immigration law. The second panel fulfilled goal two: to provide a forum for Pennsylvania immigration attorneys to share their experiences amongst themselves and with the public. The panels together fulfilled goals three and four: to help bridge the gap between policy and practice and to increase the involvement of the Institute in this important debate.

The Institute is dedicated to exploring the intersection of policy and law and frequently hosts speakers and programs that explore the relationship between government and the law.² In addition to this immigration program, the Institute recently sponsored a program, "Dred Scott After 150 Years: A Grievous Wound Remembered," and inaugurated the John L. Gedid Lecture Series with a lecture by Melissa Waters, Assistant Professor of Law, Washington & Lee School of Law.³ Professor Waters spoke about her work for the U.S. Department of State training Middle Eastern judges.⁴ In addition to hosting speakers and programs, the Institute offers four certification programs to students: Administrative / Constitutional Law, Consumer Law, Environmental Law, and Legislation.⁵ By completing the required coursework, externship, and writing requirements, students gain invaluable insight into the intersection of government and law, as well as practical experience that complements their legal

² For more information about the Institute, please visit Widener Law—Law and Government Institute (Harrisburg), <http://law.widener.edu/Academics/Institutes/LawandGovernmentInstitute.aspx> (last visited Feb. 22, 2008).

³ Symposium, *Dred Scott After 150 Years: A Grievous Wound Remembered*, 17 WIDENER L.J. 1 (2007); Melissa Waters, *Pyrrhic Justice? Lessons Learned from the Saddam Trial* (Apr. 19, 2007) (transcript on file with the *Widener Law Journal*).

⁴ Waters, *supra* note 3.

⁵ Widener Law—Law & Government Institute (Harrisburg), <http://law.widener.edu/Academics/Institutes/LawandGovernmentInstitute.aspx> (last visited Feb. 22, 2008).

educations.⁶ Additionally, the Institute selects Law & Government fellows, who are students that take an active role with the Institute throughout the academic year.⁷

In planning the Institute's activities for the academic year, it took little time to settle on immigration as the issue the Institute would address through its symposium. In late 2005, the United States Congress began debate to reform the immigration laws, mostly to address illegal immigration.⁸ The debate brought to light disagreement about what, if anything, is wrong with the immigration laws and what changes should be made.⁹ At the national level, this debate is ongoing. At the time of this writing, no immigration reform bill has emerged from Congress.¹⁰

Against the backdrop of this ongoing national debate, state and local governments enacted immigration-related legislation.¹¹

⁶ Widener Law—Certificate Programs, <http://law.widener.edu/Academics/Programs/JurisDoctorPrograms/CertificatePrograms.aspx> (last visited Feb. 22, 2008).

⁷ John L. Gedid, *The Law and Government Institute: Rapid Growth in Faculty, Offerings, Speakers*, WIDENER UNIVERSITY SCHOOL OF LAW MAGAZINE, Fall 2007, at 15-16.

⁸ In December 2005, the U.S. House of Representatives passed the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005). See also Jill E. Family, *Stripping Judicial Review During Immigration Reform: The Certificate of Reviewability*, 8 NEV. L.J. (forthcoming 2008).

⁹ H.R. 4437 is representative of an enforcement-focused approach that views illegal immigration as a policy problem caused by lax enforcement. Family, *supra* note 8. Contrasting sentiment as to the cause of illegal immigration may be found in immigration reform bills subsequently passed by the U.S. Senate. *Id.*

¹⁰ In December 2005, the House passed H.R. 4437. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005). In response, the Senate passed the Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006). The House and the Senate never met to confer on these two bills. The Senate considered further legislation in 2007 but did not pass a bill. See, e.g., Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. (2007); S. 1639, 110th Cong. (2007).

