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ACROSS THE BORDERS: IMMIGRANT STATUS AND IDENTITY IN LAW AND LATCRIT THEORY

*Ruben J. Garcia**

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Where the sky goes gray and wide
We'll meet on the other side
There across the border.¹

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1. BRUCE SPRINGSTEEN, *Across the Border*, on THE GHOST OF TOM JOAD (Columbia Records 1995). Springsteen commented that the song is "like a prayer or dream that you have the night before you take a dangerous journey. The singer seeks a home where his love will be rewarded, his faith restored, where a tenuous peace and hope may exist." BRUCE SPRINGSTEEN, SONGS 276 (1999). I dedicate this Essay to the memory of Professor Julian Eule, a fellow Springsteen fan and a professor of mine at UCLA Law School.

I. INTRODUCTION

Immigrants make up a large and increasing portion of the American community.² The recent census found an unprecedented number of immigrants within the United States.³ Immigrants, however, have fewer legal protections than almost any other individuals within our borders. This lack of protection is especially disconcerting given that immigrants are often the most subordinated members of our communities. Particularly after the events of September 11, 2001, the rights and protections available to immigrants—whether they are documented or not—are tenuous. As LatCrit scholars have pointed out, immigration law is intensely racialized, and yet other bodies of law, such as civil rights and labor law, have failed to take into account how identities that are currently legally protected—such as race, color, national origin, and ancestry—intersect with immigrant status and history.⁴

LatCrit theorists have argued that: (1) legal doctrines fragment identities to the point that the subordinated have no recourse at all;⁵ (2) existing legal categories ignore identities, cultures, and languages;⁶ and (3) legal doctrines

2. I use the term “immigrant” in this Essay rather than the legal term “alien” because: (1) there are negative stereotypes attached to “alien,” and (2) my exploration of “immigrant” involves more than a legal status, not as in the dichotomous citizen/alien legal framework, but as an identity that can live on even after citizenship is obtained. See, e.g., Kevin R. Johnson, *“Aliens” and the U.S. Immigration Laws: The Social and Legal Construction of Non-Persons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1997); Victor C. Romero, *The Domestic Fourth Amendment Rights of Undocumented Immigrants: On Gutierrez and The Tort Law/Immigration Law*, 35 HARV. C.R.-C.L. L. REV. 57, 59 n.12 (2000).

3. Eric Schmitt, *Census Data Show a Sharp Increase in Living Standard*, N.Y. TIMES, Aug. 6, 2001, at 1 (stating “immigrants make up 11 percent of the country’s population, the largest share since the 1930s”); U.S. Dep’t of Commerce, Econ. & Statistics Admin., Bureau of the Census, *We the American . . . Foreign Born*, Sept. 1993, at 2; Cindy Rodriguez, *Impact of the Undocumented: Study Cites Boom in the Job Rolls*, BOSTON GLOBE, Feb. 6, 2001 at A01.

4. Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CAL. L. REV. 1395, 1399 (1997) (stating “[t]he point of the critique is not to abandon race, but rather to examine the political economy of race, the processes through which race is used to distribute power and maintain racial privilege. These processes produce and maintain both immigrant and native identities.”).

5. See generally Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!*, 28 HARV. C.R.-C.L. L. REV. 395 (1993).

6. Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347 (1997):

Too often the corpus of civil rights literature is seen as the product of a clash between “two races,” one Black and one White. Although the racial dualism analyzed by this literature is undeniably important to our study of equal opportunity law, it does not translate well when applied to Latinos, whose

are intrinsically racialized even when it comes to purportedly nonracial subjects like immigration.⁷ Drawing on these insights from LatCrit Theory, my goal is to conduct a “thought experiment.”⁸ My questions are: What if the law recognized immigrants *as immigrants*? Do immigrants have any identity interest that the law is obliged to protect? What do we lose, and what do we gain, if we recognize immigrant status and history as an identity axis deserving independent legal protection?⁹ I believe these questions

oppression is not limited to odious classifications based upon skin color or race but also includes language capability discrimination, religious tradition, immigration status, and other markers of non-Anglo “otherness.”

