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Raquel Aldana

Pacific McGeorge School of Law

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INTRODUCTION: THE SUBORDINATION AND ANTI-SUBORDINATION STORY OF THE U.S. IMMIGRANT EXPERIENCE IN THE 21ST CENTURY

Raquel E. Aldana*

The five essays that comprise the immigration cluster for LatCrit XI focus on the living conditions of the immigrant student, mother and grandmother, undocumented worker and taxpayer, and the human trafficking victim, as well as on the laws and practices that regulate the lives of such people inside the United States. The protagonists in these pieces all share a common characteristic: “foreignness.” On one side of the spectrum is Maria, a naturalized citizen, whose compelling story involving a custody dispute over her granddaughter is narrated by her lawyer, Professor Annette Appell.¹ On the other side are the human trafficking victims who, as Professor Marisa Silenzi Cianciarulo documents in her essay, are forced into prostitution by a sophisticated ring of human traffickers who profit from U.S. immigration restrictions.² In between the two are the undocumented immigrants, many who survived smugglers and a deadly desert to cross the U.S. border as children, who now work and study in the United States, and who are branded as “illegal aliens.”³

Combined, these essays touch on themes central to the immigration experience in the United States today: subordination and anti-subordination. The essays document the interaction between these immigrant U.S. residents and state institutions who subordinate them on the basis of a legal construction of illegality and who exclude and vilify them through dominant cultural norms. Their stories are part of a larger picture: a country whose “foreign born” popu-

* Professor of Law, William S. Boyd School of Law; J.D. 1997, Harvard Law School. I thank Barbara McDonald for her excellent editing and research assistance and Jim Rogers for his financial support of my research. I also thank Jackie Gilbert and other editors of the NEVADA LAW JOURNAL for their excellent editorial assistance.

¹ Annette R. Appell, “Bad” Mothers & Spanish-Speaking Caregivers, 7 NEV. L.J. 759 (2007).

² Marisa Silenzi Cianciarulo, *Modern-Day Slavery and Cultural Bias: Proposals for Reforming the U.S. Visa System for Victims of International Human Trafficking*, 7 NEV. L.J. 826 (2007).

³ Lindsey Perez Huber & Maria C. Malagon, *Silenced Struggles: The Experiences of Latina and Latino Undocumented College Students in California*, 7 NEV. L.J. 841 (2007); Francine J. Lipman, *Bearing Witness to the Economic Injustice of Undocumented Immigrant Families: A New Class of “Undeserving” Poor*, 7 NEV. L.J. 736 (2007); Jessica Solyom, Jeremiah Chin, & Kristi Ryuijin with Nicol Razón, Thanh Tung Thrantrong, & X. Yvette González, *Be Careful What You Ask For: Educacion Para Todas/os, the Perils and the Power*, 7 NEV. L.J. 862 (2007) [hereinafter Solyom et al.].

lation as reported in the 2000 Census is 11.1% (31.1 million),⁴ many of whom are here without authorization. The Pew Hispanic Center puts this latter population at 11.1 million as of March of 2005 and growing.⁵ In fact, since 2005, the number of undocumented immigrants arriving in the United States has exceeded the average number of arrivals of documented immigrants.⁶ These statistics are not surprising. They are the product of immigration policies, such as numerical yearly caps on the number of legal visas⁷ and long waits for family-based immigration.⁸ In addition, employment-based visas that largely exclude unskilled workers both ignore and capitalize on global mass migration from poor countries.⁹

The ugliest face of these restrictive immigration policies is human sexual trafficking. Professor Cianciarulo tells us that since Congress passed the Victims of Trafficking and Violence Protection Act ("VTVPA") in 2000,¹⁰ human trafficking has affected at least 108,000 persons.¹¹ Despite high numbers and extreme facts of victimization, and even as Congress has granted up to 5000 T visas a year, immigration agencies have approved only 600 visas for victims of sexual human trafficking in the last six years.¹² This story parallels the plight of thousands of other victims of violent crime, including survivors of hate crimes and domestic violence, who, despite having cooperated with law enforcement to prosecute their victimizers, have not received VTVPA visas.¹³ In fact, on March 7 of this year, Catholic Charities and Sanctuary for Families filed a lawsuit against the U.S. Citizenship and Immigration Services

⁴ See U.S. DEP'T OF COMMERCE NEWS, U.S. CENSUS BUREAU, FOREIGN-BORN POPULATION UP 57% SINCE 1990 IN UNITED STATES (June 4, 2002), <http://usinfo.state.gov/usa/diversity/pr061002.htm> [hereinafter U.S. DEP'T OF COMMERCE NEWS].

⁵ JEFFREY S. PASSEL, PEW HISPANIC CENTER, THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY (2006), <http://pewhispanic.org/files/reports/61.pdf> [hereinafter Passel, Size and Characteristics 2005].

⁶ JEFFREY S. PASSEL, PEW HISPANIC CENTER, UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS 6 (2005), <http://pewhispanic.org/reports/report.php?ReportID=46>.

⁷ Section 201 of the Immigration and Nationality Act ("INA") sets an annual minimum family-sponsored preference limit of 226,000. Immigration and Nationality Act of 1952 (INA) § 201(c)(1)(B)(ii). The worldwide level for annual employment-based preference immigrants is at least 140,000. *Id.* § (d)(1)(A). Section 202 prescribes that the per-country limit for preference immigrants is set at 7% of the total annual family-sponsored and employment-based preference limits, i.e., 25,620. *Id.* § 202(a)(2), § 1152(a)(2) (2000).

⁸ See Visa Bulletin for July 2005, No. 83, Vol. VIII, available at http://travel.state.gov/visa/frvi/bulletin/bulletin_2539.html.

⁹ See STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 292-337 (4th ed. 2005).

¹⁰ Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended in scattered sections of 8, 18, 22, 27, and 42 U.S.C.).

¹¹ Cianciarulo, *supra* note 2, at 831 (citing U.S. Department of Health and Human Services estimates that 18,000-20,000 persons per year are trafficked to work as sexual slaves in the United States).

¹² The trafficking visa statute was codified at INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T) (2000).

¹³ The crime victim statute was codified at INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) (2000), which permits undocumented immigrants who are victims of serious crimes and who cooperate with law enforcement to apply for and receive a U visa.

("USCIS") to force the agency to comply with the six-year-old statute and grant immigration relief to these victims.¹⁴

In the last two decades, restrictive immigration policies and outright hostility to the plight of victims have affected the continuing "illegality" of this new wave of unauthorized immigrants.¹⁵ Furthermore, as these essays illustrate, these dynamics expand beyond border restrictions and into laws and practices that affect the daily lives of undocumented persons through their dealings with the federal tax system, institutions of higher learning, and the criminal justice system. Congress may pass comprehensive immigration reforms this term, which would partially address the plight of this current wave of unauthorized migration,¹⁶ though not that of future migration waves.¹⁷ Undoubtedly, the conferral of legal status on foreign nationals will improve their standing as legal subjects and social members, though not entirely. The 1996 immigration laws especially remind us of lawful permanent residents' vulnerability to criminalization and removal from this country despite long-term legal residence,¹⁸ as well as their exclusion from certain benefits (e.g., welfare restrictions)¹⁹ and rights enjoyed by citizens.²⁰ Thus, anti-immigrant and anti-alienage laws subordinate the undocumented by perpetuating a neoliberal explanation of individualized agency and a paradigm of choice to explain their legal status, while ignoring the institutional and structural forces that perpetuate "illegality."

In addition, the subordination of immigrants occurs through the perpetuity of "foreignness," even with the conferral of legal status or citizenship to "non-White" immigrants. Professor Appell's essay is a stark reminder that beyond immigration status, the social construction of "foreignness," or rather, dominant

¹⁴ See *Arroyo v. Chertoff*, Complaint for Declaratory and Injunctive Relief (filed N.D. Cal. Mar. 6, 2007), available at http://lawprofessors.typepad.com/immigration/files/catholic_charities_3607_u_visa_complaint.pdf.

¹⁵ In 1986, Congress passed the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359, adding INA § 245A, which granted amnesty to millions of undocumented workers who had been present in the United States prior to the date the law was enacted.

¹⁶ Oxford Analytica, *U.S. Immigration Reform Likely in 2007* (Oct. 18, 2006), available at http://www.forbes.com/2006/10/17/immigration-congress-labor-biz-cx_1018oxford.html.

¹⁷ The comprehensive reform legislation proposes to address future migration with a guest worker proposal that is very similar to the Bracero program of the 1940s. Unions especially are concerned that this aspect of the legislation will simply create a new wave of unauthorized migration that will show its ugly face again shortly after the law's passage. See, e.g., Letter from Andrew Stern, Anna Burger, and Eliseo Medina, SEIU Leaders, to Edward M. Kennedy, Senator of Massachusetts (Jan. 16, 2007), available at http://www.seiu.org/media/pressreleases.cfm?pr_id=1366.

