



**Gated Border, Gated Land**

**Tony Ortega**

*ARTICLES*

SIN DOCUMENTOS: LEGALLY INSTRUCTIVE NARRATIVES IN MEXICAN-AMERICAN MEMOIRS AND UNITED STATES IMMIGRATION LAW

THE FUNCTIONS OF DREAMER CIVIL DISOBEDIENCE

MICRO-AGGRESSIONS: WHAT THEY ARE AND WHY THEY MATTER

*SYMPOSIUM*

*UNDERSTANDING DIVERSITY IN LEGAL ACADEMIC AND WORK ENVIRONMENTS*

FROM EXCLUSION TO PIONEERING: THE INTRODUCTION OF DIVERSITY TO THE LEARNING AND PRACTICE OF LAW

DIVERSITY IN THE LEGAL PRACTICE

EXPERIENCES OF DIVERSE PROFESSORS IN LEGAL ACADEMIA



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Legal articles and notes include traditional pieces dealing with statutes, court decisions, and administrative policies affecting Latinos. Pieces will be published as articles if submitted by non-student authors. Any piece submitted by a student and accepted will appear as a note.

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#### b. Biographical or Cultural Capsules

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# SIN DOCUMENTOS: LEGALLY INSTRUCTIVE NARRATIVES IN MEXICAN-AMERICAN MEMOIRS AND UNITED STATES IMMIGRATION LAW

PAUL GUAJARDO<sup>1</sup> AND DAVID W. READ<sup>2</sup>

## ABSTRACT

The sincere and sometimes startling testimonies found in Mexican-American memoirs provide first-hand accounts of the plight of undocumented immigrants. Mexican-American memoirs by the likes of Francisco Jimenez, Reyna Grande, Rosalina Rosay, Rose Castillo Guilbault, Ramon Perez, Elva Trevino Hart, Jose Angel Navejas, amongst dozens of others, provide privileged insight into the sad situation facing immigrants and migrant workers, and these narratives should rile us to action. Legislators, law-enforcement personnel, and scholars may benefit from reading about what really happens along our border and in our communities. Mexican immigrant memoirs put flesh and feelings to statistics and demographics. Our studies add to the conversation about undocumented immigration but in the context of what *los migres* themselves have stated. While policymakers and presidential candidates debate the immigration issue, none quote the memoirs of immigrants. These invaluable, first-person accounts are largely over-looked but are instructive for legislators, executives, and judges. With so little explored in law and literature, and relatively little in Mexican-American literature, we seek to address and redress the egregious gap in the literature by analyzing Mexican-American memoirs in context of the law. According to demographic studies, *brown* voices will continue proliferate even if our current laws disdain them.

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## I. INTRODUCTION

Since Emma Lazarus penned “The New Colossus”—“Give me your tired, your poor, your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest-tost [sic] to me”<sup>3</sup>— there has been a sea-change in attitudes toward immigrants. Once welcomed as the life-blood of our country, immigrants today are often denigrated and denied civil rights. Although many immigrants in our country’s early history descend from Europe, today’s “wretched refuse” come from war-torn countries and especially from Latin America.<sup>4</sup> Historically, whether from religious oppression, potato famine, disease, despotic rulers, or economic hardship, immigration has been a persistent fact-of-life.

As economic and social conditions continue to decline in Mexico and other Spanish-speaking countries, immigrants trudge northward to what was once the promised-land, a place of opportunity. These immigrants come in search of a job, quality of life, and educational opportunities; they come to escape drought and endemic corruption. They come to protect their children from the horrors of drug and government cartels. They congregate in

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3. EMMA LAZARUS, *THE POEMS OF EMMA LAZARUS, NARRATIVE, LYRIC, AND DRAMATIC* 202 (Dover Thrift ed. 2015).

4. See T.R. Hightower, *Give Me Your Tired, Your Poor, Your Huddled Masses Yearning to Breathe Free . . . As Long as They Have the Proper Visas: An Analysis of the Current State of United States Immigration Law, and Possible Changes on the Horizon*, 39 TEX. TECH L. REV. 133 (2006).



Home Depot parking lots, hoping to land seven dollars an hour for day labor rather than the seven dollars per day minimum wage in Mexico.<sup>5</sup>

Undocumented immigrants come despite the considerable obstacles they face—not just the danger of deportation by the Immigration and Naturalization Service (INS), Border Patrol, U.S. Immigration and Customs Enforcement (ICE), but also from vigilante and militia groups.<sup>6</sup> Never mind hundreds of miles of dusty desert teeming with scorpions, rattlesnakes, tarantulas, barbed wire, and private property. Never mind the risk of dehydration and heat-exhaustion (or bitter cold); they come by the millions, and, as the controversial Victor Davis Hanson claims in *Mexifornia*, they are voting with their feet.<sup>7</sup> They are voting against conditions at home, even though they risk deportation, imprisonment, and death by going under the wire or across the river. Few of the millions who have crossed the border have provided an account of their ordeal, increasing the value of the narratives that are available.

According to the Pew Research Center, there are approximately 54 million Hispanics in the U.S. compared to around 38 million Blacks and around 15 million Asians.<sup>8</sup> The Pew Research Center also estimates 11.2 million undocumented immigrants in the U.S. of which at least 78% are Hispanic.<sup>9</sup> According to USA Today, four percent of unauthorized migrants work in agriculture, 21% work in service industries, and 19% work in construction.<sup>10</sup> And while large percentages of undocumented immigrants live California, Texas, and Florida, states like Georgia have shown a 95% increase between 2000 and 2010 according to the Department of Homeland Security.<sup>11</sup> Washington State's numbers are up 53%, and Arizona's population of undocumented immigrants has grown 50% according to the Department of Homeland Security.<sup>12</sup>

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5. Steven Greenhouse, *Day Laborer Battle Runs Outside Home Depot*, N.Y. TIMES, Oct. 10, 2005, [http://www.nytimes.com/2005/10/10/us/day-laborer-battle-runs-outside-home-depot.html?\\_r=0](http://www.nytimes.com/2005/10/10/us/day-laborer-battle-runs-outside-home-depot.html?_r=0).

6. See Igor Bobic, *Armed Militias Guard Border Against 'Threat' of Immigrant Children*, HUFFINGTON POST, July 29, 2014, [https://www.huffingtonpost.com/2014/07/29/armed-militias-border-crisis\\_n\\_5630763.html](https://www.huffingtonpost.com/2014/07/29/armed-militias-border-crisis_n_5630763.html).

7. VICTOR DAVIS HANSON, *MEXIFORNIA: A STATE OF BECOMING* 86 (2003).

8. Antonio Flores, *Facts on U.S. Latinos, 2015: Statistical Portrait of Hispanics in the United States*, PEW RES. CTR. (Sept. 18, 2017), <http://www.pewhispanic.org/2015/05/12/statistical-portrait-of-hispanics-in-the-united-states-1980-2013/>.

9. Gustavo Lopez & Jynnah Radford, *Facts on U.S. Immigrants, 2015, Statistical Portrait of the Foreign-Born Population in the United States*, PEW RES. CTR; HISP. TRENDS (May 3, 2017), <http://www.pewhispanic.org/2015/09/28/statistical-portrait-of-the-foreign-born-population-in-the-united-states-1960-2013-key-charts/#2013-fb-authorized-pie>.

10. David J. Lynch & Chris Woodyard, *Immigrants Claim Pivotal Role in Economy*, USA TODAY (Apr. 11, 2006, 2:07 AM), [http://usatoday30.usatoday.com/money/economy/2006-04-10-immigrants-economic-impact\\_x.htm](http://usatoday30.usatoday.com/money/economy/2006-04-10-immigrants-economic-impact_x.htm).

11. BRYAN BAKER & NANCY RYTINA, DEP'T OF HOMELAND SEC., *ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2012 7* (2013).

12. *Id.*

The Pew Hispanic Center estimates 500,000 undocumented entries into the U.S. each year<sup>13</sup> in part because there are restrictions on legal immigration currently set at 675,000 permanent immigrants annually, according to the Congressional Quarterly.<sup>14</sup> While demographic studies are continually in flux, a new pattern suggests that now more Mexicans are crossing back to their homeland.<sup>15</sup> Immigrants who remain in the U.S. or who are apprehended are usually given harsh penalties, most notably deportation, although first-time violators may receive a maximum six-month sentence in prison, and second offenses can result in two years in prison. In 2012, nearly 410,000 deportations occurred,<sup>16</sup> but before the USA Patriot Act, deportations averaged around 180,000 per year.<sup>17</sup>

Critics argue that those *sin documentos*, or without documents, depress wages and increase economic disparity; other scholars say that immigration has a minimal effect on wages.<sup>18</sup> Similarly, some suggest that unauthorized migrants take more in social services than what they contribute in taxes, while others argue that the opposite is true.<sup>19</sup>

Nevertheless, numbers and demographics provide a sketchy portrait in situating Hispanic literature and the law; whereas, memoirs provide the best insight and first-person point-of-view to the pressing issues regarding immigration law and policy. Research on Hispanic immigrant memoirs is relevant because there are no law review articles, nor articles in the law and literature genre.<sup>20</sup> This study adds to the conversation about undocumented immigration in the context of what *los migres*, or the migrants, have stated in print about their immigration experience. And, while policy pundits and the 2016 presidential candidates debated the immigration issue, none of them referenced the immigrants directly. These invaluable, first-person accounts are largely overlooked, and thus we seek to address

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13. Jeffrey S. Passel, *Size and Characteristics of the Unauthorized Migrant Population in the U.S.*, PEW RES. CTR: HISP. TRENDS (June 14, 2005), <http://www.pewhispanic.org/2006/03/07/size-and-characteristics-of-the-unauthorized-migrant-population-in-the-us/>.

14. See Kenneth Jost, *Immigration Conflict: Should States Crack Down on Unlawful Aliens?* 22 CQ RES. 229 (2012), <http://library.cqpress.com/cqresearcher/cqresrre2012030900>.

15. Ana Gonzalez-Barrera, *More Mexicans Leaving Than Coming to the U.S.*, PEW RES. CTR: HISP. TRENDS (Nov. 19, 2015), <http://www.pewhispanic.org/2015/11/19/more-mexicans-leaving-than-coming-to-the-u-s/>.

16. Jessica Vaughan, *Deportation Numbers Unwrapped*, CTR. FOR IMMIGRATION STUDIES (Oct. 30, 2013), <https://cis.org/Report/Deportation-Numbers-Unwrapped>.

17. Jacqueline Hagan, et al., *U.S. Deportation Policy, Family Separation, and Circular Migration*, 42 INT'L MIGRATION REV. 64 (2008).

18. George J. Borjas, *The Labor Demand Curve is Downward Slopping: Reexamining the Impact of Immigration on the Labor Market*, NAT'L BUREAU OF ECON. RES. (2003). See also Jeffrey Grogger & Gordon H. Hanson, *Immigration and African-American Employment Opportunities: The Response of Wages, Employment, and Incarceration to Labor Supply Shocks*, NAT'L BUREAU OF ECON. RES. (2006).

19. See Allen Thomas O'Rourke, *Good Samaritans, Beware: The Sensenbrenner-King Bill and Assistance to Undocumented Migrants*, 9 HARV. LATINO L. REV. 1 (2006). See also Dennis A. Calderon-Barrera, *Hoffman v. NLRB: Leaving Undocumented Workers Unprotected Under United States Labor Law?* 6 HARV. LATINO L. REV. 119 (2003).

20. See LEXISNEXIS, <http://advance.lexisnexis.com> (showing no search results for law review articles addressing Mexican-American autobiographies or memoirs) (last visited Feb 06, 2018).

and redress the egregious gap in the literature by analyzing the intersection of immigration law and Mexican-American memoirs. Brown voices proliferate and may increasingly dominate the electorate although currently our laws disdain them.

The timeliness of this topic is also apparent since President Donald Trump has accused Mexico of sending over murderers and rapists. Such near-sighted statements ignore the fact that immigrants risk everything to live in a place where hard work can create a better life. Also, since policy pundits in Washington are likely unfamiliar with these memoirs, they often ignore the significant contributions made by immigrants. There are more than 11 million unauthorized immigrants in the United States,<sup>21</sup> yet both Republicans and Democrats view current immigration laws as broken.<sup>22</sup> President Barack Obama signed a series of controversial executive actions that addressed unauthorized immigrants.<sup>23</sup> As a result, some 17 states filed a federal lawsuit challenging his executive orders.<sup>24</sup> The Citizenship and Immigration Services agency hired 1,000 new employees to process “cases filed as a result of the executive actions on immigration.”<sup>25</sup> President Trump signed an Executive Order banning immigration from specific Muslim-majority countries;<sup>26</sup> an executive order later blocked through a temporary restraining order.<sup>27</sup>

To draft useful laws, we need to gather as much accurate information as possible on the subject. What can we learn from the *testimonios* (oral histories) and memoirs of immigrants? In *American Victory*, for example, we learn about Henry Cejudo whose parents were both undocumented. Despite pervasive poverty, Henry goes on to win an Olympic gold medal for the United States.<sup>28</sup> In *Becoming Dr. Q: My Journey from Migrant Farm Worker to Brain Surgeon*, we read about Alfredo Quinones-Hinojosa who went from a tiny

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21. Gustavo López & Jynnah Radford, *Facts on U.S. Immigrants, 2015*, PEW RES. CTR: HISP. TRENDS (May 3, 2017), <http://www.pewhispanic.org/2015/09/28/statistical-portrait-of-the-foreign-born-population-in-the-united-states-1960-2013-key-charts/#2013-fb-authorized-pie>.

22. Max Ehrenfreund, *Your Complete Guide to Obama's Immigration Executive Action*, WASH. POST: WONKBLOG (Nov. 20, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/11/19/your-complete-guide-to-obamas-immigration-order/>.

23. *Id.*

24. David Montgomery & Julia Preston, *17 States Suing on Immigration*, N.Y. TIMES, Dec. 3, 2014, <http://www.nytimes.com/2014/12/04/us/executive-action-on-immigration-prompts-texas-to-sue.html>.

25. Michael D. Shear, *U.S. Agency Hiring 1,000 After Obama's Immigration Order*, N.Y. TIMES, Dec. 25, 2014, [http://www.nytimes.com/2014/12/26/us/politics/little-noticed-in-immigration-overhaul-a-government-hiring-rush.html?\\_r=0](http://www.nytimes.com/2014/12/26/us/politics/little-noticed-in-immigration-overhaul-a-government-hiring-rush.html?_r=0).

26. *Trump's Executive Order on Immigration, Annotated*, Nat'l Pub. Radio. (Jan. 31, 2017, 10:46 AM), <http://www.npr.org/2017/01/31/512439121/trumps-executive-order-on-immigration-annotated>.

27. Laura Jarrett, et al., *Homeland Security Suspends Travel Ban*, CNN (Feb. 4, 2017, 6:05 PM), <http://www.cnn.com/2017/02/03/politics/federal-judge-temporarily-halts-trump-travel-ban-nationwide-ag-says/index.html>.

28. HENRY CEJUDO & BILL PLASCHKE, *AMERICAN VICTORY: WRESTLING, DREAMS, AND A JOURNEY TOWARD HOME* (2011).

town in Mexico to Harvard Medical School and beyond.<sup>29</sup> Rose Castillo Guilbault was born in Sonora, Mexico but came to the U.S. at the age of five. Her charming narrative details the nuances of growing up in California, along with her struggles to fit in and to attain an education as she explains, “My parents had no college ambitions for me, but then again neither did my teachers or counselors.”<sup>30</sup> Despite having virtually no academic encouragement, Guilbault received awards and scholarships “in journalism, speech and debate, drama, and student government.”<sup>31</sup> Ultimately, she obtained degrees from San Jose State University, Pepperdine University, and the University of San Francisco and goes on to a career in broadcasting with CBS and ABC affiliates. Elva Trevino Hart grew up in Texas but migrated each year following the crops with her family of migrant farmworkers. Despite institutional racism and prejudice, she obtained a scholarship to study math at the University of Texas at Austin. After graduating, she attended Stanford University, and eventually started a successful career with IBM.<sup>32</sup> These introductory examples show the myriad ways in which immigrants enrich our society and culture; these autobiographies, and many like them, help us understand more fully the complex issues involved in the immigration debate.

Multiple voices, beyond those in government, speak out in this conversation. For example, Mark Zuckerberg has opined on the need to reform immigration laws. In a piece published by *The Washington Post*, Zuckerberg wrote, “We have a strange immigration policy for a nation of immigrants. And it’s a policy unfit for today’s world.”<sup>33</sup> Zuckerberg is one among a chorus of voices forming part of the immigrant narrative. Despite promises, and despite eight years in the White House, President Obama did not reform immigration policy or laws.

Our work centers on the minuscule number of memoirs and *testimonios* of those who live the immigration experience; in particular, we listen to the unskilled migrants growing food, building homes, mowing lawns, and caring for children. To guide this discussion, we first review the scholarship within the genre of law and literature. We then briefly consider the history of contemporary Mexican-American memoirs before moving to the role of the law. We conclude by arguing that compassionate and significant statutory reform is necessary, and we offer encouragement for the further scholarly study of Hispanic literature and the law.

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29. ALFREDO QUIÑONES-HINOJOSA & MIM EICHLER RIVAS, *BECOMING DR. Q: MY JOURNEY FROM MIGRANT FARM WORKER TO BRAIN SURGEON* (2011).

30. ROSE CASTILLO GUILBAULT, *FARMWORKER’S DAUGHTER: GROWING UP MEXICAN IN AMERICA* 117 (2005).

31. *Id.* at 143.

32. ELVA TREVIÑO HART, *BAREFOOT HEART: STORIES OF A MIGRANT CHILD* 230 (1999).

33. Mark Zuckerberg, *Mark Zuckerberg: Immigrants are the Key to a Knowledge Economy*, WASH. POST, Apr. 10, 2013, [http://www.washingtonpost.com/opinions/mark-zuckerberg-immigrants-are-the-key-to-a-knowledge-economy/2013/04/10/aba05554-a20b-11e2-82bc-511538ae90a4\\_story.html](http://www.washingtonpost.com/opinions/mark-zuckerberg-immigrants-are-the-key-to-a-knowledge-economy/2013/04/10/aba05554-a20b-11e2-82bc-511538ae90a4_story.html).

## II. LITERATURE REVIEW OF HISPANIC MEMOIRS AND LEGAL SCHOLARSHIP

Law and literature reviews provide a powerful pedagogical connection between law and the humanities because laws help ameliorate cultural or societal problems which are vividly described in the literature, especially autobiographies and memoirs.<sup>34</sup> This approach allows us to better understand the human experience generally, and in the words of one scholar, to enter “fully into the opinions, and therefore also the attitudes, feeling and total experience, of other men.”<sup>35</sup>

We submit that Mexican-American memoirs provide direct evidence of the fickle and often nonsensical immigration policy and laws in the United States. We strive, as Edward Morgan Forster suggests, to “connect the prose and the passion.”<sup>36</sup> The humanities, as we show herein with Mexican-American memoirs, can provide valuable context to meaningful social, political, and legal frameworks. An examination of the migrant experience as found in the profound *testimonios* of Hispanic/as shapes how one might view and treat those documented or undocumented.

As a matter of popular readings, memoirs have become a best-selling genre in publishing.<sup>37</sup> Supreme Court Justices, such as Clarence Thomas, pull in \$1.5 million contracts to publish their life stories,<sup>38</sup> and Justice O'Connor's memoir was a New York Times bestseller.<sup>39</sup> However, there are no bestselling lists that currently prize the Hispanic experience or their legal problems. Oscar Acosta, an illustrious Chicano lawyer, defended student protestors in East Los Angeles in the late 1960s and published his memoirs, but received far less acclaim than the likes of Gerry Spence and other Anglo legal memoirists.<sup>40</sup> For example, on Amazon.com, Reyna Grande's *The Distance Between Us* (the best ranking Mexican-Ameri-

34. COMM'N ON THE HUMANITIES AND SOC. SCI., AM. ACAD. OF ARTS & SCI., HEART OF THE MATTER: THE HUMANITIES AND SOCIAL SCIENCES 17 (defining the humanities as follows: “The humanities—including the study of languages, literature, history, jurisprudence, philosophy, comparative religion, ethics, and the arts—are disciplines of memory and imagination, telling us where we have been and helping us envision where we are going.”).

35. C.S. LEWIS, AN EXPERIMENT IN CRITICISM 85 (Cambridge University 1992) (addressing fiction but equally applicable to Mexican-American memoirs).

36. E.M. FORSTER, HOWARDS END 214 (1921).

37. Jessica Lewis, *Truthiness: Law, Literature & The Problem with Memoirs*, 31 RUTGER L. REC. 1 (2007) (citing Lev Grossman, *The Trouble with Memoirs*, TIME 60 (Jan. 15 2006)).

38. Laura Krugman Ray, *Lives of the Justices: Supreme Court Autobiographies*, 37 CONN. L. REV. 233 (2004).

39. Laura Krugman Ray, *Justices At Home: Three Supreme Court Memoirs*, 101 MICH. L. REV. 2103, 2108 (2003); *Best Sellers*, N.Y. TIMES, Mar. 3, 2002, § 7, at 18, <http://www.nytimes.com/2002/03/03/books/best-sellers-march-3-2002.html>.

40. See OSCAR ZETA ACOSTA, THE AUTOBIOGRAPHY OF A BROWN BUFFALO (1972) [hereinafter BROWN BUFFALO]; OSCAR ZETA ACOSTA, THE REVOLT OF THE COCKROACH PEOPLE (1973) [hereinafter COCKROACH PEOPLE]. See also, Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000) (addressing the case wherein Oscar Acosta serves as the defendant for a group of Mexican-American student living in East L.A. allegedly involved with the student protests.). See also OSCAR “ZETA” ACOSTA, THE UNCOLLECTED WORKS (Ian Stavans ed., 1996).

can memoir) ranks 14,709th.<sup>41</sup> Ernesto Galarza's 1971 *Barrio Boy* ranks 606,964.<sup>42</sup> On the other hand, James Frey's 2005 *A Million Little Pieces* ranks at 8,343.<sup>43</sup> Justice Sonia Sotomayor's book *My Beloved World* has an overall ranking of 1,347 and is ranked 2nd in memoirs.<sup>44</sup> The memoirs of the Supreme Court Justices are notably addressed by legal scholars,<sup>45</sup> but the Hispanic experience in literature is essentially ignored. As the racial and political map continues to change in the United States, reading habits will change, too.

Legal researchers have similarly overlooked the neglected literary genre of memoir in law and literature scholarship,<sup>46</sup> particularly Mexican-American memoirs, but there is a slowly growing corpus of research addressing Latino/a, Chicano/a, or Hispanic literature, though with less attention on memoirs. Those who occasionally address this topic often cite factual inaccuracies, as was the case with James Frey's *A Million Little Pieces*.<sup>47</sup> Because of the memoirist's propensity toward fabrication, Daniel Mendelsohn characterized memoirs as the black sheep of the literary family, humorously highlighting negative portrayals of the genre, including "unseemly self-exposure, unpalatable betrayals, unavoidable mendacity, [and] a soupçon of meretriciousness."<sup>48</sup>

Other literature excluded from this analysis discuss memoirs, including book reviews and narratives of parties to landmark court cases. Some of the legal attention lent to memoirs occurs in the form of book reviews.<sup>49</sup> With so little of the Hispanic experience

41. Amazon.com, [http://www.amazon.com/Distance-Between-Us-Memoir/dp/1451661789/ref=sr\\_1\\_2?s=books&ie=UTF8&qid=1394580819&sr=1-2&keywords=the+distance+between+us](http://www.amazon.com/Distance-Between-Us-Memoir/dp/1451661789/ref=sr_1_2?s=books&ie=UTF8&qid=1394580819&sr=1-2&keywords=the+distance+between+us) (last visited Feb. 08, 2018).

42. Amazon.com [http://www.amazon.com/Barrio-Boy-40th-Anniversary-Edition/dp/0268029792/ref=pd\\_sim\\_b\\_22?ie=UTF8&refRID=0945Y7CDN0R7C5KANYHK](http://www.amazon.com/Barrio-Boy-40th-Anniversary-Edition/dp/0268029792/ref=pd_sim_b_22?ie=UTF8&refRID=0945Y7CDN0R7C5KANYHK) (last visited Feb. 08, 2018).

43. Amazon.com, [http://www.amazon.com/Million-Little-Pieces-James-Frey/dp/0307276902/ref=sr\\_1\\_1?s=books&ie=UTF8&qid=1394580863&sr=1-1&keywords=a+thousand+little+pieces](http://www.amazon.com/Million-Little-Pieces-James-Frey/dp/0307276902/ref=sr_1_1?s=books&ie=UTF8&qid=1394580863&sr=1-1&keywords=a+thousand+little+pieces) (last visited Feb. 08, 2018).

44. Amazon.com, [http://www.amazon.com/Beloved-World-Vintage-Sonia-Sotomayor/dp/034580483X/ref=sr\\_1\\_1?s=books&ie=UTF8&qid=1394643094&sr=1-1&keywords=sonia+sotomayor](http://www.amazon.com/Beloved-World-Vintage-Sonia-Sotomayor/dp/034580483X/ref=sr_1_1?s=books&ie=UTF8&qid=1394643094&sr=1-1&keywords=sonia+sotomayor) (last visited Feb.08, 2018).

45. See Miriam Ho Ching, *Autobiographies and Other Extrajudicial Writings by United States Supreme Court Justices*, 1991 JURID. REV. 154; Krugman Ray, *supra* note 38; Robert M. Spector, *Judicial Biography and the United States Supreme Court: A Bibliographical Appraisal*, 11 AM. J. LEGAL HIST. 1 (1967).

46. As one example, a search of Professor Daniel J. Solove's (The George Washington University Law School) list of law and literature scholarship provides for no scholarship on memoirs in the law and literature genre. See Daniel J. Solove & Sam Weisberg, *Law & Literature Scholarship: A Chronological Bibliography* LAW & HUMANITIES: PROFESSOR DANIEL J. SOLOVE, <http://docs.law.gwu.edu/facweb/dsolove/Law-Humanities/works.htm> (last visited Mar. 11, 2016) (showing that his list starts spans 1982 to 2006 and includes articles, books, and book reviews.; law review articles doaddress memoirs).

47. See Lewis, *supra* note 37, at 9.

48. Daniel Mendelsohn, *But Enough About Me: What Does the Popularity of Memoirs Tell Us About Ourselves*, THE NEW YORKER, Jan. 25, 2010, <http://www.newyorker.com/magazine/2010/01/25/but-enough-about-me-2>.

49. See Paul R. Baier, *Book Review: Louisiana Legal Memoirs Law in the Cajun Nation*, by J. Minos Simon, 54 LA. L. REV. 1443 (1994); Col. Fred L. Borch, *Book Review: Vietnam Stories: A Judge's Memoir*, 165 MIL. L. REV. 291, 296 (2000) (defining "memoir" as a "history or narrative composed from personal experience and memory. . ."); Daniel J. Kornstein, *The Case Against Lillian Hellman: A Literary/Legal Defense*, 57 FORDHAM L. REV. 683, 685 (1989) (noting that author-playwright Lillian Hellman's "fidelity to facts in her memoirs has been doubted"); Solomon L. Wisenberg,

explored in law and literature and relatively little in Mexican-American literature, we seek to address the impact of law in Mexican-American memoirs, focusing on the most salient areas of immigration law. While we focus on the experiences found in Mexican-American memoirs, a body of literature addresses the personal experiences of individuals named in cases before the Supreme Court of the United States. For example, Felix Humberto Brignoni-Ponce was the named defendant in *United States v. Brignoni-Ponce*.<sup>50</sup> His story among other named defendants is addressed in various law reviews.<sup>51</sup> The backstory or the subsequent life events of the defendants are of interest to legal scholars but not explored here.

Law and literature as a movement enjoyed greater success in the past but is currently in decline,<sup>52</sup> a pattern consistent with the national trend of college degrees granted. Fifty years ago, 14 percent of college degrees were in the humanities; whereas today, only 7 percent are humanities majors.<sup>53</sup> Some scholars have addressed this waxing and waning phenomenon.<sup>54</sup> The genre has influenced both the law and the humanities.<sup>55</sup> Yoshino observes that the field of law and literature is “caught in limbo” and failed to reach the status of other interdisciplinary fields of scholarship such as law and economics.<sup>56</sup> Shulamit Almog argues

*Book Review: Sins of Omission*, 9 TEX. REV. L. & POL. 389 (2005) (offering an excruciating review of former President Clinton's memoirs).

50. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

51. See George M. Dery, III & Kevin Meehan, *Making the Roadblock a “Routine Part of American Life:” Illinois v. Lidste’s Extension of Police Checkpoint Power*, 32 A.M. J. CRIM. L. 105 (2004); Cesar Cuauhtemoc Garcia Hernandez, *Symposium: Defining Race: La Migra in the Mirror: Immigration Enforcement, Racial Profiling, and the Psychology of One Mexican Chasing After Another*, 72 ALB. L. REV. 891 (2009); Lisa Sandoval, *Race and Immigration Law: A Troubling Marriage*, 7 MOD. AM. 42 (2011). See also T. Alexander Alcinikoff, *Citizenship Talk: A Revisionist Narrative*, 69 FORDHAM L. REV. 1689, 1692 (2001) (“By defining insiders, the concept of citizenship necessarily [also] defines outsiders . . .”); Jennifer Gordon & R.A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 FORDHAM L. REV. 2493, 2505 n.40 (2006-2007) (discussing Ian Haney Lopez’s work as a critical race theory scholar); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 IND. L.J. 1111, 1116 (1998).

52. See IAN WARD, *L. AND LITERATURE: POSSIBILITIES AND PERSPECTIVES* 246 (1995) (showing a detailed bibliography of the major publications through the mid-1990s); Harold Suretsky, *Search for a Theory: An Annotated Bibliography of Writings on the Relation of Law to Literature and the Humanities*, 32 RUTGERS L. REC. 727 (1979) (showing a detailed bibliography of the major publications through 1979).

53. David Brooks, *The Humanist Vocation*, N.Y. TIMES, June 20, 2013, <http://www.nytimes.com/2013/06/21/opinion/brooks-the-humanist-vocation.html>.

54. Most scholars who write on law and literature express their views on the status of the genre. Julie Peters article is a nice overview and critique. See Julie Stone Peters, *Law, Literature, and the Vanishing Real: On the Future of an Interdisciplinary Illusion*, 120 MOD. LANGUAGE ASS’N OF AM. 442 (2005). See also Jane B. Baron, *Law, Literature and the Problems of Interdisciplinarity*, 108 YALE L.J. 1059 (1999) (addressing the problems with interdisciplinary studies); Richard A. Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351 (1986).

55. See Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUMAN. 155 (2006) (examining the development of the law and literature genre and its impact on the disciplines of law and humanities); Patrick Hanafin et. al., *Introduction: On Writing: Law and Literature*, 31 J. OF LAW AND SOC’Y 1 (2004) (compiling a collection of essays. The collection is an attempt to ease the tension between law and the humanities by allowing both disciplines to freely examine these fields without constraint.).

56. Kenji Yoshino, *The City and the Poet*, 114 YALE L. J. 1835 (2005).

the decline of law and literature discourse is due to the standing of literature and literary studies in the digital age.<sup>57</sup> However, the American Academy of Arts & Science, in its 2013 *Commission on the Humanities and Social Sciences*, argues that there is “no reason a [humanities] education cannot flourish in [a digital age] using new tools.”<sup>58</sup> At least one legal scholar has argued that the humanities crisis is “at least in part a fantasy.”<sup>59</sup>

Still, other scholars attempt to explain the decline of law and literature scholarship. Arthur Austin argues the decline in rigor in legal scholarship among the “fun generation” is to blame.<sup>60</sup> Watt posits that “law and society are disconnected in practice, and that this is attributable, in part, to the laws’ disconnection from the arts and humanities in our schemes of formal education.”<sup>61</sup> Nevertheless, some scholars attempt to revive the scholarship.<sup>62</sup> Anthony Bradney, for example, observes that law students, while high achievers in education, “are almost always culturally illiterate.”<sup>63</sup> Law and literature classes, for Bradney, are a “valuable educational resource” that provide a liberal education to rectify what the controversial Allan Bloom called “the closing of the American mind.”<sup>64</sup> Bradney argues for a wider acceptance of law and literature among legal scholars and teachers.<sup>65</sup>

The law and literature movement embraces various bodies of scholarship, with primary interest from legal and literary scholars. Some researchers identify legal or jurisprudential issues or thought in literature,<sup>66</sup> or, for example, examine “significant works of literature that use the courtroom as their dramatic engine.”<sup>67</sup> Others analyze the law—statutes and case law—as literature.<sup>68</sup> Others study the relationship between literary criticism

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57. Shulamit Almog, *Windows and ‘Windows’: Reflections on Law and Literature in the Digital Age*, 57 U. TORONTO L. J. 755, 756 (2007).

58. COMM’N ON THE HUMANITIES AND SOC. SCI., *supra* note 34.

59. Ruth A. Miller, *Nanobots Run Amok, or The Future of Law and Literature*, 24 L. & LITERATURE 295 (2012).

60. Arthur D. Austin, *The Waste Land of Law School Fiction*, 1989 DUKE L. J. 495, 495–509 (1989) (“The minimalist fiction of the fun generation does not mean the law school culture is incapable of inspiring work that would satisfy . . .”).

61. Gary Watt, *The Character of Social Connection in Law and Literature: Lessons from Bleak House*, 5 INT’L J. OF L. IN CONTEXT 263 (2009).

62. See Almog, *supra* note 57.

63. A. Bradney, *An Educational Ambition for ‘Law and Literature’*, 7 INT’L J. OF THE LEGAL PROF. 343 (2000).

64. ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND: HOW HIGHER EDUCATION HAS FAILED DEMOCRACY AND IMPOVERISHED THE SOULS OF TODAY’S STUDENTS* (Simon & Schuster, Reissue ed. 2012).

65. Bradney, *supra* note 63.

66. See Julia H. Chryssostalis, *Beyond Otonomy, or Beyond the Law of Law’s Ear*, 31 J. L. AND SOC’Y 1, 149 (2004); J.S. Koffler, *Capital in Hell: Dante’s Lesson on Usury*, 32 RUTGERS L. REV. 608 (1985); Richard Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor with an Application to Justice Rehnquist*, 57 N.Y.U.L. REV. 1 (1982); Robin West, *Authority, Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1982).

67. Michael A. Kahn, *From Shylock to Bill Budd: The Literary “Headline Trial,”* 55 ST. LOUIS U. L.J. 1329 (2011).

68. See James B. White, *The Legal Imagination* (Boston: Little Brown, 1973); Richard Weisberg, *Review of the Legal Imagination by James B. White*, 74 COLUM. L. REV. 327 (1974); Robin West, *Jurisprudence as Narrative: An*



and legal criticism.<sup>69</sup> Some scholars view adjudication as interpretation.<sup>70</sup> Some address law and literature as it relates to gender and race; however, these areas are also under-studied<sup>71</sup>. This latter body of scholarship examines how “we can improve our understanding of law by comparing legal interpretation with interpretation in . . . literature.”<sup>72</sup> West expresses reservations about the law-as-literature movement by arguing that adjudication is not interpretation.<sup>73</sup>

While not the focus of this paper, it is important to note that legal scholars also address constitutional protections of autobiographical speech.<sup>74</sup> In the 1991 case, *Simon & Schuster, Inc. v. Members of the N.Y. St. Crime Victims Bd.*, the Supreme Court of the United States addressed the important question of whether criminals should be prohibited from profiting by telling the story of their crime.<sup>75</sup> The Court answered by affirming the historical importance of autobiographical speech by deeming such speech as constitutional.<sup>76</sup> The Court stated:

Had the Son of Sam law been in effect at the time and place of publication, it would have escrowed payment for such works as *The Auto-*

*Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145 (1985); Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982).

69. See Ronald Dworkin, *A Matter of Principle* 146 (1985); STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (Duke Univ. Press Books 1989); Kenneth S. Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair*, 32 RUTGERS L. REV. 676 (1979); Ronald Dworkin, *Law as Interpretation*, 9 Pol. of Interpretation 179 (1982); *Symposium: Law and Literature*, 60 TEX. L. REV. 373 (1982).

70. See Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Tomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984).