Id. at 1355-56; see also Juan F. Perea, *Ethnicity and Prejudice: Reevaluating National Origin Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805 (1994). My analysis is related to Perea’s in that we both acknowledge the failure of the national origin classification to address a wide range of discrimination. While an immigrant classification would encompass some ethnic traits, it would provide a different framework for their protection.

7. See generally Ruben J. Garcia, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118 (1995); Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525.

8. See Richard T. Ford, *Race as Culture? Why Not?*, 47 UCLAL. REV. 1803, 1803 (2000).

9. Other articles have touched on the idea of immigrant identity, but none have attempted to craft it as a separate legal category. See, e.g., Josh Price, *Difficult Maneuvers in Discourse Against Latina Immigrants in the United States*, 7 CARDOZO J. INT’L & COMP. L. 277, 287-89 (1999) (discussing Indian immigrant identity in the context of domestic violence); Dorothy E. Roberts, *BlackCrit Theory and the Problem of Essentialism*, 53 U. MIAMI L. REV. 855, 861-62 (1999) (discussing Roberts’s choice and ability to identify both as the daughter of a Jamaican immigrant and a descendant of slaves from the Southern United States). Drucilla Cornell describes immigrant identity as “one that has fluid parameters because many different social and historical forces constitute it.” Drucilla Cornell & William W. Bratton, *Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish*, 84 CORNELL L. REV. 595, 684 (1999); see also Leslie Espinoza, *A Vision Towards Liberation*, 19 CHICANO-LATINO L. REV. 193 (1998):

Immigration issues bring Latino/as together as a community and immigration issues fracture us as a community. The immigration discourse not only fractures us, but also breaks us in a way that keeps any piece from seeing the whole. The immigration discourse reinforces an immigrant identity that simultaneously blinds us from claiming our status as the colonized.

Id. at 194-95.

For an empirical analysis of immigrants’ assimilative attitudes, see T. Alexander Aleinikoff & Ruben G. Rumbaut, *Terms of Belonging: Are Models of Membership Self-Fulfilling Prophecies?*, 13 GEO. IMMIGR. L.J. 1 (1998).

Some groups (the Mexicans and Filipinos in California, the Haitians and Nicaraguans in Florida) have moved toward a more proudly nationalistic reaffirmation of the immigrant identity. Almost all others have moved toward

implicate central tensions in LatCrit Theory, and in progressive law generally. Specifically, how do we work towards liberation for all, and still recognize the unique identities of individuals, nations, and “races?”

I believe LatCrit theorists should interrogate legal and political notions of immigrant identity. Law has played a central role in defining our notions of what an “immigrant” is in a variety of ways, running the spectrum from “good immigrants” to “bad immigrants.”¹⁰ But why does law not provide full legal protection to immigrants, undocumented, temporary, or otherwise, on the basis of their *immigration status*? This inquiry requires us to explain why law protects certain immigrants and not others. It also requires us to look at how law is shaping the lives of immigrants, and how immigrants see themselves. It requires us to think about the potential dangers of expanding categories of legal protection and the rationales for existing legal categories.¹¹ These questions focus attention on the hybrids in our legal system and how legal categories might drive wedges between potential political solidarities.¹² Finally, the inquiry requires LatCrit theorists to redefine “immigrant” in ways that law has failed to do.¹³

In order to redefine immigrant identity, it might help to begin with how racial identity is constructed. As Kevin Johnson argues, we must view the “racial” identity of people of color from at least two vantage points: (1) how people construct their own identity on an individual level, and (2) as LatCrit Theory has pioneered, the ways in which “racially subordinated people should analyze the construction of *group* identity.”¹⁴ Law is a factor, though not a determinative one, in the production of group identity. Government action delineates who is “legal” and “illegal,” and constitutional doctrine determines to what extent immigrants are allowed

pan-ethnic minority group identities, as these youths become increasingly aware of the ethnic and racial categories in which they are persistently classified by mainstream society.

Id. at 19-20.