¹¹ For information about state-level legislation, see National Conference of State Legislatures, 2007 Enacted State Legislation Related to Immigrants and Immigration (Aug. 5, 2007), available at <http://www.ncsl.org/print/immig/2007Immigration831.pdf> and National Conference of State Legislatures, 2006 State Legislation Related to Immigration

For example, beginning in the summer of 2006, the city of Hazleton, Pennsylvania, enacted a series of versions of an ordinance known as the "Illegal Immigration Relief Act Ordinance."¹² This ordinance renders it unlawful "for any business entity to recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct any person who is an unlawful worker to perform work in whole or part within the City."¹³ Those employers who fail to correct a violation within three days would be subject to suspension of their business permits.¹⁴ The ordinance also renders it unlawful "for any person or business entity that owns a dwelling unit in the City to harbor an illegal alien in the dwelling unit."¹⁵ The penalty for failure to correct a violation is suspension of the rental license.¹⁶ In the spring of 2007, U.S. District Court Judge James M. Munley declared the Hazleton ordinances unconstitutional.¹⁷

The symposium topic was dictated by the importance of increased state and local immigration regulation (with Hazleton, Pennsylvania, at the forefront) against a backdrop of federal legislative stalemate. The first panel addressed the issue of immigration law policy in Pennsylvania. The panel, moderated by the author, consisted of Larry Frankel, Esq., Legislative Director, ACLU of Pennsylvania; Helen Harnett, Esq., Senior Advocacy Attorney, Catholic Legal Immigration Network, Inc. ("CLINIC"); Peter J. Spiro, Charles R. Weiner Professor of Law, Temple University Beasley School of Law; and Jan C. Ting, Professor of

(July 3, 2006), available at <http://www.ncsl.org/programs/immig/06ImmigEnactedLegis2.htm>. As far as local-level ordinances, see Julia Preston, *Judge Voids Ordinance on Illegal Immigrants*, N.Y. TIMES, July 27, 2007, at A14, and the collection of cases available from the Civil Rights Litigation Clearinghouse, available at <http://clearinghouse.wustl.edu/>.

¹² *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 484-85 (M.D. Pa. 2007).

¹³ Hazleton, Pa., Illegal Immigration Relief Act Ordinance, Ordinance 2006-18 § 4(A) (Sept. 8, 2006), available at http://www.aclu.org/pdfs/immigrants/hazleton_secondordinance.pdf.

¹⁴ § 4(B)(4).

¹⁵ § 5(A).

¹⁶ § 5(B)(4).

¹⁷ *Lozano*, 496 F. Supp. 2d at 477.

Law, Temple University Beasley School of Law. This panel discussed immigration-related legislative efforts in the Pennsylvania Legislature in addition to local efforts like Hazleton's. True to the mission of the Institute, the panel discussed not only the legality of such state and local legislation, but also whether such efforts are good policy. There was a healthy debate on both fronts (legality and desirability).

For example, Larry Frankel expressed that the Hazleton experience should teach us that, constitutionally, immigration is a federal matter, that immigration policy affects more than just those present without permission, and that local immigration regulation has a negative impact on our communities and economy.¹⁸ Mr. Frankel described immigration-related bills pending before the Pennsylvania Legislature that would institute employer sanctions and deputize state police to enforce federal immigration laws, among other things.¹⁹ These bills have not yet been successful, Mr. Frankel believes, because public hearings have brought to light negative aspects of such proposals.²⁰

Professor Peter Spiro spoke about a historical rationale behind a predominate federal power over immigration, that local regulation would hinder foreign affairs, and argued that this rationale is less relevant today.²¹ Professor Spiro views immigration law today as not inherently federal.²² Therefore, local and state regulation of immigration law can be constitutional and, in fact, could be preferable.²³ Professor Spiro explained his view that it is in immigrants' interests to allow local and state regulation

¹⁸ Larry Frankel, Esq., Panel Discussion at the Widener University School of Law's Law & Government Institute Immigration Symposium: Immigration Law in Pennsylvania: Policy and Practice (Oct. 29, 2007), *recorded in* Videotape: Immigration Law in Pennsylvania: Policy and Practice (Oct. 29, 2007) (on file with Widener University School of Law).