¹⁸ See, e.g., Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

¹⁹ See, e.g., Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001).

²⁰ These include, for example, Fourth Amendment and due process restrictions in removal proceedings. See, e.g., Victor C. Romero, *The Domestic Fourth Amendment Rights of Undocumented Immigrants: On Gutierrez and the Tort Law/Immigration Law Parallel*, 35 HARV. C.R.-C.L. L. REV. 57 (2000).

cultural biases, such as for middle-class White nuclear families, continue to subordinate immigrant families. Her essay illustrates how Maria's extraordinary commitment to extended family and exemplary work ethic could not overcome Nevada's child welfare system's biases against her fueled by such factors as her limited English proficiency, her drug-addicted daughter, and her poverty.²¹

However, the immigration experience also includes a theme of anti-subordination. These essays tell the story of undocumented students who, against all odds, enroll in institutions of higher learning: of Maria, who went to the Child Welfare Clinic of the William S. Boyd School of Law to fight and ultimately win her granddaughter back, and of the undergraduate students who mobilized against the State of Utah's efforts to deny in-state tuition to undocumented students. This group, which includes undergraduate and graduate students, documented and undocumented, employs a Lat Crit lens to identify the structures of oppression over undocumented students. The Utah students are part of a bigger movement that showed its public face in 2006 marches to protest anti-immigrant subordination in cities across the United States. During the LatCrit XI conference, for example, another group of UNLV undergraduate and Las Vegas high school students narrated their own experiences and organized historic marches through the Las Vegas Strip in March and May 2006.²² That group recently established the United Coalition for Immigrant Rights ("I.C.I.R."), a not-for profit community coalition, to unite the Las Vegas community, eradicate discrimination, integrate immigrants into society, foster political and community activism, and create educational opportunities for immigrants.²³ Thus this story of anti-subordination must also be told as the counter story of hope for immigrant communities in the U.S. today.

I. THE SUBORDINATION OF "ILLEGALITY"

The subordination of "illegality" for immigrants in the United States has at least two interrelated characteristics: one legal, the other cultural. Through legal means, the undocumented immigrant is excluded not only from the privilege or right to remain in this country but also from access to basic social benefits or rights, such as work, health, and education.²⁴ In turn, culturally popular attitudes toward undocumented immigrants shift all blame on the undocumented person and away from institutions or structures of oppression,

²¹ Appell, *supra* note 1, at 777-91.

²² Roundtable: Student and Community Activism in Nevada on Behalf of Immigrants (speakers included UNLV student Evelyn Flores, UNLV Professor Anita Revilla, and Las Vegas High School student Julieta Marquez). See LatCrit XI Program Schedule (Oct. 2006), available at http://www.arts.cornell.edu/latcrit/annualconferences/acxi/lcxiprogramfinal9_26_06.pdf.

²³ See Las Vegas Activist Crew, http://www.myspace.com/activist_crew (last visited Apr. 12, 2007).

²⁴ Second generation rights, as these are called, which include a right to education, work, and health, are increasingly being recognized as justiciable rights, not privileges as aspirations or goals. See, e.g., David Marcus, *The Normative Development of Socioeconomic Rights Through Supranational Adjudication*, 42 STAN. J. INT'L L. 53 (2006).

even when the undocumented person is herself a victim. The essays in this cluster document the human toll of these characteristics.

A. *Legal Subordination of Undocumented Immigrants*

Four of the essays focus on human stories of undocumented immigrants left unprotected by law or excluded from it based on their "illegality." These persons include the human trafficking victims subjected to severe labor exploitation; the undocumented workers who, despite paying income and Social Security taxes, are excluded from tax deduction benefits and outright barred from recovering their social pension savings; and the undocumented students who came as children to this country and who are struggling against all odds to attend institutions of higher learning, even if graduating will not guarantee a professional job here.

1. *Legislative Subordination*

These modern stories of legal subordination are not unique. In the United States, immigrants, particularly those not authorized to remain, have always been barred from accessing basic social benefits or rights, particularly by states. In the early twentieth century, for example, "anti-alienage" measures included restrictions on property ownership, hiring, and other welfare benefits.²⁵ Post 9/11, groups like FAIR²⁶ and U.S. English, Inc.²⁷ have been supporting or promoting local efforts to pass anti-alienage ordinances or include them as propositions in important local elections.²⁸ According to the National Conference of State Legislatures, in 2006 alone, at least seventy-eight state immigration-related bills were approved in at least thirty-three states.²⁹ Today, these local anti-alienage laws restrict access to higher education, welfare, renting, and banking.³⁰

In addition, in the last three decades, the federal government has created "alienage" regulations in areas of ordinary living that have no clear relationship to immigration control. These regulations include the Immigration Reform and

²⁵ See, e.g., J. Allen Douglas, *The "Priceless Possession" of Citizenship: Race, Nation and Naturalization in American Law, 1880-1930*, 43 DUQ. L. REV. 369 (2005); Joshua J. Herndon, *Broken Borders: De Canas v. Bica and the Standards that Govern the Validity of State Measures Designed to Deter Undocumented Immigration*, 12 TEX. HISP. J.L. & POL'Y 31 (2006).

²⁶ See Federation for American Immigration Reform, <http://www.fairus.org/site/PageServer> (last visited Apr. 12, 2007).

²⁷ See Welcome to U.S. English, Inc., Homepage, Making English the Official Language, <http://www.us-english.org/inc/> (last visited Apr. 12, 2007).

²⁸ See, e.g., Edward Sifuentes, *FAIR Could Join Escondido to Defend Rental Ban*, N. COUNTY TIMES (San Diego), Oct. 28, 2006, available at http://www.nctimes.com/articles/2006/10/29/news/top_stories/22_03_2810_28_06.txt; Howard Witt, *It's Official: English-only Movement Gains Traction: Hispanic Civil Rights Groups Alarmed*, CHI. TRIB., Oct. 15, 2006, § 1, at 4.

²⁹ Summer Harlow, *Small Towns Play Big Role on Immigration: Fear of Persecution Forces Many to Move*, NEWS J. (Wilmington, DE), Oct. 15, 2005, available at <http://www.delawareonline.com/apps/pbcs.dll/article?AID=/200610150328/1006/NEWS>.

³⁰ Raquel Aldana, *On Rights, Federal Citizenship, and the "Alien"*, 46 WASHBURN L.J. 263 (2007).

Control Act of 1986 ("IRCA"),³¹ which proscribes employers from hiring the undocumented; the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"),³² which restricts certain public means benefits for both legal and undocumented noncitizens,³³ including the Earned Income Tax Credit ("EITC") for low-income undocumented persons,³⁴ the Social Security Protection Act of 2004,³⁵ which restricts Social Security payments solely to persons authorized to work in the United States;³⁶ and the Real ID Act of 2005,³⁷ which forces states to deny driver's licenses to undocumented immigrants, though prior to its adoption many states had opted to grant driver's licenses to the undocumented. By January 2005, only twenty-four states had legislation requiring a lawful presence requirement for the issuance of driver's licenses, while eleven states expressly did not.³⁸

2. Judicial Subordination

As anti-immigrant measures expand, legal challenges to them narrow. At least until the 1970s, the U.S. Supreme Court was willing to declare state anti-alienage laws unconstitutional on the basis of equal protection challenges or federal preemption. In the seminal *Graham v. Richardson* case, the U.S. Supreme Court designated "aliens," at least those legally in the United States, a "discrete and insular minority," thereby triggering a strict scrutiny analysis of state laws restricting noncitizens from accessing public benefits.³⁹ In 1982, in *Plyler v. Doe*, the U.S. Supreme Court also struck down a Texas law that would have barred undocumented children from attending public schools.⁴⁰ When it comes to federal anti-alienage measures, however, the government has enjoyed broad discretion to discriminate against non-citizens. Four years after *Graham*, the Court in *Matthews v. Diaz* largely sanctioned federal discrimination against immigrants beyond immigration control and allowed Congress to enact the very type of legislation barred under *Graham*.⁴¹

³¹ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.) (adding Section 274A to the Immigration and Nationality Act).

³² Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 42 U.S.C.).

³³ Aldana, *supra* note 30.

³⁴ Lipman, *supra* note 3, at 754-56.

³⁵ Social Security Protection Act of 2004, Pub. L. No. 108-203, 118 Stat. 493 (2004).

³⁶ Lipman, *supra* note 3, at 763-68.