71. See Carolyn Heilbrun & Judith Resnik, *Convergences: Law, Literature and Feminism*, 99 YALE L.J. 1912 (1990).

72. DWORKIN, *supra* note 69.

73. See Robin West, *Adjudication is Not Interpretation: Some Reservations About the Law-as-Literature Movement*, 54 TENN. L. REV. 203, 203-05 (1987) (“For while it is true, in a sense, that today most constitution theorists are interpretivists, and it is surely not the case that this has always been so. . . The competing vision is that adjudication, including constitutional adjudication is, an imperative act, not an interpretive act. . . . [Adjudication] is a branch of politics, not a branch of knowledge.”).

74. See, e.g., Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229 (1995) (discussing outsider legal scholarship and its reliance on autobiographical narratives); Marjorie Heins, *A Public University's Response to Students' Removal of an Art Exhibit*, 38 N.Y.L. SCH. L. REV. 201, 209 (1993) (discussing the autobiographical work of a former sex worker and prostitutes' rights advocate and arguing her autobiographical speech does not “merit dismissal with the reductionist epithet “pornography”) (internal quotation omitted); Mari J. Matsuda, *Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323 (1989) (“There is an outsider's jurisprudence growing and thriving alongside mainstream jurisprudence in American law schools.”); Sonja R. West, *The Story of Me: The Underprotection of Autobiographical Speech*, 84 WASH. U. L. REV. 905 (2006) (“This Article argues that truthful autobiographical speech deserves heightened constitutional protection.”).

75. 502 U.S. 105 (1991).

76. *Id.* at 123.

*biography of Malcolm X*, which describes crimes committed by the civil rights leader before he became a public figure; "Civil Disobedience," in which Thoreau acknowledges his refusal to pay taxes and recalls his experience in jail; and even the *Confessions of Saint Augustine*, in which the author laments "my past foulness and the carnal corruptions of my soul," one instance of which involved the theft of pears from a neighboring vineyard.<sup>77</sup>

The *Simon & Schuster, Inc.* case should answer the question of whether undocumented immigrants, those out of compliance with the law, should be able to reap the profit by telling their story. We do not address this constitutional question in the contexts of immigrants. However, this highlights the need for further scholarship in the realm of Mexican-American literature and the law.

Courts hold that anonymous speech is protected,<sup>78</sup> and constitutional protection is important for persecuted groups and victims of abuse by allowing them to tell their stories without fear of recrimination. Anonymous memoirs and questions of libel or slander are other areas that are under-researched and analyzed. One sterling example is *Illegal: Reflection of an Undocumented Immigrant* by Jose Angel N. who refuses to disclose his last name for fear of deportation.<sup>79</sup> Although our focus is minority memoirs, there are also numerous novels, autobiographical novels, memoirs,<sup>80</sup> and law reviews that reflect the law school experience.<sup>81</sup> As stated, the scholarship overwhelmingly lacks an analysis of Mexican-American literature and the law. We begin to bridge that gap.

77. *Id.* at 121.

78. *Talley v. California*, 362 U.S. 60, 64 (1960).

79. JOSÉ ÁNGEL N., *ILLEGAL: REFLECTION OF AN UNDOCUMENTED IMMIGRANT* (Urbana: Univ. of Ill. Press 2014).

80. Our research shows very little law and literature research has been conducted on memoirs. At least one exception is RICARD D. KAHLBERG, *BROKEN CONTRACT: A MEMOIR OF HARVARD LAW SCHOOL* (1992).

81. See e.g., JOHN JAY OSBORN JR., *THE PAPER CHASE* (1971); KATHERINE ROOME, *THE LETTER OF THE LAW* (1979); MICHAEL LEVIN, *THE SOCRATIC METHOD* (1987); SCOTT TURROW, *ONE L: THE TURBULENT TRUE STORY OF A FIRST YEAR AT HARVARD LAW SCHOOL* (1977). See also Brian Owsley, *Black Ivy: An African-American Perspective on Law School*, 28 COLUM. HUM. RTS. L. REV. 501 (1997); Carlo A. Pedrioli, *The Rhetoric of Catharsis and Change: Law School Autobiography as a Nonfiction Law and Literature Subgenre*, 41 MCGEORGE LAW REV. 843 (2010); Alan J. Hobbins, "Dear Rufus . . .": *A Law Student's Life at McGill in the Roaring Twenties from the Letters of John P. Humphrey*, 44 MCGILL L.J. 753 (1999); Jason Broth, *Note Topics, Professors, and Scholarship: An Autobiographical Sketch of a Law School Experience*, 7 HASTINGS WOMEN'S L.J. 113 (1996); Brad Scars, *Queer L*, 1 NAT'L J. SEXUAL ORIENTATION L. 235 (1995); Kevin S. Reuther, *Dorothy's Friend Goes to Law School*, 1 NAT'L J. SEXUAL ORIENTATION L. 254 (1995).

### III. HISPANIC IMMIGRANT MEMOIRS

The stories of immigrants are rarely told. Many who come undocumented are humble peasants with scant education and no leisure. Often, they do not think their stories are worth telling; one immigrant from Guerrero, Mexico who calls himself “*el mojado*” titles his *testimonio*: “I know I’m nobody important.” He says, “My brother and I both don’t [*sic*] finish secondary school. It was better for us to start working.”<sup>82</sup>

Fortunately, there are some memoirs that help chronicle the lives and struggles of the “homeless and tempest-tossed.”<sup>83</sup> One of the early Mexican immigrant narratives is *Barrio Boy: The Story of a Boy’s Acculturation*; it narrates Ernesto Galarza’s journey from Jalcoctan, Mexico to Sacramento, California in the wake of the 1910 revolution.<sup>84</sup> Reyna Grande’s memorable *The Distance Between Us*, published in 2012, also addresses the subject.<sup>85</sup> In between, there are numerous narratives, from *Diario de un mojado*, (*Diary of an Undocumented Immigrant*) by Ramon Perez,<sup>86</sup> which gives voice to those who are often unheard. In *The Other Side*, Ruben Martinez allows migrants to share their harrowing experiences.<sup>87</sup> Even T. Coraghessan Boyle entered the fray with *The Tortilla Curtain*,<sup>88</sup> about which the Portland Oregonian described as a “tale that squeezes one last cup of vinegar from *The Grapes of Wrath*.”<sup>89</sup> A few scant anthologies, like *Underground America: Narratives of Undocumented Lives*, allow the often invisible segments of society to voice their experiences via *testimonios*.<sup>90</sup> Despite these minor inroads, we are barely coming to understand the complexities of the immigration issue and its real-life impact on the contemporary American immigrant experience.

The few autobiographical narratives that we do have relate the stories of migrant workers who endure discrimination, oppression, racism as well as problems with employment, education, housing, and medical services. In Tomas Rivera’s . . . *y no se lo tragó la tierra*, and in the works of Francisco Jimenez, we learn that migrants are often housed in garages, tents, shacks, barns, and even chicken coops.<sup>91</sup> In *Hunger for Memory*, Richard Rodriguez relates his educational struggles and successes as the son of immigrants.<sup>92</sup> *The Circuit*,

82. UNDERGROUND AMERICA: NARRATIVES OF UNDOCUMENTED LIVES 206 (Peter Orner ed., McSweeney’s, 2008).

83. LAZARUS, *supra* note 3.

84. ERNESTO GALARZA, *BARRIO BOY* (Univ. of Notre Dame Press 2011).

85. REYNA GRANDE, *THE DISTANCE BETWEEN US: A MEMOIR* (2013).

86. RAMÓN “TINAGUIS” PÉREZ, *DIARIO DE UN MOJADO (DIARY OF A WETBACK)* (2003).

87. RUBEN MARTINEZ, *THE OTHER SIDE: NOTES FROM THE NEW L.A., MEXICO CITY, AND BEYOND* (1993).

88. T. C. BOYLE, *THE TORTILLA CURTAIN* (1996).

89. *Id.*

90. ORNER, *supra* note 82.

91. TOMÁS RIVERA, *Y NO SE LO TRAGÓ LA TIERRA* (1995).

92. RICHARD RODRIGUEZ, *HUNGER FOR MEMORY: THE EDUCATION OF RICHARD RODRIGUEZ* (1983).

by Francisco Jimenez, chronicles the pernicious cycle of back-aching (and breaking) migrant work.<sup>93</sup>

Currently, there is a contentious debate in the press, in Congress, and in the minds of comfortable U.S. citizens about whether immigrants are social assets or economic and legal liabilities.<sup>94</sup> Should we, as President Trump suggests, build a bigger wall and keep Mexicans out?<sup>95</sup> What would happen to U.S. society if we let them all into the country? What would happen to society if we deported them all? How should we reform our laws? Can we compromise? Beyond legal issues, do we have moral and ethical obligations to take in our displaced neighbors? In Victor Davis Hanson's words, "Is it wisdom or folly to emphasize our differences over our similarities, to champion separatism as preferable to assimilation, and toy with the principle that the law matters only according to the ephemeral circumstances and particular interests involved?"<sup>96</sup>

Victor Hanson, a fellow at Stanford University's Hoover Institute, was previously a professor of classics at Fresno State. As a farmer, he knows something about migrant work and migrant workers. Several of his children have married Mexican-Americans, but he is critical of how both political parties have exploited them; Hanson argues, "The two parties, for reasons of money and power, ignore the social chaos brought by millions of illegal aliens: capitalist count on profits from plentiful, cheap workers, while activists expect these laborers to become liberal voters."<sup>97</sup> Describing the immigrants, Hanson continues, "Our newcomers are not the elite or even the middle class from a poorer country, but the most uneducated and destitute of the entire North American subcontinent—usually not those of Spanish heritage, but Indians fleeing discrimination and hatred."<sup>98</sup>

Memoirs are a particularly fruitful vineyard for a law and literature review precisely because of autobiography's adherence to verisimilitude; however, there have been instances of "simulated autobiography," of which James Frey's *A Million Little Pieces* is the rotten fruit.<sup>99</sup> Though currently enjoying a renaissance, memoirs traditionally have been viewed as something of the literary step-child. In fact, the question is sometimes raised whether or not autobiography is a legitimate genre, though this critique was firmly addressed and dismissed by Stephen Shapiro's essay *The Dark Continent of Literature: Autobiography*, wherein he asserts that memoirs do follow patterns of creative literature.<sup>100</sup> Certainly, memory is some-

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93. FRANCISCO JIMÉNEZ, *THE CIRCUIT: STORIES FROM THE LIFE OF A MIGRANT CHILD* (1997).

94. See Hightower, *supra* note 4.

95. Anna Brand, *Donald Trump: I Would Force Mexico to Build Border Wall*, MSNBC (June 28, 2015 01:40 PM), <http://www.msnbc.com/msnbc/donald-trump-i-would-force-mexico-build-border-wall>.

96. HANSON, *supra* note 7, at xi.

97. *Id.* at 12.

98. *Id.* at 17.

99. JAMES FREY, *A MILLION LITTLE PIECES* (2005).

100. Stephen Shapiro, *The Dark Continent of Literature: Autobiography*, 5 *COMP. LIT. STUDIES* 421 (Dec. 1968).

times faulty, and of course, readers need to be aware of possible posturing, exaggerations, and biases in texts, but these caveats apply to any literature.

In memoirs, we do allow for the recreation of dialogue, the addition of small forgotten details (the color of mother's apron); we permit figurative language, and we allow for composite characters, as well as some flexibility in structure and the compression of time.<sup>101</sup> Hispanic memoirs often take a political bent in arguing for social justice and civil rights, though Harold Bloom takes exception to such "ideological enterprises" while arguing that "social justice is. . . [not] a source of poetic strength."<sup>102</sup> Bloom concludes that "Ideology at best can produce period-pieces, not poems."<sup>103</sup> That may be so, but before concerning themselves with poetry, immigrants would like an occasional meal and a place to sleep between shift-work at the factory.

For those with literary aspirations, a memoir or autobiographical novel is sometimes the first step toward fiction. Nevertheless, not everyone is capable of clearly, compellingly, and cogently writing their own story, and thus, sometimes *testimonios* are written by professors, social workers, or relatives. Hispanic literature often focuses on immigration of the poor: peasants in transition, migrant workers following crops, the oppressed struggling to survive. Mexican immigrants often lack higher education and are sometimes unable to write and publish their tales, and thus, there are few memoirs of the migrant experience; one notable exception is the previously mentioned *Diario de un Mojado* by Ramon Perez.<sup>104</sup> Many Mexican-American memoirs that do exist are written by college graduates, including Marco Portales,<sup>105</sup> Richard Rodriguez,<sup>106</sup> Oscar Acosta,<sup>107</sup> Francisco Jimenez (four memoirs),<sup>108</sup> Norma Cantu,<sup>109</sup> Cherrie Moraga,<sup>110</sup> Julian Nava,<sup>111</sup> Luis Leal,<sup>112</sup> David Maldonado,<sup>113</sup> Ramon Ruiz Urueta,<sup>114</sup> Ruben Martinez,<sup>115</sup> and Linda Chavez,<sup>116</sup> among others.

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101. See Roy Pascal, *Design and Truth in Autobiography* (Routledge Library 2015).  
 102. HISPANIC-AMERICAN WRITERS: BLOOM'S MODERN CRITICAL VIEWS 2 (Harold Bloom ed., 1998).  
 103. *Id.*  
 104. See PEREZ, *supra* note 86.  
 105. See MARCO PORTALES, *LATINO SUN, RISING: OUR SPANISH-SPEAKING U.S. WORLD* (2005).  
 106. See RODRIGUEZ, *supra* note 92.  
 107. See OSCAR "ZETA" ACOSTA, *AUTOBIOGRAPHY OF A BROWN BUFFALO* (1972).  
 108. See JIMENEZ, *supra* note 93.  
 109. See NORMA ELIA CANTÚ, *CANÍCULA: SNAPSHOTS OF A GIRLHOOD EN LA FRONTERA* (Univ. of N.M. Press 1995).  
 110. See CHERRIE MORAGA, *LOVING IN THE WAR YEARS: LO QUE NUNCA PASÓ POR SUS LABIOS* (1983).  
 111. See JULIAN NAVA, *JULIAN NAVA: MY MEXICAN-AMERICAN JOURNEY* (2002).  
 112. See MARIO T. GARCIA, *LUIS LEAL: AN AUTOBIOGRAPHY* (2000).  
 113. See also DAVID MALDONADO, JR., *CROSSING GUADALUPE STREET: GROWING UP HISPANIC & PROTESTANT* (Univ. of N.M. Press 2001).  
 114. See RAMÓN EDUARDO RUIZ URUETA, *MEMORIES OF A HYPIENATED MAN* (Univ. of Ariz. Press 2003).  
 115. See Rubén Martínez, *Crossing Over: A Mexican Family on the Migrant Trail* (2002).  
 116. See Linda Chavez, *An Unlikely Conservative: The Transformation of an Ex-Liberal (Or How I Became the Most Hated Hispanic in America)* (N.Y. Basic Books, 2002).

A minority of Mexican-American memoirs are written by those “caught in the middle,” as Danny Quintana phrases it,<sup>117</sup> those who escape agricultural labor and find a way to college, possibly graduate school, and form part of the professional class. Quintana’s *Caught in the Middle* is part memoir and part *testimonio* of others. Quintana, a lawyer and, social critic, writes to give rise to Hispanics who migrated to the United States after World War II. A number of Mexican-American memoirists, like Danny Quintana, Sergio Troncoso, Oscar Zeta Acosta, and Richard Rodriguez are also “caught in the middle,” but their work is at the core of the genre. Troncoso and others wax nostalgic about their parent’s crossing of an actual border. Now, “Crossing Borders,” the title of Troncoso’s memoir, means crossing linguistic, cultural, and intellectual borders and crossing the borderlands of public, state-school to private, ivy-league schools. However, in the cultural and political milieu facing minorities, great courage is required to write openly about one’s assimilated life. Rodriguez captures the assimilation dilemma, among other dilemmas, in his body of work—most of which is autobiographical.<sup>118</sup> He may be the Proust of Mexican-American autobiography but without the unreserved superciliousness. As for the “brown buffalo,” Oscar Zeta Acosta—an outcast lawyer—advocates for anti-poverty initiatives and labor disputes “with Chavez and the farmworkers”<sup>119</sup> in Oakland and San Francisco, California, serving “both in the courtroom and on the barricades.”<sup>120</sup> Acosta captures the solitariness, not to say solipsism, of an assimilated Mexican-American: “I, Oscar Zeta Acosta, who in the beginning of 1971, was the only militant Chicano lawyer in the country, was born in El Paso, Texas, in 1935.”<sup>121</sup>

Minority memoirs usually focus on poverty and privation, prejudice and discrimination—in other words, on suffering. They delineate the struggle to gain an educational toe-hold, find work, and attain the American dream of living in peace, enjoying freedom, having a secure job, owning a home, and providing opportunities for their posterity. Laws govern all these issues and thus, shape human behavior:

When you’re in Mexico, you can’t imagine what a sacrifice it is to come here. You suffer crossing the border. You suffer looking for work. You suffer while working, because the bosses mistreat you and you don’t understand why. You suffer trying to make something of yourself. When you first arrive, there are so many things you don’t understand. You’re alone. You can’t speak English. You have no papers, no transportation, and no one to help you. You arrive

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117. DANNY QUINTANA, *CAUGHT IN THE MIDDLE: STORIES OF HISPANIC MIGRATION AND SOLUTIONS TO AMERICA’S IMMIGRATION DILEMMA* 18–19 (2012).

118. See PAUL GUAJARDO, *CHICANO CONTROVERSY: OSCAR ACOSTA AND RICHARD RODRIGUEZ* 2–3 (2002) (“Rodriguez has eschewed taking part in [the Chicano movement, declaring] that he is not a minority [. . .]”).

119. ACOSTA, *supra* note 40, at 7.

120. *Id.* at 40. See COCKROACH PEOPLE, *supra* note 40.

121. ACOSTA, *supra* note 40, at 5.

with no idea what it takes to succeed. There's nothing in your head but the desire to come to the United States to work.<sup>122</sup>

This sentiment is typical of immigrant narratives, and reading these works give us empathy and insight into the struggles that others encounter daily.

Now a journalist and public intellectual, Richard Rodriguez was born into an immigrant family in Sacramento, California, “a Mexican in California.”<sup>123</sup> However, Rodriguez acknowledges, “Mexico was a memory—not mine.”<sup>124</sup> Rodriguez’s narrative is a shift from the day laborer, border-crossing narrative. Rodriguez’s *testimonio* addresses the first generation, Mexican-American assimilation—and a successful one in the eyes of those still struggling. Rodriguez, educated at Stanford, Berkeley, Colombia, Union Theological Seminary, and the Warburg Institute in London as a Fulbright fellow, confronts important issues, including immigration, affirmative action, and bilingual education,<sup>125</sup> facing what he calls the “browning of America.”<sup>126</sup> Rodriguez develops his story, beginning with *Hunger of Memory*, where he deconstructs a “socially disadvantaged” childhood and his assimilation into white, middle-class, English-speaking America.<sup>127</sup>

Rodriguez dramatizes his success in college as a “scholarship boy”—an agonizing process, pain he attributed to the alienation from his family. Rodriguez recalls other Mexican-Americans calling him *vendido* (sellout), coconut (a Mexican-American who pretends to be Anglo), and *pocho* (traitor) for assimilating; however, Rodriguez argues that assimilation is not a choice but an inevitability.<sup>128</sup> Such name-calling is not surprising because, in *Hunger of Memory*, Rodriguez argues against affirmative action and bilingual education. In *Days of Obligation*, Rodriguez records how alien he feels when visiting Mexico. He conjures up the spirit memorialized in the Treaty of Guadalupe-Hidalgo and reasserts the complicated relations between the United States and Mexico: “We are all bandits. We’ve stolen California from the Mexicans. And, they stole it from the Spaniards. And they stole it from the Indians. We can deal with the guilt history places on us only when we free ourselves from the ghosts.”<sup>129</sup>

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122. DANIEL ROYHENBERG, *WITH THESE HANDS: THE HIDDEN WORLD OF MIGRANT FARMWORKERS TODAY* 8 (1998).

123. RICHARD RODRIGUEZ, *DAYS OF OBLIGATION: AN ARGUMENT WITH MY MEXICAN FATHER* 3 (Penguin Books 1993).

124. *Id.* at 53.

125. *Id.* at 67.

126. RICHARD RODRIGUEZ, *BROWN: THE LAST DISCOVERY OF AMERICA* (2003).

127. RODRIGUEZ, *supra* note 92.

128. JOSE ANTONIO VILLARREAL, *POCHO* (1959).

129. RODRIGUEZ, *supra* note 123, at 141.

Rodriguez envisions a brown future and retells a brown past, asserting that “[t]he future is brown. . . as brown as the tarnished past.”<sup>130</sup> Henry Cisneros makes a similar argument about the future in his book, *Latinos and the Nation's Future*, where he claims that, “This phenomenon of Latino potential is of such scale that it is no longer a side-bar interest; it is now a strong shaping force of the American future.”<sup>131</sup> This view is strongly supported by changing demographics in the United States.

Like Rodriguez, Dionicio Morales, now a successful businessman, also wrestles with issues of disillusionment and assimilation. The subtitle of his autobiography captures the sentiment, *A Life in Two Cultures*.<sup>132</sup> In his memoir, Morales enumerates countless examples of discrimination, racism, and oppression. In one example, a teacher chastises him for arriving to class dirty; the teacher is blind to the reality that young Morales works in the fields before and after school.

Law and literature studies would also benefit from examining Mexican-American novels which often draw upon the authors' personal experiences, like Mario Bencastro's *Odyssey to the North*,<sup>133</sup> Jose Antonio Villareal's *Pocho*,<sup>134</sup> or Reyna Grande's novels, *Across a Hundred Mountains*<sup>135</sup> and *Dancing with Butterflies*,<sup>136</sup> but the focus here is memoir and autobiography.

#### IV. IMMIGRATION LAW, MEMOIRS, AND *TESTIMONIOS*

The Mexican-American struggle for civil rights began long before *Hernandez v. Texas*.<sup>137</sup> With a growing Hispanic population, the U.S. faces a new future on issues of law, policy, politics, and culture. Former President Obama's attempts at immigration reform showed how divided and conflicted we are on these issues, to say nothing of President Trump's attempts. Similarly, a theme in Mexican-American literature is how divided and conflicted immigrants sometimes are, and in the words of Sergio Troncoso, “The poor immigrant is part of *nuestra familia*. . . Instead of being silent about the issue of immigration, we should be the first to help new immigrants join this American experiment.”<sup>138</sup> The immigrant

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130. RODRIGUEZ, *supra* note 126, at Ch. 2.

131. HENRY G. CISNEROS, *LATINOS AND THE NATION'S FUTURE* xiv (John Rosales ed., 2009).

132. DIONICIO MORALES, *DIONICIO MORALES: A LIFE IN TWO CULTURES (AN AUTOBIOGRAPHY)* (1997).

133. MARIO BENCASTRO, *ODYSSEY TO THE NORTH* (Susan Giersbach Rascon trans., 1998).

134. VILLAREAL, *supra* note 128.

135. REYNA GRANDE, *ACROSS A HUNDRED MOUNTAINS* (2006).

136. REYNA GRANDE, *DANCING WITH BUTTERFLIES* (2009).

137. 347 U.S. 475 (1954). *See also* F. ARTURO ROSALES, *CHICANO! THE HISTORY OF THE MEXICAN AMERICAN CIVIL RIGHTS MOVEMENT* (1997).

138. SERGIO TRONCOSO, *CROSSING BORDERS: PERSONAL ESSAYS* 78 (2011).



experience should shape the law, and certainly, laws shape the immigrant experience. State and federal legislators, as well as citizens in general, would benefit from an immersion in immigrant memoir.

Federal law governs “this American experiment” as it relates to the issues of immigration, citizenship, and naturalization.<sup>139</sup> Foreigners can enter the United States legally, either as immigrants (with documents) or nonimmigrants (without documents). When they enter as immigrants, generally their rights to live and work are more similar to those of U.S. citizens and Permanent Residents. On the other hand, when entering the United States as a non-immigrant, they have very limited rights regarding living and working within the U.S. Federal law requires all aliens who remain in the United States for longer than 30 days to register with the government.<sup>140</sup> In the U.S., an alien is “any person not a citizen or national of the United States.”<sup>141</sup>

The law does not refer to “undocumented immigrants” but rather uses the term “unauthorized alien”<sup>142</sup> or “illegal aliens.”<sup>143</sup> In the literature, Mexicans refer to themselves as *sin documentos* or as *mojados* (wetbacks). The colloquialisms must be understood: *Coyotes* are smugglers, human traffickers. *Coyotes* call immigrants *chivos* (goats) because of their odor after many days of travelling without bathing, or they are referred as *pollos* (chicks) because of their vulnerability. Unauthorized migrants are also called *alambristas* (wire jumpers). In addressing undocumented immigrants who enter either without documents or with illegally forged documents—the *Chivos*, *Pollos*, *Mojados*, *Alambristas*, or simply, *los sin documentos*—there are three general classifications: entering the country without authorization or inspection, remaining in the country beyond the authorized time period, or violating any of the terms of legal entry.<sup>144</sup> The “Improper Entry of Alien” imposes a fine and/or imprisonment upon any undocumented immigrant who enters or remains in the United States.

The federal government spends around \$12 billion annually for border security.<sup>145</sup> It is a vast regulatory framework. Border control responsibility falls under the Department of Homeland Security, with shared jurisdictional authority by U.S. Customs and Border Protec-

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139. See U.S. CONST. art. I, § 8; 8 U.S.C. § Ch. 12; 8 U.S.C. § Ch. 13.

140. See 8 U.S.C. § 1302 (exceptions to this rule are governed by the Visa Waiver Program and various treaties with individual countries).

141. 8 U.S.C. § 1101 (West 2017).

142. 8 U.S.C. §§ 1188, 1255, 1324, 1324a, 1324b (West 2017).

143. 8 U.S.C. §§ 1188, 1330(3)(A), 1356, 1365(a–b), 1366, 1621(d); 42 U.S.C. § 6705(e); 49 U.S.C. 40125(a)(2) (West 2017).

144. 8 U.S.C. § 1325 (West 2017).

145. Ryan Vetter, *Border Security Costs Taxpayers \$12 Billion*, THE INDEPENDENT VOTER NETWORK (Aug. 5, 2013), <http://ivn.us/2013/08/05/border-security-costs-taxpayers-12-billion-2/>.

tion (CBP),<sup>146</sup> U.S. Coast Guard and the U.S. Immigration and Customs Enforcement (ICE). The CBP has over 58,000 employees. Over 21,000 of CBP's workers focus on patrolling the Mexican and Canadian borders.<sup>147</sup> One autobiographical report describes the border problem:

The lack of passports forces laborers to look for another way of getting across, usually being smuggled in the through some ford on the river. In both cities (Mexican and American) there is an infinite number of persons whose only business consists of smuggling these laborers and, starting from that moment, the exploitation of the laborers because they were lacking resources to tend to their subsistence, as well as the fear of being punished by the authorities; they had to divide themselves into small groups and take to the mountains where they were abandoned. And some who are not familiar with the land get lost, and it has been the case that several of them have starved to death.<sup>148</sup>

Those *sin documentos* see the army of Border Patrol workers not as anti-terrorist soldiers, but as threats to their life and as impediments to their hopes. As one undocumented immigrant frames it, "Patrol cars will be thicker than flies in a Tijuana meat market."<sup>149</sup> The threshold, the border, whether guarded by barbed-wire or by a muddy river, poses many risks that immigrants are willing to tackle because of conditions at home. Not only are there natural hazards—poisonous snakes and spiders, intense heat or cold, debilitating hunger and thirst—but there are more insidious hazards as well, most notably being robbed of the precious little money hidden in one's clothes. The *coyote*, charging around \$3,000 per person, can turn against the immigrant and rob, rape, or murder them. Sometimes one's own country-man will report another out of jealousy, envy, or spite. In light of the legalities governing risk-taking immigrants who are often ignorant of laws and regulations, the physical and emotional barriers, along with incentives to migrate, remain, as can be read in the memoirs and *testimonios* addressed herein.

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146. U.S. Customs and Border Protection has three enforcement bodies: the Office of Border Patrol ("Border Patrol"), the Office of Field Operations ("Customs"), and the Office of Air and Marine. See U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/about> (last visited November 8, 2017).

147. *Border Patrol Overview*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/border-security/along-us-borders/overview> (last updated Jan. 27, 2015).

148. ROSALES, *supra* note 137, at 84.

149. MARILYN DAVIS, *MEXICAN VOICES AMERICAN DREAMS: AN ORAL HISTORY OF MEXICAN IMMIGRATION TO THE UNITED STATES* 99 (1991).

a. *Incentive to Migrate*

Salvador Moreno, who lived in a labor camp for months, recalls why he sought to travel north: “I arrived in the United States with dreams, illusions. These dreams came from others, friends in my hometown who returned from the United States with cars and trucks, telling stories about how good things are here—how in America you have lots of fun, travel, and earn plenty of money.”<sup>150</sup> However, such incentives are counter-balanced by entering “enemy territory.”<sup>151</sup> Morales recalls his father’s migration:

By the time my father found himself crossing at Juarez, there had already been much talk about deporting Mexican workers. Less than a month after the Villa raid, the Los Angeles County Supervisors adopted a resolution, requesting federal action in the deportation of what they called the ‘*Cholos*’ whom they considered ‘very likely’ to become public charges. “They are a menace to the health and morals of any community,” declared Jim Goodhardt, the head of a noted Los Angeles rescue mission, in a press interview.

This Message reached the ears of my father. He was afraid that living in the United States might be living in enemy territory. He wondered if he would be treated as an enemy form a hostile country. How could he build the new life he planned for his family?<sup>152</sup>

Despite the high cost to the immigrant, the primary incentive to cross the U.S.-Mexico border is economic, and the economics are driven by a desire to care for oneself and one’s family. One of the costs is when fathers and mothers leave children behind to seek a “better life.” Reyna Grande provides an agonizing account: “My father’s mother, Abuela Evila, liked to scare us with stories of La Llorona, the weeping woman who roams the canal and steals children away. She would say that if we didn’t behave, La Llorona would take us far away where we would never see our parents again . . . Neither of my grandmothers told us that there is something more powerful than La Llorona—a power that takes away parents, not children. It is called the United States.”<sup>153</sup>

Living *sin documentos* poses numerous challenges, including divorce and custody disputes. If one undocumented parent prevents another undocumented parent from seeing a minor child, what recourse is there? Reyna Grande captures this dilemma. After her father declares he no longer loves her mother and has a new girlfriend, not “a blue-eyed gringa”

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150. ROTHENBERG, *supra* note 122, at 8.

151. MORALES, *supra* note 132, at 19.

152. *Id.* at 19-20.

153. GRANDE, *supra* note 85, at 3.

but a “Mexican from the state of Zacatecas,”<sup>154</sup> Grande’s father kicks her mother out of the apartment and keeps custody of her sister:

And then came his ultimate betrayal. At the end of the week he tossed [his ex-wife] out of the apartment, but did not allow her to take Betty. My mother’s first thought had been to go to the police, but she was afraid of being deported, and if that were to happen, then surely she would never see her daughter again. She wanted to go back to Mexico, back to the place she knew, back to her mother, back to us—her children—away from my father, but she couldn’t leave like this, with no money and no daughter. Everyone would scorn her for coming back worse off than when she left.<sup>155</sup>

The gear of deportation and having no access to justice, leads to Reyna’s mother “stealing” her own child from the babysitter, never to return:

The babysitter finally agreed. “You promise you will bring her back in an hour?”

“Yes, yes, I promise,” my mother said.

And she had not meant to break her promise, but half way back to the babysitter’s house something had bubbled up inside her. Her blood boiled at the thought of that other woman preparing her daughter’s bottles, giving her a bath, tucking her into bed, singing her to sleep. She imagined Betty growing up thinking the other woman was her mother. She became jealous of the woman who had already taken her husband from her, and she swore that she wouldn’t let her take her baby’s love away from her as well. And him, how could he have let go of her in that most frightening place where he knew she was all alone and he and Betty were the only family she had there? So she turned around and walked in the opposite direction, never once looking back.

The events culminated with something so horrible that even now, I still can’t fully believe it. My father, in a moment of rage, his blood boiling with alcohol, went looking for my mother with a gun. Was he planning to shoot her? My father would later say no, his intention had been to scare her. But whatever the truth may have been, someone did get hurt. An innocent bystander had tried to defend my mother when he saw my father bullying her on the sidewalk in front of Tia Maria Felix’s apartment, where my mother had sought refuge. My father wanted Betty back. My mother refused to hand her over. Betty was crying uncontrollably while both her parents had their shouting match over who got to keep her. My father’s new woman

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154. *Id.* at 84.

155. *Id.* at 85.

waited in the passenger seat of the car, and her presence enraged my mother even more. It made her hold on to Betty with all her might. The bystander and my father got into a fistfight when he tried to break up my parent's argument. The gun accidentally went off, and the man was shot.

Luckily for my father, the man did not die. Luckily for my father, he was allowed voluntary deportation, instead of getting thrown in prison. Within a week, he had managed to sneak across the border and resumed his life in the United States as if nothing had ever happened."<sup>156</sup>

In part, these problems occur and are exacerbated because the undocumented have no recourse to the legal process. They must try to work things out on their own, sometimes by "taking the law into their own hands" to settle disputes.

*b. Crossing the Border*

*Testimonios* and memoirs poignantly portray the risks associated with crossing into the United States. In one account of the hazards and horrors immigrants face, Julio decides to walk across the desert after many days of waiting on his *coyote*: "I was alone for four days—no water, no food. I walked for two whole days, no stopping. I drank from my urine . . . And I chewed my backpack . . . the saliva from the chewing helped. But for two days I didn't drink any real water."<sup>157</sup> Many migrants have perished while attempting to navigate the desert.

Seeking refuge in the United States demands unimaginable sacrifice, and *coyotes* can be life-savers who help others immigrate and ease the burden of travel, or they can be predatory robbers who do not uphold their promises. *Coyotes* obviously face great risks as human traffickers, because in the eyes of U.S. law, they are felons.<sup>158</sup> They risk criminal penalties, under the Immigration and Nationality Act, of no more than five years imprisonment and/or no more than \$250,000 in fines for bringing in and harboring undocumented immigrants,<sup>159</sup> and the penalties stiffen for repeat offenders.<sup>160</sup>

Some *coyotes* provide a service for those who are desperate, such as the person who helped Francisco Jimenez and his family cross the border and find work. Professor Jimenez, who now holds an endowed chair at the Santa Clara University, well remembers going under

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156. *Id.* at 85–86.

157. ORNER, *supra* note 82, at 179.

158. See 8 U.S.C. § 1324 (West 2017).

159. *Id.*

160. *Id.*

the wire with his family: "Late that night, we walked for several miles away from town. Papá, who led the way, paused, looked all around to make sure no one could see us, and headed toward the fence. We walked along the wire wall until Papá spotted a small hole underneath the fence. Papá got on his knees and, with his hands made the opening larger. We all crawled through like snakes."<sup>161</sup> The Jimenez family, by prior arrangement, is picked up by a *coyote* who drives them to a place where they can find work in the strawberry fields of central California.<sup>162</sup> After paying him, the Jimenez's have seven dollars left, and their first night in America, they huddle under a eucalyptus tree trying to sleep on a pile of leaves.<sup>163</sup>

Similarly, Reyna Grande's *The Distance Between Us* allows readers privileged insight into the migrant experience as she and her family seek a better life *en el otro lado* (on the other side).<sup>164</sup> Her father, Natalio, becomes an undocumented immigrant, leaving behind the two-year-old Reyna along with her older sister and brother.<sup>165</sup> His goal is to make enough money working in the U.S. to return and build a modest home in Mexico.<sup>166</sup> Later, Reyna's mother joins her husband in the north, leaving the children behind with relatives, but the parents' relationship is strained, and they eventually separate.<sup>167</sup> On one of the father's rare visits home, he sees Reyna. She recalls him seeing her with "tangled hair, the dirt on my face, my tattered clothes. . . I knew he was ashamed by what he saw. . . I had to stand before the father I hadn't seen in almost eight years, looking like a beggar."<sup>168</sup> Natalio's heart is pricked by the sight of his near-destitute daughter, and he decides to take his oldest daughter, Mago, with him on his return trip to the U.S. because they may have to run to evade the border patrol, and she'll stand a better chance. Natalio does not feel that staying in Mexico with his family is a possibility because there are no jobs in his hometown, but his two younger children beg and plead to be taken to *el otro lado*. Sensing the desperation in their voices, he relents, and with the help of *coyotes*, he smuggles his kids across.

