

Populist Judicial Reasoning

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Vladislava Stoyanova, [Populism, Exceptionality and the Right of Migrants to Family Life under the European Convention on Human Rights](#), 10(2) **Eur. J. of Legal Stud.** 83 (2018).

Under the Trump administration, each week brings a new attack on due process and on substantive protections for migrants. Sacred cows such as Temporary Protected Status for Salvadorans, which had been extended by Democratic and Republican administrations alike for the past two decades, are dispatched with alacrity. Attorney General Sessions appears intent on destroying the immigration adjudication system, demanding that immigration judges meet unrealistic case completion goals and reversal rates while limiting the resources available to the system. Migrants' rights are a constant source of litigation, from highly anticipated Supreme Court judgments to battles fought through amicus briefs before the Attorney General.

Beyond the momentary relief of deft political satire, a comparative glimpse across the pond can provide helpful perspective on the situation at home. [Vladislava Stoyanova](#)'s forthcoming article reminds us that we are not the only nation facing populist movements that "exploit public anxieties over migration" in order to "curb[] immigration and restrict the rights of migrants." Her rigorous and painstaking analysis of the [European Court of Human Rights](#) (ECtHR) decisions prompts analysis of larger philosophical questions about law's paradoxical approach to migrants' rights and offers a provocative new concept: populist judicial reasoning.

Stoyanova begins with a brief definition of populism and its relationship to migration, explaining that "migrants are...excluded from 'the pure people' that populists claim to *exclusively* represent." She then poses a question that has haunted scholars of immigration law since the first week of the Trump administration: can courts act as effective points of resistance against populism?

As her title suggests, Stoyanova's analysis focuses on the European human rights system, which offers an effective supranational framework absent in the U.S. context. Yet the parallels with legal protections for migrants available under the U.S. Constitution are still rich. Stoyanova notes that the ECtHR "acts with restraint and sides with the sovereign" when it comes to migrant rights, an apt description of our highest court. There is a difference in motivation; in extending rights to migrants, the European court has concerns about its own legitimacy that have little bearing on the U.S. Supreme Court.

And of course, Stoyanova explores a right that doesn't exist under the United States Constitution: the right to family life found in Article 8 of the European Convention on Human Rights. In her words, she explores ECtHR responses to "exclusionary nationalist anti-migrant dimension of the populist turn when adjudicating cases implicating the rights of migrants." Stoyanova dives into the technical details, critically examining the procedural steps the European Court takes to analyze migrants' right to family life.

The examination is fruitful; it is here that she uncovers the court's affinity for populist tools. As the court works to avoid acting as a point of resistance to the sovereign, it sets to one side the careful legal reasoning required of courts and instead adopts the populist method of decisionmaking without critical analysis. This is a provocative and rich idea, and this reader wished only that Stoyanova had engaged in deeper theoretical analysis around it. She does provide ample analytical support for her idea, noting four ways in which the court dances with populist tools. The ECtHR assumes a

conflict between migrant rights and community interests without examining arguments that upholding migrants' rights to family life is in the best interest of the community. The Court accepts the state's general invocation of immigration control prerogatives, rather than requiring the sovereign to clearly articulate specific aims animating its denial of the right to family life. The ECtHR doesn't engage in any rational or factual scrutiny of the goals offered by the state, and represents migrants' rights as exceptional. This careful analysis of the case law is instructive, building a strong case for her populist reasoning argument.

Stoyanova also examines critically the ECtHR's characterization of Article 8 as a positive obligation in the case of migrants who are unlawfully present. This determination contrasts with the treatment of migrants who lose their previous immigration status and can therefore claim Article 8 as a negative obligation. She exposes the analytical flaws in the ECtHR's approach, explaining that expulsion disrupts family life and "is a clear action attributable to the state irrespective of the formal migration status of the person." This downgrading of rights for migrants unlawfully present is paralleled in U.S. constitutional law, and Stoyanova's analysis offers food for thought in debates over that approach as well as arguments about whether removal should be treated as a civil or criminal penalty given its harsh consequences.

As with U.S. Constitutional law, Stoyanova points out that migrants' rights have long been a weak point of human rights law. In the battle between statism and cosmopolitanism, the sovereign has consistently prevailed. Her article points to the vacuum in legal reasoning that has led to that outcome, and presents us with a new way to frame this transnational phenomenon: populist judicial reasoning. Though neither the ECtHR nor the U.S. Supreme Court is currently doing so, Stoyanova's detailed critical analysis demonstrates how these courts could act as effective sites of resistance against populism if only they had the will.

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