³⁷ The REAL ID Act of 2005 is Division B of an act of the United States Congress entitled "Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005." Pub. L. No. 109-13, 119 Stat. 231 at §202(a)-(b) (2005).

³⁸ NATIONAL IMMIGRATION LAW CENTER, OVERVIEW OF STATES' DRIVER'S LICENSE REQUIREMENTS 2 (Jan. 31, 2007), available at http://www.nilc.org/immspbs/DLs/state_dl_rqrmts_ovrvw_2007-01-31.pdf.

³⁹ 403 U.S. 365, 372 (1971).

⁴⁰ 457 U.S. 202 (1982).

⁴¹ 426 U.S. 67, 81 (1976) (upholding the constitutionality of a federal Social Security Act provision which granted eligibility for enrollment in the Medicare part B supplemental medical insurance program to resident citizens who are sixty-five or older but denied eligibility to noncitizens unless they have been admitted for permanent residence and have also resided in the United States for at least five years).

In light of this precedent, the focus of immigrant rights groups has been to challenge state anti-alienage measures before they spread across states or are federalized.⁴² The juxtaposition of *Graham* and *Diaz* has sometimes permitted equal protection and federal preemption challenges to state alienage measures, even if similar measures would be upheld if passed by Congress.⁴³ In contrast, constitutional challenges to federal legislation that regulates the living conditions of noncitizens within the border have been unsuccessful, mostly because courts are too willing to hold that *Diaz* controls.⁴⁴ Increasingly, moreover, the preemption and equal protection challenges to state-anti-alienage measures are also being squeezed out for two principal reasons.

First, to avoid equal protection constitutional challenges, states have looked to the federal government to sanction discrimination against non-U.S. citizens when their own legislation is constitutionally barred. This was the case, for example, when the failure of Proposition 187 became the impetus for Congress' passage of the PRWORA.⁴⁵ Even in the absence of affirming federal legislation, courts have largely insulated state alienage measures from significant equal protection and preemption challenges. States have successfully redefined the class of protected "persons" under the Fourteenth Amendment as "aliens" to exclude the undocumented and even nonimmigrants from equal protection. While this strategy failed in *Plyler*, where plaintiff children were fighting for the right to attend public school, the reasoning in that case suggested that a different holding could result if the class discriminated against did not involve children and/or a quasi-fundamental right.⁴⁶

Second, the same year that the Court ruled on *Diaz*, states also successfully limited federal preemption in *DeCanas v. Bica*, particularly as applied to the undocumented, by arguing that not all state legislation that involves "aliens" is related to immigration policy.⁴⁷ There, the U.S. Supreme Court upheld the constitutionality of a California statute that penalized employers for hiring undocumented workers, reasoning that the protection of California's vital state interests – e.g., strengthening the economy – need not give way to federal preemption to regulate "aliens" in the absence of paramount federal legislation.⁴⁸ Deciphering what *DeCanas* meant by "paramount federal legisla-

⁴² See, e.g., Michael Mancini, *Development in the Judicial Branch: Immigrant Housing Laws Meet with Judicial Resistance*, 21 GEO. IMMIGR. L.J. 159 (2006).

⁴³ See, e.g., *id.*

⁴⁴ Aldana, *supra* note 30 (discussing challenges to the PWORA on equal protection grounds).

⁴⁵ See, e.g., Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627 (1997) (discussing the "steam valve" virtues of federalism in immigration policy, under which one state's preferences, frustrated at home, are revisited in Congress).

⁴⁶ *Plyler*, 457 U.S. at 219 (1982) ("The children who are plaintiffs in these cases are special members of this [undocumented immigrants] underclass.").

⁴⁷ 424 U.S. 351, 355 (1976) ("But the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional power, whether latent or exercised.").

⁴⁸ *Id.* at 355-58. Under *DeCanas*, paramount federal immigration legislation exists when (1) "the nature of the regulated subject matter permits no other conclusion . . ."; (2) "Congress has unmistakably so ordained" that result; or (3) state legislation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' in enacting the INA." *Id.* at 356-63.

tion" has been difficult, but the phrase has generally permitted states to discriminate freely against the undocumented.⁴⁹ As a result of *Plyler* and *DeCanas*, states are also largely free from any judicial restraint to discriminate against the undocumented, unless the discrimination targets undocumented children, implicates a fundamental right, or contradicts federal legislation. The effect of this legal landscape is illustrated in the essays included in this cluster.

3. *The Subordination of Undocumented Workers*

Professors Lipman's and Cianciarulo's essays narrate the story of unauthorized workers affected by federal immigration restrictions and the effect of these in other federal legislative areas or practices.

Professor Cianciarulo's narrow focus is on USCIS's mismanagement of the few human trafficking T visas available. The backdrop of this story, however, is the plight of workers more generally who become vulnerable to severe exploitation as a result of their "illegality." In the worst cases, the story is of modern day slavery, including forced prostitution of victims who must pay off their debt to traffickers or risk harm to themselves or their family members back home.⁵⁰ The threat of deportation looms large in the minds of these workers and allows the trafficker to exploit the immigration laws to subordinate them. Congress acknowledged this dynamic when it created the T visa. However, the response to this problem has been primarily focused on law enforcement, as evidenced by the few T visas made available.⁵¹ As Professor Cianciarulo argues, through this response, not only the traffickers but even the victims become the culprits. As a result, only a few victims get relief when they cooperate to prosecute the traffickers.⁵² Left out of the story is the structural subordination of workers created by the immigration system which shifts the blame of an increasingly porous border onto the worker while ignoring law's contribution to their victimization.

b. *Workplace Labor and Worker Protections*

Shifting the blame onto the workers translates into punishing them for illegality by stripping them of basic labor and other workers' rights. Consider, for example, the effect of IRCA on workers' rights.⁵³ IRCA granted amnesty to millions of undocumented persons but also made it illegal for employers to hire future unauthorized workers and for the undocumented to procure employment. Before IRCA, hiring undocumented workers was essentially legal, except in a few states that passed their own laws.⁵⁴ Here, Congress' reach to regulate the foreign national significantly expanded beyond the border (excluding or removing those without a work visa) and into the daily lives of immigrant workers (imposing civil or criminal sanctions for their unauthorized

⁴⁹ See generally Herndon, *supra* note 25.

⁵⁰ Cianciarulo, *supra* note 2, at 826-34.

⁵¹ See *supra* notes 11-13 and accompanying text.

⁵² Cianciarulo, *supra* note 2, at 726-34.

⁵³ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.).

⁵⁴ See generally Herndon, *supra* note 25 (documenting state laws that proscribed the hiring of the undocumented).

hire).⁵⁵ True, Congress' power to detect, detain, and deport workers without a visa had always existed and been exercised inside the U.S., but IRCA was different. IRCA became the impetus for subsequent federal and state laws that structurally subordinated the rights of workers and promoted abuses against them in the workplace.

IRCA's passage immediately precipitated a number of employer challenges to workers' compensation claims filed by undocumented workers. Initially, state courts consistently found no conflict between IRCA's ban on the knowing employment of undocumented workers and state laws protecting workers.⁵⁶ However, in 2002, the U.S. Supreme Court held in *Hoffman Plastic Compounds, Inc. v. NLRB* that an undocumented worker fired in retaliation for his support of union organizing would be ineligible for backpay (i.e., lost wages resulting from the unlawful termination) because such an award would conflict with IRCA's bar on the hiring of undocumented workers.⁵⁷ Despite its narrower holding,⁵⁸ employers took the *Hoffman* decision as a green light to contend that undocumented workers lack state and federal workplace rights. In doing so, employers have resorted to intimidating discovery practices during litigation to compel courts to release the plaintiffs' immigration status, which, even when unsuccessful, deter plaintiffs from coming forward.⁵⁹

The post-*Hoffman* litigation adverse effects upon the rights for undocumented workers expanded beyond the National Labor Relation's Act backpay remedies. At the federal level, the Equal Employment and Opportunity Commission ("EEOC") disallowed backpay remedies also under Title VI⁶⁰ suits for discrimination based on national origin.⁶¹ To date, however, the EEOC and other federal agencies have refused to expand *Hoffman* beyond backpay.⁶² The National Labor Relations Board ("NLRB"), for example, barred employers from disallowing votes to unionize from undocumented workers, while the U.S. Department of Labor has stated that it will vigorously enforce federal worker protection laws, including the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), without regard to immigration status.⁶³

At the state level, employers have sought to limit or bar workers' compensation or tort damages to undocumented workers for injury-related awards, and sometimes, even for work actually performed. With few notable exceptions,

⁵⁵ 8 U.S.C. §§ 1101-1537 (2000).