10. See I.N.A. § 1101(a)(15)(A-V) (containing 22 statutory definitions of “immigrant”).

11. See Ford, *supra* note 8, at 1803 (an ideologically left-wing critique of the attempt to extend civil rights protection to cultural differences or identity correlated traits). For a proposal for greater legal protection of “foreignness,” see Natsu Saito, *Alien and Non-Alien Alike: Citizenship, “Foreignness,” and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997).

12. See generally RUTH COLKER, *HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW* (1996).

13. Just as there are many different legal categories that define immigrants, so too, are there many differences among immigrants as to whether they see themselves as temporary or permanent members of the community, insiders or outsiders, and to what privileges accorded to other members of society they believe they are entitled.

14. Kevin R. Johnson, *Immigration and Latino Identity*, 19 CHICANO-LATINO L. REV. 197, 197 (1998). The question of law’s constitutive power also has been addressed by law and society scholars. See text and notes at Part II(D), *infra*.

to participate in the full range of U.S. civic life.¹⁵ In Part II, this Essay looks at the way law has rendered immigrant identity invisible by ignoring immigrant status, history, and identity in the so-called “private” realms of work, housing, and public interaction. Part III analyzes how immigrants have constructed their own identities individually and collectively even in the absence of any legal recognition, primarily in the context of labor organization. Finally, in Part IV, this Essay explores points where links can be built between law and social mobilization of groups, and the implications of building those links.

II. THE POROUS BORDERS OF EXISTING LEGAL DOCTRINES

A. *Workplace Law: Weak Protection of Immigrants*

Immigrants are protected indirectly and incompletely by the laws prohibiting discrimination in the workplace. Under Title VII of the Civil Rights Act, discrimination on the basis of race, color, national origin, and ancestry are prohibited; discrimination on the basis of immigrant status is not prohibited.¹⁶ Immigrants may receive “national origin” protection under Title VII, but they do not receive it based on their immigrant status.¹⁷ Proving the national origin claim often requires plaintiffs to show that their discriminator bore some hostility toward their particular nation of origin or ancestry, as opposed to a general, undefined animus toward “newcomers” or “illegals.”¹⁸

15. See *Foley v. Connelle*, 435 U.S. 291 (1978) (New York’s citizenship requirement for police officers upheld); *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (upholding California’s ability to prevent aliens from serving as deputy probation officers); see also *Ambach v. Norwick*, 441 U.S. 68 (1979) (allowing New York to bar aliens from becoming public school teachers); Victor C. Romero, *Expanding the Circle of Membership by Reconstructing the “Alien”: Lessons from Social Psychology and the “Promise Enforcement” Cases*, 32 U. MICH. J.L. REFORM 1 (1998) (describing how the court-stripping provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 strip immigrants of membership in the polity).

16. 42 U.S.C. § 2000e-2 (a)(1) (2000).

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin. . . .

Id.; see also *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973).

17. See generally *Espinoza*, 414 U.S. at 86.

18. See generally Gloria Sandrino-Glasser, *Los Confundidos: De-Conflating Latinos/as’ Race and Ethnicity*, 19 CHICANO-LATINO L. REV. 69 (1998) (critiquing the conflation of Latinos/as’ race and nationality in national origin jurisprudence). The conflation of immigrant

Although workplace law barely recognizes them, immigrants form the backbone of our economy and are a substantial presence in U.S. unions.¹⁹ The relatively large number of cases that involve immigrants as well as union, wage, and job discrimination cases obscure other issues facing immigrants. These include the need to be free of housing discrimination and to have free access to public places and businesses.²⁰ The lack of litigation involving these other needs suggests the tacit assumption that law need only ensure that immigrants can make the minimum wage, organize a union, and be protected from “race” discrimination on the job—because immigrants are here only to do the work that the *güeros* will not do.