¹⁹ *Id.*

²⁰ *Id.*

²¹ Professor Peter Spiro, Panel Discussion at the Widener University School of Law's Law & Government Institute Immigration Symposium: Immigration Law in Pennsylvania: Policy and Practice (Oct. 29, 2007), *recorded in* Videotape: Immigration Law in Pennsylvania: Policy and Practice (Oct. 29, 2007) (on file with Widener University School of Law).

²² *Id.*

²³ *Id.*

because such measures will die a natural death as their effects on the local community take hold.²⁴ Additionally, state and local regulation could be friendlier to immigrants than federal regulation.²⁵

From this policy panel, Professor Jan Ting and Helen Harnett each contributed articles that appear in this issue. These articles are representative of the questions addressed by this first panel. Ms. Harnett provides us with a legal analysis of two hefty constitutional issues raised by state and local regulation of immigration: federal preemption and due process.²⁶ She does so by analyzing the Hazleton ordinances. Ms. Harnett argues that "only the federal government can regulate immigration" and that Hazleton's ordinance is, in fact, regulation of immigration.²⁷ Ms. Harnett argues that because the ordinance allows only citizens or legal residents to rent a home within the city, it is a regulation of immigration because the ordinance excludes some legal immigrants from renting.²⁸ Individuals whom the federal government considers to be lawfully present would be denied permission to rent in the city of Hazleton.²⁹ Ms. Harnett also argues that the Hazleton ordinance's regulation of employers is both expressly and impliedly preempted by federal law.³⁰ As far as due process, Ms. Harnett highlights the due process implications of a local immigration ordinance that affects the right to rent property and also affects property rights in business and employment.³¹ Ms. Harnett concludes that the Hazleton ordinance does not provide due process.³²

Professor Ting's article is a piece of the policy, or desirability, debate that took place among the panelists. Professor Ting asks us,

²⁴ Spiro, *supra* note 21.

²⁵ *Id.*

²⁶ Helen Harnett, *State and Local Anti-Immigrant Initiatives: Can They Withstand Legal Scrutiny?*, 17 WIDENER L.J. 365, 365-82 (2008).

²⁷ *Id.* at 368-70.

²⁸ *Id.* at 369.

²⁹ *Id.*

³⁰ *Id.* at 370-76.

³¹ *Id.* at 377-82.

³² Harnett, *supra* note 26, at 377-82.

"What do you think U.S. immigration policy should be?"³³ He concludes that we should have a system that very much resembles the system we have, but one which contains "an enforcement system so that only those chosen to immigrate are allowed to do so, and those not chosen who come anyway are removed."³⁴ Professor Ting argues that no legalization should occur until the United States government demonstrates an "ability to enforce its own immigration laws by securing the border, enforcing employer sanctions, and by visibly and significantly reducing the number of illegal aliens in the United States."³⁵ In the meantime, Professor Ting writes that state and local legislative actions like Hazleton's "are a worthy attempt to establish constitutional space for state and local responses to illegal immigration in the face of the federal government's failure to enforce its own immigration laws."³⁶

The second panel consisted of Pennsylvania immigration law attorneys Steven P. Barsamian, Esq.; Won Kidane, Visiting Assistant Professor of Law, Penn State, The Dickinson School of Law; Troy J. Mattes, Esq.; Craig R. Shagin, Esq.;³⁷ and Benjamin D. Yerger, Esq. Professor Wesley M. Oliver moderated the discussion. These attorneys described the challenges facing them in their immigration law practices and expressed thoughts on immigration law policy from their practice perspectives.

Steve Barsamian described how immigration law has become front-page news and how he has observed a tightening of immigration law interpretation against the foreign born.³⁸ Troy Mattes discussed challenges in navigating the immigration bureaucracy, including his concerns about the government's use of

³³ Jan C. Ting, *The Case for Immigration Law Enforcement in the United States and in Hazleton, Pennsylvania*, 17 WIDENER L.J. 383, 385 (2008).

³⁴ *Id.*

³⁵ *Id.* at 386.

³⁶ *Id.* at 388.