Crossing the border is challenging enough, but as evident in Mexican-American narratives, when unauthorized migrants make the journey to *el norte*, they face the question of whom can they trust. Some *coyotes* abandon their promise of service as can be seen in Julio's narrative when he was left to navigate the desert alone. Another example, El Mojado recounts the trust one must repose in *coyotes*:

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161. JIMENEZ, *supra* note 93, at 4.

162. *Id.* at 4-5.

163. *Id.*

164. GRANDE, *supra* note 85.

165. *Id.* at 6.

166. *Id.*

167. *Id.* at 85.

168. *Id.* at 143.

My oldest son was three years old at the time. He also had the papers of a citizen. He passed alone, without my wife, with the son of a *coyote*, a twelve-year-old kid. My wife was already waiting on the other side. You see the *coyotes* have to separate the children from the parents because the children will sometimes say, "My mom doesn't have papers." You have to be careful with those things. And say the mother gets caught, taken down, at least the child has gotten through. When she got to Garden City my wife was crying. She had never been separated from her son like that and she was afraid that something could've happened to him. That's why it feels bad when they separate you. And you have to trust people you do not know. Thank God that we are all here and we're okay, but I wouldn't want any of us to go through that again."<sup>169</sup>

Additionally, immigrants must either evade border control or trust the officer will be friendly once they cross. But corruption can exist on both sides of the border as the following *testimonio*, by a Guatemalan immigrant named Abel, reveals: "I went with a *coyote* this time. He brought me from Guatemala to Arizona. I had to pay twenty-five thousand quetzals, approximately three thousand dollars. I paid, but unfortunately, Mexican immigration got me at the border. They eventually told me I had to pay them if I wanted to be let off. They sequestered me. They grabbed me. They punched me."<sup>170</sup>

However, Border Patrol officers run too great a risk to conspire with undocumented immigrants. They too can be imprisoned and fined. The problem of aiding and abetting illegal immigration has been brought to the attention of the United States Congress which has mandated applicants for Border Patrol employment to undergo polygraph testing. From 2011 to August of 2013, and after more than 10,000 tests, some 200 applicants had confessed that they had close associations with *narcos* (drug-traffickers), or that in some way they were directly involved with illegal smuggling of drugs or immigrants into the U.S.<sup>171</sup> The issue of trust for undocumented immigrants is fraught with constant fear and anxiety. Undocumented immigrants have to worry about being exploited by criminals who are predatory, greedy, or dishonest on both sides of the border. For immigrants, there are no safe zones.

Ramon Perez, an indigenous Zapotec, learned about the nature of trust in the journey north. Perez arrives at a border bus station as an ingénue, and he is immediately approached by a new "friend":

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169. ORNER, *supra* note 82, at 208.

170. *Id.* at 126.

171. See Marissa Taylor & Cleve R. Wootson, Jr., *Seeing Threats, Feds Target Instructors of Polygraph-Beating Methods*, McCLATCHY WASHINGTON BUREAU (Updated on Jan. 02, 2014 02:14 PM), <http://www.mcclatchydc.com/2013/08/16/199590/seeing-threats-feds-target-instructors.html#.UileOn9fuSp>.

“Do you see that dude who’s wearing the cowboy hat? Well, that’s Juan Serna, he’s my boss,” he tells me, with the pride and arrogance of someone who has introduced Pancho Villa. “All you have to do is say that you’re a client of Juan Serna, and the police will leave you alone, because—let me tell you—if you go outside to the street right now . . . the Judicial Police will grab you—and forget it!—they’ll let you go on the next corner, with empty pockets. They’ll rip-off your change, man. But if you tell them that you’re with Juan Serna, they themselves will take you to the house where we keep the *chivo*.”<sup>172</sup>

The rite of passage is costly in every imaginable way—monetarily, emotionally, and physically. In *Mexican Voices/American Dreams*, Marilyn Davis relates how “[t]wo Mexican police officers have robbed a young man of the savings and hope of his family—\$30,000 pesos.”<sup>173</sup> It is no secret that those who seek passage north, have money hidden somewhere on their person, and some will do anything to rob them. In many cases, migrants are attempting to cross on borrowed money, and when it is stolen, they face even greater problems and setbacks.

Many who cross over to the United States long to return to their native country to see family. They have the expectation that they will return, but *sin documentos* the horrendous nightmare is played out again. Jose Angel N., the author of *Illegal: Reflections of an Undocumented Immigrant*, has lived in the U.S. more than 20 years, without being able to visit family in Mexico because if he is apprehended trying to cross, he could lose all for which he has worked so hard—his U.S. home, his possessions, his job, his friendships.

Although security and food are scant, there are no shortages of danger for those who desire a new life up north. In Mexico, the police know that would-be immigrants have money, sometimes hundreds or thousands of dollars to pay for their perilous passage to paradise. Robbers posing as *coyotes* take advantage of *pollos*, and women face even worse dangers. Perez learns of the plight of a young woman from San Salvador: “Before the journey was over, he [the human-trafficker] told her that if she didn’t cooperate, he’d abandon her on the road, and then he raped her.”<sup>174</sup>

When Maria Medina de Lopez hires a *coyote* to take her and her infant son across to the U.S., the female *coyote* says that she will first take the baby. Maria recalls, “I was very afraid because I heard talk about women who cross children and then sell them. They sell them to people who can’t have children.”<sup>175</sup> Many days later, when the baby boy is delivered, he’s been robbed too; he’s delivered naked: “I sent him with pants, boots, socks, a shirt, and

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172. RAMÓN “TANGUIS” PÉREZ, *DIARY OF AN UNDOCUMENTED IMMIGRANT* 18 (1991).

173. DAVIS, *supra* note 149, at 101.

174. PÉREZ, *supra* note 172, at 40–41.

175. DAVIS, *supra* note 149, at 105.



a cute little jacket that I had just bought him because he was going to see his father. And she [the *coyote*] gave him back naked with just one sock . . . that was it.”<sup>176</sup> Later, Maria consoled her son, “Yes, little one, I am going to save this sock so that when you’re big you can say, ‘This is what I wore when I came to the United States.’”<sup>177</sup>

### c. Documents

Undocumented immigrants have few rights, and until a landmark Supreme Court case, Mexican-Americans did not have equal protection under the 14th Amendment. *Hernandez v. Texas*<sup>178</sup> was the first time the Supreme Court recognized constitutional protections against discriminated Mexican-Americans. As is typical of Mexican-American memoirs and *testimonios*, the *Hernandez* case involved a Mexican agricultural worker who was accused of murder and who was convicted by an all-white jury. The Court held in a unanimous ruling that Mr. Hernandez was entitled to a jury composed of jurors without regard to race or ethnicity. The *Hernandez* holding’s impact was that all racial groups, not only African-Americans, benefited from the 14th Amendment’s equal protection clause.

However, the reality for the undocumented is harsh if they do not have documents. In the eyes of the law, it is documents, not history or culture that are tied to one’s identity.<sup>179</sup> Born in Guerrero, Mexico, the man who calls himself *El Mojado* speaks of his experience migrating to the U.S. illegally. He lives with his wife and four children in Dodge City, Kansas. He observes that, “Immigrants need documents. They need at least an ID or license. But there’s no way to get a license. Here in Kansas, you must drive to get to the store, to the hospital, everywhere. And everything we do is a crime. You don’t have papers, it’s a crime. You buy fake papers, it’s a crime. You live a crime.”<sup>180</sup>

Some, like Morales, luck-out by being born at the right time: “Had my mother arrived in the United States two weeks later than she did, I would have been born in Mexico. But my citizenship was determined when she entered the country over the hot sands of the Arizona desert.”<sup>181</sup> A person become a citizen in the United States by birthright, but as Morales notes, “my citizenship made little difference to me back then.”<sup>182</sup> Ultimately, documentation cannot protect an immigrant from all the challenges faced in the United States.

176. *Id.* at 109.

177. *Id.*

178. 347 U.S. 475 (1954).

179. See e.g., RODRIGUEZ, *supra* note 126; QUINTANA, *supra* note 117, at 18–19 (2012) (explaining “I grew up dark brown in the middle of white America [. . .] The white children did not play with me. I hated every minute of every day at school.”).

180. ORNER, *supra* note 82, at 215.

181. MORALES, *supra* note 132, at 11.

182. *Id.*

Nevertheless, undocumented immigrants have some opportunities to attain citizenship status, yet they know very little about legal processes or procedures, and most do not have the ability to retain an immigration lawyer. They often do not know that they can obtain permanent resident status by following certain procedures, such as immigration through a family member,<sup>183</sup> employment,<sup>184</sup> investment (500,000 to 1 million US dollars), diversity lottery,<sup>185</sup> Refugee and Asylum status,<sup>186</sup> or through provisions of the Immigration and Nationality Act allowing protection for battered spouses and children,<sup>187</sup> or other special categories.<sup>188</sup> Certainly none of them have much hope of a visa being approved by the Director of the Central Intelligence Agency.<sup>189</sup>

*d. Apprehension and Deportation*

The reality is that if unauthorized immigrants are apprehended, deportation is the likely outcome. From 2003 to 2008, deportations increased by 60% with an estimated two-thirds being Mexican.<sup>190</sup> Under the Obama administration, deportations increased significantly; there were 400,000 deportations in 2010 and projections estimated more than a 10% increase until President Obama's executive order was issued in late 2014.<sup>191</sup>

The stories of deportation are similarly heartbreaking as those of crossing the border.<sup>192</sup> The first time that Ramon "Fianguis" Perez attempts to cross the border, he is robbed of the \$550 that he had saved to pay a *coyote*—money that he had borrowed. Even so, he promises payment if he is delivered to his uncle's house in Houston. The savvy smuggler calls the uncle to be assured of payment. Perez along with "[s]ixteen men are laid down like sardines in the floor of the station wagon. Another nine are stuffed into the blue car that had been on blocks the day before."<sup>193</sup> Because Perez is one of the shorter men, he and two others ride in the trunk of a car.

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183. *Green Card Eligibility Categories*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/greencard/eligibility-categories> (last updated Sept. 12, 2017).

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. See Peter Slevin, *Deportation of Illegal Immigrants Increases Under Obama Administration*, THE WASH. POST, July 26, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/25/AR2010072501790.html>.

190. See *Associated Press*, *Mexicans Deported from US Face Shattered Lives*, DAILY NEWS: LATINO (Aug. 25, 2008), <http://www.nydailynews.com/latino/mexicans-deported-face-shattered-lives-article-1.315040>.

191. *Id.*

192. DAVIS, *supra* note 149, at 174.

193. PEREZ, *supra* note 172, at 29.

When Perez and his *compadres* finally make it across the river, all nine of them are pulled over by the authorities and taken to the immigration office in Hebronville, Texas. They are told: “You are detained for having illegally entered the country. We are going to investigate you, but first you must know your rights. You can refuse to answer our questions and you can request the presence of an attorney, and if you don’t have one, we’ll provide one.”<sup>194</sup> However, none of them ask for an attorney.<sup>195</sup> This detail is indicative of their attitudes toward the law and the legal system.

After crossing the border, unauthorized migrants still live in fear of apprehension. Constitutional protections exist against unreasonable searches even at police checkpoints.<sup>196</sup> However, Border Patrol officers set up fixed check points where they stop vehicles and briefly question drivers about their citizenship and immigration status.<sup>197</sup> In theory, Border Patrol agents cannot stop a vehicle solely on the basis of the driver appearing to be of Mexican descent. Rather, officers on roving patrol must have articulable facts establishing reasonable suspicion that a person is carrying undocumented immigrants, other than by citing ethnicity as evidence.<sup>198</sup> Examples of what may constitute reasonable suspicion have been set forth by the Court, such as,

. . . characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic are all relevant. Officers . . . also may consider information about recent illegal border crossings in the area. The driver’s behavior may be relevant, as erratic driving or obvious attempts to evade officers can support a reasonable suspicion. . . . Aspects of the vehicle itself may justify suspicion. For instance, officers say that certain station wagons, with large compartments for fold-down seats or spare tires, are frequently used for transporting concealed aliens. . . . The vehicle may appear to

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194. *Id.* at 46.

195. *Id.*

196. *See e.g.*, *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (holding that Border Control does not violate the Fourth Amendment when they set up permanent or fixed checkpoints on public highways that lead to or from the Mexican border); *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990) (holding that police sobriety checkpoints meet the Fourth Amendment’s “reasonable search and seizure” standard); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (holding that checkpoints set up for the purpose of “general crime control” were unreasonable under the Fourth Amendment); *Ill. v. Lidster*, 540 U.S. 419 (2004) (holding that the Fourth Amendment allows the police to use a roadblock to investigate an accident). Appeals Courts have addressed the stops for the sole reason of being Hispanic as a reasonable suspicion in *U.S. v. Montero-Camargo*, 208 F.3d 1122, 1131 (9th Cir. 2000) (holding that “Hispanic appearance” in areas with high Hispanic populations is not a relevant factor in deciding “whether reasonable suspicion exists to support an investigatory stop”).

197. *See Martinez-Fuerte*, *supra* note 196, at 545-46 (1976).

198. *See Brignoni-Ponce*, *supra* note 50, at 884-85 (holding that, “Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.”).

be heavily loaded, it may have an extraordinary number of passengers, or the officers may observe persons trying to hide. . . The Government also points out that trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut. . . In all situations, the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling.<sup>199</sup>

The Supreme Court addressed the question of where to draw the line between the government's interest in protecting the border from illegal entry and preserving Fourth Amendment protections, i.e. from unreasonable searches. The Court held in *United States v. Brignoni-Ponce*<sup>200</sup> that to stop an individual solely on the appearance being of Mexican descent is unconstitutional, i.e. an unreasonable stop.

Apprehension and deportation issues face all 50 states. Arizona's Senate Bill 1070<sup>201</sup> (SB 1070) highlights the fear of apprehension. This worrisome bill received national attention for its anti-illegal immigration measures. In particular, SB 1070, among other things, required that state law enforcement officers attempt to determine an individual's immigration status during a "lawful stop, detention, or arrest"<sup>202</sup> even when there is no reasonable suspicion that the individual is an undocumented immigrant. Protests across the country erupted. In Los Angeles, over 100,000 protestors, some waiving Mexican flags, walked the streets, chanting, "*Si se puede*."<sup>203</sup> Legal challenges to the Act were raised immediately. In particular, federal Judge Susan R. Bolton issued a preliminary injunction before the law was to take effect.<sup>204</sup> The preliminary injunction stopped the implementation of the "lawful stop, detention, or arrest" provisions.

The U.S. Supreme Court ruled on the challenges to the Act in its June 2012 decision, *Arizona v. United States*.<sup>205</sup> The United States Justice Department filed the case, arguing that the Act usurped the federal government's authority to regulate and enforce immigration laws. At least 11 Latin American countries filed amicus briefs supporting the U.S. Government's position, including Argentina, Bolivia, Chile, Colombia, Costa Rica, El Salvador, Guatemala, Mexico, Nicaragua, Paraguay, and Peru. On the other hand, 81 members of

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199. *Id.* at 885.

200. *Id.* at 873.

201. See Arizona S.B. 1070, § 2 (the Support Our Law Enforcement and Safe Neighborhoods Act, which Gov. Jan Brewer signed into law on April 23, 2010).

202. *Id.*

203. "*Si, se puede*" means "Yes, we can," and it is the motto of the United Farm Workers (UFW). The phrase is attributed to Cesar Chavez and Dolores Huerta, founders of the UFW. See *Arizona Immigration Law Sparks Huge Rallies*, CBC News (May 1, 2010), <http://www.cbc.ca/news/world/arizona-immigration-law-sparks-huge-rallies-1.967969>.

204. See Order Granting, in Part, and Denying, in Part, Preliminary Injunction, 703 F. Supp. 2d 980.

205. 567 U.S. 387, 392-93 (2012).

Congress filed an amicus brief in support of Arizona.<sup>206</sup> The Court struck down three provisions—Sections 3, 5(c) and 6. Section 3 made it a crime to be unlawfully present in the U.S. and fail to register with the federal government. Section 5 made it a misdemeanor for an undocumented immigrant to seek or hold a job in the Arizona, and Section 6 allowed Arizona police to detain and arrest any individual for suspicion of being an undocumented immigrant.<sup>207</sup>

The problems facing immigrants are not limited to U.S. policies. Juan de Compostela, like others, is critical of the Mexican authorities and politicians, whom he accuses of being corrupt.<sup>208</sup> In Mexico, one political party, *Partido Revolucionario Institucional* (PRI), held power in the country for over 88 years.<sup>209</sup> Compostela comments that Mexican presidents:

Come into office and see what is left in the pot. Then they borrow, increasing the debt, and leave with at least half the money. They send it to foreign bank accounts. Everyone knows that. All Mexican presidents leave office wealthy; then we are left with a huge foreign debt.<sup>210</sup>

Endemic corruption is not limited to politicians; Compostela claims that the “corruption goes down the line, and you can’t get a job unless you’re related to someone. It’s not like the United States. There you’re hired because of your skills.”<sup>211</sup>

But it is not just politicians who are distrusted; according to Compostela:

The worst robbers are the Mexican police. For a Mexican, the border is worse when you’re returning. If you’ve been in the United States without papers, the Mexican border police will take everything you have to let you back in. They know you can’t turn around, and if they won’t let you go forward, well, where can you go? No, the only way we’ll ever end our problems is with a revolution.<sup>212</sup>

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206. See Brief for Rep. Lamar Smith et al. as Amici Curiae Supporting Petitioners, *Arizona v. United States of America*, 567 U.S. 387 (2012), 2012 U.S. S. Ct. Briefs LEXIS 665.

207. See Andrew Cohen, *Razing Arizona: Supreme Court Sides with Feds on Immigration*, THE ATLANTIC (Jun. 25, 2012), <http://www.theatlantic.com/national/archive/2012/06/razing-arizona-supreme-court-sides-with-feds-on-immigration/258932/>.

208. DAVIS, *supra* note 149.

209. Associate Press, *Mexico: Ruling Party PRI Has Work to Do If It Wants to Stay in Power*, NBC NEWS (May 26, 2017) <https://www.nbcnews.com/news/latino/mexico-ruling-party-pri-has-work-do-if-it-wants-n765056>.

210. DAVIS, *supra* note 149, at 111.

211. *Id.*

212. *Id.*

At the conclusion of Rosalina Rosay's *Journey of Hope: Memoirs of a Mexican Girl*,<sup>213</sup> she criticizes Mexican activists who blame "the United States and its trade policies. . . for so many people coming here illegally." She is also frustrated, with those who criticize U.S. immigration policy, for she feels that conditions in Mexico are the problem:

If anyone is to blame, it is the elite class and the politicians of Mexico . . . And the government was—and still is—too corrupt and inefficient to help us. For years I felt disturbed every time I heard President Vicente Fox refer to Mexicans coming to America as a 'migration phenomenon.' People fleeing their home country because if they stay they face a lifetime of poverty and deprivation is not a migration phenomenon. It is a desperate journey of hope. Vicente Fox and the current president of Mexico have criticized the United States many times saying the U.S. is making a grave mistake not giving amnesty to millions of Mexicans. How can these two presidents criticize the United States? When they themselves—as well as most Mexican presidents—have neglected poor Mexican people for a great number of years?<sup>214</sup>

Increasingly among, the tired, the poor, the huddled masses, there is a sense of powerlessness and helplessness. Immigrants confront significant complications and problems on both sides of the border. Those who are well off often have little interest in the plight of the poor.

Ramon Perez also points an accusing finger at corrupt government bureaucrats when he returns to Mexico after a few years of hard work in the U.S.<sup>215</sup> He hoped to bring gifts, tools, and some savings to share with his family, but the Mexican officials manage to empty his pockets and strip him of packages by seeking a *mordida* (bribe). Perez is accused of being a smuggler, of evading import tax, but he defends himself: "I'm not a smuggler, captain. I went as a wetback, and in order to buy those tools, I had to work for a good bit of time. I'm no thief."<sup>216</sup> Perez hates the idea of letting the product of his hard work end up in the hands of the polyester-clad crooks. The Mexican officials insist on \$70,000 pesos: "Without so much as saying thank you for the thousands that I've given them, they walk silently away, taking long paces with great dignity, as if instead of a robbery, they'd just carried out an act of justice. That's the way Mexico works. It has always been that way."<sup>217</sup>

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213. ROSALINA ROSAY, *JOURNEY OF HOPE: MEMOIRS OF A MEXICAN GIRL* 170 (2007).

214. *Id.*

215. PEREZ, *supra* note 172.

216. *Id.* at 235.

217. *Id.* at 236.

e. *Undocumented Workers*

Mexican immigrants seek employment, and they are willing to work hard,<sup>218</sup> but they run numerous risks, worries, and problems—visas, worksite enforcement, raids and sweeps, awful working conditions, child labor, injury, or sexual harassment—occasionally with recourse.<sup>219</sup> As Daniel Rothenberg reports,

Few Americans work as hard as farm laborers and yet earn so little.<sup>220</sup> Migrant farmworkers work for very low wages and are subject to the vagaries of seasonal employment. Many of them cross the border daily, like Gilberto Perez. “Every day, I get up at around one in the morning. While I wash, my wife makes me tortillas and coffee, and cooks tacos or burritos for me to take to work. Then I walk a few blocks from my house and grab a taxi which takes me to the border. It’s early. It’s cold and dark. The taxi costs a dollar each way. Then I walk across the border to Calxico [California]. You have to cross over by two in the morning so that one of the *mayordomos* [bosses] will put you on his list. You get on the bus and wait there until the sun rises at around five. Then, they start up the bus and you go out to the fields to work. You leave home at one-thirty in the morning and get to the fields by six, so it’s about four and a half hours from your house to work. . . You try to sleep a bit on the bus.<sup>221</sup>

Similar experiences are recorded in Ernesto Galarza’s *Barrio Boy* which chronicles the unequal power structures between day-laborers and employers. First, Galarza, or “Ernie”, describes a crescendo of oppression as he and his family move city to city until they settle in Sacramento, California. In Jalcoctan, Mexico, Galarza observed the lack of organized labor, and thus workers are powerless to resist unfair wages and working conditions. Galarza recalls, “Gustavo came back one weekend from his job at the sugar mill to tell us he had been laid off. The police had come, the manager and his family had left, and some of the peons had been taken away.”<sup>222</sup> Once Galarza moves to the city of Tepic, Mexico, the burden of life expands.<sup>223</sup> In Mazatlán, one of Galarza’s uncles, Jose, is employed by a group who tries to have him shot rather than pay the wages owed.<sup>224</sup> Even in Sacramento life is

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218. See CAMILLA GUERIN-GONZALES, *MEXICAN WORKERS & AMERICAN DREAMS: IMMIGRATION, REPATRIATION, AND CALIFORNIA FARM LABOR 1900-1939* (1994).

219. See *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989).

220. ROTHENBERG, *supra* note 122, at 16.

221. *Id.* at 18.

222. GALARZA, *supra* note 84, at 108.

223. *Id.*

224. *Id.* at 189.

complicated, where a diversity of cultures resides and attempts to work and to live together.<sup>225</sup> Galarza endures work camps with unsanitary living conditions.<sup>226</sup>

Work related dangers, hardships, and injustices abound for immigrants trying to gain a toe-hold in the U.S. economy. 42-year-old Hector, working in California narrates the following work related injury:

Suddenly the wire broke and I fell ten or fifteen feet onto the rocks below. I couldn't move. It felt like my whole body had cracked like an egg. He and another worker started to pick me up by the arms but I asked them to not pull on my right arm—I had to insert the bone back into its socket first . . . We didn't call an ambulance or a doctor right away. I didn't want them to. I'd heard that they'll fire you if you have an accident on the job. So I waited and hoped to feel better. But after a few days, I could still barely move. Eventually I went to see the doctor. He said the break was bad, that I'd need surgery, and that I couldn't work for a while. I took the x-rays to show my boss, but he only said that I waited too long to tell him about the fall. I didn't get anything for it.<sup>227</sup>

Many such tragedies and atrocities go unreported, but this exploitation needs to be broadcast widely, and one of the benefits of studying memoirs is the insight and empathy that we gain from contemplating such horrors. To one extent, Mexican immigrant memoirs can be read as an indictment of working conditions in the U.S. For example, Roberto was a restaurant worker for 30 years before he receives a green card, but his wife and daughter are deported. He was often cheated by employers, recalling that “[t]hey count the coins and give you whatever count they feel like, they pay you whatever they want. They tell you the rate per coin ahead of time, but when it comes time to pay, they break their words all the time. It's how they make their money, and you can't argue with them. If you argue, they won't allow you to work again.”<sup>228</sup> Other hardships include the living conditions:

Your back is aching because you slept on the floor too . . . A bed over there is a piece of cardboard on a table.

Radishes ooze a lot of stuff and also makes you very itchy, gives you sores—I think it's from the chemicals they spray on them . . . your skins absorbs everything, right into the pores. A lot of people got

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225. *Id.* at 108.

226. *Id.* at 296.

227. ORNER, *supra* note 82, at 87-98.

228. *Id.* at 60.



used to showering with all their clothes on, instead of washing their clothes separately. . .<sup>229</sup>

So I would see eight, nine-year-old kids working out there, in the sun, all day long. You see it, and it make you want to cry. I didn't like to see the kids so young out there.

I was still young myself when I started working in the fields—only fifteen years old or so—but I wasn't with my family; I was alone. I was lonely and scared, but you have to keep going—with no money, no one to count on for support, you have to just keep going. You make yourself appear strong, but at the same time you're scared.<sup>230</sup>

Immigrants are especially vulnerable because of the constant fear of deportation. Even when another person breaks the law and causes an accident, the undocumented immigrant feels that he must flee:

I saw a child—a little girl—fly through the window and land on the street . . . Even though I felt it wasn't my fault—I had the green light!—I got scared seeing that girl fly out the window like that. I saw her lying on the street and I saw people start to gather around, and I just panicked. I drove off. I didn't even get out of my car until I got home. When I got to my apartment, though, the police were already there, waiting. They said that since I left the scene of the accident, I got all of the blame. They took me to jail and then a few days later I had a trial. The judge gave me six months in prison and I had to pay a fine. . . [T]he guards mess with the food—they urinate in it, they put ketchup in the oatmeal just to spoil it, they pour milk all over your dinner. Other things. No, it was an awful experience. I can't talk much about it.<sup>231</sup>

Another undocumented worker claimed:

I worked at a ceramics factory until the owner hired more workers and then at that point, she asked for our papers. She had an inspector come and he asked for my Social Security card. When I gave it to him, he said that it was useless, fake. I was out of another job.<sup>232</sup>

Another immigrant, Roberto, applies for asylum, but his lawyer lies about dates.<sup>233</sup> Despite long hours, "We never got paid overtime."<sup>234</sup> He works from 5 a.m. until 3 or 4 p.m.

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229. *Id.* at 61.

230. *Id.* at 62.

231. *Id.* at 64-65.

232. *Id.* at 68.

233. *Id.* at 70-72.

234. *Id.* at 70.

Additionally, his wife and daughter are deported. “. . .but it was very hard. My children did not want to leave. Jennifer was in the middle of her sixth-grade year, she was doing very well in school and had good friends here . . . It was hard on junior too.” These cases are too common, and sadly, “Even though he was an American citizen and didn’t legally have to leave, we felt it was best if he stayed together with his mother and sister . . . he was very sad. I think my kids didn’t want to leave me, either.”<sup>235</sup>

“When I see my kids, though, I get even sadder. Now, it has been four years that they’ve been gone. I turn around and they’re adults already. I feel I’ve missed out on their lives.”

“I miss them both very much. Too much. Sometimes when I’m lonely, I’ll get out their old toys from when they were younger. The ones they left here. . .it makes me miss them even more.”<sup>236</sup> Like most of us, he says, “I have a dream for my family and me . . . I want to buy a house here in the United States . . . Somewhere quiet . . . I want us to be together. I hope to build a life here with my family. God willing.”<sup>237</sup> In addition to physical and legal hardships, immigration also takes an emotional toll on families.

Refugees, political and economic, who migrate from Mexico continue to vote with their feet while risking their lives to cross the border into what used to be the land of freedom and opportunity. As Hispanics continue immigrating, U.S. society and culture will inevitably evolve. As Mexico and Latin America continue to fight drug and political cartels, immigration rates will remain high, and while officials in Washington debate the question of whether those *sin documentos* enrich or impoverish our country, we will learn more by studying immigrant memoirs than by listening to the political pundits. Only by carefully studying this phenomenon, this history, this literature, can we create informed laws and policies. These memoirs are not just immigrant stories, they are universal works about the human condition. In the end, we have more commonalities than differences—as the study of our diverse cultural history makes evident.

## V. USING MEMOIRS TO INFLUENCE POLICYMAKING

Immigration policies in the United States need reevaluation and improvement. Too often we have been guilty of turning our backs on those who are most vulnerable—the poor, the needy, and the oppressed. Throughout the world, there are those who yearn for what America represents—democracy, freedom, and equal opportunity—and those who are lucky

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235. *Id.* at 73.

236. *Id.* at 74.

237. *Id.* at 75.

enough to enjoy these gifts are morally compelled to think of ways in which these gifts can be extended to our hapless brothers and sisters. Too often in these contentious debates over immigration policy, politicians and voters take an antagonistic approach. Too often, they do not view immigrants as fellow humans. Some even view immigrants as the enemy—consider the role of self-appointed vigilante groups, racists, supremacists, and others who forget that we are more alike than different.

Additionally, the immigration crisis has been co-opted for the partisan purposes of divided political parties. Instead of seeking solutions and resolutions in the benefit of those desperate to immigrate, elected officials and voters sometimes become embroiled in making sure that their political party wins regardless of what is right or wrong, regardless of what is ethical or moral. In this sad and dangerous game, everyone loses. Immigrant memoirs can enlighten policy-makers to the realities that confront those who cross borders.

Despite what some disparate voices might declare, America *is* the land of plenty, and there is ample room with sufficient resources to share with others. Immigrants from around the globe are desperate to join America in the great experiment of democracy. They have sacrificed much, and they are willing to contribute everything. As depicted in the Mexican immigrant memoirs, they are willing to work hard at virtually any job even while sometimes enduring inhumane working conditions. They appreciate what the United States of America represents and what it can offer, and they can make positive cultural and economic contributions to American culture.

An often-neglected point when criticizing U.S. immigration policy, much of the impetus for migration lies with conditions in Mexico (and other countries). Why do so many Mexican nationals feel compelled to leave home? What is the Mexican government, and the governments from other Latin American countries, doing to ameliorate the immigration crisis? In a chapter titled “Immigration and Liberal Taboos,” Edward Abbey, not in jest, once suggested, “We must stop meddling in their domestic troubles and permit them to carry out the social, political, and moral revolution which is both necessary and inevitable. Or . . . let us meddle for a change in a constructive way. Stop every *campesino* at our southern border, give him a handgun, a good rifle, and a case of ammunition, and send him home. He will know what to do with our gifts and good wishes. The people know who their enemies are.”<sup>238</sup> Of course, this amounts to blaming the victim, since many who seek to leave the poverty and other problems at home are already disenfranchised; nevertheless, Abbey’s point is that the immigration situation have origins outside of the U.S. and the problem may continue until conditions improve in other countries.

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238. EDWARD ABBEY, *ONE LIFE AT A TIME, PLEASE!* 44 (1988).

Allowing every idealistic immigrant to immigrate to the United States could create chaos, so basic measures would ensure that those whom policy-makers have collectively decided should not be admitted would be barred, including documented criminals and gang members. However, determining who should have access to the U.S. should be a fair and objective process. As previously noted, our laws allow certain ways in which immigrants may attain a visa or citizenship: work, family, business, school, and asylum (religious, political, and cartel persecution). Taking precautions against illegal entry avoids later deportation and all the heartache and cost associated with that. Many feel that building a stronger border, i.e., a wall, is wrong and insulting to our neighbors, some worry about the enormous costs of such a barrier, and still others suggest that no border is impenetrable. Nevertheless, all should agree that the current system encourages immigrants to take extreme risks: crossing vast deserts, dealing with unscrupulous human-traffickers, and risking deportation or imprisonment. Furthermore, the country sends the wrong message when those who have broken laws are rewarded through amnesty programs that short-circuit the immigration process. The United States supports and has benefited from the rule of law, and obviously, policies that privilege law-breaking over law-abiding should not be promoted.

During World War II, the United States entered into an agreement with Mexico to import workers. The Mexican Farm Labor Program, also known as the Bracero Program (*brazo* is Spanish for arm, but this synecdoche is better translated as farm-hand). Erasmo Gamboa, a professor at the University of Washington, writes extensively about this program extensively because Mexicans, the “largest agricultural work force, were largely invisible.”<sup>239</sup> One concern about imported cheap labor, aside from issues of exploitation, is the question of whether these workers are assets or whether they merely depress wages. Patricia B. Strait points out that, “The second risk that immigrants are believed to pose is to the financial solvency of a host country’s social programs such as healthcare, public education, transportation, and unemployment insurance.”<sup>240</sup> Both sides of the political spectrum make strong arguments for and against these ideas. Strait also suggests that for immigration to work best, “The host population must be willing to socialize with, live along side, and ultimately intermarry with the immigrant population. In other words, the host country must have a social class structure which is permeable.”<sup>241</sup> She also notes that immigration problems have occurred in the somewhat homogenous populations of northern Europe where some “highly visible national figures have declared Multiculturalism a failure.” The “multiculturalism model” suggests that “immigrants should not be forced to fully assimilate or integrate with the host population but rather host countries should encourage and foster a pluralistic soci-

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239. See ERASMO GAMBOA & KEVIN LEONARD, *MEXICAN LABOR AND WORLD WAR II: BRACEROS IN THE PACIFIC NORTHWEST, 1942-1947* (2000).

240. Patricia B. Strait, *When Societies Collide: Part Three: Finding the Best Fit Immigration Model*, in DOROTHEA U. SEYLER, *READ, REASON, WRITE: AN ARGUMENT TEXT AND READER* 503 (11th ed., 2015).

241. *Id.* at 505.

ety.”<sup>242</sup> Since, “the mixing of various cultures, languages and[,] religions is thought to create a more advanced and sophisticated society. . .”<sup>243</sup>

Amy Chua, a Yale University law professor, provides her input on the immigration debate by acknowledging that some problems arise as a result of “increasing pluralism and diversity. Across Europe, immigration has resulted in unassimilated, largely Muslim enclaves that are hotbeds of unrest[. . .]with Muslims poised to become a majority in Amsterdam and elsewhere within a decade[. . .]Not surprisingly, virulent anti-immigration parties are on the rise.”<sup>244</sup> Within the U.S. similar anti-immigrant sentiments are on the rise. Professor Chua believes that “a common language is critical to cohesion and national identity in an ethnically diverse society.” Like many, Chua also emphasizes the importance of the rule of law: “The starkly disproportionate ratio of Latinos—reflecting geographical fortuity and a large measure of lawbreaking—is inconsistent with this principle.”<sup>245</sup> Chua favors a more equitable approach to determining who is allowed into our country.

Additionally, many unauthorized visitors do not intend to remain in the U.S. permanently. Many come as a rite-of-passage, a sort of grand tour before settling down to a job or family.<sup>246</sup> Others come to earn quick cash to start a business or buy a house back in Mexico. Most Mexicans love their country dearly and would prefer to return home eventually rather than becoming permanent second-class citizens in the U.S. Acknowledging this fact might help us provide effective guest-worker programs that could be mutually beneficial.

The startling testimonies found in Mexican-American memoirs stand as an indictment of our seeming *ad hoc* immigration policies. The first-hand accounts available give us privileged insight into the sad plight of migrants, and these narratives, if read, should rile us to action. The perusal of this literature humanizes the people who have risked their lives to live in the United States of America. Once we are familiar with their stories we cannot but feel for their abject condition. Presidential aspirants, legislators, law-enforcement personnel, and think-tank intellectuals would all benefit from reading about what happens along our border and in our communities. Mexican immigrant memoirs put flesh and feelings to statistics and demographics.

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242. *Id.*

243. *Id.* at 506-7.

244. Amy Chua, *Immigrate, Assimilate*, in *READ, REASON, WRITE: AN ARGUMENT TEXT AND READER* 492 (11th ed., 2015).

245. *Id.* at 495.