Even though immigrants have made some progress in obtaining basic protection under U.S. labor and employment laws despite daunting citizen/alien and legal/illegal distinctions, their access to job rights and remedies is tenuous. Most courts assume immigrants have basic coverage under these laws, but deny equal access to the legal remedies needed to fulfill the promise of the laws’ protection.²¹ Thus, undocumented victims of unfair labor practices under the National Labor Relation Act (NLRA), while technically covered by the law, may not obtain reinstatement to their former job if their reinstatement would not be legal under the Immigration Reform and Control Act of 1986 (IRCA).²² Until the Supreme Court

status, race, and national origin that I discuss here is similar to Sandrino-Glasser’s exploration of the conflation of race and nationality. I do not believe that legal recognition of immigrant status under antidiscrimination law will mark an end to the conflation that Sandrino-Glasser describes. As I argue below, I believe, however, that de-conflation of race, national origin, and immigration status would better reflect social realities than current doctrines.

19. David Bacon, *Labor Fights for Immigrants: The Stage Is Set for a Showdown Over the Fate of Undocumented Workers*, NATION, May 21, 2001 (noting the importance of immigrant workers to the survival of the labor movement).

20. Immigrants have, of course, been successful in establishing the right to public education. See, e.g., *Plyer v. Doe*, 457 U.S. 202 (1982) (children of undocumented immigrants are entitled to public education).

21. On undocumented immigrants’ basic coverage under Title VII, see *Rios v. Enterprise Ass’n Steamfitters Local Union 638*, of U.A., 860 F.2d 1168, 1173 (2d Cir. 1988); see also *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1516-17 (9th Cir. 1989); *Patel v. Quality Inn S.*, 846 F.2d 700 (11th Cir. 1988) (undocumented immigrants entitled to minimum wages and overtime pay by the Fair Labor Standards Act), *cert. denied*, 489 U.S. 1011 (1989). On the inadequacy of remedies, see Maria L. Ontiveros, *To Help Those Most in Need: Undocumented Workers’ Rights and Remedies Under Title VII*, 20 N.Y.U. REV. L. & SOC. CHANGE 607 (1993).

22. *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 53 (2d Cir. 1997) (employer may require reinstated worker to provide proof of authorization to work in the United States); see also *NLRB General Counsel Memorandum 98-15* (Dec. 4, 1998) (directing agency lawyers that reinstatement should be sought without regard to immigration status, but that the employer then can refuse to reinstate the employee if the employee cannot show the legal ability to work in the U.S.). But see *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115 (7th Cir. 1992) (questioning, in dicta, whether undocumented workers should be covered by the NLRA at all in light of IRCA).

decided *Hoffman Plastic Compounds, Inc. v. NLRB*²³ in March 2002, most courts and the National Labor Relations Board (NLRB) had decided that undocumented immigrants could receive back pay, as long as they were physically present to collect it. The Court's denial of back pay in *Hoffman* to an undocumented immigrant fired in violation of the NLRA does not bode well for remedies available to immigrants under other protective statutes, such as the Title VII antidiscrimination protections, and minimum wage and overtime protections under state and federal laws.²⁴

Even before *Hoffman* was decided, the Fourth Circuit Court of Appeals held that undocumented aliens were not covered by federal antidiscrimination law. In *Egbuna v. Time-Life Libraries*,²⁵ the undocumented plaintiff could not meet the prima facie requirement that he was "qualified" because of his violation of the immigration laws.²⁶ The decision implies that immigrants who are here legally (using some kind of visa) but who violate the technical requirements of their visa, for example, by working when not permitted by the terms of the visa, do not meet the "qualified" requirement.²⁷ Under *Egbuna*, undocumented immigrants are not entitled to Title VII's protection, or by extension, the protection of the other labor and employment laws for which being "qualified for work" is a prerequisite for relief.²⁸

The invisibility of immigrants under Title VII is not limited to the undocumented. This was made clear by the U.S. Supreme Court in its 1973

23. 122 S. Ct. 1275 (2002).

24. In *Hoffman*, the Court decided only whether back pay would be available to undocumented immigrants under the NLRA. *Id.* at 1278. The Court acknowledged that the undocumented would continue to be covered by the NLRA, but denied back pay on the following grounds: "The [NLRB] asks that we overlook [the worker's undocumented status] and allow it to award backpay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud." *Id.* at 1283. This rationale for denying back pay, which overlooks the illegality of the employer's actions and potential deterrence factors, could be used to deny remedies and basic coverage to undocumented immigrants under a variety of protective labor laws, such as Title VII and The Fair Labor Standards Act.