⁵⁶ Anne Marie O'Donovan, *Immigrant Workers and Workers' Compensation After Hoffman Plastic Compounds, Inc. v. NLRB*, 30 N.Y.U. REV. L. & SOC. CHANGE 299, 304 (2006).

⁵⁷ 535 U.S. 137, 151, 159-60 (2002).

⁵⁸ Robert I. Correales, *Did Hoffman Plastic Compounds, Inc., Produce Disposable Workers?*, 14 BERKELEY LA RAZA L.J. 103, 105 (2003).

⁵⁹ See, e.g., Connie de la Vega & Conchita Lozano-Batista, *Advocates Should Use Applicable International Standards to Address Violations of Undocumented Workers' Rights in the United States*, 3 HASTINGS RACE & POVERTY L.J. 35, 47-58 (2005).

⁶⁰ 42 U.S.C. §§ 2000e-2000e-17 (2000).

⁶¹ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, DIRECTIVES TRANSMITTAL NO. 915.002, RESCISSION OF ENFORCEMENT GUIDANCE ON REMEDIES AVAILABLE TO UNDOCUMENTED WORKERS UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAWS, (June 27, 2002), available at <http://www.eeoc.gov/policy/docs/undoc-rescind.html>.

⁶² de la Vega & Lozano-Batista, *supra* note 59, at 49-50.

⁶³ *Id.* at 50.

most state courts have disallowed restrictions on wages for work performed.⁶⁴ Typically, under workers' compensation, an employee is entitled to three types of benefits: medical, temporary total disability, and permanent impairment benefits.⁶⁵ The majority of state courts and agencies have also held that that *Hoffman* does not preclude awards for medical expenses to undocumented workers.⁶⁶ However, some states have relied on *Hoffman* to bar undocumented workers from recovering wage-loss benefits or partial disability benefits under workers' compensation laws resulting from their work-related injuries.⁶⁷ Similarly, a few state courts have relied on *Hoffman* to restrict liability in personal injury and tort cases for lost income based on projected earnings.⁶⁸ In addition, some courts have determined that vocational rehabilitation under workers' compensation laws may not be awarded to undocumented workers because they are ineligible to work in the United States.⁶⁹

c. *Income and Social Security Taxes*

Beyond these state-sanctioned employer-driven denials of rights, Congress has also relied on the logic of the "unauthorized worker" to deny workers their benefits as taxpayers. Professor Lipman documents how in 1996 Congress decided that "individuals who are not authorized to work in the United States" should be denied Earned Income Tax Credit benefits.⁷⁰ Congress thus amended the Internal Revenue Code ("IRC") to require any taxpayer and each qualified child to have a valid Social Security number in order to receive any EITC benefits.⁷¹ As a result, the amendment has worked to deny EITC benefits to not only undocumented immigrant families, but to certain legally working immigrant families as well.⁷²

The same logic was then applied to Social Security restrictions for the undocumented, despite the fact that undocumented workers pay billions of dollars annually in Social Security taxes.⁷³ In her essay, Professor Lipman notes the irony that both the EITC and the Social Security insurance programs seek to reward poor working families who are "deserving" of such programs because of their toil, in contrast to recipients of welfare benefits, which are not attached to work.⁷⁴ Yet here, the "illegality" of workers has allowed Congress to penalize them and strip them of benefits they have earned. This is not much differ-

⁶⁴ *Id.* at 52-53.

⁶⁵ Jose M. Rivero, *Challenges Facing Immigrant Workers in Obtaining Workers' Compensation Benefits in the Wake of Hoffman Plastics*, 2 ANN. ATLA-CLE 2877 (2005).

⁶⁶ See O'Donovan, *supra* note 56, at 304.

⁶⁷ *Id.* at 304-06. See also Rivero, *supra* note 65, at Sec. II; *Developments in the Law, Jobs and Borders*, 118 HARV. L. REV. 2171, 2230-34 (2005).

⁶⁸ de la Vega & Lozano-Batista, *supra* note 59, at 55.

⁶⁹ Marjorie A. Shields, Annotation, *Application of Workers' Compensation Laws to Illegal Aliens*, 121 A.L.R. 5th 523, §§ 4-5 (2004).

⁷⁰ Lipman, *supra* note 3, at 753 (citing to the Staff of J. Comm. on Taxation, 104th Cong., General Explanation of Tax Legislation Enacted in the 104th Congress 394 (Comm. Print 1996)).

⁷¹ Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, § 205(a), 118 Stat. 1166 (2004).

⁷² Lipman, *supra* note 3, at 756-59.

⁷³ *Id.* at 762.

⁷⁴ *Id.* at 744-46, 748-50.

ent from the economic exploitation of workers by private employers who capitalize on the workers' immigration status.

4. *The Subordination of Undocumented Students*

The essay by Perez Huber and Malagon shows how undocumented students protected by *Plyler* must bear the brunt of their illegality as soon as they graduate from high school. Generally, college-bound high school graduates face the decision of what college to attend and how much scholarship or student loan money they will need. Undocumented students must worry instead about whether they can even be admitted into college, whether they will have to pay higher out-of-state tuition, and how they will pay for their schooling. Because they do not qualify for financial aid or loans, they must fill generally low-paying jobs as unauthorized workers. Every year, approximately 65,000 students graduating from U.S. high schools face limited prospects for completing their education or working legally in the United States because their parents brought them to the U.S. as undocumented children.⁷⁵ Of these, an estimated 7,000-13,000 undocumented students enroll in community colleges or universities, even when their prospect for post-graduate job placement is limited.⁷⁶

The human toll for undocumented students who enroll in institutions of higher learning, despite the hurdles, is significant. The six students interviewed by Education Doctoral students Perez Huber and Malagon reveal the extreme fear, isolation, anger, frustration, shame, financial distress, institutional neglect, and racism that these students experience.⁷⁷ As one student commented:

I can't travel, you know, I can't drive, I can't vote, I can't be involved in many social activities because of it, I can't apply for scholarships, I can't apply for financial aid, I can't apply for loans, I can't buy a home, I can't do anything you know, I'm just like, I'm non-existent in a way, you know what I mean? As my senior year approaches, I'm like, what am I gonna do?⁷⁸

Here too, federal and state laws have created the structures of subordination for these students. Higher institutions of learning were also affected by the 1996 federal welfare reforms that restricted student aid eligibility to foreign nationals. Section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") proscribed states from conferring upon undocumented immigrants any postsecondary education benefits based on residency status within the state unless the state was willing to offer the same to any other U.S. citizen or national regardless of residency status.⁷⁹ At the same time, the PRWORA denied post-secondary monetary assistance to the undocumented in the form of grants, loans, and work-study.⁸⁰ Any state wishing to

⁷⁵ JEFFREY S. PASSEL, THE URBAN INSTITUTE, FURTHER DEMOGRAPHIC INFORMATION RELATING TO THE DREAM ACT 2 (2003), available at http://www.nilc.org/immlawpolicy/DREAM/DREAM_Demographics.pdf.

⁷⁶ *Id.*

⁷⁷ Perez Huber & Malagon, *supra* note 3, at 853-60.

⁷⁸ *Id.* at 860.

⁷⁹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, § 505, 110 Stat. 3009-672 (amending 8 U.S.C. § 255(b)(1) (1996)).

⁸⁰ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §411, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 42 U.S.C.).

make an undocumented person eligible for any state or local public benefit would have to enact a state law affirmatively providing for such eligibility.⁸¹ Subsequently, Congress included Section 1623, which appears to withdraw state discretion to grant in-state tuition to undocumented students.⁸² That provision reads: "Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State . . . for any postsecondary education benefit"⁸³

For five years, members of Congress have introduced bipartisan legislation to repeal IIRIRA provisions on higher education and to offer a means for certain undocumented children to earn legalization.⁸⁴ If passed, the legislation would effectively trump any state measure that denies admission to the undocumented and would remove any disincentive for charging in-state tuition rates to undocumented or nonimmigrant students. Specifically, the proposed legislation, introduced as either the Development Relief and Education for Alien Minors ("DREAM") Act (S. 1545) or the Student Adjustment Act (H.R. 1684), would repeal Section 505 of the IIRIRA and allow states to offer in-state tuition rates to undocumented students.⁸⁵ The DREAM Act also provides qualifying youth access to certain government financial aid.⁸⁶ The legislation would legalize young people who have good moral character, can establish five years residency in the United States, are under twenty-one years of age, earn a high school degree, and complete at least two years of college or military service.⁸⁷ Despite support by several members of Congress,⁸⁸ neither the DREAM Act nor the Student Adjustment Act has become law. In 2004, the bills would likely have passed if brought up for a vote, but the congressional leadership was reluctant to do so in an election year. On November 18, 2005, a bipartisan group of senators reintroduced the DREAM Act again.⁸⁹ Then in 2006, the bill was incorporated into the Comprehensive Immigration Reform Act of 2006,

⁸¹ 8 U.S.C. § 1621(d) (2000).