246. Paul Guajardo, *Border Crossing as Rite-of-Passage*, *J. OF SO. TEXAS ENGLISH STUDIES*.



## THE FUNCTIONS OF DREAMER CIVIL DISOBEDIENCE

RENÉ GALINDO

Civil disobedience was first practiced by undocumented immigrant students on May 17, 2010, when five student leaders from different states and student advocacy groups conducted a sit-in inside Senator John McCain's office in Tucson, Arizona. The police arrested three undocumented immigrant students on that occasion.<sup>1</sup> This first case occurred only two months after another important first, the "National Coming Out of the Shadows Day" event in Chicago on March 10, 2010, in which undocumented immigrant students first publicly proclaimed their undocumented status as a political act.<sup>2</sup> Other acts carried out by different groups of students across the country soon followed this first case of civil disobedience.<sup>3</sup> These cases documented Dreamers' unique contribution to the history of civil disobedience in this country as non-citizen political actors outside the polity<sup>4</sup> who nevertheless

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1. René Galindo, *Undocumented & Unafraid: The DREAM Act 5 and the Public Disclosure of Undocumented Status as a Political Act*, 44 *Urban Rev.* 589, 590 (2012) (providing an analysis of the first case of Dreamer civil disobedience and serving as the background for this essay. This essay differs by identifying what differentiated Dreamer civil disobedience). Julia Preston, *Illegal Immigrant Students Protest at McCain Office*, N.Y. TIMES, May 17, 2010, <http://www.nytimes.com/2010/05/18/us/18dream.html>. In March 2011, the second "National Coming Out of the Shadows" event took place under the "Undocumented, Unafraid, & Unapologetic," see IMMIGRANT YOUTH JUSTICE LEAGUE, *[Video] Coming Out: Undocumented, Unafraid, Unapologetic* (Mar. 7, 2011), <http://www.iyjl.org/coming-out-undocumented-unafraid-unapologetic/> and IMMIGRANT YOUTH JUSTICE LEAGUE, *National Come Out of the Shadows Day!* (Feb. 17, 2010), <http://www.iyjl.org/national-coming-out-of-the-shadows-day>.

2. See IMMIGRANT YOUTH JUSTICE LEAGUE, *National Come Out of the Shadows Day!* (Feb. 17, 2010), <http://www.iyjl.org/national-coming-out-of-the-shadows-day/>; See also Sofia Tarecn, *Young illegal immigrants 'coming out' in Ill.*, BOSTON.COM, Mar. 10, 2010, [http://archive.boston.com/news/local/massachusetts/articles/2010/03/10/illegal\\_immigrant\\_youth\\_hold\\_coming\\_out\\_day/](http://archive.boston.com/news/local/massachusetts/articles/2010/03/10/illegal_immigrant_youth_hold_coming_out_day/); Mary Schmich, *Undocumented and Unafraid: Despite the risks, a young illegal immigrant will publicly declare her status at a downtown rally*, CHICAGO TRIBUNE, Mar. 10, 2010, [http://articles.chicagotribune.com/2010-03-10/news/ct-met-schmich-0310-20100309\\_1\\_tania-undocumented-banners](http://articles.chicagotribune.com/2010-03-10/news/ct-met-schmich-0310-20100309_1_tania-undocumented-banners).

3. See Galindo, *supra* note 1, at 607 (explaining that within 16 months of the first event, at least eight other groups of undocumented immigrant students had also engaged in civil disobedience, with students as young as 16 being arrested).

4. See, e.g., IMMIGRANT YOUTH JUSTICE LEAGUE, <http://www.iyjl.org/> (last visited Nov 29, 2017); DREAMACTIVIST.ORG, <http://www.dreamactivist.org> (last visited Nov 29, 2017); UNITED WE DREAM, <https://unitedwedream.org/> (last visited Nov 29, 2017) (providing examples of campaign events for Dreamers). See generally WALTER NICHOLLS, *THE DREAMERS: HOW THE UNDOCUMENTED YOUTH MOVEMENT TRANSFORMED THE IMMIGRANT RIGHTS DEBATE* (2013).

participated in the historical pattern of immigrants renewing this country's democratic practices.<sup>5</sup>

The practice of civil disobedience demonstrates a new political stance for undocumented immigrants that challenges illegal status and rejects the fear and silence imposed by a "regime of invisibility."<sup>6</sup> Dreamers are creating a paradoxical situation by exiting the "shadows of society" and revealing their status publicly at coming-out demonstrations and by seeking arrest through civil disobedience. This paradox is a result of the transformation of their criminalized status, represented by deportation, into a status of radical democratic political actors, represented by civil disobedience. For Dreamers, civil disobedience is both a political strategy and a symbol of a new political identity that rejected silencing and criminalization. Additionally, they are directly challenging the deportation regime responsible for approximately 400,000 annual deportations since none of the students arrested for civil disobedience have been deported.<sup>7</sup> Coming-out events are becoming a public declaration of undocumented status as a political act.

Dreamer civil disobedience introduced an important chapter in the history of civil disobedience in this country. Their disobedience stems from their undocumented status and the "Undocumented and Unafraid" Campaign.<sup>8</sup> They built upon and extended the functions of civil disobedience from the civil rights era by highlighting their marginalized position as students facing deportation without the recourse to vote. An important aspect of Dreamer civil disobedience is to replace the political silence and invisibility of undocumented status with a new political identity, specifically as democratic actors, who are not merely low-wage laborers. This essay examines the unique contributions of Dreamer civil disobedience by first presenting a brief definitional overview of civil disobedience followed by reflections offered by theorists of this phenomenon. The essay then identifies the rationale for civil disobedience and its critical functions within the "Undocumented and Unafraid" campaign through three short texts written by a Dreamer activist. These texts provide a critical context for the interpretation of Dreamer civil disobedience since they are among the few texts written by

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5. See generally BONNIE HONIG, *DEMOCRACY AND THE FOREIGNER* (2001).

6. CRISTINA BELTRÁN, *THE TROUBLE WITH UNITY: LATINO POLITICS AND THE CREATION OF IDENTITY* 134 (2010).

7. See Mark Hugo Lopez et al., *As Deportations Rise to Record Levels, Most Latinos Oppose Obama's Policy* (Dec. 28, 2011), PEW RES. CTR., <http://www.pewhispanic.org/files/2011/12/Deportations-and-Latinos.pdf> ("Deportations reached record levels under President Obama, rising to an annual average of nearly 400,000 since 2009, about 30% higher than the annual average during the second term of the Bush administration and about double the annual average during George W. Bush's first term"); see David Nakamura, *Obama Administration Deportations of Undocumented Immigrants Drop in 2013*, THE WASH. POST (Dec. 19, 2013), [http://www.washingtonpost.com/blogs/post-politics/wp/2013/12/19/obama-administration-deportations-of-undocumented-immigrants-drops-in-2013/?tid=auto\\_complete](http://www.washingtonpost.com/blogs/post-politics/wp/2013/12/19/obama-administration-deportations-of-undocumented-immigrants-drops-in-2013/?tid=auto_complete) ("There were 369,000 deportations during fiscal year 2013, a 10 percent drop from 2012 with a record 410,000 deportations."); see *DHS Releases End of Fiscal Year 2016 Statistics*, U.S. DEP'T HOMELAND SEC. (Dec. 30, 2016), <https://www.ice.gov/news/releases/dhs-releases-end-fiscal-year-2016-statistics>.

8. See Galindo, *supra* note 1.



Dreamers that present a rationale for civil disobedience. Finally, a supporting moral argument for Dreamer civil disobedience implied in *Plyler v. Doe*<sup>9</sup> is discussed.

#### DEFINITIONS OF CIVIL DISOBEDIENCE

Theorists define civil disobedience as an illegal, public, and nonviolent conscientiously motivated act of protest by those who willingly submit to arrest and subsequent punishment.<sup>10</sup> It is also defined as disobedience carried out in “nonviolent, civil behavior”<sup>11</sup> and in “a deliberate, open, and peaceful violation of particular laws. . . which [the protesters] believe to be illegitimate for some reason.”<sup>12</sup> During civil disobedience, a law is broken for the sake of society which must then consider whether to imprison such lawbreakers or honor them for “reminding us of the grandeur of human nature.”<sup>13</sup> Gene Sharp notes that civil disobedience is generally utilized only after other efforts to bring about social change have failed and no alternative remains.<sup>14</sup> This option is then used to oppose a law that the protesters find to be unjust as opposed to merely disregarding it. Of the four categories of civil disobedience identified by Sharp,<sup>15</sup> the type practiced by undocumented immigrant students may be considered “reformatory civil disobedience” because it is “aimed at changing only a particular aspect of the regime’s policies or a particular law or regulation regarded as immoral or unjust.”<sup>16</sup>

The term “civil disobedience” contains a seemingly paradoxical pairing of compliance with resistance. “Civil” refers the open, peaceful, and public nature of the actions along with the non-concealment of identity on the part of the resisters.<sup>17</sup> Additionally, the public nature of the actions indicates that the resisters are members of a civil community.<sup>18</sup>

Civil disobedience is not a phenomenon of American culture, in fact it is a tool used around the world to protest what protesters see as illegitimate legislation. Mahatma Gandhi once noted that while public protests should be conducted peacefully, they should also court the possibility of arrest. “We must treat arrest as the normal condition of the life of the non-

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9. 457 U.S. 202 (1982).

10. Paul HARRIS, *Introduction: The Nature and Moral Justification of Civil Disobedience*, in CIVIL DISOBEDIENCE 1 (Paul Harris ed., 1989).

11. GENE SHARP, *THE POLITICS OF NONVIOLENT ACTION* 315 (1973).

12. *Id.*

13. ROBERT A. GOLDWIN, *ON CIVIL DISOBEDIENCE* 2 (1968).

14. SHARP, *supra* note 11.

15. *Id.* at 316.

16. *Id.*

17. HARRIS, *supra* note 10, at 7.

18. *Id.*

cooperator" Gandhi wrote.<sup>19</sup> For Gandhi, civil disobedience exceeds other particular acts of protest. "Complete civil disobedience is a state of peaceful rebellion- a refusal to obey every single State-made law."<sup>20</sup> This peaceful rebellion presents a greater threat than armed resistance because it can not be put down.

Gandhi indicated that civil disobedience was "the inherent right of a citizen"<sup>21</sup> but also viewed it as a human birthright "that could not be surrendered without surrender of one's self-respect."<sup>22</sup> He further believed that human agency and civil disobedience are mutually dependent, "He dare not give it up without ceasing to be a man."<sup>23</sup> The capacity to exercise conscience in response to moral obligations is central to Gandhi's definition of the human agent as a civil resister. For Gandhi, attempts to put down civil disobedience are attempts to imprison conscience. He further defined the non-violent resister as "harmless to the State willing to listen to the voice of public opinion."<sup>24</sup>

The requirement of nonviolence as a component of civil disobedience has been debated across time.<sup>25</sup> However in the modern era, Dr. Martin Luther King Jr. and Gandhi made it an essential component of modern civil disobedience. Dr. King called nonviolence an active and courageous form of resistance.<sup>26</sup> He believed that nonviolent resisters should be physically passive and accept suffering without retaliation. Just as importantly, resisters were also to be spiritually, emotionally and mentally engaged in persuading their opponents.<sup>27</sup> Dr. King's phrase, "active nonviolent resistance" centrally located nonviolence in the effort<sup>28</sup> to "awaken a sense of moral shame in the opponent."<sup>29</sup> Another goal of nonviolence, according to Dr. King, was the creation of a "beloved community" which contrasted with "tragic bitterness" resulting from violence.<sup>30</sup> The ethic of nonviolence also represents the belief in the peaceful change process of democracy.<sup>31</sup>

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19. M.K. GANDHI, NON-VIOLENT RESISTANCE 172 (1951).

20. *Id.*

21. *Id.* at 174.

22. *Id.*

23. *Id.*

24. *Id.*

25. HARRIS, *supra* note 10.

26. Martin L. King, *Pilgrimage to Nonviolence*, in STRIDE TOWARD FREEDOM 89 (1958).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. HARRIS, *supra* note 10.

## THEORETICAL REFLECTIONS ON CIVIL DISOBEDIENCE

The topic of civil disobedience is not a modern one; in fact, multiple theorists have written on this phenomenon and provide reasons for why citizens turn to this type of political action. Thoreau's 1849 essay, "Resistance to Civil Government," responded to the Mexican-American war, slavery, and a tax that supported those efforts.<sup>32</sup> Thoreau believed that citizens should never resign their conscience to a legislator and that they should not replace their moral obligations by political loyalty to civil governments, which sometimes enacted unjust laws. Thoreau asked, "Must the citizen ever for a moment, or in the least degree, resign his conscience to the legislator? Why has every man a conscience?"<sup>33</sup> Citizens should also remember where their loyalties reside. "I think we should be men first, and subjects afterwards," he wrote.<sup>34</sup> Faced with unjust laws, Thoreau questioned whether one should obey them while endeavoring to change them or whether they should be transgressed at once. Thoreau felt that the common tendency was not to act immediately, but rather to wait until the majority was persuaded that change was needed.<sup>35</sup> Thoreau argued that an unjust law should be broken and through such actions, one can challenge harmful policies. "[B]ut if it is of such a nature that it requires you to be the agent of injustice to another," he wrote, "then, I say, break the law. Let your life be a counter friction to stop the machine. What I have to do is to see, at any rate, that I do not lend myself to the wrong which I condemn."<sup>36</sup> Resistance to unjust laws illustrates the exercise of conscience and the desire not to be complicit with them.

For Thoreau, civil resistance was an internal critique of society and served as a reminder of democratic values. He noted that civil resisters served the state with their consciences but were commonly treated as enemies of the state.<sup>37</sup> He questioned if the incarceration of resisters was the best possible use that the state had for them.<sup>38</sup> The state did not recognize the value of the resisters' criticism, and Thoreau wondered, "Why does it not cherish its wise minority?"<sup>39</sup> Acts of civil disobedience can reinforce the democratic values of the state, rather than threaten them, he argued.<sup>40</sup>

John Rawls, an American moral philosopher, noted that civil disobedience could be a stabilizing device in a constitutional system, although by definition, it is an illegal act that

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32. Henry Thoreau, *Resistance to Civil Government*, in *ON CIVIL DISOBEDIENCE* (Robert Goldwin ed., 1968).

33. *Id.* at 12.

34. *Id.*

35. *Id.* at 18.

36. *Id.* at 19.

37. *Id.* at 13.

38. *Id.* at 23.

39. *Id.* at 18.

40. *Id.*

nevertheless appeals to the fundamental principles of democracy.<sup>41</sup> Those who practice civil disobedience appeal to others to consider the inequity of their condition. This service to the state is based on fidelity to the law as illustrated by the non-violent nature of the act and the willingness to be arrested and suffer legal consequences.<sup>42</sup> Rawls believed that civil disobedience could also be a mode of address in a public forum and, therefore, care must be taken by the resisters to ensure that their actions were properly understood by others.<sup>43</sup>

Hannah Arendt notes that civil disobedience was often practiced in the name of a group and not to address the problems of an individual.<sup>44</sup> Arendt, a political theorist, contrasts the individual conscientious objector with practitioners of civil disobedience, who are members of a group similar to voluntary associations.<sup>45</sup> These voluntary associations, such as those that comprised the student movement of the 60s, are termed by Arendt "organized minorities."<sup>46</sup> She further argues that civil disobedient groups should be considered protected groups, like ethnic minority groups, within the political system, since their disobedience was not recognized within the legal system. These protected groups should be recognized similarly to lobbyists whose aim is to influence and pressure legislators from within the political system.<sup>47</sup> Minorities of opinion by contrast typically operate outside the official political system and resort to civil disobedience when faced with limited political options.

Similar to the organized minorities described by Arendt, undocumented immigrants serve as a juxtaposition to the citizen within a nation-state since immigrants are "projected outside the political realm of the state, but with the continuous production of outsiders within the state itself."<sup>48</sup> Although they live and work in the United States, undocumented immigrants remain positioned as the voiceless and invisible contrast to a voting citizen. In the nation-state, political subjectivity is conflated with citizenship where the lack of political membership is also a denial of human subjectivity. As Etienne Balibar noted, "The same institutions that allow individuals to become human subjects by reciprocally granting rights to each other, also destroy these rights, and threaten the human."<sup>49</sup> The denial of citizenship rights has not prevented Dreamers from practicing civil disobedience as a right of every human being. Notably, they have been the first generation of undocumented immigrants to

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41. See John Rawls, *A Theory of Civil Disobedience*, in *CIVIL DISOBEDIENCE* 126 (Paul Harris ed., 1989).

42. *Id.* at 128.

43. *Id.* at 135.

44. Hannah Arendt, *Civil Disobedience*, in *CRISES OF THE REPUBLIC* 49, 55 (1969).

45. *Id.* at 96.

46. *Id.* at 99.

47. *Id.* at 101.

48. Etienne Balibar, *(De)Constructing the Human as Human Institution: A Reflection on the Coherence of Hannah Arendt's Practical Philosophy*, 74 *SOC. RES.* 727, 733 (2007).

49. *Id.* at 734.

directly challenge deportation through their political campaigns in which they risk deportation if they are arrested.

Dreamers commonly cite Dr. King's "Letter from Birmingham Jail," which provides a rationale for civil disobedience.<sup>50</sup> It was written in response to criticism that the demonstrations in Birmingham were untimely and unwise. Dr. King responded that the time was always right to challenge injustice and the city leaders' unwillingness to negotiate left him no alternative. Additionally, civil disobedience dramatized the issue so that they could no longer be ignored. Dr. King described a non-violent tension that was necessary for needed growth to escape from "the dark depths of prejudice and racism."<sup>51</sup> He wrote, "Injustice must be exposed, with all the tensions its exposure creates, to the light of human conscience and the air of national opinion before it can be cured."<sup>52</sup> This non-violent tension would create a crisis that would open the doors to negotiation. Additionally, he noted that unjust laws should be disobeyed "openly, lovingly, and with a willingness to accept the penalty."<sup>53</sup>

### THREE DREAMER ESSAYS

Three essays by Alaa Mukahhal, an activist affiliated with the Immigrant Youth Justice League in Chicago, provide insights into the rationale for Dreamer civil disobedience and how the disobedience contributes to their political identity. Her first essay, "I Searched for a Line to Stand In / We Define Ourselves" was read by Mukahhal at the second National Coming Out of the Shadows Day in Chicago in 2012.<sup>54</sup> In this, she introduced herself as a Palestinian born in Jordan and raised in Chicago. Her family's visa expired when she was seven, and she was placed in deportation proceedings when she applied for asylum. She described the last eighteen years as filled with fear, shame, and restrictions including not being able to work, travel, or qualify for financial aid.

Mukahhal wrote a telling metaphor to explain the daily threat of deportation she faced, "The threat of deportation has always been more real to me than the concrete I walk on."<sup>55</sup> Mukahhal repeated the call other Dreamers made: they would no longer allow others to determine who they were. This indicates that Dreamers are taking control of their narratives and political strategy and they will lead the struggle for their rights under the banner of

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50. Martin L. King, *Letter From Birmingham Jail*, in *ON CIVIL DISOBEDIENCE* 61 (Robert Goldwin ed., 1968).

51. *Id.*

52. *Id.*

53. *Id.* at 67.

54. Alaa Mukahhal, *I Searched for a Line to Stand In / We Define Ourselves*, IMMIGRANT YOUTH JUST. LEAGUE (Mar. 12, 2012), <http://www.iyjl.org/i-searched-for-a-line-to-stand-in-we-define-ourselves/>.

55. *Id.*

“Undocumented and Unafraid.”<sup>56</sup> This call signaled a new Dreamer political identity—becoming leaders of their political campaign.

Mukahhal defined herself in this essay as a human being with dignity that demanded justice in ending the approximately 400,000 annual deportations.<sup>57</sup> She argued that Dreamers would further oppose any law or policy that degraded any human being. She ended her essay by noting that her hope was not in legal systems, politicians, or administrations which she termed as providing “false hope.”<sup>58</sup> Rather, her hope was in the students themselves— “The only hope lies in the risks we’re willing to take, in the boundaries we’re willing to push, so stand up straight without fear or apologies. Tell me, what are you willing to risk?”<sup>59</sup> To Mukahhal, civil disobedience symbolizes both the risks Dreamers willingly assumed and the ability to take control of their campaign.

At a Secure Communities<sup>60</sup> public hearing on August 17, 2011 in Chicago, Mukahhal read the second text, “How to Walk Out of a DHS [In]secure Communities Hearing.”<sup>61</sup> The topic of fear appeared at the beginning in a paragraph recounting her mother’s anxiety and fear of deportation.

My name is Alaa and I’m undocumented. Today, I am here for my mother and father who spent the last 18 years living in anxiety and fear, afraid that our family is next. I’m here for my mother who when I told her about Secure Communities becoming mandatory, she put her head in her hands and asked me “When are they going to leave us alone?” I sat there, and I listened to her tell me all the friends and family she knew who were caught and deported. They weren’t criminals; they were fathers, mothers, sons, and daughters. You would never accept this life for yourselves or for your families, so why would you accept it for your neighbors and communities?<sup>62</sup>

Mukahhal’s rationale for civil disobedience indicates that greater action is needed since public hearings, press conferences and speeches have not achieved the desired results. She cited fear of deportation and the fear caused by the Secure Communities program as motivating factors for taking greater action. Her second essay ended with a call for everyone to walk-out in protest and join them at the sit-in on the street. This act of civil disobedience,

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56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. See *Secure Communities*, U.S. IMMIGR. AND CUSTOMS ENFT., <https://www.icc.gov/secure-communities> (last visited Feb. 05, 2018) (providing more information regarding the Secure Communities program).

61. Alaa Mukahhal, *How to walk out of a DHS [In]secure Communities Hearing*, IMMIGRANT YOUTH JUST. LEAGUE (Aug. 18, 2011), <http://www.iyjil.org/how-to-walk-out-of-a-dbs-insecure-communities-hearing/>.

62. *Id.*

termed a “minor offense” by Mukahhal, could possibly result in deportation, she admitted.<sup>63</sup> The theme of fear in ’s second public statement was also a prominent topic in the next essay that most clearly presented a rationale for Dreamer civil disobedience.

The third essay, “Silence Is a Blanket So Thick It Leaves You Gasping for Breath,”<sup>64</sup> was written in response to the Secure Communities hearing in Chicago. The first part described the unsettled mood of the crowd at the hearing and the meeting the students held to plan the event. Mukahhal described the Secure Communities Program as “tearing apart families and instilling a sense of fear in immigrant communities.”<sup>65</sup> The student advocacy groups had decided to conduct civil disobedience in their planning meeting to bring attention to an “unfair and broken” immigration system.<sup>66</sup> She acknowledged that every time students made their undocumented status public, they risked arrest and deportation.

In this essay, listed numerous states and locations where undocumented students had practiced civil disobedience, indicating that it had been widely adopted by Dreamers as a strategy and that none of the students detained were deported. She identified the functions of civil disobedience as raising awareness of a broken immigration system, confronting unjust laws, pushing for change, and demanding human rights.<sup>67</sup> Mukahhal rejected the accusations that students had been “reckless” and “irresponsible” for practicing civil disobedience by explaining that the students had discussed the risks, legal consequences of arrest, and their rights in detention during the planning meeting.<sup>68</sup> The student activists knowingly took a deliberative and strategic approach in deciding where and when to practice civil disobedience and understood the possible consequences.

Mukahhal drew from Dr. King’s “The Letter from Birmingham Jail” to further develop her rationale for civil disobedience. She quoted Dr. King’s line regarding bringing injustice under the scrutiny of American conscience and how civil disobedience created tension and forced the oppressor to confront the issues, stories, and humanity of the protestors.<sup>69</sup> The Dreamers’ campaign was not solely focused on challenging the Secure Communities Program or supporting the DREAM Act. Rather, it was about “human dignity, respect, and the simple right to be able to live without fear.”<sup>70</sup> Mukahhal repeated the slogan of the movement, stating that they were undocumented and unafraid and would no

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63. *Id.*

64. Alaa Mukahhal, *Silence is a Blanket So Thick It Leaves You Gasping for Breath*, IMMIGRANT YOUTH JUST LEAGUE (Sept. 30, 2011), <http://www.iyjl.org/silence-is-a-blanket-so-thick-it-leaves-you-gasping-for-breath-the-necessity-of-civil-disobedience/>.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

longer live in the shadows of society. Mukahhal countered critics of their tactics by saying it was cruel to ask undocumented students to continue to wait for immigration reform, noting that she had already waited for 18 years.<sup>71</sup> She rejected claims that students should not practice civil disobedience by arguing that it was time for students to not only engage in direct action but also take control of their stories and political strategy. She wrote:

It is cruel to ask us to wait until the time is right. We cannot bear to live in humiliation another day, and we won't wait for the media to tell our stories for us. We initiate the action, we frame the conversation, and we determine the messaging. We tell our own stories. That in itself, is a liberating feeling.<sup>72</sup>

Mukahhal further elaborated on the theme of human rights introduced during the public hearing by defining justice in light of the undocumented immigrant experience:

The cry for justice is not some abstract, theory-based ideology. It is a hard, harsh reality. It is in the abused person who is afraid to call the police for help, it is in the parent's fear that when they leave the house they may never get back to their children, it's the youth who is one wrong move away from being detained and deported. It is in the one million deportations that have happened since Obama took office. That's one million people, one million faces, one million stories. In the fiscal year 2010 alone, almost 400,000 people were deported, aided in part by Secure Communities.<sup>73</sup>

Mukahhal also discusses her personal struggles with the fear of deportation.<sup>74</sup> She referred to the conversation with her mother in which her mother confided for the first time that she and 's father had lived in constant fear for 18 years.<sup>75</sup> Her mother named all the deported people she knew, none of whom were criminals. Mukahhal was not aware that her mother knew so many deportees and had lived in fear for so many years.<sup>76</sup> Mukahhal examined her own fear of deportation: "As an undocumented person fighting for immigrant rights, I still have not completely conquered fear. Because the truth is, no matter how many times I have come out as undocumented, no matter how many rallies I attend, the fear is still there."<sup>77</sup>

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71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*



Mukahhal provided an example of her fear from the Secure Communities hearing.<sup>78</sup> After calling for a walk-out, she joined approximately 300 people who left the hearing and was followed by members of the media who requested her last name. She hesitated to provide her last name and noted the irony of the situation as someone “who came out publicly to the media more times than [she] can count.”<sup>79</sup> Mukahhal connected her fear of deportation with her desire to remain silent, citing “the systemic fear of the law and of the system [instilled in her].”<sup>80</sup> She then experientially described that silence is “a blanket so thick it leaves you gasping for breath.”<sup>81</sup>

Mukahhal credited the organizational work of undocumented immigrant student advocacy groups as the key to overcoming her fear.

A direct action is a manifestation of all our organizing work. It directly breaks people’s fear of a broken system. It is a testament to the power of our organizing efforts and community support network that when a group of undocumented youth willingly chooses to be arrested, no major action is taken against them, and they are released early the next day. It is an assurance to those wanting to speak up about their status to know that they will be all right. The community is stronger than the system.<sup>82</sup>

Mukahhal noted that the six students arrested after the Secure Communities public meeting were released and were not in deportation proceedings.<sup>83</sup> She also highlighted that every student arrested for practicing civil disobedience was released after a short period and continued to live in this country.<sup>84</sup> For Mukahhal, the success of the civil disobedience was a testament to student advocacy groups, “Even when that fear is with us when we’re alone, our courage, our trust in each other, and our awareness of the significance of the situation trump our fears. Such is the power of community.”<sup>85</sup> For Mukahhal, the importance of civil disobedience was the ability to overcome her fear of deportation, for she now understood that she was part of something much bigger than herself. She was part of a dominant movement.

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78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

## THE FUNCTIONS OF DREAMER CIVIL DISOBEDIENCE

The functions of Dreamer civil disobedience go beyond those commonly identified, such as bringing awareness to a societal injustice. Functions particular to Dreamer civil disobedience include helping members overcome the fear of deportation and symbolizing Dreamer control of their political strategy and stories. Mukahhal described undocumented status as a life lived in silence bred from fear. Civil disobedience challenges both the fear of deportation and the silence resulting from fear. Civil disobedience has the power to break the grip of fear because “it is a manifestation of all our organizing work. It directly breaks people’s fear of a broken system. It is a testament to the power of our organizing efforts and community support network.”<sup>86</sup> Mukahhal identified the organizational efforts of student advocacy groups and broader community support as the reason for no student arrested for civil disobedience being deported. Civil disobedience also functions as a symbol of the political agency of undocumented immigrant students who took control of the political strategy and their stories. According to Mukahhal, Dreamers took control because they did not want to live in humiliation for another day, nor wait any longer for the right time for political action. This reasoning paralleled the rationale presented in the “Letter from Birmingham Jail” when Dr. King rejected calls to delay direct actions.

The functions of civil disobedience from the civil rights era discussed in “The Letter from Birmingham Jail” are both similar and different to Dreamer civil disobedience. A key difference is that Dreamer civil disobedience focuses on breaking the fear of deportation and coming out of the shadows. Although the Dreamers’ political activism might be expected given their plight, their collective actions and the exercise of personal conscience are paramount. They break the fear of deportation and decade’s long practices of invisibility, silence, and living in the shadows of society. The principal barrier to the public disclosure of undocumented status and related political activism had been the fear of deportation, especially in an anti-immigrant era. Although not all undocumented immigrants will be deported, the fear of deportation nevertheless has characterized their experience as described by Mukahhal. Dreamer activist groups have been the first to collectively reject this fear experienced by undocumented immigrants across decades.

As in “The Letter from Birmingham Jail,” the adoption of civil disobedience by Dreamers indicates that they feel that there was a lack of alternatives towards achieving immigration reform. In general, civil disobedience is both a form of dissent against unjust laws and an appeal directed at a broader audience to draw attention to injustice. For these undocumented students, however, the appeal may not be as effective since they may be considered by some as lawbreakers even before engaging in civil disobedience. In opposition to this criminalized image, Dreamers created a new image of undocumented immigrants as

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86. *Id.*

democratic actors who acted politically like citizens. Civil disobedience was thus an important symbol from the civil rights era of political participation, national belonging, and the claiming of rights that was utilized by Dreamers in their “Undocumented and Unafraid” campaign. It demonstrated for undocumented immigrants, as it had for other practitioners throughout history, the exercise of conscience, willingness to challenge unjust laws, and peaceful acceptance of arrest. Additionally, in practicing civil disobedience, Dreamers are reclaiming their human dignity in an anti-immigrant climate of dehumanization and criminalization.

The practice of civil disobedience in general represents the ironic situation where respect for the law is communicated by breaking the law. This irony was depicted by the term “fidelity to the law.”<sup>87</sup> Undocumented immigrant students were already in violation of immigration law and do not need to conduct a sit-in to be considered “law-breakers” by some, since their immigration status violated civil law. They could be considered civil resisters merely by their presence in the United States and their unwillingness to “self-deport.” But more accurately, the exercise of conscience expressed in acts of nonviolent and public protest against unjust laws, along with the willingness to be arrested and suffer the consequences, made them civil resisters. Accepting the legal consequences of being arrested, as expressed by “fidelity to the law,” acknowledged Dreamers’ understanding of the moral obligations of the democratic process.

#### A MORAL ARGUMENT FOR DREAMER CIVIL DISOBEDIENCE

The ruling in *Plyler v. Doe* may be seen as providing moral support for the Dreamers’ civil disobedience. It discusses the importance of providing education to undocumented immigrants for the sake of their future social, economic, and political integration. As Motomura noted, the core of *Plyler* is a moral argument, “[to direct] the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice.”<sup>88</sup> This moral argument addresses barriers to education, declaring that “denying educational opportunity to anyone whose unlawful presence is inherently ambiguous and historically contingent is especially unjust.”<sup>89</sup> The denial of education holds consequences for both students and society since it not only consigned students to an enduring disability of illiteracy, but it also limited opportunities for societal integration and contribution.<sup>90</sup> A free public education is critical for the functional participation of immigrants in a democratic society and

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87. RAWLS, *supra* note 40, at 143.

88. Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2091 (2008).

89. *Id.*

90. *See Plyler*, 457 U.S. at 223.

the betterment of their socioeconomic position.<sup>91</sup> Additionally, the court noted that a disfavored group through education “might raise the level of esteem in which it is held by the majority.”<sup>92</sup> Dreamers built their political activism in part on this moral argument.

Dreamer civil disobedience operates from a precarious and marginalized socio-legal position as non-citizens living in a criminalized gap between national exclusion and inclusion.<sup>93</sup> While guaranteed a free K-12 public education by *Plyler*, non-citizens still lack affordable access to higher education and a pathway to citizenship. Additionally, they can still be deported. Motomura described this gap as “a zone of moral and legal ambiguity” due to the minor status of the *Plyler* plaintiff students and the contingency of undocumented status.<sup>94</sup> Their socio-legal position was further described by Olivas as “unauthorized, liminal, and contested.”<sup>95</sup> *Plyler* noted this marginalization by contrasting the social integration function of education for undocumented students on the one hand, with the possibility of their deportation on the other. Under *Plyler*, undocumented students could receive a free public K-12 education while living under the threat of deportation in spite of residing in this country with “an inchoate federal permission to remain.”<sup>96</sup> *Plyler* likewise recognized the harsh conditions faced by undocumented immigrants noting that these immigrants could become a permanent caste of exploited workers denied benefits available to citizens and lawful residents.<sup>97</sup> In its ruling, *Plyler* rejected the societal invisibility of undocumented immigrants and recognized their presence within the nation by granting them equal protection under the Fourteenth Amendment.<sup>98</sup> The majority opinion challenged the criminalization of undocumented immigrants by critically noting that undocumented status was not permanent or immutable given federal powers of discretion or congressional authority to change immigration law.<sup>99</sup> As the majority opinion noted, “the illegal alien of today may well be the legal alien of tomorrow.”<sup>100</sup> From the majority’s perspective, the mutability of undocumented status and the likelihood they would remain in the country called for the free K-12 public education of the plaintiff students as future lawful immigrants that one day might even become citizens.<sup>101</sup>

*Plyler* anticipated the eventual social, economic and political integration of undocumented students made possible through education.<sup>102</sup> The absence of this integration in spite

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91. *See id.* at 222.

92. *See id.* at 223.

93. MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND: *PLYLER V. DOE* AND THE EDUCATION OF UNDOCUMENTED SCHOOLCHILDREN 25 (N.Y. Univ. Press 2012).

94. Motomura, *supra* note 88, at 2088.

95. OLIVAS, *supra* note 93, at 100.

96. *See Plyler*, 457 U.S. at 227.

97. *See id.*, at 218-19.

98. OLIVAS, *supra* note 93, at 26.

99. *See, e.g.*, Motomura, *supra* note 88, at 2048; OLIVAS, *supra* note 93, at 2.

100. *See Plyler*, 457 U.S. at 207.

101. *See id.* at 227.

102. Motomura, *supra* note 88, at 2072.

of K-12 public education is unfinished business of *Plyler*. The “Undocumented and Unafraid” campaign created a new political identity needed to pursue the unfinished business of integration. *Plyler* recognized the role of education in the preservation of a democratic form of government, the transmission of societal values, and participation in democracy.<sup>103</sup> The ruling also noted that the nation suffered as a whole when the legal principle of equality before the law was not extended to select groups denied the means to learn the values and skills upon which civic society rested.<sup>104</sup> Undocumented status, while important, was not determinative in the majority’s opinion because the students were likely to remain in the country, and provisions were available for a change of status.<sup>105</sup> The ruling identified education as the basis for the future well-being of undocumented immigrant students as well as for the nation in general.

Dreamers await the full societal membership envisioned by *Plyler* while entrapped in two discourses of exclusion discussed in the ruling. First, undocumented immigration status is more criminalized now than in 1982. Second, a prejudicial societal view of undocumented immigrants has also grown in the current anti-immigrant climate. Both of these discourses have been fed by anti-immigrant policies across different levels of government and a growing number of deportations at the federal level. Although benefiting from K-12 education, Dreamers still struggle to obtain a college education given their lack of access to public financial aid and in-state tuition in all but 20 states.<sup>106</sup> The entrapment of Dreamers within these two discourses reproduces their national exclusion. In spite of this, Dreamers continue to bear witness to their plight in their narratives of personal and familial trauma, fear, struggle, and hope. Given the Dreamer’s lack of work authorization before the Deferred Action for Childhood Arrivals (DACA),<sup>107</sup> they were unable to fulfill the economic betterment envisioned by *Plyler*. However, Dreamers have utilized their education to participate in democratic practices as envisioned by *Plyler*. This public political participation was previously hindered by fear of deportation. The Dreamers’ courage and political vision overcame the barriers to political activism that the K-12 education provided by *Plyler* could not overcome by itself.