25. 153 F.3d 184 (4th Cir. 1998) (en banc), cert. denied, 525 U.S. 1142 (1999).

26. *Id.* at 186. In *Egbuna*, the plaintiff was a Nigerian national who had overstayed his student visa, a situation common to a large number of the "undocumented." *Id.* at 185-86. Despite the fact that he was qualified enough to be hired by defendant, Time-Life Libraries, Inc., when he had a valid student work visa, the court concluded that he could not be considered "qualified" after that visa expired. *Id.* at 187.

27. See 8 U.S.C. § 1324a (2000).

28. See *Egbuna*, 153 F.3d at 184. Title VII is actually one of the only statutes that requires the plaintiff to be "qualified for work." The NLRA requires only that the victim of unfair labor practices be "available for work." See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984). This divide between being "qualified" and "available" highlights the fragmentation of Title VII and the NLRA. See Iglesias, *supra* note 5.

*Espinoza v. Farah, Inc.*²⁹ decision. Plaintiffs in *Espinoza* were lawful permanent residents who challenged Farah's policy prohibiting noncitizens from holding employment as a violation of Title VII's ban on national origin discrimination.³⁰ In affirming dismissal of the claim, the Court held that discrimination on the basis of citizenship was not prohibited under Title VII's national origin category.³¹ The decision ended the formal conflation of immigrant status and national origin categories. Now, any claim under Title VII based on the alien/citizen distinction will fail. Still, the informal conflation of immigrant status or history with race and national origin discrimination continues.³² Thus, in many cases, statements such as "wetback" and "go back where you came from," have been considered evidence of race or national origin discrimination against Mexicans and other Latinas/os.³³

Although not prohibited by Title VII, discrimination on the basis of citizenship status is unlawful under the antidiscrimination provisions of IRCA.³⁴ The borders between race discrimination and anti-immigrant sentiment, however, continue to be policed by provisions that prevent the EEOC and the U.S. Department of Justice from exercising concurrent jurisdiction over claims on the basis of national origin discrimination.³⁵ In addition, IRCA's antidiscrimination provisions do not apply to the undocumented.³⁶ Thus, even though IRCA may prohibit some discrimination on the basis of citizenship status with respect to hiring, firing and retaliation, it does not provide Title VII's range of protection (e.g.,

29. 414 U.S. 86 (1973).

30. *Id.* at 87.

31. *Id.* at 95. In his dissent, Justice Douglas argued that the employer's policy had a disparate impact on the Latino/a plaintiffs, and that discrimination based on birth outside the U.S. is necessarily discrimination based on national origin. *Id.* at 96 (Douglas, J., dissenting).

32. See, e.g., *Nieto v. United Auto Workers Local 598*, 672 F. Supp. 987 (E.D. Mich. 1987). In *Nieto*, the court stated: "[A]lthough the verbal harassment [suffered by plaintiff] was replete with references to green cards, boats, wetbacks and borderpatrols suggesting national origin discrimination, this is racial discrimination within the meaning of section 1981." *Id.* at 989.

33. See, e.g., *United States v. Makowski*, 120 F.3d 1078 (9th Cir. 1997); *Erebia v. Chrysler Plastic Prod. Corp.*, 772 F.2d 1250 (6th Cir. 1985); *Miller v. Kenworth of Dothan, Inc.*, 82 F. Supp. 2d 1299 (M.D. Ala. 2000).

34. See 8 U.S.C. § 1324b(a)(1) (2000). The aggrieved individual must make a complaint with the Office of Special Counsel (OSC) for Immigration Related Unfair Employment Practices in the Civil Rights Division of the U.S. Department of Justice. *Id.* § 1324b(b)(1). If the OSC finds that the complaint has merit, an Administrative Law Judge, whose decision can then be enforced or appealed in the United States Court of Appeals, will hear the complaint. *Id.* § 1324b(d)(1), (i)(1).