⁸² Rebecca Ness Rhymer, Note, *Taking Back the Power: Federal vs. State Regulation on Postsecondary Education Benefits for Illegal Immigrants*, 44 WASHBURN L.J. 603, 619-20 (2005).

⁸³ 8 U.S.C. § 1623(a) (2000).

⁸⁴ During the 108th Congress, Representatives Chris Cannon (R-UT), along with Howard Berman (D-CA), Lucille Roybal-Allard (D-CA), and many others introduced H.R. 1684, the Student Adjustment Act in April 2003, while Senators Orrin Hatch (R-UT) and Richard Durbin (D-IL) introduced S. 1545, The Development, Relief, and Education for Alien Minors (DREAM) Act in July 2003. See American Immigration Lawyer's Association, AILA Issue Packet: AILA Issue Paper: Student Adjustment for Deserving Children (2004), available at <http://legalizationusa.org/proposed/DREAM/AILAPacket.pdf> (describing federal legislation on immigrant access to higher education).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ In the 108th Congress, which ended in 2004, the DREAM Act attracted forty-eight cosponsors of both parties, and it passed the Senate Judiciary Committee by a 16-3 vote. The Student Adjustment Act was cosponsored by 152 Republican and Democrat House members. See National Immigration Law Center, DREAM Act: Basic Information, Feb. 2007, available at http://www.nilc.org/immlawpolicy/dream/dream_basic_info_0406.pdf [hereinafter NILC, Basic Information].

⁸⁹ See National Immigration Law Center, *DREAM Act reintroduced in Senate*, Nov. 21, 2005, <http://www.nilc.org/immlawpolicy/dream/Dream002.htm>.

which passed the Senate with a vote of 62 to 36.⁹⁰ Unfortunately, its prospect for passage was bleak, precisely because of its incorporation into the Senate bill. The Comprehensive Immigration Reform Act of 2006, which also contains provisions on legalization, was extremely controversial in the House of Representatives and never passed. Currently, the Dream Act has been reintroduced as H.R. 1275 and is still pending in the 110th Congress.⁹¹

The effect of the existing federal measures has been to discourage higher education institutions from admitting noncitizens into their programs and to strengthen arguments in favor of restricting access. Despite this effect, state responses to the 1996 laws have been mixed. A few states have denied public university admission to the undocumented. In Virginia, for example, the attorney general issued a 2002 memorandum to all public universities and colleges and to the executive director of the State Council for Higher Education in Virginia stating, "the Attorney General is strongly of the view that illegal and undocumented aliens should not be admitted into our public colleges and universities at all"⁹² Based on this memorandum, Virginia's colleges and universities implemented, or continued to enforce, policies denying admission to the undocumented.⁹³ When challenged, the U.S. District Court of Virginia upheld the admission bar to higher education, as long as the state resorted to federal standards for establishing who is and is not undocumented.⁹⁴

Other state legislatures have passed or introduced legislation either to grant or deny in-state tuition benefits to the undocumented.⁹⁵ To date, at least ten states have passed laws to grant in-state tuition to the undocumented or temporary residents,⁹⁶ while two states have attempted to pass laws denying benefits.⁹⁷ In addition, about twenty-one other states have attempted to adopt legislation to grant in-state tuition to the undocumented.⁹⁸ Utah and California laws, in particular, feature prominently in these essays. Doctoral students Perez Huber and Malagon discuss California's A.B. 540, which allows between 5000

⁹⁰ NILC, Basic Information, *supra* note 88.

⁹¹ See Immigration.com, Improving Immigration Laws, The Dream Act, http://www.immigration.com/improving_immigration/dreamact.html (last visited Apr. 19, 2007).

⁹² Memorandum from the Commonwealth of Virginia Office of the Attorney General, *Immigration Law Compliance Update 5* (Sept. 5, 2002) (cited by *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 591 (E.D. Va. 2004)).

⁹³ *Merten*, 305 F. Supp. 2d at 591.

⁹⁴ *Id.* at 602-04, 608.

⁹⁵ See, e.g., National Immigration Law Center, Table: State Proposed or Enacted Legislation Regarding Immigrant Access to Higher Education (2003), available at http://www.nilc.org/immlawpolicy/dream/DREAM_Bills.pdf.

⁹⁶ These are Texas, California, New York, Utah, Washington, Oklahoma, Illinois, Kansas, New Mexico, and Nebraska. See NATIONAL IMMIGRATION LAW CENTER, BASIC FACTS ABOUT IN-STATE TUITION FOR UNDOCUMENTED IMMIGRANT STUDENTS (2006), available at http://www.nilc.org/immlawpolicy/dream/in-state_tuition_basicfacts_041706.pdf.

⁹⁷ The two states are Alaska and Virginia. National Immigration Law Center, State Proposed or Enacted Legislation Regarding Immigrant Access to Higher Education, available at http://www.nilc.org/immlawpolicy/DREAM/TABLE_State_Leg_Imm_Higher-Ed.PDF.

⁹⁸ María Pabón López, *Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe*, 35 SETON HALL L. REV. 1373, 1402 (2005). Those states include: Colorado, Delaware, Florida, Georgia, Hawaii, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, and Wisconsin.

and 8000 students to pay resident tuition fees to attend college, though not to access state financial aid. Such students must have attended a California high school for at least three years, have graduated, and have sworn to file for legal residency as soon as that option becomes available.⁹⁹ In Utah, 2002 H.B. 144 provided for similar requirements,¹⁰⁰ though there remain ongoing efforts to repeal this law (H.B. 7).¹⁰¹ Utah college students who resisted H.B. 7 characterized it as having a discriminatory undertone regarding legal status, intellectual ability, and the right to education.¹⁰²

In the absence of the DREAM Act, moreover, anti-immigrant groups like FAIR have been employing preemption to challenge state laws granting access to higher education for the undocumented on the basis that the state laws are counter to current federal immigration policy. One such preemption challenge involved a Kansas state law that also provided in-state tuition benefits to undocumented students who attended three years of high school in the state.¹⁰³ The plaintiffs were out-of-state students who were ineligible for in-state tuition under the law and their parents. On July 5, 2005, a United States District Court for the District of Kansas dismissed the lawsuit based on plaintiff's lack of standing.¹⁰⁴ In other states, however, similar challenges have been more successful, at least when the conferral of in-state tuition is not tied to high school attendance in the state.¹⁰⁵

Why are undocumented students restricted in higher education? The principal reason is that constitutional protection against federal or state discrimination targeting the undocumented in higher education has extended only to lawful permanent residents and certain temporary residents (nonimmigrants) who can establish "residency" in the United States. Even before *Plyler*, the U.S. Supreme Court looked to preemption and/or equal protection to proscribe state discriminatory treatment of immigrants in their access to higher education. In 1977, the Court struck down New York's bar to state funded scholarships for all immigrants except refugees and those lawful permanent residents who had not applied or lacked the intent to apply for citizenship.¹⁰⁶ In *Nyquist v.*

⁹⁹ Perez Huber & Malagon, *supra* note 3, at 851 (citing Cal. Educ. Code § 68130.5. Specifically § 68130.5(a)(4) reads in pertinent part ". . . will file an application as soon as her or she is eligible to do so.").

¹⁰⁰ Solyom et al., *supra* note 3, at 864-66.

¹⁰¹ *Id.* at 866-69.

¹⁰² *Id.* at 867.

¹⁰³ Day v. Sebelius, 376 F. Supp. 2d 1022 (D. Kan. 2005) (challenging KAN. STAT. ANN. § 76-731a (2004)).

¹⁰⁴ Day, 376 F. Supp. 2d at 1034, 1039-40. According to FAIR, an appeal is planned. See Press Release, Federation for American Immigration Reform, *Day v. Sebelius*: FAIR Decries Use of Procedural Obstacles to Keep Young Students From Having Their Day in Court, July 6, 2005, http://www.fairus.org/site/PageServer?pagename=media_releasejuly6_2005.

¹⁰⁵ See, e.g., *Regents of the Univ. of Cal. v. Bradford*, 225 Cal. App. 3d 972, 978-80 (1990) (striking down a university's interpretation of a state statute residency requirement to favor the undocumented who were not proscribed by federal immigration law from establishing residency because such interpretation would be inconsistent with federal immigration law). Subsequently, California adopted A.B. 540, which is still good law. See also Op. Att'y Gen. No. 186-109 (Ariz. 1986).