The “Undocumented and Unafraid” campaign responds to the moral and legal ambiguity Dreamers faced by creating a space that constructed a new political identity. This new identity is that of a political activist who rejected invisibility and silencing through the public disclosure of undocumented status. Through political activism, Dreamers have extended the

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103. See *Plyler*, 457 U.S. at 222.

104. *Id.* at 223.

105. OLIVAS, *supra* note 93, at 2.

106. *Tuition Benefits for Immigrants*, NAT’L CONF. OF ST. LEG., <http://www.ncsl.org/research/immigration/tuition-benefits-for-immigrants.aspx>.

107. Deferred Action for Childhood Arrivals (“DACA”) previously provided temporary two-year relief and work authorization for eligible Dreamers. On September 5, 2017, Acting Secretary of the Department of Homeland Security, Elaine Duke, rescinded the DACA program.

moral argument in *Plyler* beyond K-12. It now extends to higher education, attaining a pathway to citizenship, and against the deportation regime itself. The Dreamer's likewise extended the mutability and contingency of undocumented status discussed in *Plyler* by rejecting the societal invisibility and silencing instilled by the fear of deportation. With the introduction of the Dreamer as a political activist, undocumented status would no longer be a barrier to political actions that could lead to arrest and possible deportation.

#### DEFERRED ACTION FOR CHILDHOOD ARRIVALS

President Obama's DACA announcement on June 15, 2012, provided moral support for the Dreamers' political struggle.<sup>108</sup> He stated that the DACA program would "mend our nation's immigration policy to make it more fair, more efficient, and more just" for Dreamers.<sup>109</sup> President Obama characterized Dreamers as Americans in heart and mind since they had been raised and educated in this country and considered themselves part of America.<sup>110</sup> He noted that it made no sense to deport talented young people who could contribute to the economy, defend their country, and uphold democratic values. He further described Dreamers as "talented, driven, and patriotic."<sup>111</sup> He pointed to the moral dilemma represented by Dreamers who had studied and worked hard their entire life, yet still faced possible deportation to a country they barely knew. He recognized their political activism saying that Dreamers had come forward at great risk to themselves to speak out and encourage others to affirm "our own most cherished values."<sup>112</sup> President Obama noted how their political activism had garnered support from communities and churches across the country.<sup>113</sup>

The DACA executive order resulted in large part from the Dreamers' activism and civil disobedience. In spite of their contribution towards DACA, however, two undocumented immigrant students faced negative consequences from their activism and civil disobedience when they applied to for DACA. The first student, Nadia Sol Ileri Unzueta Carrasco, received DACA status in 2013.<sup>114</sup> Her renewal application was denied due to her participation in civil disobedience in 2013. The denial letter from the U.S. Customs and Immigration Services indicated that Unzueta Carrasco had been arrested for civil disobedience on May

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108. President Barack Obama, Remarks by the President on Immigration (Jun. 15, 2012) (transcript available at <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration>).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Interview by Juan González with Ileri Unzueta Carrasco & Momy Ruiz-Velasco (May 27, 2016) (transcript available at [https://www.democracynow.org/2016/5/27/civil\\_disobedience\\_is\\_survival\\_ileri\\_carrasco](https://www.democracynow.org/2016/5/27/civil_disobedience_is_survival_ileri_carrasco)).

29, 2013, after she had been granted DACA status on March 20, 2013.<sup>115</sup> The letter also indicated that she had engaged in civil disobedience on four separate occasions from 2009-2012.<sup>116</sup> The decision could not be appealed, which led her to file a lawsuit in May of 2016, accusing the government of denying her First Amendment right to free speech.<sup>117</sup> At the announcement of the lawsuit she stated, “I’m filing this lawsuit today because, like myself, there are hundreds of undocumented people who have participated in acts of civil disobedience to protect their communities. I do not want them to be targeted for their acts of political expression.”<sup>118</sup> In its letter of denial, the U.S. Citizenship and Immigration Services (USCIS) stated that her activism was a “threat to public safety.”<sup>119</sup> Unzueta Carrasco noted in contrast, “For me, civil disobedience is an act of survival. It’s something that we do to defend our communities. And [it is] important that we defend our right to continue expressing ourselves politically and be able to organize to defend our communities.”<sup>120</sup> Unzueta Carrasco was not convicted of any charges.<sup>121</sup> She dropped the lawsuit in October of 2016, after her DACA status was renewed.<sup>122</sup>

The second student, Lizbeth Mateo, was part of the Dreamer Act 5 who first practiced civil disobedience in Senator McCain’s office in 2010.<sup>123</sup> On July 22, 2013, she participated in the “Bring Them Home Campaign” with a group of 8 other Dreamers who voluntarily left the country for 13 days and reentered at the Arizona border to illustrate the need to reunify deported Dreamers with family members in the United States.<sup>124</sup> She was detained for 17 days and then released.<sup>125</sup> She received two letters from USCIS, indicating that they planned to deny her application due to the 13 days she spent in Mexico.<sup>126</sup> USCIS indicated that her stay in Mexico violated the DACA requirement of continuous residency in the United States. Mateo originally applied for DACA in October of 2015. In May of 2016, she graduated from the Santa Clara University School of Law and, in the same month, she

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115. USCIS Explanation of Denial, in *DACA Youth Punished for Protesting Sues DHS & USCIS*, NOT ONE MORE DEPORTATION (Mar. 30, 2016), <http://notonemoredeportation.com/daca-youth-punished-for-protesting/>.

116. *Id.*

117. Dorothy Atkins, *Activist Drops DACA Suit After Feds Renew Work Permit*, LAW360 (Oct. 4, 2016), <https://www.law360.com/articles/847866/activist-drops-daca-suit-after-feds-renew-work-permit>.

118. Wendy Widom, *Chicago Woman Sues Homeland Security After DACA Renewal Denied*, CBS CHICAGO (May 25, 2016), <http://chicago.cbslocal.com/2016/05/25/woman-sues-after-daca-denied/>.

119. USCIS Explanation of Denial, *supra* note 115.

120. Atkins, *supra* note 117.

121. *Id.*

122. *Id.*

123. Jorge Rivas, *An Immigrant Who Fought for DACA Says She’s Being Denied DACA Because She Fought for DACA*, SPLINTER NEWS (Oct. 24, 2016), <https://splinternews.com/an-immigrant-who-fought-for-daca-says-she-s-being-denie-1793863080>.

124. *Id.*

125. Nadia Carrasco, *To: Leon Rodriguez, Director, US Citizenship and Immigration Services: Grant DACA to Law School Graduate and Undocumented Leader Lizbeth Mateo*, MIJENTE, <https://action.mijente.net/pctitions/grant-daca-to-law-school-graduate-and-undocumented-leader-lizbeth-mateo>.

126. *Id.*

received her first DACA denial letter from USCIS.<sup>127</sup> In October of 2016, she stated that the denial of her DACA application was intended to silence her and other activists, “It’s retaliation for my organizing and an attempt to silence the community, not just me but an entire community.”<sup>128</sup> In November of 2016, she discussed her ongoing struggle to obtain DACA status on a radio program and indicated that her absence from the country for 13 days was a political demonstration for the “Bring Them Home” campaign.<sup>129</sup> She has gathered support from a wide number of law professors and members of Congress and has an online petition with 2,799 signatures as of February 2018.<sup>130</sup>

With the approaching end of the Obama presidential administration in January of 2017, a bill was introduced on December 9, 2016 to protect DACA called “The Bridge Act” (Bar Removal of Individuals Who Dream of Growing Our Economy, S-3542).<sup>131</sup> It proposed similar, temporary protections from deportation and provided work authorization. It was a bipartisan bill introduced by Senators Lindsey Graham (R-SC) and Dick Durbin (D-IL). The bill’s eligibility requirements were essentially the same required by DACA, but it would extend the two-year work authorization provided under DACA to three years. DACA recipients would maintain provisional protected status until their DACA expired and then be eligible to apply affirmatively for provisional protected status under The Bridge Act. Additionally, the bill would impose restrictions on the sharing of application information with the U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection for purposes of immigration enforcement.<sup>132</sup> At the bill’s announcement, Senator Graham recognized that Dreamers had assumed risks when they come out as undocumented, stating “I do not believe we should pull the rug out and push these young men and women—who came out of the shadows and registered with the federal government—back into the darkness.”<sup>133</sup> For his part, Senator Durbin noted that “DREAMers have so much to contribute to this country, their country, and they’ve demonstrated their commitment to the United States in countless ways – by opening businesses, becoming doctors and teachers, and serving in uniform.”<sup>134</sup> Senators Murkowski (D-AK) and Feinstein (D-CA) cited the moral obligation to free Dreamers from the fear of deportation.<sup>135</sup> Among those voicing support for the pro-

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127. *Id.*

128. Rivas, *supra* note 123.

129. Scheer Intelligence, *Lizbeth Mateo: An Immigrant Activist Using Herself as an Example*, KCRW (Nov. 4, 2016) <http://www.kcrw.com/news-culture/shows/scheer-intelligence/lizbeth-mateo-an-immigration-activist-using-herself-as-an-example>.

130. Carrasco, *supra* note 125.

131. BRIDGE Act, S. 3542, 114th Cong. (2016).

132. *FAQ: The BRIDGE Act*, NAT’L IMMIGR. L. CTR. (last updated Apr. 6, 2017), <https://www.nilc.org/issues/daca/faq-bridge-act>.

133. Press Release, Richard J. Durbin, U.S. Senator, Graham, Durbin Announce Bipartisan Bridge Act to Protect Young Individuals from Deportation (Dec. 9, 2016), <http://www.durbin.senate.gov/newsroom/press-releases/graham-durbin-announce-bipartisan-bridge-act-to-protect-young-individuals-from-deportation>.

134. *Id.*

135. *Id.*



posed Bridge Act received were CEOs from Illinois, Florida and Colorado,<sup>136</sup> The U.S. Conference of Catholic Bishops,<sup>137</sup> and The American Council on Education.<sup>138</sup><sup>139</sup>

## CONCLUSION

Three critical points concerning national exclusion, undocumented immigration status, and political agency differentiate Dreamer civil disobedience from the civil rights movement and mark their contribution to the history of civil disobedience in this country. These points are: 1) their socio-legal position of exclusion from the polity as non-citizens, 2) the function of civil disobedience of rejecting the fear of deportation that was specific to their undocumented immigration status, and 3) symbolizing ownership of the “Undocumented and Unafraid” campaign. Previous civil resisters had been characterized by Arendt as “organized minorities” that functioned as “minorities of opinion.”<sup>140</sup> Thoreau termed them a “wise minority” that offered an internal national critique and reinforced democratic principles like dissent that undergirded the political system.<sup>141</sup> Dreamers are political minorities in more ways than those discussed by Arendt and Thoreau, since they are neither citizens nor legal resident immigrants. They provide an important example of how civil disobedience can be practiced from outside the polity as they overcame the fear of deportation and publicly declared their undocumented status. As practitioners of civil disobedience, Dreamers not only operate as “wise minorities” and “minorities of opinion,” they developed their unique political identity that overcame the political invisibility of undocumented immigrants.

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136. Press Release, Ill. Bus. Immigr. Coal., 88 CEOs from Ill., Fla. and Colo. Announce Support for BRIDGE Act (Jan. 12, 2017), <http://us5.campaign-archive1.com/?u=c9b77483e42c2ad9fded0f4bb&id=cdf2250182&e=6c4486a6c8>.

137. Kevin Clarke, *U.S. Bishops Urge Legislation to Protect 'Dreamers' from Deportation*, AMERICA (Dec. 29, 2016), <http://www.americamagazine.org/politics-society/2016/12/29/us-bishops-urge-legislation-protect-dreamers-deportation>.

138. Letter from Molly Corbett Broad, Pres., American Council on Educ., to U.S. Sen. Lindsey O. Graham and Sen. Richard J. Durbin (Jan. 12, 2017), [https://www.nasfaa.org/uploads/documents/ACE\\_BRIDGE\\_Act\\_endorsement\\_letter.pdf](https://www.nasfaa.org/uploads/documents/ACE_BRIDGE_Act_endorsement_letter.pdf).

139. On September 5, 2017, the DACA program was rescinded and Acting Secretary of Homeland Security, Elaine Duke released a memorandum rejecting all initial DACA applications received after September 5, 2017 and all renewal applications received after October 5, 2017 from current DACA recipients. On January 9, 2018 Judge William Alsup of the U.S. District Court for the Northern District of California issued a preliminary nationwide injunction in *Regents of the University of California, et al. v. Department of Homeland Security, et al.* 3:17-cv-05211, requiring the federal government to accept renewal applications, <https://www.nilc.org/2018/02/13/ny-dreamers-obtain-ruling-halting-daca-termination/>. In a separate case, Judge Garaufis of the Eastern Court of New York also issued a nationwide stay in *Batalla Vidal v. Nielsen* that overlapped with that of District Judge Alsup in that it mandated the acceptance of renewal applications, <https://www.nilc.org/2018/02/13/ny-dreamers-obtain-ruling-halting-daca-termination/>.

140. ARENDT, *supra* note 44, at 101.

141. THOREAU, *supra* note 32, at 18.

From a position of political exclusion, Dreamers introduced a novel function of civil disobedience in rejecting the fear of deportation. This new function is critical to undocumented immigrant rights since it challenges the deportation regime that kept many undocumented immigrants living in the shadows and politically inactive. The introduction of this unique function of civil disobedience necessitated the development of a new political identity for undocumented immigrants represented in the “Undocumented and Unafraid” campaign. This new political identity is based on the public declaration of undocumented status as a political act that is the cornerstone of that campaign.<sup>142</sup> This campaign, developed by Dreamers, highlights their stories and their ability to overcome fear. It also introduces the undocumented immigrant as a political figure capable of engaging in the democratic process to bring needed change to immigration policy. Some Dreamers continue their activism even after DACA was introduced and thereby risk their opportunities to qualify and benefit from DACA as they seek greater immigration reforms. Thoreau noted that resisters serve the nation by acting on their conscience,<sup>143</sup> a trait exhibited by Dreamers who responded to rising deportations, and, by doing so, they courageously contributed to the public discourse on needed immigration reform.

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142. See Galindo, *supra* note 1.

143. Thoreau, *supra* note 32, at 12.

# MICROAGGRESSIONS: WHAT THEY ARE AND WHY THEY MATTER

CATHARINE WELLS<sup>1</sup>

## I. INTRODUCTION

Dr. Chester Pierce, the first African-American psychiatrist to join the faculty of the Harvard Medical School, invented the term “microaggression” during the 1960’s.<sup>2</sup> In trying to capture the distorted relationship between the races, he explained the concept of microaggression this way:

Most offensive reactions are not gross and crippling. They are subtle and stunning. The enormity of the complications they cause can be appreciated only when one considers that the subtle blows are delivered incessantly. Even though any single offense can . . . be relatively innocuous, the cumulative effect to the victim and to the victimizer is of an unimaginable magnitude. Hence the therapist is obliged to pose the idea that offensive mechanisms are usually a microaggression, as opposed to a gross, dramatic, obvious macro-aggression such as lynching.

He then went on to underscore the importance of addressing this form of subtle offenses:

The study of microaggression by whites and blacks is the essential ingredient to the understanding of in what manner in the process of interactions must be changed before any program of action can succeed.<sup>3</sup>

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1. Catharine Wells is a Professor of Law at Boston College Law School, where she teaches and writes in various areas of legal theory, including Pragmatic Legal Theory, Feminist Jurisprudence and Civil Rights Theory. The author expresses her gratitude to the students in her course, Advanced Topics in Civil Rights, for their candid and honest discussions.

2. CHESTER PIERCE, OFFENSIVE MECHANISMS (1970), *reprinted in* THE BLACK SEVENTIES 265, 265–266 (Floyd Barbour ed., 1970).

3. *Id.* at 266.

Fifty years later, writers on race have rediscovered the term and made it a part of their vocabulary. It seems like a simple term – easily grasped and assimilated. Examples include such common statements as:

- I don't think of you as Black
- You don't look Jewish
- Where are you from? No, where are you *really* from?

Such comments may seem well-intentioned but, each of them is based on a stereotype that carries a negative message. “I don't think of you as Black” suggests that there might be something wrong with being Black. Similarly, “you don't look Jewish” suggests that looking Jewish is not looking good. Further, both of these comments suggest a degree of “passing” that the target might find uncomfortable. The final comment – “where are you *really* from” – suggests that the foreign-looking recipient cannot possibly be a fellow American. Individually, as Dr. Pierce suggests, none of these comments are devastating. However, it is not hard to see that constant repetition of these comments would become more than annoying.

There is an internet video that captures this point by likening microaggressions to mosquito bites.<sup>4</sup> The video begins by stating that mosquito bites are annoying. It then suggests that mosquitoes bite some people more than others, illustrating the point by showing a series of such bites accompanied by common microaggressions. Then it proceeds:

- *Getting bit by mosquitoes every god damn day, multiple times a day is fucking annoying and makes you want to go ballistic on those mosquitoes* (showing an African American woman with a machine gun and a white person nearby saying, “another angry black woman”)
- *Which seems like a huge overreaction to those who only get bit once in a while.*
- *Of course, beyond just being truly annoying, some mosquitoes carry threatening diseases* (a picture of a white college counselor suggesting that an African American choose a less challenging major)
- *And other mosquitoes carry strains that can even kill you.* (A picture of a mosquito armed with an assault rifle saying “He looked like he was up to trouble. I felt threatened.”)

In less than two minutes, this video covers all the salient points, explaining why repeated microaggressions are oppressive; and why, in some circumstances, they threaten serious harm. But not everyone is convinced. The following two comments are typical of the negative commentary on Facebook:

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4. Fusion Comedy, *How Microaggressions are like Mosquito Bites • Same Difference*, YOUTUBE (Oct. 5, 2016), <https://www.youtube.com/watch?v=hDd3bzA7450>.

- Liberals love labels. Lol. I mean micro aggression? Seriously? That's stupid. What are you, a 5 year old child? Go cry in your safe spot. Grow up. The worlds a cold place. Stop with your stupid labels. Liberalism is a disease.
- If you're affected by microaggressions, then your level of strength and maturity is microscopic. Real adults worry about real aggressions.

At first glance, this last statement seems to make a forceful point. Hate crimes against minorities are on the rise. Recently, for example, a lawless group assaulted the African American husband of a mixed-race couple, made death threats and burned a 6-foot wooden cross in their front yard.<sup>5</sup> This was all done to chase the couple out of their neighborhood.<sup>6</sup> Compared to this, it is not surprising that some see microaggressions as relatively harmless. But if we are tempted to dismiss them, we need only remember that human beings can be harmed in many ways and that a deadly poison can be concealed in a seemingly innocuous piece of cake.

In this paper, I will talk specifically about the way in which microaggressions affect our students. Law schools are competitive places, and we need to understand microaggressions in this context. In the first section, I will examine some of the harms that microaggressions cause. In the second, I will discuss two forms of microaggression that are present in the law school environment. In each case, I will offer some brief comments about what law schools and law teachers could do to provide a more favorable environment in which all students – and especially students of color – can flourish.

## II. THE HARMS CAUSED BY MICROAGGRESSIONS

In any form of social interaction, the responses of individuals will vary. Microaggressions are no exception. Depending on the day, on the context, or even on a person's mood, the effect of a microaggression may be severe, merely annoying, or nothing much. Nevertheless, each microaggressive comment has the potential to do real damage. To see why this is so, we begin with the idea that we live in a racially divided world. It is not only that advantages like wealth, education, healthcare, etc., are unequally distributed. It is also that so many people – consciously or unconsciously – associate darker color skins with many ostensibly negative characteristics. Social scientists have demonstrated time and again that these stereotypes are very powerful. They distort our perception of reality and lead to mistaken

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5. Sara Nealeigh, Florida Man Pleads Guilty to Burning Cross in Interracial Couple's Yard, *MIAMI HERALD*, Mar.12, 2017, <http://www.miamiherald.com/news/local/crime/article138044718.html#storylink=cpy>.

6. *Id.*

judgments of people based upon their membership in a disfavored group. For example, in an early study, subjects were shown a picture of a white man in working clothes threatening a black man, dressed in a suit, with an open straight razor. The subjects were asked to describe the picture to a third party; the third party to a fourth party; and so forth. After a few rounds, many participants believed that the razor was in the hands of the black man.<sup>7</sup> This example illustrates the danger that stereotypes pose to African-American men. As observers, we are fairly loose in our perceptions, careless in our descriptions, and, most fatally, too willing to act on the basis of stereotypes. Some stereotypes may be true if somewhat overgeneralized. Most are clearly false. But they are nearly always self-fulfilling as observers fall victim to distorted perceptions.

Why, we might ask, are stereotypes so powerful? Obviously, they are not simply random errors that somehow fall into common use. Instead, they are connected to the reality of intergroup relations. In this country, for more than half its history, the vast majority of African people who came to this country were enslaved. White people claimed to “own” these Africans and, under our laws, the “owners” were entitled to abuse them and work them without compensation. It would have been difficult under these circumstances for those who favored slavery to believe that there was no difference between the races. Such a belief would have made the injustice of chattel slavery evident and would have touched off feelings of shame in those who defended it. Thus, a narrative was born – one that justified slavery in terms of the inferiority of the African races. Slaves needed the white man’s protection, white Americans said, because they were, as a race, mentally deficient and morally compromised.<sup>8</sup> Indeed, some even suggested that African slaves lacked normal human feelings.<sup>9</sup> Even after the abolition of slavery, the narrative remained. Well into the Twentieth Century, there were few defenders of the idea that the races were equal in feeling, ability, and moral stature. And unfortunately, the narrative lives on in many areas of the country and in unconscious spaces of most white minds.

Stereotypes are reinforced by the fact that they connect to this narrative. This explains why negative stereotypes are so powerful. Whether we consciously embrace them or not, they “ring true” because they resonate with the ancient story of racial superiority. Furthermore, once a stereotype lurks in our unconscious, we are likely to see every confirming

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7. Gordon W. Allport & Leo J. Postman, *The Basic Psychology of Rumor*, TRANSACTIONS OF THE N.Y. ACAD. OF SCI. 61, 61–81 (1945); GORDON W. ALLPORT & LEO J. POSTMAN, *THE PSYCHOLOGY OF RUMOR* (New York: Henry Holt & Co. 1947) (overstating the results in their studies regarding racial stereotypes); see Molly Treadway and Michael McCloskey, *Unseen: Distortions of the Allport and Postman Rumor Study in the Eyewitness Testimony Literature*, 11 LAW AND HUM. BEHAV. 19, 20 (1987) (stating that “in over half of the experiments using this picture at some stage in the series of reports, the black man, rather than the white man, was said to hold the razor in his hand”).

8. See *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

9. See, e.g., *State v. Jarrott*, 23 N.C. 76, 67 (N.C. 1840) (“some acts which between white persons are grievous provocations, when proceeding from a white person to a slave—whose passions are, or ought to be tamed down to his lowly condition — will not and cannot be so regarded”).

instance and none of the exceptions. This is because perception is often guided by our unconscious expectations. Worse, as the experiment described above shows, we will even interpret an exception (a white man holding the knife) as a confirming instance of the stereotype.

Stereotypes also gain power from the fact that they are self-fulfilling. For example, if police believe that crime is heavier in black areas, they will police those areas more intensively. As a result, crime statistics for those areas will rise. Or, to take another example, if taxi drivers will not pick up black men for fear of being robbed, black men will learn this and make other arrangements for transportation. This means that the number of harmless, black taxi riders will go down and the percentage of thieves in the pool will go up.<sup>10</sup> For all these reasons, stereotypes persist even if there is no real evidence to support them.

On a conscious level, most of us would entirely disavow the ideology of white supremacy. Many of us have worked hard to rid ourselves of “old” ideas. But they stubbornly persist and express themselves in moments when we are thinking and speaking inattentively. This creates a situation of cognitive conflict and social embarrassment. It would help, of course, if we could all just admit that this is the case and sincerely apologize for the harm we have caused. But often this is not what we do. When we find ourselves relying on a stereotype or making a microaggressive comment, we struggle to say what we “really meant.” Sometimes white people simply argue that the stereotype is true. Sometimes we try to say that the comment in question was not really based on race. But the truth is that, in a moment of inattention, our tongues connect to the putrid story of racial superiority that is buried deep in our brains and, we say or do something offensive.

This explanation of stereotypes makes it clear why microaggressions can be so painful to those are targeted. By referring to a negative stereotype, a microaggression implicitly places the recipient into a stigmatized group and attributes certain negative characteristics to her. For example, a well-meaning professor may think that a white middle-class student does not understand the social context of a given case. Without thinking, she calls on a nearby student of color by saying: “Do you think that x (the white middle-class student) has the full picture?” If the case is about drugs, single parenthood, or poverty, this may cause discomfort to the student of color. True, if the same question had been asked of a white student, everyone would have taken it at face value. However, when the question is directed at a student of color, (s)he feels singled out as a person who would know about these matters – all of which are part of a racial stereotype. Even though most students of color who end up at elite law schools have not been raised in poverty, they are keenly aware that some of their white counterparts assume that this must be true. And, whether the student of color comes from a poor background or not, (s)he will find it embarrassing to be taken as the poster child for social dysfunction.

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10. See GLENN LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 30–31 (2003) (discussing this example at length).

Labeling a student as poor in front of a large group of mostly privileged students is stigmatizing. Stigmas and stereotypes are not individual acts of hostility; they inevitably relate to social groups. Take, for example, the use of the word “faggot” as a disparaging and offensive epithet for a male homosexual. It is an ugly word: it has a guttural sound and rhymes with maggot. Its origins bespeak its extreme negativity as well as its relationship to sexism and homophobia:

**Faggot**, origin —late 13c., “bundle of twigs bound up,” from Old French *fagot* “bundle of sticks” (13c.)

Especially used for burning heretics (emblematic of this from the 1550s), so that phrase fire and faggot was used to indicate “punishment of a heretic.” Heretics who recanted were required to wear an embroidered figure of a faggot on their sleeve, as an emblem and reminder of what they deserved.

“male homosexual,” 1914, American English slang (shortened form *fag* is from 1921), probably from earlier contemptuous term for “woman” (1590s), especially an old and unpleasant one.

The oft’ reprinted assertion that male homosexuals were called faggots because they were burned at the stake as punishment is an etymological urban legend. Burning was sometimes a punishment meted out to homosexuals in Christian Europe (on the suggestion of the Biblical fate of Sodom and Gomorrah), but in England, where parliament had made homosexuality a capital offense in 1533, hanging was the method prescribed. Any use of faggot in connection with public executions had long become an English historical obscurity by the time the word began to be used for “male homosexual” in 20th century American slang, whereas the contemptuous slang word for “woman” was in active use.<sup>11</sup>

The word “faggot” is frequently used in anti-homosexual hate speech, and it can cause real suffering for gay men. It is also a good example of the operation of stigma. To see why this is so, we should listen to one man’s description of the effect this word had on him. His name is Rory O’Neill and he is the man behind Panti Bliss, a popular Irish drag queen. He was recently the center of controversy when he labeled two newspaper columnists and a Catholic Think Tank, “homophobic.” They threatened to sue for libel and the television

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11. *Faggot*, DICTIONARY.COM, COLLINS ENGLISH DICTIONARY - COMPLETE & UNABRIDGED 10TH ED., <http://www.dictionary.com/browse/faggot> (last visited July 26, 2017).



station that had aired his words quickly settled despite his objection.<sup>12</sup> His response came in the form of a speech that has been widely shared on the internet.<sup>13</sup> Let me quote from it:

Have any of you ever been standing at a pedestrian crossing when a car drives by and in it are a bunch of lads, and they lean out the window as they go by and shout “Fag!” and throw a milk carton at you?

Now it doesn't really hurt. After all, it's just a wet carton and anyway they're right – I am a fag. So, it doesn't hurt, but it feels oppressive.

When it really does hurt, is afterwards, because it is afterwards that I wonder and worry and obsess over what was it about me, what was it they saw in me? What was it that gave me away? And I hate myself for wondering that. It feels oppressive and the next time I'm standing at a pedestrian crossing I hate myself for it but I check myself to see what is it about me that “gives the gay away” and I check myself to make sure I'm not doing it this time.

Have any of you ever come home in the evening and turned on the television and there is a panel of people – nice people, respectable people, smart people, the kind of people who probably make good neighborly neighbors, the kind of people who write for newspapers, and they are all sitting around having a reasoned debate about you. About what kind of a person you are, about whether you are capable of being a good parent, about whether you want to destroy marriage, about whether you are safe around children, about whether God herself thinks you are an abomination, about whether in fact you may be “intrinsically disordered”. And even the nice TV presenter lady who you feel is almost a friend and she thinks it's perfectly ok that they are all having this reasonable debate about you and what rights you deserve or don't deserve.

And that feels oppressive.

Have you ever been on a crowded train with your gay friend and inside a tiny part of you cringes because he is being *so* gay and you find yourself trying to compensate by butching up or trying to steer the conversation onto “straighter” territory? This is you who have spent 35 years of your life trying to be the best gay possible and yet there is this small part of you that is embarrassed by his gayness.

And I hate myself for that. And that feels oppressive. And when I'm standing at the pedestrian bloody lights I am checking myself.

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12. Liam Stack, *Panti Bliss, The Accidental Activist of Ireland*, N.Y. TIMES, Aug. 19, 2015, <https://www.nytimes.com/2015/08/20/fashion/panti-bliss-the-accidental-activist-of-ireland.html>.

13. Rory O'Neil, *Panti's Noble Call at the Abbey Theatre*, YOUTUBE (Feb. 2, 2014), <http://www.youtube.com/watch?v=WXayhUzWni0>.

Have you ever gone into your favorite neighborhood café with the paper that you buy every day, and you open it up and inside is a 500-word opinion written by a nice middle-class woman, the kind of woman who probably gives to charity, the kind of woman that you would be totally happy to leave your children with. And she is arguing so reasonably about whether you should be treated less than everybody else, arguing that you should be given fewer rights than everybody else. And when you see that and the woman at the next table gets up and excuses herself to squeeze by you with a smile and you smile back. But inside you wonder to yourself, "Does she think that about me too?"

And that feels oppressive. And you go outside and you stand at the pedestrian crossing and you check yourself and I hate myself for that.<sup>14</sup>

This passage clearly describes the complexity of stigma. What Mr. O'Neill has done in this brief excerpt is to connect the practice of yelling hostile epithets with a particular kind of harm. Note that the harm he describes is not trivial. He is not talking about social discomfort or even hurt feelings. What he is talking about is a reverberant kind of self-hate. First, he hates himself not for being gay but for appearing to be the "disgusting thing" that the word "faggot" purports to describe. Then he hates himself for hating himself. Then he hates himself for trying to pretend that he is not one of those "disgusting things." Soon he is awash with the kind of negative energy that makes it difficult to find one's way in the world. This type of harm is not uncommon. It is, in fact the classic reaction to being stigmatized.

Erving Goffman, the well-known sociologist wrote a book on stigma.<sup>15</sup> This is not a book about racial stigma or homophobia—he is writing about the problem of stigma generally, but he makes a number of points that are important to think about in this context. First, he shows us how debilitating stigma can be. He begins the book by reproducing a letter that was written to an advice columnist. It is heart wrenching. "Dear Miss Lonelyhearts," the letter begins.

I am sixteen years old now and I don't know what to do and would appreciate it if you could tell me.

I would like to have boyfriends like the other girls and go out on Saturday nites, but no boy will take me because I was born without a nose— although I am a good dancer and have a nice shape and my father buys me pretty clothes. I sit and look at myself all day and cry. I have a big hole in the middle of my face that scares people even myself so I can't blame the boys for not wanting to take me out.

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14. *Id.*

15. ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (Prentice Hall, Inc. 1963).

My mother loves me, but she cries terribly when she looks at me. What did I do to deserve such a terrible bad fate? . . . I asked Papa and he says he doesn't know, but that maybe I did something in the other world before I was born or that maybe I was being punished.

Ought I commit suicide?

Sincerely yours,  
Desperate<sup>16</sup>

Like Panti Bliss, "Desperate" is stuck in a place of reverberating self-hate, and it is worth taking a moment to focus on its extreme consequences. It is not just that stigma undermines self-respect, though that is part of it. It is also that stigma leads her to experience herself as something noxious – noxious like a piece of rotten meat or a stinky stale cigarette. As a result, she comes to believe that she is so defective that self-elimination is the only decent or heroic thing she can do. Goffman refers to this harm as a question of spoiled identity. Stigma is a characteristic that you recognize as being deeply you; but, at the same time, makes you feel that your very existence is entirely unacceptable. While you may try to rationalize it and say it is not so bad, you cannot easily disconnect it from the tide of shame that floods your heart. Note how serious the result of stigma can be. Desperate's question is clearly sincere – Should she kill herself? So, too, Mr. O'Neill's fear is real. He is too well adjusted in his gayness to want to kill himself but he recognizes that the world is filled with others who would do him harm. Thus, he continues:

Have you ever turned on the computer and seen videos of people just like you in faraway countries, and countries not far away at all, being beaten and imprisoned and tortured and murdered because they are just like you?

And that feels oppressive.

Goffman's second point is that people rarely develop this state of mind all by themselves. It needs an atmosphere of family or social abuse to flourish. Stigma inevitably implicates group action. It commonly arises in the feelings that one group has about another. Social groups have a life of their own. This means that every group constructs norms of behavior that serve to define the group and to direct its activity. For example, among certain groups of heterosexual men, there is often a tacit agreement about how they should treat homosexuals. It is in this context that stigma occurs. We know a stigma is present when:

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16. Nathanael West, *Preface to id.* at 14-15.

1. There is a prevailing narrative among the dominant group that imputes a series of negative characteristics to members of a subgroup.

*In our society, gay men are an obvious example of a stigmatized group.*

2. According to this narrative, membership in the subgroup can be ascertained by the presence of certain stereotypical characteristics.

*For example, the relevant narrative with respect to gay men designates a series of characteristics that define gayness. Certain manners of speech (a soft voice, a lisp), certain manners of dress (careful attention to detail, color coordination) and certain kinds of physical gestures (limp wrists, exaggerated hand movements) are all part of what might identify any individual man as gay.*

3. The narrative depicts the subgroup as not being “normal,” and therefore less entitled to the privileges and immunities of the larger group. This results in disrespectful and damaging conduct that causes varying degrees of trauma and physical violence

*For example, the stigmatizing behavior described by Panti Bliss or the repeated stories of heterosexual violence against gay men.*

Note that the harm here is not just the immediate self-hate but also the on-going loss of the rights and privileges of group membership – some of which relate to safety and simple civility. Thus, young men who would normally think it inappropriate to yell insults from speeding cars feel entitled, maybe even obligated to do so, with respect to gay men. And gay men, sadly, live in a world that is less civil and less safe than the one that group norms would normally provide.

### III. MICROAGGRESSIONS IN LAW SCHOOL LIFE, PART I: THE CLASSROOM

On its face, the law school campus seems immune from incivility and violence. Nevertheless, most students of color live through a virtual storm of microaggressive conduct. Not all of it is on campus. Students must commute to the school, shop in the local area and find apartments in local neighborhoods. The fact that they are law students does not exempt them from the racism of the surrounding community. My law school is located in a “liberal” suburb of Boston. The town is not all white, but neither is it fully integrated. Police, merchants and even residents still look at African-Americans – especially young African American men – with suspicion. Thus, it is small wonder that students of color do not feel at home.

The law school campus, fortunately, is more integrated and the school makes a real effort to provide an inclusive environment. This integration does not mean, however, that it is a safe zone. Listening to students over the years, I have heard many descriptions of

microaggressive conduct. As a woman who went to law school in 1973, I experienced some myself. These experiences have convinced me that most classroom microaggressions could be easily avoided. As an example, I will use an episode from my own law school experience.