35. This is because of the different jurisdictional requirements of the two statutes. IRCA only applies to national origin claims against employers having four to fourteen employees; Title VII applies to employers with fifteen or more employees. *Id.* § 1324b(a)(2)(B), (b)(2).

36. See generally *id.* § 1324b(a)(2)(B), (b)(2).

with respect to discipline or discriminatory working conditions not resulting in discharge) or remedies (e.g., front pay, injunctive relief). This patchwork of legal protection for immigration status under various federal statutes calls out for explicit, uniform treatment of immigration status under Title VII and other civil rights statutes. That is, Title VII should be amended to include immigration status as a protected category in addition to race, color, ancestry, and national origin.

The failure of labor and employment litigation to provide a sound basis of equal job rights for immigrants gives credence to those who argue that litigation may not be the way to change the world.³⁷ My proposal for amending Title VII would, of course, only touch those employers who are otherwise covered by the law (those with fifteen employees or more), and would be subject to the same distinctions between documented and undocumented immigrants that have divided the workplace, unless the current regime of employer sanctions for hiring the undocumented is also repealed.³⁸ In response to these incongruities, many advocates are pursuing alternative strategies. Their agendas include repeal of employer sanctions and the decriminalization of immigrants seeking work in this country. A number of organizations, including the AFL-CIO and civil rights organizations, seek a repeal of employer sanctions and a grant of general amnesty.³⁹ The end of employer sanctions alone would not cause a panacea so long as employers could continue to threaten deportation by the INS. Moreover, even after removal of employer sanctions, some courts might still deny coverage of the laws on the ground that the undocumented are not "job-qualified" under Title VII, as the Fourth Circuit did in *Egbuna*.⁴⁰

Winning amnesty would still leave immigrants vulnerable in many other basic areas of survival, such as the ability to obtain housing after long days of building and cleaning the homes of others. So, a cohesive political strategy for immigrants must also look outside the employment context.

37. See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); Kevin R. Johnson, *Racial Hierarchy, Asian Americans and Latinos as "Foreigners," and Social Change: Is Law the Way to Go?*, 76 OR. L. REV. 347, 362-66 (1997) (expressing misgivings on the effectiveness of Natsu Saito's proposal in the same volume for legal protection of "foreignness").

38. 42 U.S.C. § 2000e(b) (2000) (defining "employer" as a "person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year").

39. See, e.g., Tom Gilroy, *Immigration: AFL-CIO Unveils Worker Initiative to Legalize Millions of Workers, Officials Say*, DAILY LAB. REP., Feb. 15, 2001, at B-3; Julie Quiroz-Martinez, "A Fair and Just Amnesty": A Grassroots Movement for Immigration Legalization Is Gathering Strength, NATION, May 21, 2001 (describing the efforts of, inter alia, the National Council of La Raza, and the National Coalition for Amnesty and Dignity).

40. *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184, 188 (4th Cir. 1998) (en banc), cert denied, 525 U.S. 1142 (1999).

B. Fair Housing Law: No Home for the Immigrant Worker

Like employment law, fair housing law has attempted to address the alien/citizen divide by resorting to race, national origin, or ancestry paradigms. In contrast to the legal obstacle presented by IRCA's prohibition on the employment of undocumented workers, nothing in immigration law prevents rental or sale of property to the undocumented.⁴¹ While the judicial rationale for covering immigrants under the labor laws is to prevent employers from exploiting this labor force and creating incentives to attract *more* immigrants, this rationale would not seem to apply to immigrants seeking housing.⁴² Preventing housing discrimination against individuals based on their immigrant status would seem to have little or no effect on attracting labor, and so courts would seem to have little incentive to provide fair housing protection for immigrants.