¹⁰⁶ *Nyquist v. Mauclet*, 432 U.S. 1 (1977).

Mauclet, however, the Court left open the possibility that a different outcome might result if the bar to state scholarships discriminated only against temporary legal migrants (nonimmigrants) who, by federal law, were precluded from establishing the residency requirement often required for higher education scholarships.¹⁰⁷ Thus, some states, like Maryland, narrowed *Nyquist*'s scope to permit states to continue discriminating against temporary legal migrants or nonimmigrants, as long as the state measure imposed a residency requirement that also applied to citizens. Subsequently in 1982, days after *Plyler*, in *Toll v. Moreno*, the Court struck down the University of Maryland's policy of charging out-of-state tuition rates to G-4 visa holders because under federal immigration policy, G-4 visa holders could establish residency.¹⁰⁸ The holding, however, left open the door to distinctions targeting nonimmigrants that could not establish residency in the United States. It also left open the possibility that states could discriminate against undocumented students who, by virtue of their unauthorized stay in the United States, would be ineligible for residency. In sum, since *Nyquist* and *Toll*, states have upheld the constitutionality of charging out-of-state tuition fees to higher education to nonimmigrant and/or undocumented students, as long as any state residency requirements are consistent with federal immigration policy.¹⁰⁹

But why did the Court not extend constitutional equal protection to protect nonimmigrant and undocumented students from discrimination in higher education in the same way that it chose to protect the children in *Plyler*? There are at least two legal explanations, which continue to subordinate undocumented students. First, higher education is not considered a fundamental or quasi-fundamental right, so that discrimination against foreign nationals is permitted as long as states have a rational basis for the disparate treatment.¹¹⁰ Second, students in higher education are less likely to be treated as a "protected class" for equal protection purposes given that most are likely to be viewed as young adults with agency and no longer the young and "innocent" children in *Plyler v. Doe*. In *Plyler*, the Court did not consider undocumented immigrants generally to constitute a suspect class.¹¹¹ Rather, the Court recognized undocumented children as a vulnerable class deserving of protection, in part, because penalizing children for their parents' choice to bring them to the United States unlawfully would be unfair.¹¹² In contrast, the Court stated that "[p]ersuasive

¹⁰⁷ *Id.* at 4. In dicta, the Court acknowledged the policy barred also nonimmigrants but stated that "[s]ince many aliens, such as those here on student visas, may be precluded by federal law from establishing a permanent residence in this country, the bar . . . is of practical significance only to resident aliens." (citations omitted). *Id.*

¹⁰⁸ *Toll v. Moreno*, 458 U.S. 1, 17 (1982).

¹⁰⁹ See, e.g., *Carlson v. Reed*, 249 F.3d 876 (9th Cir. 2001) (upholding denial of in-state residency tuition to TN/TD visa holder); Op. Att'y Gen. No. JM-241 (Dec. 12, 1984), available at <http://www.oag.state.tx.us/opinions/op47mattox/jm-0241.htm> (foreign nationals who are permitted by Congress to adopt the United States as their domicile while they are in this country must be allowed the same privilege as citizens and permanent residents of the United States to qualify for Texas residency for purposes of tuition at state universities, despite the limitation in section 54.057 of the Texas Education Code).

¹¹⁰ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28-39 (1973).

¹¹¹ *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982).

¹¹² *Id.* at 219-20.

arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct.”¹¹³ Here again, the Court in dicta suggests that laws beyond immigration control can “regulate” the living conditions of noncitizens in ways that punish their “illegality.” That is, indeed, what has happened to the *Plyler* students who grew up – as if, suddenly, they inherited their parent’s “illegality,” and with it, the subordination of law.

B. Cultural Subordination of Undocumented Immigrants

Undocumented immigrants are also subjected to cultural subordination based on their “illegality.” Such cultural subordination is evident, for example, in the story of human trafficking victims apprehended in a Dallas raid who were deported rather than granted T visa protection. Professor Cianciarulo recounts how only four of forty-two victims of human trafficking ultimately testified against their traffickers and received visas after their Dallas, Texas brothel was raided in August 2005.¹¹⁴ The rest were deported or put in removal proceedings.¹¹⁵ Professor Cianciarulo explains in her essay how ICE agents charged with the investigation characterized the victims as having voluntarily come to the United States to become prostitutes, particularly given that the women, according to ICE agent Ken Gates, “were not teenagers – most were mature women in their 30s. A clear majority were professional prostitutes who knew exactly what they were doing”¹¹⁶ The counter-story, as narrated by Professor Cianciarulo, is vastly different. The women, who spoke little English, reported how they serviced dozens of customers a day, at times when they were sick, sore, and bleeding. During such times, they were not allowed to seek medical treatment.¹¹⁷ In addition, the victims faced the looming threat that if they escaped or collaborated with law enforcement, their families back home would suffer.¹¹⁸

Cultural subordination is also evident in the stories of the undocumented students who do not deserve to realize the “American dream” because their parents chose to break the immigration laws, an “illegality” which they inherit as adults. Utah student activists describe this widespread sentiment among Utah residents and students when the legislature was considering H.B. 7. They explain:

[H.B. 7] had a terrorizing effect as it put into question what constitutes local, state, and national residency and who has a right to an education. Residency was (re)framed to exclude a basic understanding that residency is really about – where people belong, where they feel safe, where they break bread, where they create community, what they call home, and what they hope for in the future.¹¹⁹

For these students, the fight thus became redefining what constitutes local, state, and national residency and who deserves the right to education by “out-

¹¹³ *Id.* at 219.

¹¹⁴ Cianciarulo, *supra* note 2, at 833-35.

¹¹⁵ *Id.* at 827.

¹¹⁶ *Id.* at 836.

¹¹⁷ *Id.* at 837.

¹¹⁸ *Id.* at 838.

¹¹⁹ Solyom et al., *supra* note 3, at 868.

ing” the reality of millions of undocumented workers many of them parents, who toil in invisibility to provide cheap products and services to the U.S. community.¹²⁰

Finally, cultural subordination is evident in what Professor Lipman describes as “broad proclamations of misinformation casting ‘illegal aliens’ as the scapegoat for all of the nation’s problems”¹²¹ She explains that the U.S. public believes that undocumented immigrants do not pay taxes yet consume billions of dollars of government benefits annually, when, in fact, the opposite is true.¹²² Undocumented workers pay billions of dollars in taxes annually and do not qualify for most government benefits including EITC, Social Security, and Medicare, factors which lead economists to conclude that undocumented workers actually contribute more to public coffers than they cost in social services.¹²³

The common characteristic in these stories of cultural subordination is one of a bounded national community model, which substantially reflects an individualistic ideology and emphasizes the ideas of consent, sovereignty, and restrictive community.¹²⁴ This type of individualism, in turn, seeks “to limit reciprocal obligations of sharing and sacrifice, the scope of legal duties, and the force of equitable claims.”¹²⁵ Under this vision then, undocumented persons defied U.S. sovereignty by crossing the U.S. border illegally or overstaying their visas and remaining here without consent. Undocumented persons broke the laws, and they cannot now reap the benefits of their actions or argue that U.S. laws and institutions should turn a blind eye away from their “illegality.”

This story, however, fails to capture the complex and ambiguous character of the relationship between the undocumented and U.S. society. For example, the increasing interdependence that the U.S. has aggressively pursued with other nations, particularly on issues of liberalized trade and investment, erase the “sharp boundary between subject and object, government and alien, us and them, that has characterized” restrictive national policies.¹²⁶ Unfortunately, the global neoliberal agenda has not been kind to developing nations whose populations are then forced to migrate, their journey usually from the dying farm to struggling cities in their own countries, and ultimately, in the case of Latin Americans, northbound.¹²⁷ In addition, the United States’s economic dependency on cheap immigration labor resulting from intensified competitive pressures of a global market ensues in both legal and illegal immigration to the United States.¹²⁸ This mass exodus of undocumented immigrants, moreover, cannot be blamed solely on the immigrant, particularly when labor recruitment and incentives by U.S. employers, combined with immigration policy that

¹²⁰ *Id.* at 867.

¹²¹ Lipman, *supra* note 3, at 742.

¹²² *Id.*

¹²³ *Id.* at 759-60.

¹²⁴ See Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 48 (1984).

¹²⁵ *Id.* at 47.

¹²⁶ *Id.* at 36.

¹²⁷ See, e.g., Alejandro I. Canales, *Mexican Labour Migration to the United States in the Age of Globalization*, 29 J. ETHNIC & MIGRATION STUD. 741 (2003).