³⁷ Although not published in connection with this symposium, see Craig R. Shagin, *Deporting Private Ryan: The Less than Honorable Condition of the Noncitizen in the United States Armed Forces*, 17 WIDENER L.J. 245 (2007).

³⁸ Steve Barsamian, Esq., Panel Discussion at the Widener University School of Law's Law & Government Institute Immigration Symposium: Immigration Law in Pennsylvania: Policy and Practice (Oct. 29, 2007), recorded in Videotape: Immigration Law in Pennsylvania: Policy and Practice (Oct. 29, 2007) (on file with Widener University School of Law).

prosecutorial discretion in immigration cases.³⁹ Mr. Mattes described the practice of immigration law as rewarding and the relations among immigration lawyers as collegial.⁴⁰ Craig Shagin focused attention on the world-wide phenomenon of migration.⁴¹ He also shared his observation that the imagery of fear and hate surrounding immigration is on the rise.⁴² Benjamin Yerger described his work for the Pennsylvania Immigration Resource Center's Particularly Vulnerable Populations Project, where he represents detained noncitizens suffering from serious mental or physical illness.⁴³ Mr. Yerger expressed concern with the number of unrepresented noncitizens in removal proceedings and with the fact that there are no special protections in immigration proceedings for incompetent persons.⁴⁴

Professor Won Kidane's article, appearing in this issue, is emblematic of the challenges and frustrations expressed during the discussion.⁴⁵ He touches on the problem of lack of representation and then describes the challenges that The Dickinson School of Law Immigration Clinic has faced in representing detained noncitizens in deportation proceedings.⁴⁶ He leads us through a

³⁹ Troy Mattes, Esq., Panel Discussion at the Widener University School of Law's Law & Government Institute Immigration Symposium: Immigration Law in Pennsylvania: Policy and Practice (Oct. 29, 2007), *recorded in* Videotape: Immigration Law in Pennsylvania: Policy and Practice (Oct. 29, 2007) (on file with Widener University School of Law).

⁴⁰ *Id.*

⁴¹ Craig Shagin, Esq., Panel Discussion at the Widener University School of Law's Law & Government Institute Immigration Symposium: Immigration Law in Pennsylvania: Policy and Practice (Oct. 29, 2007), *recorded in* Videotape: Immigration Law in Pennsylvania: Policy and Practice (Oct. 29, 2007) (on file with Widener University School of Law).

⁴² *Id.*

⁴³ Benjamin Yerger, Esq., Panel Discussion at the Widener University School of Law's Law & Government Institute Immigration Symposium: Immigration Law in Pennsylvania: Policy and Practice (Oct. 29, 2007), *recorded in* Videotape: Immigration Law in Pennsylvania: Policy and Practice (Oct. 29, 2007) (on file with Widener University School of Law).

⁴⁴ *Id.*

⁴⁵ Won Kidane, *The Challenges of Representing Detained Noncitizens in Expedited Removal Proceedings from the Perspective of The Dickinson School of Law Immigration Clinic*, 17 WIDENER L.J. 391, 391-92 (2008).

⁴⁶ *Id.* at 391.

step-by-step description of the expedited removal process and the pitfalls, with harsh consequences, that dominate the landscape.⁴⁷ For example, Professor Kidane describes the perhaps unexpected immigration consequences of a criminal plea bargain.⁴⁸ Professor Kidane relays the phenomenon that, at least in terms of immigration consequences, actually serving time for less than one year can be better than receiving a one year suspended sentence.⁴⁹ His use of real life case examples brings the challenges into crisp focus.⁵⁰ Professor Kidane provides a valuable resource for anyone with an interest in understanding the deportation process from the ground level and up.

The Institute is honored to have hosted this discussion about immigration policy and the practice of immigration law in Pennsylvania. We are indebted to the participants for their help in allowing the Institute and Widener University School of Law to participate in this significant debate.

⁴⁷ Kidane, *supra* note 45, at 392-412.

⁴⁸ *Id.* at 392-97.

⁴⁹ *Id.* at 394-95.

⁵⁰ *See, e.g., id.* at 395-97.