Our first case in Criminal Law was the *People v. Josephine Chavez*.<sup>17</sup> The prosecution alleged that Chavez had delivered a child in her home bathroom and that she either killed it or failed to take any steps to keep alive. By the time she cut the cord, the baby was limp, possibly dead, and Josephine wrapped it up in newspapers and left it under the tub. The professor, who was white and male, led the mostly white and male class through a discussion of the elements of manslaughter as they applied to the facts of the case. It was apparent from the discussion that none of the students who participated had the least understanding of what could lead a woman to take so little interest in the survival of her child. In fact, they thought her behavior so bizarre that it led them to make some negative inferences about her intent. After thirty minutes, Margaret Montoya, the lone Latina in the class, raised her hand. She was visibly upset but determined to make the class understand the facts and circumstances that made Josephine Chavez feel she had no choice. Some of the students were supportive, but there was little discussion of her points. After Margaret's intervention, the class moved on to other matters. Many years later, Ms. Montoya, now a law professor, wrote about the experience:

Contextual information should have been relevant to determining the criminality of her behavior. Josephine Chavez's behavior seems to have been motivated as much by complex cultural norms and values as by criminal intent.

A discussion raising questions about the gender-, class-, and ethnicity-based interpretations in the opinion, however, would have run counter to traditional legal discourse. Interjecting information about the material realities and cultural context of a poor Latina woman's life introduces taboo information into the classroom. Such information would transgress the prevalent ideological discourse. The puritanical and elitist protocol governing the classroom, especially during the 1970s, supported the notion that one's right to a seat in the law school classroom could be brought into question if one were to admit knowing about the details of pregnancies and self abortions, or the hidden motivations of a pachuca (or a chola, a "homegirl" in today's Latino gang parlance). By overtly linking oneself to the life experiences of poor women, especially pachucas, one would emphasize one's differences from those who seemed to have been admitted to law school by right.<sup>18</sup>

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17. 176 P.2d 92 (Cal. App. 1947).

18. See Margaret E. Montoya, *Máscaras, Trenzas, Y Greñas: Un/Masking the Self while Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. J. L. GDN. 185, 205 (1994).

Prof. Montoya's point is well taken. It is not only that the classroom discussion omitted relevant considerations. It was the fact that there seemed to be a taboo against mentioning these considerations; that "one's right to a seat" could be questioned for even knowing about them. It is tempting for all of us who are not Margaret — the only Latina sitting in in the austere confines of a Harvard classroom — to say that she is overreacting; that she would not be ostracized for speaking her mind. Indeed, there were many of us — students and perhaps even the professor — who understood her point and admired her bravery. But bravery it was. The pressure to remain silent about such things is intense. But as Professor Montoya notes, the silence comes at a cost:

The silence had profound consequences for me and presumably for others who identified with Josephine Chavez because she was Latina, or because she was female, or because she was poor. For me, the silence invalidated my experience. I have re-experienced the longing I felt that day many times. At the bottom of that longing was a desire to be recognized, a need to feel some reciprocity. As I engaged in their reality, I needed to feel them engage in mine.<sup>19</sup>

I have chosen this example because, like many microaggressions, it is devoid of any malice on the part of the professor or the students. Indeed, it is incidents like these that have led the forces of reaction to complain about "political correctness." "What is so wrong," they say, "with treating the appellate decision on its own terms? Even if some of our students feel excluded, the world is a hard place. We all have to "man up" and find our way through the difficult and sometimes hostile terrain."

I understand the impatience that lies behind these objections, but there are ample reasons why law professors ought to be concerned about this kind of problem. First, we are educators and not armored knights jousting in an intellectual marketplace. If we want our students to learn, we have to be concerned about teaching them in the place they are in. This means that if some students think of Josephine Chavez as a "homegirl" and others think of her as some stereotypical bad girl, the discussion must be open enough to include both perspectives. Secondly, there is an issue of fairness. Understandably, a student who feels excluded because of her knowledge will not do as well as one who feels validated in her ignorance. Thus, students who are treated as insiders gain an advantage over those who have been excluded.

There is also a more profound reason why law professors should be concerned about this problem. Some people suggest that American law represents the ability of those who

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19. *Id.*

are rich and powerful to assert their will over everyone else. Others believe that it represents consensus and the ideal of self-government. Most of us, I suspect, think it lies somewhere in between. This issue lies at the heart of questions about law's legitimacy. We load the dice in favor of consensus if we make room for only one perspective in the classroom. By permitting the social perceptions of the dominant white culture to be treated as fact, we beg the question of law's legitimacy. We empower those students who belong to the dominant culture to claim a kind of universality for the law that it does not deserve. If, on the other hand, there is room for many perspectives in our classrooms, we allow the law to grow towards the ideal of true universality.

My final point is this: It is not difficult to open the classroom to other perspectives. If you are assigning the Chavez case, there are a few simple things that you can do to prepare. First, you must recognize that there is a wide gulf between Chavez's perspective and that held by the appellate judges who decide her fate. Second, you need to assign a reading that describes that other perspective. You could, for example, assign parts of Prof. Montoya's article. Or there are many others that would meet the need. During the last thirty years, Critical Race Theory has blossomed, resulting in rich literature that offers many different perspectives on various areas of the law. Third, you should be sure to summarize the salient points from the article sometime near the beginning of the discussion. The advantage of this is that you are eliminating the need for students of color to represent the missing perspective – you have brought it forward and will defend it yourself if necessary. The resulting discussion will not only be more inclusive; it will also stimulate many interesting questions about the role of law in society.

#### IV. MICROAGGRESSIONS IN LAW SCHOOL LIFE, PART II: LSATs AND THE STIGMA OF AFFIRMATIVE ACTION

One common form of law school microaggression involves the concept of affirmative action. Affirmative action is controversial on both sides of the political spectrum. Some on the right argue against it because they think it discriminates against white applicants. Some on the left oppose it because they think it stigmatizes students of color. Whether you are for it or against it, there is no question that it sets up a pernicious narrative about racial differences in our student populations. It runs something like this:

Admission to law school is granted on the basis of merit. To determine merit, the school uses a numerical formula. The inputs of this formula are undergraduate grade point average and LSAT Score.

Since people of color do less well on the LSAT's,<sup>20</sup> a class admitted solely on the basis of the numerical formula would be disproportionately white. This result is not acceptable, and therefore the school admits a number of less qualified people of color.

Clearly, this narrative rests upon one very significant assumption. It equates the ordering achieved by the numerical formula with merit, and it is this sleight of hand that makes the whole concept of affirmative action so microaggressive. It is the essence of stigma. A small subgroup is identified by an easily applied criterion (skin color) and, its members are singled out as inferior or less worthy of inclusion.

This kind of stigma would be bad enough if there were only a few roughnecks who embraced it. (Imagine them riding around in cars yelling “affirmative action admittee” and throwing wet milk cartons at law students of color.) But, as Panti Bliss reminds us, roughnecks are not the only problem; the “nice people, respectable people, smart people, the kind of people who make good neighborly neighbors” may present more invidious difficulties. Whether they say so or not, many otherwise liberal and sensitive members of the law school community believe this narrative. Sadly, even students of color come under its spell. Thus, it is not enough to remain silent, to ignore it or to pretend it doesn't exist. We must investigate the matter and examine the underlying assumptions. Does the racial difference in LSAT scores rest on racial bias or real differences in ability?

First, let us consider what the test presumes to measure. At first glance, it looks like this is a technical question, requiring a Ph.D. in psychometrics. This complexity deters most of us from thinking about it, but it should not. The truth is that even if we take the technicians at their word, the LSAT has little to recommend it as a predictor of legal ability. Here is the explanation of the validity of the LSAT direct from the LSAC<sup>21</sup> website:

Correlation is stated as a coefficient for which 1.00 indicates an exact positive correspondence between candidates' test scores and subsequent law school performance. A coefficient of zero would indicate nothing more than a coincidental relationship between test scores and subsequent performance. The closer to 1.00 the correlation coefficient is, the greater the test's predictive validity [ . . . ]

The correlation between LSAT scores and first-year law school grades varies from one law school to another (as does the correlation between GPA and first-year law school grades). During 2016, validity studies were conducted for 168 law schools. Correlations between

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20. Susan P. Dalessandro et al., *LSAT Performance with Regional, Gender, and Racial/Ethnic Breakdowns: 2007–2008 Through 2013–2014 Testing Years*, LAW SCHOOL ADMISSION COUNCIL, Oct. 2014, at 22.

21. See *About LSAC*, LSAC.ORG (2017), <https://www.lsac.org/aboutlsac/about-lsac> (explaining that the LSAT, like all standardized tests, results in significantly lower scores for African-Americans. For the test taking year 2013-2014, the difference between the mean score for black and white test takers was approximately eleven points).



LSAT scores and first-year law school grades ranged from .12 to .61 (median is .41). The correlations between UGPA and first-year law school grades ranged from .02 to .50 (median is .27).<sup>22</sup>

Two things are noticeable from this account. First, when the LSAC claims that its test is valid, what this means – and *all* that it means – is that it has some correlation with first-year grades. Second, its correlation with first-year grades varies widely from school to school. And finally, a third thing is clear to anyone familiar with the law school admission process: admission to a particular law school often depends upon a few points difference in LSAT score.

The problem with linking the validity of LSAT scores with first-year grades is clear. There is some question as to whether first-year grades are a realistic measurement of one's aptitude for law. As a person who has taught first-year courses and dispensed first-year grades for thirty years, I believe that they roughly measure a certain intellectual skill that is important to lawyers. Specifically, they measure the speed and accuracy with which a student can digest a given factual hypothetical, recall certain legal principles and apply them properly to the hypothetical. What they do not measure is other useful traits. For example, a lawyer is well served by an ability to comprehend other points of view and to build bridges between differing points of view. Lawyers are also well served by an ability to strip away abstract conceptions and get to the point – the things that each side may view as vital. If we tested for these things, there might be no racial bias at all. In fact, one might argue that the ability to bridge differing points of view is heightened by the experience of being a minority in a white-dominated culture.

If we consider the correlation between LSAT's and first-year grades, the question remains whether there is a real difference in performance between the races or whether the test itself imports a racial bias. To begin, we might note that these kinds of tests have a long and doubtful history.<sup>23</sup> Racial bias was evident from the beginning. The first widely administered standardized test was the Army Mental Test that was given to soldiers during the First World War. On that test, "fair" Northern Europeans scored significantly higher than "darker" Southern Europeans and Eastern European Slavs; and, confirming the test givers' expectations, American "Negroes" scored even lower. The reason for this is not hard to see. The questions on the test had obvious cultural biases. For example, in a section where the test taker was to complete a picture by providing a missing object, the thing missing was, in one instance, a bowling ball and, in another instance, a tennis net. In effect, scoring well required you to know that bowling was played with a ball and tennis was played with a net.

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22. *LSAT Scores as Predictors of Law School Performance*, LSAC.ORG (2017), <https://www.lsac.org/jd/lsat/your-score/law-school-performance>.

23. See STEPHEN J. GOULD, *THE MISMEASURE OF MAN* (W. W. Norton & Co. 1981).

The problem with these tests and to some extent all “aptitude” tests is that it is hard to separate intelligence from the cultural assumptions of the white middle class. Modern testing tries to avoid such obvious pitfalls, but efforts to correct this problem often fail. The current LSAT consists of three parts: Reading Comprehension, Analytical Reasoning, and Logical Reasoning. These labels make it sound as though the test measures a set of race-neutral abilities, but the issue is not as straightforward as it first appears. All three of the sections require the test taker to absorb a certain amount of content. Since the test is timed, speed is of the essence. A person may answer a question correctly; but, if it takes her somewhat longer to do so, she will not finish the test. Therefore, the issue – especially at the top end of the performance curve where racial differences are the greatest<sup>24</sup> – is speed rather than ability. It is necessary therefore to ask ourselves what contributes to the speed of comprehension.

One factor is that our thought processes are sped up by the use of familiar stereotypes to rule out possible interpretations. Here is a hypothetical example of a seemingly innocent grammar question that may have a gender bias:

- **Instruction** – Indicate what changes are necessary to make the following sentence grammatical. If none is necessary, mark d) as the correct answer.
- **Mary took a karate course to protect herself from a well-known instructor**
  - a) Mary took a karate course, to protect herself from a well-known instructor.
  - b) Mary takes a karate course to protect herself from a well-known instructor.
  - c) Mary, wanting to protect herself, took a karate course from a well-known instructor.
  - d) No change

Note that to confound the common stereotype that women are passive, the writer of the question has portrayed Mary in an active role. The problem, however, lies in the fact that there are two possible interpretations of this sentence and the right answer depends upon what you think the sentence is intended to express. Some students will quickly assume that the intended meaning of the sentence is that Mary is taking a karate class (from a well-known instructor) because she wants to protect herself. They will, therefore, select answer

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24. See *The Widening Racial Scoring Gap on Standardized Tests for Admission to Graduate School*, THE J. OF BLACKS IN HIGHER EDUC. (2006), [http://www.jbhe.com/news\\_views/51\\_graduate\\_admissions\\_test.html](http://www.jbhe.com/news_views/51_graduate_admissions_test.html) (stating “In 2004, 10,370 blacks took the LSAT examination. Only 29 blacks, or 0.3 percent of all LSAT test takers, scored 170 or above. In contrast, more than 1,900 white test takers scored 170 or above on the LSAT. They made up 3.1 percent of all white test takers. Thus, whites were more than 10 times as likely as blacks to score 170 or above on the LSAT. There were 66 times as many whites as blacks who scored 170 or above on the LSAT.”).

c). Other students may see an additional possible meaning. Perhaps it is the well-known instructor that had made Mary feel less safe. These test takers may know someone who has been harassed by an instructor or perhaps they have been harassed themselves. They will see that the question is ambiguous; and, if they refer back to the instructions, they will mark d) as the correct answer. Given the gendered realities of modern life, it is likely that there will be more males in the first group and more women in the second. Unfortunately, those in the second group will be doubly penalized. Not only is it likely that their answer would be scored wrong,<sup>25</sup> but also, in a timed test, their need to resolve the ambiguity wasted precious minutes. It would not take more than one or two such ambiguities to skew the results by gender.<sup>26</sup>

A second thing that affects the time taken on an exam is priming. A test-taker is “primed” when subjected to a protocol that significantly affects performance on the test. The results are remarkable. Consider the following description of what happens when students are primed by asking them to identify their race before taking the test.

[Steele and Aronson] primed Caucasian and African American college students by asking them to identify their race just before they took a test. The researchers found that such a simple priming task had profound effects on African American test performance: African American participants took longer to answer questions and achieved lower overall scores than Caucasian participants, but only when they were primed. Thus, [they] found that priming a participant’s racial identity likely implicated a complex relationship between African American identity and negative stereotypes relating to ability.<sup>27</sup>

Since LSAT examiners ask applicants to identify their race before taking the exam, this result is particularly significant in evaluating performance differences in their scores. When you put it all together, it seems clear that African American students are unfairly stigmatized, not by affirmative action but by the racial effects of relying on LSAT scores in law school admissions. Before thinking what we might do about this problem, I want to make a

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25. Questions are retained when they are verified in an experimental section given to all test takers. An answer is considered “correct” when a group of high scoring test takers select that answer. Thus, it is likely the more traditional answer will receive a positive score.

26. The ambiguity in the hypothetical question might seem to be good reason for throwing it out. But throwing a question out of a standardized test depends on subjecting it to two different statistical tests. First, did the question discriminate—were there enough takers who got it right and enough takers who got it wrong to make it worthwhile asking the question. Second, did the question discriminate properly? Did the students who did well on the test get it right and the people who did poorly get it wrong? This second test introduces a conservative element to the test. Questions are good questions only if they replicate the results obtained by questions in the past. This means that if the test has a bias, questions will only be included if, in fact, they tend to replicate the bias.

27. Justin D. Levinson et al., *Implicit Racial Bias: A Social Science Overview*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 14 (Justin D. Levinson & Robert J. Smith eds., 2012) (citing Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African-Americans*, 69 *J. Personality & Soc. Psychol.* 797 (1995)).

point about affirmative action. The Supreme Court talks about affirmative action being justified because it gives the black population a time to “catch up” with whites. Maybe it is just the opposite – maybe we – we, white people — need time to figure out how our seemingly inclusive culture erects barriers – often invisible to us – that exclude people of color. If we are committed to racial equality, there are obviously things we could do. If we continue using the LSAT, we should at least require the LSAT to stop asking for racial identification at the testing site. Instead they should gather this information at the time people sign up for the test. Furthermore, there should be more investigation into the kinds of questions that promote racial bias and more disclosure about the limitations of the test.

My personal view is that we should stop relying on the LSAT or seriously reduce its weight. There are possible alternatives. For example, a group of researchers from U. C., Berkeley, sought to broaden the skills to be measured by an admissions test. When they did so, racial bias diminished. They report:

The research process unearthed a complex model of lawyering. It confirmed that professional competence requires not only the analytic quickness and precision that law school currently seeks, teaches and rewards but that it also requires relational skills, negotiation and planning skills, self-control and self-development, creativity and practical judgment, among other proficiencies. The research confirmed that selection based on this more complete model of lawyering greatly reduces racial disparities and captures a more fundamental meaning of merit which should drive admission decisions. Finally, and importantly, the research showed that professional competence can be predicted with objective tests. Just as the LSAT predicts likely academic success as a first-year law student, the generally race-neutral assessments that Shultz and Zedeck created and tested as a part of this research project predict a different sort of merit-likely success as a practicing, problem-solving attorney.<sup>28</sup>

Imagine, if you can, a world where admissions officers received numerical scores that provided better information about their applicants and where any form of affirmative action became unnecessary. This information is what it would take to eliminate the stigma of affirmative action and provide a truly diverse and inclusive environment for our students.

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28. Kristen Holmquist et al., *Measuring Merit: The Shultz-Zedeck Research on Law School Admissions*, 63 J. LEGAL EDUC. 565, 566 (2014).

## V. CONCLUSION

I want to end by reiterating Dr. Pierce's point about microaggressions. The past century has seen real progress in integrating American society. The worst aspects of Jim Crow are dead. *De jure* segregation is a thing of the past. Many people of color are in the forefront of American political, intellectual, and cultural life. This progress is good, but it is not enough. Minorities continue to pay an unacceptable cost for integration. So long as we subject them to the endless gauntlet of microaggression, we have not achieved full equality. As Dr. Pierce says, this is "the essential ingredient" for success. Oddly, this last part is not the hardest part of the process. The first stage has involved changing society, facing conflict, and making room for people of color in our social systems. The second stage requires only that we discard worn-out ideologies.

It is therefore ironic that just as we reach this point, we encounter serious backlash. We were willing, it seems to change many of our institutional arrangements, but now we are reluctant to accept personal responsibility for our actions. No one likes to make mistakes; no one likes to suffer the embarrassment of making those mistakes in public. As white people, the idea of microaggression hits us in this place of relative insecurity. If we want to be politically correct, we have own up to the limits of our enlightenment. We have to recognize the dark spaces still in our minds. It is easier, of course, to simply reject the requirement of political correctness. But, if we think about it, we can see that there are many reasons we should not do so. Aside from politeness and good manners, there is a basic question of justice. Americans inherit a long history of racial injustice. To ignore microaggressions is to say: Our history of racial oppression has left a residue of interpersonal discomfort between the races. Although I have received the many advantages of being white, I still insist that the comfort I receive by pretending to be race-blind is more important than the discomfort I inflict on others by refusing to recognize the persistence of racism. For those who are white and care about justice, this is an untenable position.



## SYMPOSIUM

### UNDERSTANDING DIVERSITY IN LEGAL, ACADEMIC, AND WORK ENVIRONMENTS

On April 14th, 2017, the Texas Hispanic Journal of Law and Policy (“THJ”) hosted a symposium titled “Understanding Diversity in Legal, Academic, and Work Environments” at the University of Texas School of Law. This symposium included discussion on the state of diversity in the legal practice, academia, and law schools. Speakers shared their experiences and unique obstacles, and analyzed possible solutions to increasing diversity in the legal profession.

The following biographies correspond to the speakers that participated in the THJ Symposium:

**The Hon. Gina Benavides:** Justice Gina M. Benavides spent the first 17 years of her career as a private litigator, during which time she served as President of the Cameron County Bar Association, President of the Mexican-American Bar Association of Texas, and vice president of the Texas Association of Defense Counsel. Then, in 2006, Justice Benavides was elected to the **Texas Thirteenth Court of Appeals**; she won re-election for a second six-year term in 2012. As a member of the Court, Justice Benavides has been actively involved in implementing internal procedures and policies to improve the effectiveness and efficiency of the Court. She also continues her involvement in national, state, and local associations for the betterment of the judiciary and the law, as evinced by her numerous awards for both her judicial acumen and her civic and professional contributions. Those commendations include: “Latina Judge of the Year” by the National Hispanic Bar Association (2007); the Chair’s Award of Excellence by the Texas Center for the Judiciary (2013); and “Judge of the Year” by the Hispanic Issues Section of the State Bar of Texas (2014).

**Daniel Collins:** Daniel Collins is the **Deputy Legislative Director for Texas State Senator José R. Rodríguez (D)**. After graduating from the University of Texas School of Law in 2012, Mr. Collins worked as a public policy fellow with the Texas chapter of the ACLU. During the Texas Legislature’s 2013 Session, he worked for Sen. Eddie Lucio, Jr. (D) as his General Counsel and Press Secretary, before joining Sen. Rodríguez’s office during the 2015 Session.

Apart from his responsibilities as Sen. Rodríguez's Deputy Legislative Director, Mr. Collins serves as a board member of the Austin LGBT Bar Association.

**Ricardo "Rick" Garza:** Rick Garza serves as **Assistant Director of Student Affairs, Inclusion, and Community Engagement at the University of Texas School of Law**. His primary responsibilities in this role include managing the Society Program, partnering with Texas Law's student organizations on leadership and strategy, and serving as the law school's principal student resource for diversity and inclusion programming. Rick also works especially closely with Texas Law's affinity, minority, and public-service oriented student groups regarding organizational development, fundraising, policy, and community outreach.

**Lewis Hutchison, Jr:** Lewis Hutchison joined **Duke Law School** in March 2016 as the **Dean of Students**. He was most recently the Assistant Dean for admissions and financial aid at the University of South Carolina School of Law, where he was recognized as the Faculty/Staff Member of the Year by the Black Law Students' Association. Lewis received his undergraduate degree at New Mexico State University, where he earned the distinction of being a Crimson Scholar. He then enrolled at the University of Texas School of Law, where he was the Chair of the Student Recruitment and Orientation Committee and a student member of the Admissions Committee.

**Punam Kaji:** Punam Kaji is a **litigation associate with Haynes & Boone's Houston office**. Her work is primarily in the field of employment and labor law. She has handled numerous litigation matter before both the federal Occupational Safety and Health Review Commission ("OSHRC") and its state equivalents. She frequently volunteers with various domestic violence organization, is active in bar associations, and is committed to pro bono work. Punam recently had the honor of being selected for the Leadership Council on Legal Diversity (LCLD) Pathfinder Program. She is also Chair-Elect of the Asian Pacific Interest Section of the State Bar and VP of Community Outreach and CLE of the South Asian Bar Association of Houston.

**Prof. George A. Martinez:** George A. Martinez is a **Professor of Law at the Dedman School of Law at Southern Methodist University**. He received his law degree, cum laude, from Harvard University. He holds a master's degree in philosophy from the University of Michigan and an undergraduate degree in philosophy, with high distinction, from Arizona State University. He has published extensively in the areas of civil rights law and race.

**Yulanda McCarty-Harris:** Yulanda L. McCarty-Harris, is a Senior Certified Affirmative Action Professional (Sr. CAPP), and serves as the **Executive Director for the Office for Inclusion and Equity under the Division of Diversity and Community Engagement at the University of Texas at Austin**. In her role, she is responsible for the strategic direction and leadership of the office and supporting the university's commitment to fulfill equal opportunity laws and policies. Ms. McCarty-Harris oversees the administration of the university's Title VI, Title VII and Title IX compliant intake, triage, investigation and resolution process,



and also oversees the university's affirmative action program and provides counsel to and advises university employees and departments about equal opportunity, nondiscrimination, and anti-harassment laws.

**Prof. Catharine Wells:** Keynote speaker Prof. Wells is a **Professor of Law and Law School Fund Research Scholar at Boston College Law School**, where she teaches and writes in various areas of legal theory, including Pragmatic Legal Theory, Feminist Jurisprudence and Civil Rights Theory. She is a nationally recognized expert on Pragmatism and its relationship to American legal theory. Prof. Wells has taught at a number of law schools, including those at the University of Southern California, Stanford University, the University of Arizona and the University of Utah. Her law review articles have been published in many journals including the Harvard Law Review, the Michigan Law Review, University of Southern California Law Review, and the Northwestern Law Journal.

**Sandra S. Yamate:** Sandra S. Yamate is the **Chief Executive Officer of the Institute for Inclusion in the Legal Profession (IILP)**. IILP is a 501(c)3 organization dedicated to creating a more diverse and inclusive legal profession through its research, programs and publications. A lawyer by training, Sandra spent ten years as the Director of the American Bar Association's Commission on Racial and Ethnic Diversity in the Profession and was the first Executive Director of the Chicago Committee on Minorities in Large Law Firms. Prior to that, Sandra was a litigator in Chicago for ten years. Sandra earned her J.D. from Harvard Law School and an AB in Political Science (cum laude) and History (magna cum laude) from the University of Illinois at Urbana-Champaign, where she was elected to Phi Beta Kappa.

**Phyllis Young:** Phyllis Young is a **Partner at Akin Gump Strauss Hauer & Feld LLP**. Ms. Young specializes in finance, financial restructurings, mergers and acquisitions, private equity, commercial contracts and other corporate matters, with industry expertise in energy, manufacturing, steel, OCTG, petrochemicals, technology and retail. She routinely handles secured lending transactions, debt restructurings and complex intercreditor arrangements. Ms. Young is a member of the Houston office's Diversity and Hiring Committees and serves as chair of the Pro Bono Committee. She is also a member of the State Bar of Texas, the International Women's Insolvency and Restructuring Confederation (IWIRC), Texas Wall Street Women, and the Houston Bar Association.



## **FROM EXCLUSION TO PIONEERING: THE INTRODUCTION OF DIVERSITY TO THE LEARNING AND PRACTICE OF LAW**

**SPEAKER:** YULANDA McCARTY-HARRIS, EXECUTIVE DIRECTOR OF THE  
UNIVERSITY OF TEXAS'S OFFICE OF INCLUSION AND EQUITY

**PRESENTER:** ADIA MERCADO-MONTERO, THJ CO-SYMPOSIUM EDITOR

**Adia Mercado:** Good morning, everyone. My name is Adia Mercado-Montero and I am one of the symposium editors for the Texas Hispanic Journal of Law and Policy. On behalf of our editorial board I want to welcome you to the 2017 Symposium: Understanding Diversity in Legal, Academic, and Work Environments. We'd like to thank our sponsors for making this possible. We extend thanks to the Office of Student Affairs, the Center for Women in Law, who provided breakfast, the Hispanic Bar Association, the Department for Diversity and Community Engagement, Lloyd Gosselink Rochelle & Townsend, and Kaplan Law Firm, for their generous support today.

People of color, as well as people of differing physical abilities, diverse ethnicities, and gender identities, have made important inroads into the legal profession and academia over the last two decades, but in many cases, underrepresented groups are still trying to gain opportunities for advancement, and to create environments in which they feel valued and welcomed. The purpose of this symposium is to provide diverse people an opportunity to share their perspectives about the role of diversity in the study and practice of law. It's also an opportunity for them to share their experiences as attorneys, professors, and students. Our keynote speaker will give us ideas on coping with unpleasant experiences of exclusion and help us to learn how to help others feel included in our respective environments. But first, it is my great honor and privilege to introduce Ms. Yulanda McCarty-Harris, who's going to be our opening speaker today. She'll be sharing about the introduction of diversity to the study and practice of law in a very personal context. She'll be talking about her experience as a woman of color, navigating varying legal environments: from law school, to the law firm, to academia.

Ms. Yulanda L. McCarty-Harris serves as the Executive Director for the Office for Inclusion and Equity, under the Division for Diversity and Community Engagement here at the University of Texas at Austin. In her role, she's responsible for the strategic direction and leadership of the office, and supporting the university's commitment to fulfilling equal op-

portunity laws and policies. She oversees the administration of the university's Title VI, Title VII, and Title IX compliance. She also oversees the university's affirmative action program and advises both university employees and departments about equal opportunities, non-discrimination, and anti-harassment laws. She's licensed to practice law in Texas and Ohio, and received her undergraduate degree from the University of Texas at Austin. She received her Juris Doctorate from the Southern Methodist University of Law in Dallas. She is also a senior certified affirmative action professional. Ms. McCarty-Harris currently serves, also, as the National Board Membership Chair for the American Association of Access, Equity, and Diversity, which is the oldest operating association of professionals in the equal opportunity and affirmative action profession. Please join me in welcoming Ms. McCarty-Harris.

**Yulanda McCarty-Harris:** Good morning. Wow. It is indeed an honor and pleasure to speak with you, and before I get started, I would like to thank a couple of the students who reached out to me: Adia Mercado-Montero, who personally invited me, and also Zachary Burnett if he's here, who was on me about my bio for weeks and weeks. And also to the Symposium Committee, and you know I'm really appreciative because I just came to campus this past September, and to be here at my alma mater is just an unbelievable dream. In fact, sometimes I have to pinch myself because if you'd have told me thirty years ago, or just even perhaps just a few years ago, that I would be working and serving as the Executive Director for the Office of Inclusion and Equity, which is such an integral part of our campus community, I would say "no way."

But I am a true believer of purpose. And I believe that I'm here for a reason. I spent the last 20 years northeast Ohio with my family and when I got out of law school, and actually you know before I go: there's a professor here. I cannot forget professor Martinez. Thank you. I saw your name on the list. He was one of my professors and I hope he doesn't tell any stories about me. But, he was one of my professors at SMU Law School.

The topic – I know is published in your materials – is "From Exclusion to Pioneering: the Introduction of Diversity to the Learning and Practice of Law." But when I asked Adia about who is going to be my audience and what would I speak about, well things have been so crazy at my job. Let me just give you a brief overview. I came here actually to be the Director of Compliance and Equity for the school, and that was going to be working with the affirmative action plan. And so, I had that experience. I had been a director at Cleveland State for like three or four years. I had also been a director of an office at Youngstown State University. That dealt also with compliance issues and diversity, and I had been doing this type of work for like fifteen years. But quickly, there was a transition that happened in my office, and I knew that the person that led it, she had been there like twenty-seven years. So actually I came here, and I talked to my husband about it, and I took about a thirty thousand dollar pay cut to come to my alma mater. I really wanted to be back in Texas. My mother was

getting older, and I needed my family to be in Texas. And I thought for a long time that my husband pulled me away from my family, and I need to come back.

But just a quick overview: so, the office changed. Within about a week or two weeks, we lost one of our investigators. And basically, they knew I had investigative skills. When you become a director you're like a working director. You're not just telling people what to do. The offices are very, very small, right? Usually, five at the most. And you can imagine here there were five or six people at our office, and we were handling both compliance issues as well as diversity issues. And so, I became an investigator. They asked me if I could do that. And within a couple of months after that – three months after that, the other investigator announced that he would be leaving. And then, we lost our administrative assistant, and here I am. And then we got a new person that came in as a temporary. And here I am wearing four different hats, trying to run an office to make sure that basically our campus community is safe and respected and valued during all of these cases.

So, when they asked me to do this, I was like there's no way I could fit this in my schedule because the hours at work were turning into fourteen, sixteen, sometimes eighteen-hour days, just trying to do the work. So here I am. And I'm trying to figure out this thing about the woman of color. And she [Adia] asked me to speak about that in this vast world of diversity and inclusion. Particularly my experience – I'm going to talk about as an undergraduate student, actually, as a law student, as an attorney, and administrator. And I look back over it and sometimes I was amongst a few. And sometimes I was the only person of color in a room. And these things leading me up to the law has really shaped who I am.

But if I look over the thirty years – when I was here in 1985 – that's when I came in as an undergrad. I think though a lot of things have shaped me, and my story goes beyond race. And I think my story goes beyond gender. The many aspects and challenges and experiences come from me to me as a young girl who came from a small rural town and landed at a large urban university in 1985, and then on to a private law school like SMU. But, what I remember most is like struggling with my identity. Not quite fitting in. I found myself trying to be this intellectual giant in one sense, then going back home and trying to be this young woman who had to make sure that I didn't come across as too educated, better than anyone else. I found myself changing my voice. I found myself speaking differently, so my family would not say you're at home now, you can stop speaking in your white voice. Speak like you're from Littlefield, Texas.

You see I grew up in this small town of Littlefield, Texas. It's just on the lower part of the panhandle called Littlefield, Texas, yes. And in fact, we're known as the home of Waylon Jennings, country and western singer. I, however, as a UT Alum discovered that George W. Littlefield, actually, a regent of the University of Texas, whose name is visibly entwined with many aspects of UT Law, including the Littlefield Fountain in front of the UT Tower, made his greatest count of acquisition when he purchased for \$2, three-hundred and twelve-thou-

sand acres. And thus, founding my town of Littlefield, Texas. So, my town is only about six-thousand people, and here I was. So, I was kind of part and parcel of UT before I came here. But as I stated, I struggled with identity, and when I got here I masked a lot of it because I really thought I was pretty smart. I was in the top ten percent of my class like many of you. I was an athlete. I was a star state-competitor in track, I had come here. I was also part of the regional finals basketball team. I was very, very popular in school. I was like this all wild-cat girl, or athletics. I was like the homecoming queen.

But when I got here at UT I made my first C, and I remembered it was like devastating. It was like I never made a C, ever. Then, I remember my first year this professor telling me in my Computer-Science class that no blacks were going to pass his class. Or at least I remember hearing that because I dropped it. I didn't even think about it, I just dropped it. And then I remember getting introduced to my blackness, right? This small town, we were actually if I think about it when I got here, this is the first time I really start figuring out this whole issue about race, right? We lived on the other side of the tracks. And those that may be in the room, if you lived on the other side of the tracks, you really didn't think about being over on the other side of the tracks. That's just where all the black people lived. And the upstairs, was pretty much all the white people. And I didn't really think about this, but when I came here I was introduced to this thing of blackness. And we had these shirts that said "Black by Popular Demand." And on the back of our shirts were "You wouldn't understand." So, I went home and wore this shirt very proud, and my father says to me, "Why do you have 'Black' strolled all across your shirt?" "Everybody knows you're black." And I said, "You wouldn't understand."

And so, I remembered marching with those here, we were marching to the State Capitol. We were marching because there was this fraternity that had decided to have these shirts, and it was supposed to be of Michael Jordan but it was a Black Sambo. And he had these big red lips, large lips, and he had an earring. And then I thought about it and I never knew the black national anthem growing up. And so, at UT is where I learned about these social justice issues, about equal rights and struggles that my ancestors had. Who was I? Who was I becoming? I wasn't quite sure. I joined a sorority, pink and green, Alpha Kappa Alpha. I like those sisters they were very distinguished, classy. And I said, I want to be one of them. And they wanted to give back also.

I was not a very strong student here even though I had done all I could in high school. I thought I was very smart. I was not a strong student. In fact, many of the blacks were told that if you didn't flunk out you were doing good. So, that is what I thought was the norm. But I remember my third year, here at UT, I took a media law class, and I did very well. It was one of my few A's that I got and I fell in love with the law. I thought that the law could change. I thought everything revolved around the law and no matter what you were doing, whether it was your apartment contract, whatever it was, you had to know about the law. Now I had a cousin that went to SMU that was also a lawyer and I had another lawyer

that went to Texas Southern, another cousin that went to Texas Southern. But here I said “Well, how am I going to go to law school?” I had only mastered a 2.8 GPA. So, I decided I needed to work to basically create a different life experience for myself, that I would be a different student going in to law school.

So I got a job at the Austin American-Statesman as a sports writer. I took that job to prepare for the LSAT. I didn’t do very well the first time and then the next time I scored 13 points more, better than I had done before. In fact, I think they questioned, “Was I the same person that took the test?” So I applied for, what I thought at the time was, the top five law schools: UT Austin, of course, University of Houston, Texas Tech, Baylor, and SMU. I said “I’m not applying to anything else. If I don’t get in Lord, oh well. I’m not going. Because I’m not applying anywhere else.”