¹²⁸ Schuck, *supra* note 124, at 37-39.

caters or acquiesces to these pull factors, are significant contributors.¹²⁹ It is irreconcilable for the United States government and public to “legitimize” de facto the presence of the undocumented by employing them, selling them products and services, and taxing them, while at the same time delegitimizing them as a matter of law and excluding them from the community.

Moreover, the illegality of immigrants is not solely a matter of individual choice but also a legal and social construction as reflected in immigration policy that has been intimately tied to race.¹³⁰ In the past, for example, Congress legislated directly to exclude Asians from U.S. immigration or citizenship.¹³¹ Today, the same exclusion of other groups from the United States is less direct but the consequences no less dire. Immigration law’s numerical restrictions and the elite nature of work visa categories, for example, severely restrain Mexican legal immigration, despite the historical interdependence between Mexican workers and U.S. employers.¹³² The majority of Mexican workers in the U.S. are ineligible for visas, even temporary ones, while most Mexican nationals eligible for family-based immigration must wait years to legalize.¹³³ Ultimately, then, to view “alien” illegality as solely a matter of individual choice is to ignore the private and public structures that promote and perpetuate that status.

Given these structural dynamics of undocumented migration, the U.S. should expand and transfigure the sources of, and justifications for, legal and moral obligations to undocumented persons that respond more to their actual interaction with both government and private individuals or groups. Consider, for example, the employer-worker relationship in the United States and the law’s treatment of this relationship. The individualized version of the story argues that because the worker is unauthorized to work, he should also not be entitled to other rights that flow from the employer-employee relationship. But why not measure the relationship by virtue of the status of the worker as employee in fact and regulate employers to require basic labor and worker rights protections to all workers irrespective of immigration status? The case is simpler when the employer knowingly hires the undocumented worker and exploits him to violate U.S. labor and worker laws. But even when the worker has deceived the employer by producing false documents to work, this fact

¹²⁹ See BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* 118-33, 155-83 (2004) (discussing, *inter alia*, the Bracero program, the 1996 amnesty and accompanying under-enforced employer sanctions); Nestor Rodriguez, “Workers Wanted”: *Employer Recruitment of Immigrant Labor*, 31 *WORK & OCCUPATIONS* 453 (2004).

¹³⁰ See, e.g., VICTOR C. ROMERO, *ALIENATED: IMMIGRANT RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA* 162-66 (2005); HING, *supra* note 129, at 1-8.

¹³¹ HING, *supra* note 129, at 28-61.

¹³² *Id.* at 97-111.

¹³³ Today, Mexican nationals who qualify under family-based immigration, except for immediate relatives (spouses or minor unmarried children of U.S. citizens) must wait between seven and twenty-two years before their visas become available. Adult or married children of U.S. Citizens, for example, have a wait period of twenty-two years. Visa Bulletin for July 2005, No. 83, Vol. VIII, available at http://travel.state.gov/visa/frvi/bulletin/bulletin_2539.html. In addition, the 3/10 year bar for unlawful stay in the United States severely infringes on family unification. See Emma O. Guzmán, *The Dynamics of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996: The Splitting-Up of American Families*, 2 *SCHOLAR* 95 (2000).

does not obliterate the employer's obligation to the worker for this labor. If the worker is injured on the job and his injuries render him disabled, that worker should receive all benefits that would have been available to a U.S. citizen worker similarly situated. It is the "alien's" condition as worker with his employer and not his immigration status that should govern the regulation the government imposes on the consequences born from that relationship. Similarly, regardless of the worker's undocumented status, if he is being treated as a worker and is also paying taxes, the United States cannot then resort to his "illegality" to refuse to recognize his right to Social Security or EITC benefits. The alternative creates a permanent underclass of persons subject to exploitation and relegation to a life of poverty and servitude.

Over twenty years ago, Justice O'Connor was willing to stand up against the fate of undocumented children, at least with respect to K-12 education.¹³⁴ More than two decades later, unfortunately, the *Plyler* legacy has been confined to its very facts; no case since *Plyler* has conferred upon undocumented immigrants any other type of privilege or right.¹³⁵ To the contrary, *Plyler* is not frequently cited for its statement that undocumented immigrants are not a suspect class, but is instead distinguished from cases that challenge the denial of right to undocumented adults (even the *Plyler* children who grew up).¹³⁶ Still, the proportion of foreign born persons in the United States today (at least 11.1%) is the highest since 1930 (11.6%).¹³⁷ At the turn of the twentieth century, that immigrant population was mostly European and legal.¹³⁸ Today, it is mostly Latin American, and much of it "illegal."¹³⁹ Given these patterns, the racial animus behind much of anti-alienage laws and practices, and their resulting racialized subordination cannot be ignored any longer.¹⁴⁰

II. THE PERPETUITY OF "FOREIGNNESS"

LatCrit and immigration scholars have well documented immigration laws' racial subordination and the employment of alienage as a proxy for race-based discrimination.¹⁴¹ Another theme in the essays, moreover, is the perpetuity of a status of "foreignness," upon both immigrants and native born persons, particularly Latinos. Currently, there are nearly thirty-five million

¹³⁴ "[W]hen those children are members of an identifiable group, that group – through the State's action – will have been converted into a discrete underclass." *Plyler v. Doe*, 457 U.S. 202, 234 (1982) (Blackmun, J., concurring).

¹³⁵ See, e.g., Michael R. Curran, *Flickering Lamp Beside the Golden Door: Immigration, The Constitution, & Undocumented Aliens in the 1990s*, 30 CASE W. RES. J. INT'L L. 58 (1998).

¹³⁶ See, e.g., *Vasquez-Velezmoro v. INS*, 281 F.3d 693 (8th Cir. 2002); *United States v. Coleman*, 166 F.3d 428 (2d Cir. 1999); *Doe v. Ga. Dep't of Pub. Safety*, 147 F. Supp. 2d 1369 (N.D. Ga. 2001).

¹³⁷ U.S. DEPT OF COMMERCE NEWS, *supra* note 4.

¹³⁸ *Id.*

¹³⁹ March 2004 estimates showed at least 57% of undocumented migrants came from Mexico. About 24% originate from the rest of Latin America. PASSEL, SIZE AND CHARACTERISTICS 2005, *supra* note 5, at 1-2.

¹⁴⁰ Aldana, *supra* note 30.

¹⁴¹ See, e.g., HING, *supra* note 129; KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS (2004).

Latinos in the United States, making them the second-largest ethnic group in the country, and they are a varied group, ranging from newly-arrived immigrants to generations of U.S.-born Latinos.¹⁴² One distinguishing characteristic of Latinos is that they are disproportionately immigrants as compared to other groups. While fewer than 20% of all non-Latinos are immigrants, more than 35% of each of the following Latino sub-groups is comprised of immigrants: Mexican, Puerto Rican, Cuban, and other Hispanics, with Cubans having the largest proportion (67%).¹⁴³ Still, the majority of Latinos are born in the United States,¹⁴⁴ and many are naturalized citizens.¹⁴⁵ Nevertheless, their closeness to a more recent immigration experience,¹⁴⁶ and to some degree, their ethnic composition mean that their Latino identity is "foreign." To the extent that language acquisition is a reasonable proxy to measure acculturation and assimilation,¹⁴⁷ it is worth noting that among the adult Latino population, almost half (47%) indicate that they are primarily Spanish speakers, about one-quarter (28%) indicate they are bilingual, and one-quarter (25%) indicate they are primarily English speakers.¹⁴⁸

Professor Appell places her article in the broader context of poverty and other social measures to view how Latinos are faring in the United States, whether legal or not.¹⁴⁹ Her focus specifically is on the child welfare system, namely children who have been taken into the custody of the state. What she uncovers in her essay is that Latino children are overrepresented in the child welfare system as compared to White-non-Hispanic children by 1.6.¹⁵⁰ Still, this number as compared to Blacks and Native Americans is lower. Professor Appell suggests several explanations for the complex causes of comparatively over- and underrepresentation of Latino families.

As to the overrepresentation of Latinos, she suggests poverty as one explanation, which Latinos share disproportionately with other ethnic groups. She uncovers that the 2004 poverty rates in the United States for Latinos was 21.9% of Latinos, as compared to 8.6% of non-Latino Whites and 9.8% of Asians, and 12.7% among all people nationwide.¹⁵¹ She also notes that there is a high correlation between being foreign born and being in poverty, with 17.1% of foreign born residents and 21.7% non-citizens living in poverty, as compared to

¹⁴² ARTURO GONZALEZ, THE IMPACT OF 2001/2002 ECONOMIC RECESSION ON HISPANIC WORKERS: A CROSS-SECTIONAL COMPARISON OF THREE GENERATIONS 4 (2002), available at <http://pewhispanic.org/files/reports/4.pdf>.

¹⁴³ *Id.* at 4-5.