So one by one I was rejected. And finally, I got accepted into SMU. In fact, I’ll tell you a quick story about that. I had basically gotten a job at the Fort Worth Star-Telegram, and so I thought I wasn’t going to go to law school. For whatever reason, the mail was late. Had I stayed like another couple of weeks I would have known I had gotten accepted at SMU. Therefore, I wouldn’t have taken the job at the Fort Worth Star-Telegram. But it didn’t come until later, and so when I told them about it they said I’d have to give them all the money back that they had paid for travel expenses. I was like “I don’t have that type of money!” So I basically called the law school and said “can I defer a year?” and they said “yes.”

When I got to SMU law school I met this person and what she liked about me, and that’s what is so interesting about it, is that she liked my story. My story of hard work, of perseverance. She liked the fact that I had ran a marathon. Oh, I forgot to tell you I ran a marathon, right? I ran a marathon. In fact, I wrote about that experience in the Austin American-Statesman as a sports writer. I ran and trained for about 6, 7 months. But my colleagues dared me to do it, and there was something about me: When you dared me to do something or told me I couldn’t do anything, I rose above the occasion. I always—have always done it. So here I am now. Let’s take me to law school, right? And in my second year what big case comes? 1996 comes down. Everybody should know that case. Which case? The *Hopwood* decision.

The 5th Circuit determined that race could not be a factor anymore in admissions. The consideration of race, even as a factor, was unconstitutional. Cheryl Hopwood and others had sued the University of Texas, claiming that they were denied admission to the law school—here, in which we sit today—because it preferred black and Mexican applicants. The U.S. Supreme Court had decided to decline to review that decision, and that was the end of affirmative action, at least in admission to universities here in Texas, and I think it went on to Mississippi and Louisiana. There I was in law school, and I’ll be honest with you. I didn’t

really realize the significance of that case. I think I was just there. I was just glad to be there, right?

But remember back in 1978, in which you guys had basically talked about. The Court had ruled that basically we could consider race. We could. It was a very compelling educational benefit to have diversity in enrollment and then to remedy past discrimination. It was indeed a major blow to Texas institutions, including my school, SMU. I remember in the 1995 class, basically 1998 in which we would graduate, there were about 13-15, I think, African Americans at that school. The following year, I heard there was one or two. After *Hopwood*. But Texas would quickly respond. Legislatures then passed what is now known as 'The 10% Rule.' Right? So here we are, and actually UT, I read, basically, 10% was going to be too many, so there was another legislation that was going to be passed that UT kind of capped it at 75%. So technically, at UT Austin, basically, you get about the top 7-8%. It's not the top 10%. In fact, I had a friend whose daughter was in the top 10%. She thought she was getting in, and she didn't get in to UT Austin. They told her to go to one of the other schools.

But the rule, no doubt, helped those that were rural, like me, right? There's been a significant increase in Hispanics at UT. But even in law school, guys, I struggled with my identity because now I was amongst these young, preppy students, and here I was, this 28-year-old, non-traditional student, not quite fitting in. And I did not fit in at all. And my father then passed my first week in law school. And I remember him telling me, when I decided to go to law school, "When are you going to get a job? When are you going to get a permanent job?" And then when I got accepted into law school, he was telling everybody I was an attorney. I was like, "Dad, I'm not an attorney, yet."

I also remember, in law school, my contracts professor, and he was black, and he pulled me aside. He pulled me into his office and said, "You know, sometimes everyone that comes to law school don't really belong in law school. They may have made the wrong choice, and your personality really fit marketing or PR." He said I was not getting it. And so, several of my colleagues took me in, and they began to tutor me in contracts. And then we had this exceptional mentor peer program where the older law students would teach the younger law students. And I ended up getting a B in that class. And, I've been meaning to like, find him and say, "Now look at me now, right? You told me I couldn't go. You told me I shouldn't be here."

But then another thing happened in law school: I got pregnant second year going to my third year. And I remember clerking for this, this Supreme Court. I was working for this judge and she was a black lady. And I think I disappointed her because she said, "So, you're gonna drop out?" And I was like, "No." She's like, "Well, you can't go to law school and have a baby." I was like, "Yes, I can." And so, I got married the summer before going to my third year, and I had my first son, Johnathon Miles Harris, now who is a freshman at Lafay-



ette College in East EPA. And I have another son, Lexton, who is a sophomore, and we have a daughter that we share that's 30, and she's married.

But anyway, I say all of this about me and how who I was shaped who I am as a lawyer and now administrator. And I say it doesn't matter where you come from. Even if you struggle with your identity, you'll eventually find yourself. You'll find purpose in what you do. You'll meet some great people along the way, and you'll meet some not so good people along the way. You may even face racism or some other form of discrimination. But I say to you, you can be aware of it. Know your history, know who you are, know whose you are, but don't allow racism to shackle you. When I say, "shackle you" that means "hold you down so you lose focus of your ultimate goal of why you're here."

I have some statistics I wanted to share with you. But I wanted to share, some, quickly, some statistics that I got is actually on the State Bar of Texas Department of Research and Analysis. And it kind of shows, basically, the racial, ethnic minorities in the State Bar of Texas. And, just real quickly, it shows the 2006 and the 2016, so you can see, we have, basically, made some strides, right? So this is minority attorneys currently make up twenty percent of the State Bar membership, as compared to fifteen percent in 2006. There has been a seventy-one percent increase in the number of minority attorneys in Texas over the past ten years, growing from 11,060 in 2006 to 18,924 in 2016. Now, the projection is, by 2021, guys, minority attorneys are projected to make up twenty-two percent of the State Bar's membership based on a ten-year average annual growth trend. The two occupations minority attorneys are most concentrated in are in private law practice, sixty percent, and in government, fifteen percent. During the 2016-17 academic year, minorities made up thirty-nine percent of the law students enrolled in Texas law schools. Texas Southern had the highest percentage of racial minority enrollment at eighty-five percent among the Texas schools, followed by St. Mary's at fifty-six. SMU actually had the lowest at twenty-two percent, followed by Baylor at twenty-four percent.

And then as it relates to women, very quickly, women attorneys currently make up thirty-five percent of the State Bar membership, as compared to thirty-one percent in 2006. There has been a forty-three percent change in the number of women attorneys in Texas over the past ten years, growing from 24,469 in 2006 to 35,000 in 2016. Our projection, women are projected to make up thirty-five, thirty-seven percent of the state Bar's membership based on a ten-year average annual growth and rate trends. During the 2016 academic year, women made up forty-four, forty-eight percent of the law school, of the law students enrolled in Texas, and the highest percentage once again, for women, came from Texas Southern, followed by Baylor at fifty-two percent. Overall, there was slightly less women at forty-eight percent than men, fifty-two percent, enrolled in law schools in 2016 and 17.

So I leave you with this, with what we call, and what I learned, called the five Cs of leadership. Be competent. Be *competent*. Know your stuff. Be knowledgeable. Matter of fact,

know it backward, forward, all the way. Just know it. Be knowledgeable. Be consistent. Don't be wavering back and forth. You say you're going to do something, you do it. Be committed. Hard work goes a long way. Be a collaborator. Know, get out of your comfort zones. Network. Get to know people. And be caring. I think that's the fifth one. The other guy said you got to be likeable. I don't know if it's about being likeable; I think it's about being kind and just having a genuine concern for others. And when you do have those things, you're going to be likeable.

So, I wish you all the best in your life's journey, and I hope you too understand the importance of diversity: different individuals valuing each other regardless of skin, intellect, talent, or years. Continue to be pioneers and forge ahead. This is, indeed, what I think, my alma mater, UT Texas had in mind when it fought so vigorously for the successful win in the *Fisher* case. Thank you, very much.

## **DIVERSITY IN THE LEGAL PRACTICE**

**SPEAKERS:** THE HONORABLE GINA BENAVIDES, 13TH TEXAS COURT OF APPEALS  
DANIEL COLLINS, DEPUTY LEGISLATIVE DIRECTOR FOR TEXAS STATE SENATOR  
JOSÉ RODRÍGUEZ  
SANDRA S. YAMATE, CEO, INSTITUTE FOR INCLUSION IN THE LEGAL PROFESSION  
PHYLLIS YOUNG, PARTNER, AKIN GUMP STRAUSS HAUER & FELD, LLP

**MODERATOR:** ISAAC MALLET, THJ CO-EDITOR IN CHIEF

**Isaac Mallett:**

Alright, sorry for the delay everyone. My name is Isaac, and I am the Co-Editor in Chief of the Texas Hispanic Journal. I'll be the moderator for the Attorney-Judge Panel. Panelists, if you don't mind introducing yourselves, name and title, that would be great.

**Phyllis Young:**

Okay, I'm Phyllis Young. I'm a partner at Akin Gump in Houston, in our Global Energy Transactions Practice Group.

**Gina M. Benavides:**

I am the Justice on the 13th Court of Appeals, Gina M. Benavides. I've been on the court since 2007, and that court sits in Corpus Christi and Edinburg.

**Sandra Yamate:**

I am Sandra Yamate. I am the CEO of a not-for-profit organization based in Chicago that's called The Institute for Inclusion in the Legal Profession.

**Daniel Collins:**

And I'm Daniel Collins. I am the Deputy Legislative Director for State Senator Jose Rodriguez whose district is based out of El Paso.

**Mallett:**

Alright, thank you all for being here. Let's get started. So, first question: why is diversity important in the legal field, generally?

**Benavides:**

This is what happens when you sit there, you get to go first.

**Young:**

I know, I have to start first, yes.

**Benavides:**

I promise you won't always be first.

**Young:**

Of course, I think it's important for a lot of different reasons and really on a lot of different levels. Obviously, ultimately, at the end of the day, what we're doing as attorneys is provide legal advice and provide client service—good client service—to our clients. And so diversity is important because, when you, as an attorney, on the way we're trained to think—

I guess, backing back a little bit—the legal profession—when you come to law school—maybe you think about law a certain way, and then you get to law school, and something happens your first year. And they kind of warp your mind, and you realize, “I wasn't thinking about law the right way.” And law school really trains you how to think like a lawyer, right? And it's a very conservative way of thinking. And when you give legal advice, it's very—it's conservative in how you give your legal advice. So, you're kind of starting from that perspective in general with the practice, but when you get out and you're actually practicing and advising clients, it's good to have perspective. And be able to think about things from different angles and problem solving, in order to best serve your client.

So, I think diversity is important in order to have perspective in the legal profession, in order to get all the different types of points of view. People bring different things to the table, and so, ultimately when you combine all of those components together—that's how you're really going to be a good lawyer or great lawyer. That's how you're going to be able to provide great legal advice. That's how you're going to be able to best serve your clients when you have that perspective, and you're able to evaluate things from different angles and bring multiple people as a team together to advise your clients.

**Benavides:**

Of course, diversity is important. And diversity is even more so important, I think, in a public interest area, which is where I am as a judiciary, and as an election, I think that. And as an elected official, I think it's even more important because we have the perception of the public coming before us in the court room. And we have people that enter the courtroom. And we want—just as it is important as it is to have a trial by your jurors, someone who looks like you is where it first starts. Not only thinks like you but looks like you is important for them also when they also come into a courtroom, into even a boardroom.

The clients want that same ability to look at each other. And it's very much in line of what—you know—what Sonia Sotomayor said when she was having her hearing, which started the big Latina remark was I think that a Latina woman with her background, which is different from your background, which is different from my background, different from the

backgrounds of those—might make a better decision on certain types of cases. That is not a racist remark. That's a practical remark that we bring different things to different avenues. And on our court, just as it is important to have diversity from a background from a practical, those who came from appellate law, those who came from criminal law, those who came from family law, it's just as important to have that view.

More recently, Justice Contreras from my court ran for the Texas Supreme Court, and her basis of her platform was diversity. We need to have—just as we have diversity in the local courts, we have to have diversity in the highest court of our lands. And we don't have that. We don't have it at the Court of Criminal Appeals. We do not have it at the Texas Supreme Court. And that was her platform, and it's to get that message out there to ascertain why that's so important. We need it; we don't have it, but we need to struggle to fight today to continue to have it.

**Yamate:**

Diversity—and inclusion—isn't just important to the legal profession; it's crucial. It's crucial because you have to stop and take a step back and think about all the roles that lawyers play in society. Whether it's practicing in a large firm; whether it's having a storefront practice where you represent individuals who may be walking off the street because they have a family law dispute, or they need a will written; whether it's because you are going to be serving in a governmental capacity—either as an elected official, or an appointed one, or a career one; whether you're sitting on a bench, it doesn't matter. The roles that lawyers play in our society is so important, it's so vital that it becomes absolutely crucial that diversity and inclusion be represented there. And why? Because it comes back to serving the needs of our clients the best way we possibly can.

Clients—I think everyone will agree—deserve the best possible representation that they can find. And in order to do that, it's crucial then that we become a profession not just of the leagues, but a profession of the best and the brightest individuals who have the aptitude, and the drive, and the passion to want to pursue justice in our society. And if we don't have that, then we are not doing our clients—and that can be clients from the largest multinational corporations to the individual on the street, to somebody who needs pro bono services, to constituents who may be representing as elected officials—we do them a disservice if we don't make sure that they have that opportunity to have diversity represented and lots of different viewpoints in the hopes that we're going to be getting the best possible result that actually does begin to approach justice.

**Collins:**

And I agree with what everyone said. I just wanted to build on a couple of things. I'll build off—first you [Yamate] since I work in a political field—how important I think it is for elected representatives, in particular, to represent diverse constituents and be diverse themselves because I think this is a general matter, and this is beyond the context of the law.

I think representation matters. It's important that someone who has your lived experience, or can appreciate your lived experience, is actually representing you in the halls of power, be it in the courtroom, or be it in the state capitol, or in Washington DC, or what have you, because, again, I think you get better results that are actually informed by someone who's actually had an experience that's similar to yours. I think maybe also building off this new problem—you know more about this than I do, but my experience is that in serving your clients, a lot of the clients—especially if you're talking about big corporate clients, working with, you know, outside clients that are big corporate law firms—they're demanding diversity. So, the biggest thing for law firms who are interested in kind of increasing their diversity is just to say, well, my clients want it.

And it's been my experience, having been participating in the Austin LGBT Bar Association, the State Bar Association, Lavender Law, and other different organizations of the sort, that a lot of corporate firms are not only—you know, when they're putting out bids for law work—are inquiring about diverse representation within the law firm; they're also following up, which I think has been kind of interesting. I was on a—I was watching a panel not too long ago about practices for corporate clients where they would, you know, invite counsel from their outside law firms to come and participate in their own diversity events, which has been sort of a strong way for them to send a message that diversity really matters, and we're following up on it.

And I think some of the larger law firms are catching up in the corporate context and non-corporate context. I think that they have really, I think, been ahead of the curve when it comes to really actively putting themselves out there—not so much establishing quotas, but putting themselves in communities where they're like, “surely there's talent out there, but we need to just to invest a little bit more effort into finding it and cultivating it.” And I think the law profession's finally starting to catch up because they're being responsive to what their clients' demands are.

**Mallett:**

Alright, thank you all. A lot of reasons why diversity is important. On that note, does your workplace present any unique challenges to diverse and minority candidates, and in what way?

**Benavides:**

So, I'll start. I won't make you [Young] start first this time. I'm an equal person. So, on the court, as sitting on the court, it's a little bit different, because it's a government entity. The Thirteenth Court of Appeals has six judges, for those who do not know. We sit in Corpus and in Edinburg, so it's the south Texas area, and I'm going to tell you that we are six Hispanics on the Thirteenth Court of Appeals.

Thank you very much, y'all can applaud that. That's a great endeavor that we had to take. Here's the second clap you need to do: we are five women at the Thirteenth Court of

Appeals. That did not come by chance, that comes by a concerted effort of, including myself, being recruited by other colleagues on the Court that were Hispanic that said, you need to run, and including me, getting other Hispanic women to run. So, it's easier on the Thirteenth Court of Appeals because we are South Texas, so our population is more Hispanic and so we-we have that ability.

So, what becomes difficult—and I will tell is that we then, of course, have attorneys that come to apply to our court, whether it's an internship program or lawyers, and we don't, because we're a government entity—we can't take into account, you know, gender kind of, races kind of things. But we do look at that, and sometimes I will tell you that the bad news is that we don't have any minorities applying to the Court of Appeals.

And it's something that I've discussed with others, and it's a perception that I want to talk to you about. It's a perception that, even when I went to law school 30 years, “well the minorities don't get the big corporate jobs, you know. They don't apply; they don't go to the interviews; they don't get the judicial clerkships. You know, why apply? It's not going to go to y'all.”

And it's that same perception that we still see 30 years later. I tell them, “what's the worst they're going to tell you? ‘No?’ And you'll still live tomorrow.” So, it's in that application process that I think is more important—that I try to—we call the universities, and we always tell them, “please apply,” with this caveat, which is what Mrs. McCarthy-Harris says: if you're going to apply, please prepare an applied application, because then what we get is these half-ass applications, and that doesn't help us in any way, form, or fashion. So, whether it's the Thirteenth Court or the Third Court of Appeals, or even the Texas Supreme Court or the Court of Criminal Appeals, you lose nothing but some time (that I think you actually learn) by filling out an application and putting forth, because without the interest, then we can't change the numbers that we discussed earlier.

**Yamate:**

In my own workplace, it's pretty perfect because I'm the boss. I talk to lots of lawyers around the country and lots of law firms and corporate law departments and government agencies, and I recognize that I'm just really lucky, because you know diversity issues are a challenge for just about every employer with more than one or two lawyers. It manifests in lots of different ways, and the sad thing is that despite how sophisticated we may believe we are as a society, you know, for most women, and people of color, and people who are openly LGBT, and especially people who have visible disabilities, chances are they are going to encounter some form of discrimination, or bias, or the micro-aggressions that your keynote is going to be talking about later today, in more than one fashion. It's kind of like that theme from cops, you know? “What you gonna do when it comes for you?” It's coming.

The challenges really—what are you going to do when it's your turn, when it hits you in the face, or your friend, or just you observe it. And that's where I think we sometimes

spend so much energy worrying about, you know, protecting ourselves from ever encountering it. We're not as focused as we maybe ought to be on "so what do you do, how do you respond?" And it puts us in a really uncomfortable position.

A lot of times it can be a teachable moment for somebody, because a lot of times when you see it, when it confronts you, how you respond, how you choose to deal with it is going to influence how that person—whether they did it intentionally or not—how they view a lot of these diversity issues for the rest of their lives. So, it's kind of a heavy responsibility that's put on us, unfortunately, but there you have it. So, I do think that one of the real challenges is to better prepare ourselves for how we respond to these incidents, whether we experience them or just observe them.

**Collins:**

So I think the question was what challenges for diversity are in our particular offices. Well, my particular instance is, you know, we are a very small office. The Senator really only directly employs about ten people, and then we have several interns throughout the course of the semester. So, you know, sometimes there's just not enough roles to actually fill, which is a challenge. In spite of that, we do manage to be relatively diverse which I guess is great. You know we have queer people, we have Hispanic people, we have at least one Jewish colleague, one South-Asian colleague. If you blow it up to our interns we have, you know, African American interns; we have a couple—we have had a couple transgender interns. I mean it's been a fairly diverse sort of work environment. And I do—I mean, not to toot our own horn—I do think I want to credit that to us again doing, I think, some really proactive outreach to different communities.

I credit our district office in particular; they're really aggressive about, you know, going out to our local universities and community colleges. And we've even had a couple high school interns that have just been real go-getters that would want to come in even if it's just for a couple hours a week and, you know, get some experience in an elected official's office. You know going out there—and to the judge's point—talking to people who you know might not otherwise have thought, you know, "why would I do this? Why would this be an experience for me?" And, you know, we've been trying to show them that, you know, this is a career path. It might not be a career path for you, but it's certainly an experience that you should have, and we can try and help train you up in a professional environment.

And I will say again, our capital office—we should probably be a little bit more aggressive in doing some of the outreach that our district office is doing—but we'll also get some students—and I'm usually the person who is interviewing our interns—where I will know, having, you know, read their background materials and having had an interview with them, I'll know when an intern is going to be a project in that, you know, they will probably need to have some of those rough edges sanded down. They just need a little extra attention.



And it's really incumbent on, I think, the employer to work on that to, you know, make sure that someone actually feels included if they weren't someone who, you know, came from a background where they had the advantages of already being plugged into networks that might land them in a capitol office, or in a judge's chambers, or somewhere else for an internship—to kind of work with them to see, “okay, well where are your deficiencies and how can we improve them in a constructive manner?”

Because I think there's often, especially in the law profession, a tendency to sort of, you know, dismiss folks who aren't rising to your standards right away, and especially for folks who, you know—I'm the first attorney in my family—for folks who've never had this experience in the past. They really do need some sort of expert guidance to make them really succeed in the environment. And I think that's kind of the lesson that can be applied widely to most legal environments.

I think it takes a lot of time to invest in someone's being comfortable so that they can be competent, and then you can actually retain them. And I think it's incumbent on employers to do that because they've invested a lot of time and energy in, you know, hiring this person, putting them on the job. They should probably try and get the return on their investment.

**Young:**

I'll answer the question from the standpoint of just practicing at a big law firm and not necessarily specifically for my law firm. And my background is I started at a big law firm; I lateralled to my current firm in 2004. I never thought I actually would stay at a big law firm for this long. I thought, you know, “I'll stay three years—you know, maybe one year for every year of law school—and then I'll go in-house.” But I actually really enjoy practicing at a big law firm because of the resources that are available, the ability to work on a lot of different types of clients, a lot of different types of transactions. So I've really enjoyed working at a—in a big law practice.

But it kind of goes back to what my answer to the initial—the first question. And as I'm sitting there listening, I was listening to Ms. McCartney-Harris, and I kind of reformulated, actually, what I was going to say on this response. Because in thinking about it—at UT is unique in that you think about cases like *Sweatt vs. Painter*, you think about the Hopwood Case—UT is really sort of like a of the real world. And I went to UT for undergrad. And, you know, growing up when I went to school, when I was going to school—middle school and high school—I had friends who were escaping communism in Poland—people—friends from India, friends from all over the world—Saudi Arabia, Vietnam, you name it—you know, friends who escaped in the middle of the night from Vietnam and came to the U.S. on, you know, barely, you know, boats really that were practically falling apart. That type of thing.

But I remember when I came to UT for undergrad, kind of at orientation, some of the upperclassmen pulled some of the younger black students in particular and said, “you know those people who were your friends in high school? They may not be your friends when you come to UT.” And it was kind of—it struck me as interesting because I’d had this sort of really diverse—like really diverse group of friends all through up to high school, and then I still managed to maintain it in undergrad. But it was just interesting to hear that statement that—it’s like something changes when people come to that collegiate level that maybe it’s the level of competition, people—it’s something starts kicking in, like this is the real world now, and the law-legal profession has. . .

I went to—when I came to law school, the legal profession has been sort of closed right, and you know I still work with some female partners who, when they graduated law school in the 80s, had to go to California to find clerkships. But the big Houston law firms would not hire them because they were women and so that wasn’t that long—

**Benavides:**

—We were going to go off and have—get married and have babies, so why hire us?

**Young:**

Right, or they were, “well, why don’t you be a legal secretary?”

**Benavides:**

Yes, mhmm.

**Young:**

And that wasn’t that long ago, so it’s just—it’s a very conservative profession. It’s—it’s—people are very slow to change, and so just when you kind of combine all that together, you know—I went to law school, and you know, even thinking of some of the cases, I went to law school, and there probably are some people here today—yup, there are some people that think they were born to go to UT Law in particular, like that’s their birthright was to go, to be able to get into the University of Texas, to have a seat at the law school. So you’re kind of dealing with that sort of attitude. And so, it just—in general, you kind of combine all those factors together. It presents some unique challenges, I think, for minorities coming into the legal profession.

In particular, I think practicing in big law, there are a lot of unwritten rules. There are some—like the networks and things like that—some people sort of born into those networks. If you don’t have a family member who’s an attorney or a partner at a law firm, that sort of thing, you kind of have to learn to create those networks or figure out how to do it. So I think the unique challenges for diverse and minority candidates, in particular, is sort of learning the ropes, being yourself while still operate—you know, kind of being your authentic self while still operating within these confines and not totally feeling like, you know, you’re sticking out, and people are noticing you when you walk in the room.

There are sort of those unique challenges, but really a lot of it's just kind of the getting in there, learning what the unwritten rules are, figuring—observing, figuring things out, adjusting—and even like I said—sort of that kind of internal, you know, “I want to be myself but I've also—I got these confines in which I have to operate” and figuring out that balance even within yourself. So I would say, in general, that's probably what, just practicing, the workplace challenges in big law present in particular for minority and diverse candidate students.

**Mallett:**

Alright, and Daniel kind of touched on this already, but what are some successful initiatives that your firm or employers have implemented that you've seen have had a positive effect on diversity, you know, where you work. And what are some unsuccessful ones or ones that you know, you think can be improved?

**Yamate:**

I'm getting the look from the other side that it's my turn to start.

**Benavides:**

I have that look. I practice it from the bench every day. Your turn.

**Yamate:**

And it's a very clear communication, let me say. To me, the most successful programs and strategies are those that allow us to build stronger bridges across the different silos. One of the challenges, I think, that our profession has, is that many of our diversity inclusion programs and strategies are still mired in a very twentieth-century view of the world. And so you have a lot of silos in terms of—and it came about because groups coalesced at different times, so you've got, you know, your African-Americans here, and the Latinas here, and the LGBT community over there, and then the women's group (which is generally, primarily white women, you know) still another part.

And so I think while we all can understand how you can take a certain degree of comfort from being around other people who are like you, they get where you're coming from, they get your background. There are certain jokes you can make and feel very safe in the environment.

The most successful policies and programs nowadays—the best strategies are those that allow you to preserve that sense of camaraderie, and yet also facilitate opportunities to build bridges across those lines of difference, which allow us then to be stronger as a voice, advocating for a more diverse, inclusive profession. I have to give a shout-out to Linda Bray Chanow and Dawnyelle Addison from the Center of Women in Law because I think that some of the work that they do really—it embodies that whole concept because in a lot of traditional women's groups, it's always white women, and yet the stuff that Linda and Dawnyelle are doing to really make sure that women of color and lesbian women and trans

women feel welcome and included. You know, we shouldn't take it for granted because it's not happening nearly as much as it should. And so, the opportunity to build alliances and find those synergies across lines of difference is really key.

The strategies and programs that are failing and that really actually just burn up a lot of valuable time and resources and actually do a disservice to our efforts to have a more diverse and inclusive profession are the ones that allow groups of diverse individuals to just feel like they have to operate in their own little bubble. Because at that point, all you're doing is just preaching to the choir over and over, and you're not really having an opportunity to try to send messages and get messages back because I really don't think that we're gonna ever advance one group by itself without all the other groups either somehow pulling it back—like a rubber band effect. So, we're either, as a profession— we're all moving forward together or we're going to be stuck here.

**Collins:**

Well, you know I love these type of—I'm going to say just having totally—since I haven't had experience myself—but I'm curious to see your thoughts, actually. Some of the tips I've heard for law firms that are really trying to do it right and trying to really improve their—their diversity—one of the things they did was make sure that, you know, if they did have some diverse people within their existing employment pool, they would make sure they were included in their diversity committee and included on their hiring committee and that they were the ones going out there and doing the actual interviewing. Which, I think, probably, you know, I can tell you anecdotally, that makes a big difference, if there's another person that's either a person of color or a queer person sitting opposite me, I'm already feeling a little bit more comfortable, probably, in that interview. I think I'm probably putting my best face forward. I find that you know, anecdotally, that's been successful for firms in really trying to actively recruit diverse candidates. Would you say that's correct?

I know, again, for retention we always get, especially in the context of like gay attorneys—not to get too stereotypical—but you know, we always have these situations where the partners, like their fun outing day, is either, like, the ladies can go to a spa, and the guys can go hunting or go for golf. And, a lot of times, my, like, you know, gay colleagues are not super into doing the hunting trip or the golf trip and they might just as well do the spa day, but do they want to, is this a safe space for them to like say “no, I'm not really into doing that?”

I mean these are the sorts of, like, you know, just little—they probably seem like little things, but they make a huge difference because the same firm that's also saying “yeah everyone can go golfing or everyone can go hunting; why not?” might also be the same firm that says something to the effect of “oh, well we don't really care about your personal life; that's not our business,” which, you know, someone might say, “oh what's wrong with that?” But if you're a gay person, that's very unwelcoming. Does that mean when I go to a cocktail

party, I can't like bring my partner, or I can't like have a picture of my family in my office because that's not anyone's, you know, that's not anyone's concern?

I mean I think stuff like that is happening less and less, but it still happens often enough. And I, for the Austin LGBT Bar Association—I organize our mentor program, and I also organize resume workshops and interview workshops, and, just anecdotally, I still hear some of these stories from students when they come and talk to me, so I feel like, you know, it's happening less and less but it's still happening often enough that, unless there is a concerted effort within the culture of different law firms, there's probably not going to be as much outreach or as much improvement in attracting and retaining diverse students. Would you say that that's all fair and. . . ?

**Young:**

I think in terms of what's successful and what types of initiatives—it's important for an organization to have a really—a top-down approach when it comes to commitment to diversity. So, for instance, at my firm, the last—our current chair is a woman who at one point actually worked part-time and then went back full-time partnership chair—full part-time—full partnership track and now is the chair of our firm. She's obviously involved with a lot of different types of—she definitely has the commitment to diversity and women's initiatives.

So, just having that top-down commitment. The Chair even before her was a white male, and he was actually married to an African-American female who was a partner at a big law firm, and so it was interesting—his commitment as well. He had a really interesting and unique perspective and real commitment to diversity, so I think the top-down approach is probably the most important thing when you're talking about organization. We have diversity, we have a firm-wide diversity committee, and we have local diversity committees within each of our offices.

I think our diversity committee in our Houston office—we promote—it's one issue is that it's not just for attorneys. We really—it's promoting diversity for the whole office, the whole firm, so it's not just attorneys. It's the staff; it's everyone. We have sort of monthly really programs where we'll present on a particular issue or bring in a speaker, a diverse speaker, to present and talk about certain religion, a presentation, that sort of thing, and so I think that's been good for our office and just making people feel more welcome. "Okay, here's my perspective being presented. Here's something about me personally that's being honored," and you know that sort of thing.

We had one of our office services workers one month talk about—he was a prisoner of war in Vietnam, and so I didn't even know he was that old actually, to be honest. He was telling these stories. He talked about his perspective and there's always food involved too so that helps to get people to come, especially in a working environment. So I think those types

of initiatives are important, especially if it's not just geared toward the attorneys, but it's really for the whole workplace.

Just speaking in general, for those who are law students, remember the Texas Minority Counsel Program, the TMCP, that is a really good program that the State Bar puts on each year. And it rotates between Austin, Dallas, and Houston. And it's a really good program for women, diverse, LGBTQ, every year, lots of networking—really good program—I highly would recommend that you start going to that once you graduate and start practicing. So I think it's just those types of initiatives and having that commitment that's helpful. I think what's not helpful would be just being purely aspirational and paying lip service, but not backing up your initiatives with actual results, so that's my thoughts on that issue.

**Benavides:**

I'm going to follow up. I think TMAP from the State Bar is one of the best programs. I was a minority director for the State Bar of Texas, and I think the State Bar does an amazing job in trying to be very inclusive, both for all lawyers. It takes a lot of hits and currently is under attack for its minority. The Board—the Board of Directors has been in a current lawsuit because it's being attacked by an Anglo-white male out of Houston that says, “why do you have the State Bar Board of Directors?”—which is a Board of Directors of 44 directed geographically. But in the bylaws, they have implemented four minority positions, which are for African-American, women, Hispanics, any of that representation that we don't get to see a lot on the Board. And there's a lawsuit now in federal court saying that is unconstitutional.

So, where they do a great job, but these things always get attacked, and we need to be aware. Senator Watson has implemented a bill to change the State Bar's—so it's going to be called if it passes, “Outreach Director.” I don't like it. I've gone on record as saying I don't like it. I think it should be a “Minority Director” because then an “Outreach Director” can be anything that the President decides to be included—another white male, of which there's already 43 on the Board of 44. But—but with that being said, I do understand that there is something to be said for Outreach Program Director.

Joe Escobedo, who is the chair, is that it would be more inclusive of the gay community and the LGBT community, which is not included in the minority diversity programs. I can see the pros and cons of it, but I think as someone who sits on the board, and many boards, including the Judicial Section of which we're a board of 14, which is the arm of the judicial part of the State Bar. And when I look around the conference table, I am one of four female and one of two Hispanic females. When I sat on the Texas Association of Defense Council Board, and I was the only female and the only Hispanic on that board.

So I'm going to tell you a little story because I think that it's important. I told some student earlier yesterday that I'm a rabble-rouser. And I am. I think you can probably see

that just by looking at me. “That one’s going to cause trouble.” Yes, this one causes trouble. So when I first became—because when I see something, I am somehow compelled to do something about it, I am compelled to do something.

When I joined the judiciary and went to the first Texas Center for the Judiciary—I’ll try to keep this quick because I know we’re short on time—and went there was an opening on that board. Judge Lora Livingston, who is a trial judge here in Travis County your first African-American, did which I do, and looked around and said, “we’re missing minorities,” and there was an open position, and she fought for me to get on this board. And we looked around and the board was just not diverse. The judicial section is not diverse.

And so we—the way to get on the board is, there’s a committee, and then it slates the next, you know, board for the next section. And, you know, so it’s the same board picking another board, and which works because they’re the ones who know and understand it. But we know from studies that people will be inclined to pick those who look like them, you know. So if you have a primarily white committee picking the board for the next committee that’s who’s going to be selected on the committee. So on a Saturday afternoon, Justice Lora Livingston—I’m not going to out them out, but I’m going to out Lora Livingston—there’s a judge out of El Paso—two judges out of El Paso, a judge out of San Antonio, and myself got together and said, “we need diversity on the board.”

And we sat there on a Saturday afternoon and slated a completely different board. And we did that board selection at the annual meeting, and we put forth our slate independent of the committee board. And It was a big to-do because usually the committee gets up and it’s the thing and do it by acclamation and all their people get in. We had counters out, and we had fliers out.

I am glad to report that our slate won by an amazing majority from the judiciary. We had David Sanchez and—a judge with a bright pink shirt on in the middle—and we’re talking about in front of 600-700 judges—and these are *judges*—and we would have them stand in front of our slates to vote for the right one. But all it took was us in one afternoon to reach out to judges from the area that they needed to represent that would represent more diverse judiciary. And all we had to do which goes back to what I said all you have to do is reach out and ask and now we have a very diverse board on the Center for the Judiciary. And we completely changed it, and they are now fully aware of it, and we have women, and we have African-Americans, and we have Asian. That’s the way it should look.

And I’m going to say one more thing. And I don’t know if y’all are aware of this. The Fifth Circuit has an opening—actually two—they filled one. Peakman and Benavides retired from the Fifth Circuit. And there was a, and I tell y’all this because y’all are young, and y’all are upcoming, and I’m getting tired of doing this, so I’m trying to pass it to y’all—is that there was a selection and a concerted effort to put another Hispanic or minority on the Fifth Circuit. There has never been a female Hispanic on the Fifth Circuit. It is the Circuit that

represents Texas, Oklahoma, and Louisiana. That is just to me—we are in 2017—just incredulous.

They went through five Hispanic names— including me— for that selection, and none of us got the nod from the Senators in the State of Texas. The list is now in front. The new list is six. They are all male. There is not an African-American on the list. There is not a Hispanic on the list. There is one Asian male on the list. So every time I think we take some steps forward— what I'm telling you is that the fight is real, and it is present and that we need to scream and yell and you— this is your court now, Fifth Circuit. I'm on the way out guys. I'm looking and counting my days to retirement, and it is your fight that you now have to scream and yell about.

**Mallett:**

Keeping with that message of pushing advice to law students— what advice do you have for up-and-coming diverse attorneys, you know law students? . . . I think it's Daniel's turn to start.

**Collins:**

Oh, gosh . . . I mean that's . . .

**Benavidez:**

Sorry, Daniel.

**Collins:**

That's a lot to follow, but you know I will just build on your comments to say . . . I mean there is space for each of you—if you're really interested in increasing the diversity in the legal profession— there are spaces, you know. here in the local community. We here in Austin, just for example, have— I think for our fifth year? Or maybe this upcoming one is our fifth year— have done a diversity report card that is still really modest, like it's only about— less than thirty or maybe right at thirty— of the large law firms in Austin that participate, and it was only a couple of years ago that we started including some LGBT numbers, which has been a challenge because the State Bar, for example, doesn't collect any of that demographic information in the same way that they do for other ethnic or racial minorities.

For the first year—this last year—we finally included women in the scorebook for our report card. And again its very small, like ours is just kind of a regular survey one of our, the people who are putting it together— and right here I have to give credit to Fred Sultan from Gardere and Rudy Metayear from the Black Lawyers Association because they've really been the—the big strong arms in pushing this diversity report card forward. I just think it's remarkable just in the few like five years we've been doing this, albeit very modest, report card the level of engagement that I think the firms have responded back with.



Because no one wants to get a D right? We're all overachievers and all the law firms want to get As, and a lot of them have managed to do so.

And I think it's really opened up some important dialogue I think it's really underlined the fact that we, in the same way that Austin is generally losing black population, we are not seeing them being represented or promoted in the law profession here in Austin, and that's become really stark when we've started doing this report card. Like I said, I think it's kind of drawn attention to the fact that we're not collecting demographic information for LGBT people at the state bar or even within law firms.

Again, we still have this culture where people will— we have to get over the uncomfortableness with, you know, saying, “yes, I am a gay person. That's okay for you to ask me about or talk to me about.” But again I think it's really important because it's too easy for all diverse communities to just be invisible, or maybe to have some fear about you know being too outspoken on these issues. And I think some of us probably just need to not give into that and push a little bit harder the same way the Justice pointed out.

**Young:**

I can go next. I like coming to these types of conferences because a lot of themes start to apply. Thinking about the four Cs— thing I had on my list really was become a good lawyer. Be competent. Become the best technical lawyer that you can be. Know your information inside-out, backward, forward, because people— you'll become the go-to person. Learn about an area of law that other people maybe aren't so interested in, or think ahead and think, “what's the what's the new thing?” And get really knowledgeable about something maybe that's very sort of boring and tedious that no one else wants to learn about because you can become an expert in that area.

I think just as an attorney, as a young attorney, one of the most important things you can do is just become a great lawyer because that, people— like I said, you'll become a go-to person. And just the other piece of it I think is just to persevere. It can be challenging practicing law: there's a lot of pressures on you. There are time constraints. There are, you know, client pressures, all sorts of pressures, your family, all sorts of things. You're probably experiencing that in law school, lots of things kind of coming in at you at one time. And it doesn't change. Law school is very good actually at preparing you for juggling—what we like to refer to as juggling—and I would just say persevere and don't give up.

Just don't give up. There are going to be times when, I've had this conversation with a lot of people actually, who just want to say, “You know, I just want to give up. I'm tired of doing this,” and I say, “no, don't do it.” Because one thing—there aren't a lot of people like you. I don't see people like you in the profession or as many people like you. So, don't give up despite—everybody is facing the same types of challenges that you're facing and just persevere.

**Benavides:**

I think the advice that I give always to law students when it deals with diversity—I mean, always be prepared. You know, I mean that’s just—I don’t care you know what ethnic or gender you are. Nothing drives me worse from the bench as an unprepared lawyer, and no one will get yelled at faster than an unprepared lawyer. But, in a diversity aspect, I think that we should wrap ourselves in our diversity instead of walk away.

You know, we talked about back—and your first speaker, I thought it was really interesting that she said that, because I feel like her story could be my story, and probably many of our stories up here is that, you know, you start talking differently when you came to UT. I came to UT undergrad. You start, you know, dressing differently in order to fit in. What I finally learned, when I went to practice law, is that my gender could get me ahead and that my Hispanic-ish—if that’s even a word. I may be making it up this morning—could get me ahead because that was unique to me.

No one else has that ability in the courtroom to have what I have. And so, I used i.e. “I’m a female litigator when there are no other female litigators out there,” —and if you hear my phone, it’s not that I’m watching; it’s that I actually wrote my notes on here, and so usually I don’t have my notes. So if you’re, you know, I apologize for that, but that’s where my notes are today. So, I took that and said, “you know what, I’m going to use this to my best ability.” What that got me in 18 years of private practice was 34 jury verdicts, because they couldn’t find any other female Hispanic litigators who could pronounce the names of jurors in El Paso and San Antonio, or the names of the witnesses properly, or could speak the language.

I don’t apologize for speaking Spanish. I speak it as often as I can. I always found it very interesting that, that when we were told as youth as my parents were, “don’t talk to your kids in Spanish. It will hinder their ability to educate,” but when a non-Hispanic person can speak Spanish, we’re all, “like oh my God, they can speak Spanish.”

Well, I can speak two languages, too! Why are you telling me I can’t speak my second language? And so, I use that.

So use whatever makes you different to your advantage. There is nothing better than to be undervalued and underestimated in the field of law. To them to think that I was the court reporter or the secretary, that’s fine. You think that all you want because I’m about to kick your butt in this courtroom. So, use that. Don’t hide away from it. Don’t shy from it. Wrap yourself in it is what makes you, you, and you should whatever that is. Take that into whatever area of practice of law that you want to do.

**Yamate:**

I have three pieces of advice: be kind, be bold, and don’t let anyone else corrupt your sense of a moral compass. By being kind what I mean is that a lot of times when you are

diverse—any kind of diversity—we sometimes have a tendency to falling into the habit of feeling like we're always victimized. And you know what, lots of times we are, but that's not an excuse for us not to look beyond ourselves and figure out what we might be able to do to help somebody else. You'll find that once you are out in the working world there are many places of employment where there just aren't a whole lot of other diverse people like you. And so, it might be that gee, you're an Asian-American woman, and there are three other Asian-American women, and so you're going to go to lunch every day.

You know, look around. Maybe there's an African-American man or an openly LGBT lawyer who doesn't have that same support network, because their numbers maybe are even smaller you know you can include them. You can reach out. You can just be kind and make sure that they, too, can be part of your support group.

And by being bold, I mean sometimes getting outside your comfort zone to spend time talking with people that maybe aren't always the individuals that you would naturally gravitate towards. It's a wonderful profession when you can spend time with people who are totally different from you and maybe by getting to know you, you can change their worldview.

I serve on the board of this one organization which is always predominately been run by privileged white men who are openly straight. And that's really nice and, you know, the first few years that I was on this board, I was complaining to a friend of mine that I felt that I was encountering all the stereotypical issues that women often do. I would say something at a board meeting and it would be ignored and then some man would say it and they would be, like, "oh what a great idea Joe had." But I've persevered, and I have made every effort to build bridges with a lot of these men to the point where now they turn to me to ask what do I think. Is a good idea? It's become a place where I really enjoy the company now of the other board members. But again, sometimes you have to be bold and really sort of push the fact you are going to build a relationship with some of these people, whether they want it or not.

And when it comes time toward being a practicing lawyer, there will be times when your moral compass will be challenged. And it can be something that often times doesn't seem really important in the greater scheme of things. And I'm not talking about, you know, whether you're taking a bribe or something like that. I would presume that you would know not to. But, for instance, in my own law school alma mater, Harvard, we had a situation last year, and you might have read about this, where one morning the students woke up, and they went into the main common building of the campus and—and every African-American faculty member's portrait had been defaced with a circle with a black line across it.

And I happen to be on the Alumni Associate Board at the time, and I said, "This is outrageous. We need to say something. We need to make sure the students know that we as the alumni are appalled by this. We don't stand for this." And there was another white

woman on the board, who's a judge in New York who said, "Absolutely this is horrible. We need to say something. We need to say something strong. We need to say today."

And the other Board members, including the African-American board members, are like, "Oh, but the Dean might get upset with us, and we should wait, and we should see how this plays out when the police finish investigating it."

You know, if it's wrong, it's wrong. You know, just say it. So that's what I mean when I say don't allow, you know, your own moral compass to be corrupted because other people are afraid. Be kind, be bold, and stick to your guns.

**Mallett:**

Thank you guys, for messages of empowerment, unity. That concludes our panel. Thank you all for participating.

## **EXPERIENCES OF DIVERSE PROFESSORS IN LEGAL ACADEMIA**

**SPEAKERS:** RICARDO GARZA, ASSISTANT DIRECTOR OF STUDENT AFFAIRS AT THE UNIVERSITY OF TEXAS SCHOOL OF LAW  
LEWIS HUTCHISON, JR., ASSISTANT DEAN OF STUDENT AFFAIRS AT DUKE LAW SCHOOL  
PUNAM KAJI, ASSOCIATE, HAYNES AND BOONE, LLP  
GEORGE A. MARTINEZ, PROFESSOR AT SMU DEDMAN SCHOOL OF LAW

**MODERATOR:** MARIAH BERRY, THJ OPERATIONS EDITOR

**Mariah Berry:**

Good morning. My name is Mariah Berry, I am the Operations Editor for the journal this year. This morning we've already spoken about diversity in the judicial context and in law firm environments, but the purpose of this panel is to get some insight into diversity in legal academia. So, with that being said, speakers could you please introduce yourselves with your name and job title.

**Lewis Hutchison:**

Hello, everyone. I'm Lewis Hutchison. I am the Dean of Students at Duke Law School.

**George Martinez:**

I am George Martinez. I am a professor of law at Southern Methodist University in Dallas.

**Rick Garza:**

I'm Rick Garza. I'm the Assistant Director of Student Affairs right here at Texas Law.

**Punam Kaji:**

I'm Punam Kaji. I'm an attorney at Haynes & Boone in Houston, Texas, and I practice employment law.

**Berry:**

Thank you. So, to get things started, could you please explain why you believe that diversity as far as faculty and staff is important in legal academia?

**Hutchison:**

Ok. Well, I'll tell you the short version of it. As people are developing the foundations of their future career, I think it's important for them to see and hear the experiences of people that they can relate to. A lot of times, I tend to think that helps it to settle in better so that you learn it better. Equally as important, when we talk about diversity, it's important as future lawyers are laying the foundation for their career, that they hear and see people that they may not ordinarily hear and see. So, they learn a different perspective.

I think as an attorney, one of the best things you can do is to try and understand someone else's perspective. That'll help you throughout your entire career, and if that can start here, where you're exposed to new people and new ideas, and those two usually go hand-in-hand, then it lays a very good foundation for everything you're going to do here on out.

**Martinez:**

I think, the diversity on law faculties is very important because one of the main things is the idea of role models. Students have to believe that they can be successful in this profession. They have to believe that there is a way to actually become a lawyer or to become a law professor, or whatever. If you don't see that on your law faculties, the suspicion is that maybe it's not possible to do, and it's especially important now in this era, because as Ms. McCarty-Harris, who was my student, pointed out. Also, I'm very pleased to see another one of my students here, Ms. Kaji. It's a pleasure to see them here.

At one time, there were many, there were a lot of diverse law students. At the time of Ms. McCarty-Harris, the *Hopwood* case pretty much killed [diversity] off at many law schools. It hasn't really recovered since then. So, now, you can take the students who are here and take a look around at their law classes, and they don't really see that much diversity anymore. So, it's very important to see law faculty there, too, for the ones who are there to believe that it can be done.

The other thing is the diverse perspective of a law minority law faculty is very important for having good teaching. In order to have good teaching, you have to have different perspectives. For example, in my classes, I talked about the Trump travel ban. The Trump travel ban and the issue of immigration is something that is a very important issue now, and I think minority faculty, especially Latino faculty, are able to bring an important perspective to that issue. The other advantage of having a diverse faculty is that it improves the legal scholarship of the faculty. It improves the legal scholarship because it brings a different perspective to legal scholarship as well.

So, as Latinos and other minorities apply that different perspective to producing legal scholarship, then you get new and different insights. When you get new and different insights, you get new areas of law that are produced and legal scholarship. So, for example, racial minorities, including Latinos, have developed the new genre of legal scholarship that is known as critical race theory or Lat-Crit. Theory. That has all been developed by minority faculty, since the advent of diverse faculties, so a diverse faculty produces benefits for students, for the faculty, and also for the law school. So, it's hard to contend that you are a top law school if you don't have a diverse faculty or a diverse student body. It's very difficult to contend that you're a top law school.

**Garza:**

Right, and I would add that, as far as the staff side goes, I think it's really important from a comfort aspect and from an inclusion aspect to have staff members, in positions of counsel and advice, who have shared experience with students of color. I hope, as a Hispanic, first-generation college graduate, first-generation law school graduate that I can provide insight to students of color and first-generation students that, you know, for all of their good will that maybe other staff members might not be equipped to relate to those students. So, I think that diversity in all aspects, especially the faculty is important, but from a staff point of view, I think there's also a great importance in helping to accommodate a student's needs outside of the classroom.

As our black students begin reading about the civil rights cases, as our Hispanic students begin reading about Fisher, and especially in the context of Texas and South Texas in particular, how they live and how they interpret those case and how those cases then begin to shape their view of their own culture and their own point of view of the law, can be impactful. It can also be psychologically tiring, so having someone who is available and who happens to look like them, I think it's fairly superficial.

I think something to point out is that I look like our Hispanic students. I think having a similar background, a similar experience and helping them contextualize what they are going through and what they're reading is extremely important. I can also relate to having a family that wasn't super excited that I was going off to law school. I think my parents might have been more excited if I told them I was getting my plumber's certification. In a lot of ways, it would have been something they could identify with, they would feel more comfortable with.

When I left for law school, I think they felt an inability to continue being parents in a small way. So being able to relate to those students, who have fewer and fewer people to relate to, as far as their own day to day experiences, is vital, and I think it's a really important part of the law school experience, both inside and outside of the classroom.

**Kaji:**

So as a disclaimer, unlike the other three panelists, I don't actually work in academia. But as a practicing lawyer who works hard on diversity initiatives and that's also something I was very passionate in law school, I can second the various comments about how important it is to have diverse faces at the law firms, whether it's the staff or the faculty. I think that goes to two key points. One is that mentorship and the ability to be able to see someone who looks like you, the role models, as Professor Martinez said, is very important.

Justice Goodwin Liu, who is a Supreme Court Justice from California, has been compiling data on Asian American lawyers specifically and found that about 95% of them don't have other lawyers in their family. That statistic is probably true for a lot of other minority lawyers. What that often means is that mentorship is extremely critical to answers those questions when you aren't able to go to go to your parents or your family to brainstorm or talk about your career path. You need to be able to do that with someone else, or you need to be able to relate to someone enough to say, "Ok, this looks like a career path I could take. This person looks like someone that I could be, or this person is somebody that I have a connection with." That does not only have to happen amongst minority folks. We all probably have mentors that are not necessarily the same race or ethnicity, but there is something to that. There's some value to that.

Secondly, we need law firms to continue promoting the pipeline and having that focus on diversity and that comes with a budget. That comes with sending students to conferences to supporting the affinity organizations on campus. I was very active in my affinity organization, and we had robust support from the school. That all comes, in part, from having diverse voices on the faculty and staff that are pushing that agenda. Because a lot of times, the white male who might be the decision maker doesn't mean to be blind to these issues, but unless somebody brings them to the table and says these are the issues we need to be addressing for our diverse lawyers, they don't know those issues exist. We can't necessarily blame them for that.

One observation, I noticed the flyer for this event had different people of color with their hands up, and I thought not only is this showing diversity, it's showing people raising their hands and saying we're here to participate, we have something to say. So, we can't sit there without our hands raised. We need to raise our hand and say this is what we need to be doing on campus, here's what I expect from my faculty and staff on the issue of diversity.

**Berry:**

Professor Martinez, you touched on the issue and I wanted to open it up for the group. Has the level of diversity and inclusion changed over the course of your career, and if so, how?



**Martinez:**

Well, what I thought I would do here on that question is to because it's a Hispanic law journal sponsoring this, I wanted to give a little history of Latino in law teaching. So, here's how the literature has developed that history. In 1994, professor Michael Olivas of the University of Houston, who is also known as sort of the dean of Latino law faculty. He published an early article on the need to increase the number of Latino law professors, and he pointed out in 1982, that there were 22 Latino law professors in only a dozen law schools. In 1992, he says there were fewer than 100 Latino law professors of the over 5,700 total number of law school professors. So, in 1992, fewer than 2% of the total number of law professors were Latino, and most of them were employed in only sixty law schools. To promote diversity, Olivas has started something called the "dirty dozen list," and he, along with the Hispanic National Bar Association, published a list composed of the top twelve American law schools located in areas with high Latino populations, but which had no Latinos on their law faculties. And the idea was to pressure these faculties to hire Latinos on their law faculties. The last "dirty dozen list" was published about seventeen years ago.

In 2008, Professor Ediberto Roman published an article entitled "Free Riders and Diversity in the Legal Academy" and he reexamined the status of Latinos on law faculty, and he found that many law faculties continued to have no Latino law faculty members. In particular, he found there were 131 Latino law professors at the top 100 law schools, which was spread out just over 63 law schools. Almost half of the top 100 law schools lack a single Latino law professor. In 2008, they found that there were 196 total Latino law professors out of a total of 12,216 law professors. 1.6% of the total law professors were Latino law professors. They identify a free rider problem in the legal academy with respect to the hiring of Latino law professors, that many law schools reap the benefit of the entire group's effort to increase the diversity of the Latino law professors without taking any steps to increase the Latinos on their own faculties. They can say they are part of a profession that values diversity and they point to statistics to show the presence of Latinos on law faculties in general, but they make no significant efforts to diversify their own faculties. So Latino law professors are mostly found in particular geographic region, namely regions among the southern border of the United States and within the lower ranked law schools. So nearly one half of the American law schools do not have a single Latino law professor. The free riding problem means that a few number of law schools at the top and the bottom of the rankings are carrying out the task of diversifying American law schools.

So now Professor Ediberto Roman, in a recently published piece published this year, says that he is going to start the "dirty dozen list" again. They are going to reestablish the "dirty dozen list" to try and pressure law schools to do some hiring. Here are the current statistics, the most recent statistics from 2013: the American Bar Association shows that there are 222 tenured Latino law faculty and 97 tenured track Latino law faculty nationwide.

**Garza:**

I'll add, from again, a position on campus that works a lot with our student organizations, it's become a point of emphasis with our student organizations to become more vocal and active in increasing diversity among our faculty ranks. This is led by CHLSA and TMLS, our black student law association.

As I have discovered in the past two and a half years since I've gotten here, I think, changing drastically the ethnic and gender makeup of your faculty is like pushing an elephant up a hill. It takes forever. It takes a lot of people, and it takes persistence and strength. But I think it's worth doing. What I am also trying to impress upon our current students, especially those in those groups that I mentioned, but all students is that, as they transition from law students into law school alumni, a lot of them don't realize that their sway and their voice will increase in this area. Their affiliation with their alumni association, both the Hispanic Alumni Association as well as the law school in general, can make their voice be heard through that organization and that membership to a greater extent than I think they would realize as law students.

So, it's something that's on the mind of our student orgs. It's something that's on my mind, as someone who works with our student orgs a lot, both in educating them as to the process and trying to teach them how to work within that process, while also maintaining a little bit of militancy and a little bit of persistence in trying to address these issues. Also, it's important to teach them to increase the visibility of Hispanic, black, and women and Asian law professors at a law school, frankly, that should represent those groups to a greater extent, I think.

**Kaji:**

I'll just comment briefly on how I think the diversity conversation has changed, especially in my last five years of practice. I know we have probably heard about implicit bias today. I think the conversation going in that direction addresses the nuance that really needs to be confronted that may impact the attrition rates and success of law students and young lawyers more so than anything else right now. I know at Haynes & Boone this is unique, but we have had implicit bias training for all of our associates made mandatory, and all of our partners did it at the partnership retreat. And I think that's where the conversation needs to go. We are also seeing a push from corporate clients, right, saying, "We want diversity at the forefront of the firms that we hire." So, firms then have to look back at their pipelines and ask, "Are we hiring enough diverse lawyers to satisfy our clients?"

A really refreshing thing that I think is happening, at least at my law firm and I hope at others, is a real genuine conversation about when we put minorities in front of the jury or in front of general counsel for a pitch. What I mean by this, and I won't name the general counsel, but there was a general counsel at a big company that said—and they were talking about diversity success in their mind—and they were saying, "We had a trial in Oakland,

California where the jury in that situation was predominately African American, and so, we made sure we told the firm put the African American lawyer in charge.” Is diversity when the African American lawyer got the opportunity? Should it really matter what the jury looked like? The African American lawyer had the skill set to do that case regardless. They need to be asking for the minority lawyers to take the lead regardless of what the jury looks like. We’ve had that conversation at our firm, and I think that’s where the conversation needs to go. We can’t be using token minorities or only using minorities when it serves a certain purpose. That’s not the best way to get lawyers the experience they need to excel.

So those nuanced conversations – those tough conversations, sometimes – are happening now. And I think that’s really important. And it goes also for pitches in front of counsel or clients: you know, to say, “Oh, general counsel is an Asian female. Go find the Asian female associate and make sure she comes with us!” Right? That’s not how this works, and that’s not the point of including minority folks at the law firm. It’s for that diversity of thought and to represent the make-up of this country. So, I am happy in this regard that I think the conversation is moving forward. As you can tell, based on the story I just told you about that general counsel from a big company, there’s still work to do, but I am glad that we’re having these conversations.

**Hutchison:**

I think, as far as the student side of the house, the number of minority students has increased. The percentage, it varies, but I’m fairly confident the number of minority students has increased over the years. One of the factors was the economic downturn of 2010 that started around 2010. When the number of students applying to law schools started to decline, the number of minority students applying to law school didn’t decrease nearly as much. So, that started to work on the percentage of students going in to law school. The other thing is that a lot of law schools are building pipeline programs, where we try to get more minorities into law school, and we put law school on their mind and being a lawyer on their mind earlier in the process. That’s when you start to see college programs, high school programs, and even elementary programs that law schools are doing.

While we can increase those pipeline programs, some of the barriers to enter into the legal profession, we can’t really do a lot about, and that’s what the pipeline tries to address. For instance, you have to have a bachelor’s degree. Well, getting students out of high school into college is one huge leap. And so, the pipeline programs can only do so much to address that. I can tell you here personally at the University of Texas School of Law, I was in the third class after *Hopwood*. I think Ms. Young was in the second class after *Hopwood*. So, the first year after *Hopwood*, there were four African-American students in the incoming class of about four hundred and seventy-five students. The second class, Ms. Young’s class, I think there were seven, and in my class, there were seven. You have more than seven now in your incoming class. So, I think that here it’s certainly increased. And I think that a large part of that, those low numbers those years, it wasn’t for lack of effort. There was plenty of effort on

the part of the university and great administrators, but I think it was just a factor of people not feeling welcome. It's like, people just did not feel like they were wanted here, and as that perception has changed, the numbers have certainly increased.

**Berry:**

Shifting gears a bit, how has affirmative action played a role in the work place?

**Garza:**

I sat in the wrong chair. When I went to law school, I received what they called a Diversity Scholarship, which was a full scholarship—all three years, no minimum GPA requirement. They wanted my brown face in those seats, and they wanted to, you know, boost their statistics. At the end of the fall semester, my friends and I were talking about grades and GPAs and preparing for finals, and they were under a lot of pressure because they had scholarships as well, but they had minimum GPAs to maintain. And I think I let it slip that I didn't. And they're great people, and we're still friends. But, I think, it changed their view of my law school experience a little bit. And you know, this was a private school, it's upstate New York, so it was a fairly progressive area.

But I think even up there—and I can only imagine, and I don't have to imagine actually—the students have talked about it at a pretty good clip around me, especially our minority students, about the apprehensions that they feel in class when the civil rights cases come up, when the affirmative action cases come up. They don't have to look up to feel the eyes turning to them, people thinking about what they're going to say, measuring what they say so as not to offend their minority colleagues in the classroom. I think that it has a great effect, whether it's increasing the number of students in the classroom. I think that's a great benefit of affirmative action. I think affirmative action should be the torch that we all carry going forward, whether we have benefited directly from it or not, but I do think that there are, there are ways in which the institutions that bring the students to campus via this policy, there are ways in which they can make their experience once they are here better.

Part of that falls on our student affairs staff, that's a large chunk of what I do here on a daily basis, but I think exposing faculty members to sensitivities when it comes to some of these cases and during our orientation process exposing our students to sensitivity training, diversity training, I think are important steps in easing that burden. But I mean, at a school like Texas Law, where we've really been the epicenter of affirmative action legalities for the entire nation, it's, of course, on everyone's mind all the time, and to think that it does not have an effect on the students once they are here is probably a little naive. But starting to think about ways in which we can make their experience better and more inclusive, I think is a charge that we should all carry forward.

**Kaji:**

Well, this is a tough one, just as a topic because I think what's just been talked about is very true. Affirmative action is so important for the pipeline, right, so important for getting

more diverse people at the law schools, and then a lot of jobs also create placeholders for minority candidates.

So, I got my job at Haynes and Boone as a 1L under a diversity scholars program, and it's very rare to have a 1L position. It was an amazing learning experience; it opened my eyes to the field of law since, like I said, I don't have lawyers in my family, didn't really know what I was getting into until that experience. I think those types of programs are really important. Of course for the law firms that do those types of programs the requirements are still the same: you still have to meet these really tough grade requirements your 1L year. That perhaps is not communicated all the time, and so, you not only experience some of the backlash to affirmative action as a law student, but you may face it again in your career when people look at you. You might say, "Oh well, they might be here in part because they are a minority."

To that I say you are always going to maybe confront some of those people. On the last panel, the judge that was here said the greatest thing that can happen to you is to be underestimated because you can prove people wrong. That's an unfortunate burden perhaps that minority candidates will always face for the time being while those notions still exist about affirmative action, and that is something I'm probably still learning to face. When you are underestimated maybe because of notions about affirmative action and how you got to where you are or just because of other implicit biases, how to empower yourself to confront those issues. Without a doubt, without affirmative action we can't create the pipeline that we are trying to establish to get all the way to the top of some of these legal professions. Whether it's being the dean at the law schools, whether it's being in-house counsel at big companies, or managing partners at firms, those numbers are still super, super, super small and you got to look at it all the way back to early education quite honestly, but certainly affirmative action along the way at the undergraduate level and the law school level. It's imperative I think to the pipeline.

**Hutchison:**

I'll say Justice Thomas said he felt ostracized because of affirmative action, because he felt like his classmates looked down on him because of affirmative action. I can tell you I've never, never felt that way at all because a lot of time when I talked to my colleagues who might not be a candidate for affirmative action, I found they had their own version of it. They had their own family ties, or their own this or that or whatever. So, it might not have been, "Ok we are going to give the Black student a chance or the Hispanic student a chance." It was, "Hey, I know you know so and so, so I'm going to open the door for you." So, I didn't feel any type of heartburn about it whatsoever because I thought, "No, no, you have a different version of it, but you do the same thing."

And I tell you, my experience here really helped me because I remember being in a senior staff meeting at the University of Florida's Law School, and I remember advocating a

position. The Dean said, "Well, you know Louis that is a great idea, but we can't do it because you know, we might get sued over affirmative action." I said, "Look, I went to the University of Texas. I am not afraid of that. I can handle that. That's nothing. I know their phone number; they are on speed-dial."

**Martinez:**

I think affirmative action still continues to be very important for all the reasons that everyone is saying here. It is still needed to open the door to give a chance for people to break into various professions. And I know, for students who are here listening, there are programs like diversity judicial clerkships that all of you need to look into if any of you are looking for a position or trying to get a judicial clerkship. There is an excellent national one that gives people opportunities to clerk with judges across the country, not just in Texas, and it is something that you need to look into. I think it is called diversity clerkship, look into that if you are interested in clerking for a judge. And these clerkships are very important because they can turn into a full-time judicial clerkship following law school.

So, these are not just internships or clerkships. They are things that can turn into jobs, so affirmative action is definitely still important. I think it needs to be improved. We need to go beyond where we are at now because you see, let's just assume there has been affirmative action, look at the statistics for the hiring of Latino law faculty. The statistic is still very small, extremely small. And if you look at the statistics for partners at the big law firms, it is obvious there's still very strong glass ceilings that continue to exist.

I also practiced law for 6 years at two of the biggest law firms in the country, and I could tell you that what I observed there was usually a revolving door of associates who were hired and then were never made partner. Even those statistics also show for example, that Latino lawyers make more money than the Anglo lawyers, which suggest that there is actually an under hiring of Latino lawyers in this country.

**Berry:**

We have discussed the economic push for diversity, the societal changes, and of course the legal requirements. What do you think is the best impetus for expanding diversity? It's a tough question.

**Kaji:**

I'll start by saying that I think what has practically been the best impetus has been the push from a financial standpoint. Law firms are recognizing how important it is to have diversity as part of their pitch to clients. I know that is pushing the big firms for sure, that probably is a very high motivator, and there have actually been studies by McKenzie and similar consulting firms showing that the most diverse companies and law firms are the most lucrative. Now, I do not know if that is correlation or causation but incorporating that into your brand is becoming a really important thing. So, there is just a bottom line dollar value to now being a firm, to being a company that includes diversity and inclusion as part of your

message. I think the most important impetus for a sincere change in our outlook on diversity is the social changes, and the hearts and minds of people, as you might say. Sometimes the laws get ahead of the hearts and minds of people, and sometimes the dollar value initiatives get ahead of the hearts and minds of people.

We need everyone to catch up on the viewpoint on why diversity is important, and to my earlier point, this conversation is getting better and getting more nuanced, I think part of that is us addressing the question, “Why do we want more diversity in the first place?” I think more people understand that it’s about diversity of viewpoints. It’s about the companies genuinely being better at what they do because they have candidates that can bring different viewpoints to the table. So, I guess the real answer is probably the money—money talks. But I think the sincere changes in the way we are looking at diversity is really coming from the hearts and minds of people, and people really addressing implicit bias. The attrition rate and those statistics are starting to speak for themselves. “Why are diverse lawyers leaving?” And they are leaving big firms, especially at a very high rate. Addressing those questions has put us in a much better place to have a sincere conversation about inclusion and diversity beyond the numbers.

**Hutchison:**

I would say as well that I think the best impetus is that employers and universities just need to be more honest about things. While a strong LSAT is a good indicator of a lot of things, what is it not an indicator of? It’s a good indicator of how you are going to perform during your first year of law school and whether you pass the bar exam, perhaps. But the correlation between that and you being a good lawyer, I don’t think I’ve seen anything that suggests that.

Because you probably heard it: “The As become law professors, the Bs go to law firms, and the Cs get rich.” That’s typically what they say when we’re in law school. I’ll tell you—now that I’m 15 years out of law school, that saying might have some truth to it. I know several students that have graduated in schools that I’ve worked at that have become millionaires just within five to ten years of graduating, and none of them were the A students. Now the A students have done well. They’ve become partners at big firms and they are doing well on their own. But I think if, for instance, firms were more honest, they could say, “Well, this student may not have a 3.6 GPA from law school, but for what we want this person to do, do we really need it? Do they have the skills necessary to go onto a courtroom, relate to a jury, tell the story, and convince 12 people of whatever it is that we want to convince them of?” So, I think it’s that.

I think law schools have gotten more honest in the holistic approach to admissions when we start saying, “What are the skills that attorneys need? Let’s look beyond the LSAT and GPA and look at some of the soft factors. What have they overcome? Where are they coming from?” and so forth. So, I think that the biggest thing is just being more honest

instead of going by those rigid standards of the past that were there somewhat artificially. I think just be honest. What skills will it take to get this person to where they want to be or to help them be successful? And then, use that. With that mode, diversity tends to come in on its own.

**Martinez:**

Well, I think in the context of a law faculty and trying to increase diverse faculty, it's useful to examine some of the obstacles that are present. There's an important book that's been recently published that is called *Presumed Incompetent: The Intersections of Race and Class for Women in Academia*, which is published by a number of minority women law professors. I think what they say is applicable more generally, but let me just tell you some of the things they point out as obstacles. The main thing is that minority faculty may encounter a presumption of incompetence from students, colleagues, and staff. So, they say that the culture of academia remains distinctly white male heterosexual and upper and middle class. Anyone who differs from that norm are to a greater or lesser extent presumed incompetent as teachers and scholars. So, law students will tend to presume that people of color are not as accomplished or credentialed as white colleagues. They question their competence and may challenge everything they say in the classroom as a result. They become enraged if they don't get a grade that they want.

So, what happens is they point out that minority women may spend more time—too much time—preparing to teach classes so that they don't produce enough scholarship. And if they can be punished by student evaluations—and I think that's a big obstacle for the people who are hired through the affirmative action process or whatever—that they still have to meet whatever the standards are. And if the students are presuming them incompetent, and give them bad teaching evaluations, they're not going to make it. They're not going to get tenure. And I can tell you that I've seen, I've been on a faculty for twenty-six years, and I've seen many people who have been hired to law faculties across the country, minority faculty, who never survive to get tenure. They don't survive to get tenure because maybe their teaching evaluations are not what they want to see, or their scholarship is not where they want it to be, or they may not find mentors in the senior faculty.

But you also have to have some senior faculty that are going to go to bat for you when the times comes to vote on whether you're going to get tenure. And then the decision is, "Do they want to have you around the rest of their lives?"

So if they don't really identify with you—if they have no investment in you—then are you going to be able to muster the tenure vote for people at your faculty? And that's something that's extremely hard to do. And it's a political process on law faculties, or trying to become a partner at a law firm is a similar kind of process, as well. So people have to, minorities have to understand that there's a political aspect to all these jobs. I have a senior colleague, who's a historian at SMU, and he says that—and I think he may be right—that



many times minority faculty don't really understand that tenure is not necessarily a meritocracy, that it is often a political award to people who are able to negotiate the system. And if you don't know how to negotiate the system, you've never learned how to do that, then you're not going to make it. So, you have to try to get advice from people who have been through the process who can try to help you negotiate the process.

What you're going to have to do, you're going to have to have some friends who are senior faculty. I have a friend who's a statistician, he's a professor at Rice University (he's a Latino), and he told me that somebody told him when he was coming up in the area of statistics in his department—he got tenure at SMU and now he's got tenure at Rice—he said somebody said, “You got to put something on their resume of your senior faculty for them to want to go to bat for you. And you're going to have to show that you're valuable to them, enough that they're going to want to keep you around for the rest of their lives.” Because tenure is a lifetime, potentially a lifetime job.

**Garza:**

I think, again, from more of a student-centered point of view, it's hard to identify one impetus for diversity. Not all of them are always well-intentioned. I think if you look at the need for—if we start at, kind of, the end of the road, why aren't there more faculty of color? Why aren't there more judges of color? You necessarily have to start coming down that ladder. To create more faculty of color, more lawyers of color, and judges of color, you've got to start producing more law students of color. Well, what's the run down from that? You've got to start producing more college graduates who can credential themselves in a way to gain admission to these elite institutions. To create more college graduates who meet that profile, you've got to create more high school graduates of color. You know, it goes all the way down to, what some would argue, paid leave for parents. I think an investment from the bottom of that ladder all the way through someone's education would beget more of these goals that we're looking at.

And so, I think the impetus for more diversity should be equity. I think that's, you know, that's in a lot of ways where all of this stems from. I'm not sure that's always the driving force. Sometimes it's political. Sometimes it's visual. Sometimes it's a marketing tool. And when it is those things, I think the measures taken to improve diversity are superficial in a lot of ways. You know, why do we have a top-ten-percent rule? Why don't we just invest in the schools in the [Rio Grande] Valley and the schools in East Texas? Why don't we invest public education more rather than having a top-ten-percent rule? Well, a top-ten-percent rule is not as expensive. You know? It doesn't cost nearly as much to just admit the top ten percent of Harlingen High School rather than create a Harlingen High School that can compete with Plano High School and all these other more elite schools.

So, I think diversity—any measure of diversity has some value. I don't want to discredit what people are trying to do, in any way, to improve representation. But I think it's

important, from a Student Affairs point of view, to begin to educate our students as far as why these systems are in place, especially at a law school. Why these systems are in place, who is putting these systems in place and in what ways can they be improved? Are you creating these systems to achieve a certain monetary goal? A certain statistical goal? Or a certain social goal? And it then becomes incumbent, you know, on the students that we educate and graduate to change those systems and refocus them and, because, you know—my . . . ah well, I don't want to say anything. But diversity begets diversity. The more college graduates we have, those people go on to have families. They're going to have sons and daughters who look like them, who will have advantages. And that's the whole point of all of this. So, one would hope that someone's intentions are good. That's not always the case, and I think bringing those true intentions to light is part of our job as educators, as well.

**Berry:**

Please join me in thanking our panelists.