¹⁴⁴ *See id.* at 5-7.

¹⁴⁵ Of the 16.1 million eligible Latino voters in 2004, four million were naturalized citizens. LINDSAY DANIELS & CLARISSA MARTINEZ DE CASTRO, THE LATINO ELECTORATE: PROFILE AND TRENDS 2 (2007), available at http://www.americanprogress.org/events/2007/02/latino_electorate.pdf.

¹⁴⁶ GONZALEZ, *supra* note 142, at 5-7.

¹⁴⁷ PEW HISPANIC CENTER & THE HENRY J. KAISER FAMILY FOUNDATION, SURVEY BRIEF: ASSIMILATION AND LANGUAGE, 1 (2004), available at <http://pewhispanic.org/files/reports/15.10.pdf>.

¹⁴⁸ *Id.*

¹⁴⁹ Appell, *supra* note 1 at 771-77.

¹⁵⁰ *Id.* at 771-72.

¹⁵¹ *Id.* at 773.

11.8% of residents born in the United States.¹⁵² Professor Appell also suggests similarities of cultural exclusion that Latinos share with other minority groups in comparison to the Anglo, English-speaking, nuclear family.¹⁵³ Here, however, and using Maria to illustrate this point, Professor Appell also focuses on characteristics that are unique to Latino families, including limited English skills and “foreignness,” even as a naturalized U.S. citizen, to which social providers are resistant and slow to respond.¹⁵⁴ Beyond the communication challenges that come from language barriers, there were also cultural miscommunications that came from the imposition of a dominant cultural lens to the experience of a poor person such as Maria. Maria’s commitment to take care of five grandchildren born by her drug-addicted daughter, her reliance on extended family to help her, and her continuing engagement with her daughter resulted in the agency’s decision that it could not trust Maria’s ability to protect her granddaughter.¹⁵⁵

As to under-representation as compared to other ethnic groups, Professor Appell observes that part of the explanation comes from the social characteristics of Latino families (i.e., high proportion of marital families) and the relative invisibility of Latinos to family social services, ironically not because of poverty, but because many do not qualify for these services given their immigration status.¹⁵⁶ Here I want to suggest the immigration experiences of Latinos as immigrants and their treatment by immigration law as another explanation for the underrepresentation of children in the child welfare system. More specifically, I am suggesting that child welfare laws deal with fewer Latino children because many stay behind in their country of origin when their parents migrate, while others are removed or must leave with their parents when they are removed from this country, regardless of their own citizenship. For many Latino families, family separation begins with their immigration journey. Particularly for the undocumented, many, both men and women, leave their families behind to find work in the United States.¹⁵⁷ In addition, thousands of unaccompanied minors also trek the journey and end up in mandatory detention in the United States until they are removed.¹⁵⁸ Even immigrants who eventually gain legalization have difficulty uniting with families due to significant immigration backlogs and procedural bars to legalization.¹⁵⁹

Still, about 6.6 million unauthorized families lived in the United States as of March, 2005, defined as a family unit or solo individual in which the head of household is unauthorized.¹⁶⁰ All these families risk family separation because of the threat of removal. The workplace raids that are occurring across the country illustrate the horrific experiences of children being abandoned at

¹⁵² *Id.*

¹⁵³ *Id.* at 776.

¹⁵⁴ *Id.* at 777.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ See PASSEL, SIZE AND CHARACTERISTICS 2005, *supra* note 5, at 6.

¹⁵⁸ Lara Yoder Nafziger, *Protection or Persecution?: The Detention of Unaccompanied Minor Children in the United States*, 28 HAMLINE J. PUB. L. & POL’Y 357 (2006).

¹⁵⁹ See generally, Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage? Immigration Law’s Conflicted Answer*, 32 HOFSTRA L. REV. 273 (2003).

¹⁶⁰ See PASSEL, SIZE AND CHARACTERISTICS 2005, *supra* note 5, at 7.

schools or at day care while their parents await removal in detention.¹⁶¹ While their stories are not well documented, some of these children stay behind with extended family members in informal family relationships; others become wards of the state, while still others are simply removed with their parents. It makes me wonder in these scenarios if child welfare offices would ever advocate for U.S. citizen children to stay behind in foster care in the “best interest” of U.S. citizen children who otherwise must return home with their parents. Already in some family courts, as documented by my colleague David Thronson, immigration status has been used against parents in custody proceedings based on their parents’ risk of deportation and their living conditions as undocumented residents.¹⁶²

III. IMMIGRANTS AND ANTI-SUBORDINATION

Using Critical Race Theory (“CRT”) themes as a foreground for LatCrit theory, this discussion, first and foremost, acknowledges that racism is endemic; that it impacts structures, processes, and discourses; and that it intersects with multiple other forms of oppression such as immigration status, gender, and language.¹⁶³

This quote comes from the University of Utah students’ essay narrating their experiences of resistance as students of color to Utah’s H.B. 7. There are two wonderful aspects to this essay. First, the essay is testimony that a decade of LatCrit theory has influenced young students to reframe the story told about them as immigrants and as students of color. Second, it is wonderfully illustrative of a movement of collective resistance against this modern wave of anti-immigration oppression.

These students employ counterstorytelling as a method to narrate their own stories, when generally these are not told, or to challenge and critique the dominant discourse over the immigration debate today.¹⁶⁴ Richard Delgado would feel proud that Rodrigo exists in young students today.¹⁶⁵ Like Rodrigo, these students experience anger and frustration, but they are also able to transcend these feelings, first, by reconstructing the rhetoric and, second, by owning their activism. For example, as in the case of immigrant marches that took place across the nation in 2006, the media and community leaders criticized these students for waving the Mexican flag and protesting, rather than engaging in quiet and traditional protest and writing to their representatives.¹⁶⁶ But rather than succumb to the critique, these students recognized that the critique became a way of refocusing on the individual actions of the protestors – here,

¹⁶¹ See, e.g., Kate Randall, *U.S. Immigration Agents Arrest 1,282 in Raids at Six Meatpacking Plants*, WWSWS.ORG, Dec. 14, 2006, <http://wsws.org/articles/2006/dec2006/raid-d14.shtml>.

¹⁶² David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL’Y 45 (2005).

¹⁶³ Solyom et al., *supra* note 3, at 864.

¹⁶⁴ *Id.* at 869.

¹⁶⁵ See, e.g., Richard Delgado, *Rodrigo’s Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997) (reviewing LOUISE ANN FISCH, *ALL RISE: REYNALDO G. GARZA, THE FIRST MEXICAN AMERICAN FEDERAL JUDGE* (1996)).

¹⁶⁶ Solyom et al., *supra* note 3, at 871-72.

their “foreignness” – as a way of trivializing the very structural oppression that the students were protesting.¹⁶⁷

What struck me about this piece is how closely the experiences of the Utah students parallel the experiences of the Las Vegas high school and UNLV students who helped organize the local Latino community in the anti-immigration marches of 2006. I know many of these students personally, and I have heard them speak many times formally and informally about their experiences. It is exciting to hear how “MySpace” became a place for resistance for young high school students who self-organized to walk out of school and marched down the Las Vegas strip in protest of the treatment of immigrants. These students did so despite significant threats and actual disciplinary actions taken against them by schools. It was instructive to hear how students challenged other community leaders, including unions, about how to conduct the marches. It was clear that for these students, the tone of resistance had to be defiant; and, as such, their symbols became the icons of Latin America’s own struggles against oppression (e.g., Zapata). And like the Utah students, the Las Vegas students were guided by a LatCrit scholar, in this case, UNLV Women’s Studies Professor Anita Revilla.

For me, the hope has always been that these marches form a part of a lasting movement of resistance. During the LatCrit XI conference, I talked at length about this with my good friend Roberto Lovato, our keynote speaker and a New York-based writer with New America Media and frequent *Nation* contributor. Lovato believes in this New Moviento, as he called it his 2006 article in the *Nation*.¹⁶⁸ Lovato, who has traveled across the United States documenting the marches, thankfully harbors great hope that this is a lasting movement. To Lovato, this new movement traces a large part of its roots befittingly in the migration patterns from Latin America, as well as in the civil rights struggles of the United States. It is an “expression of a resurgent Latin American left as it is a new, more globalized, human rights-centered continuation of the Chicano, civil rights, and other previous struggles that facilitated immigrant rights work here.”¹⁶⁹ As such, it is a movement driven by a robust legacy, a wealth of experiences, years of indignation, and borderless activism.

¹⁶⁷ *Id.*

¹⁶⁸ Roberto Lovato, *Voices of a New Movimiento*, THE NATION, June 19, 2006, at 11.

¹⁶⁹ *Id.* at 13.