Immigrant plaintiffs with documents in fair housing cases have had mixed results, which does not bode well for potential plaintiffs without documents. When plaintiffs seek relief under the Fair Housing Act of 1968, or under 42 U.S.C. § 1981, challenging arbitrary obstacles such as immigration status or alienage, many courts have attempted to fit their situation into one of Title VII's prohibited grounds for discrimination.⁴³ In *Espinoza v. Hillwood Square Mutual Ass'n*,⁴⁴ the plaintiffs, a Mexican immigrant couple and an Indian immigrant, were noncitizen permanent

41. Historically, however, transfer of property has been formally constrained by race and immigration status. In 1920, California voters passed the Alien Land law that denied Japanese immigrants the ability to own agricultural land. The Supreme Court upheld the constitutionality of these laws in *Oyama v. California*, 332 U.S. 633, 646 (1948). See Kevin R. Johnson, *The New Nativism: Something Old, Something New, Something Borrowed, Something Blue*, in IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 165, 169 (Juan F. Perea, ed. 1997).

42. See *Patel v. Quality Inn S.*, 846 F.2d 700 (11th Cir. 1988).

If the FLSA [Fair Labor Standards Act] did not cover undocumented aliens, employers would have an incentive to hire them. Employers might find it economically advantageous to hire and underpay undocumented workers and run the risk of sanctions under the IRCA. . . . By reducing the incentive to hire such workers the FLSA's coverage of undocumented aliens helps discourage illegal immigration and is thus fully consistent with the objectives of the IRCA.

Id. at 704-05.

43. One case held that discrimination based on immigration status may be a disparate impact violation of the Fair Housing Act. See *United States v. Hous. Auth. of the City of Chicksaw*, 504 F. Supp. 716 (S.D. Ala. 1980). Disparate impact theory, however, is yet another "back door" approach to the problem of getting immigrants fair access to housing through "the front door," that is, through explicit protection of immigration status.

44. 552 F. Supp. 559 (E.D. Va. 1981).

residents who were denied membership in a housing cooperative open only to U.S. citizens. Relying on *Espinoza v. Farah*, the court dismissed the Fair Housing Act claim based on national origin because, as in the analogous Title VII context, “the term . . . refers to a person’s ancestry, and not his citizenship.”⁴⁵ The court allowed the section 1981 claim to proceed, however, recognizing the split in authority as to whether section 1981 applies to purely private contracts where alienage is the asserted basis for discrimination.⁴⁶ Deciding that section 1981 applied to private contracts, the court held that alienage was an illegitimate basis for the plaintiffs to be denied membership in the housing cooperative.⁴⁷ The Supreme Court recently agreed to resolve a split among the circuits on whether Section 1981 applies to private alienage discrimination, but the parties in that case settled the case before it was argued.⁴⁸

To summarize, Title VII and the Fair Housing Act afford no protection on the basis of immigrant status alone. Section 1981 may provide protection for immigrants to enter into contracts for employment and housing, depending on the circuit and the Supreme Court’s ultimate decision on the matter. The porous legal patchwork just described goes to the citizen/alien distinction in situations where the plaintiff’s citizen/alien status is usually undisputed. It leaves untouched discrimination based on a person’s *perceived* immigration status *or history*. That latter breed of animus exists in legal outskirts and is the subject of the next section.

45. *Id.* at 568.

46. *Id.* at 561. 42 U.S.C. § 1981(a) provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens

Other cases have held that section 1981 only protects “aliens of color” from invidious discrimination because the text of section 1981 refers to race and not “national origin.” *See, e.g., Patel v. Holley House Motels*, 483 F. Supp. 374, 382-84 (S.D. Ala. 1979).

47. *Espinoza*, 552 F. Supp. at 568.

48. *See Anderson v. Conboy*, 156 F.3d 167, 169-70 (2d Cir. 1998) (holding union requirement that its employees be citizens of the United States is actionable private discrimination on the basis of alienage under 42 U.S.C. § 1981), *cert. granted sub. nom.*, *United Bhd. of Carpenters v. Anderson*, 526 U.S. 1086 (1999), *cert. dismissed*, 527 U.S. 1030 (1999). *But see Bhandari v. First Nat’l Bank of Commerce*, 887 F.2d 609 (5th Cir. 1989) (en banc) (holding section 1981 does not prohibit discrimination based on alienage by private actors), *cert. denied*, 494 U.S. 1061 (1990).

C. *Darkness: Public Accommodations, Hate Crimes, and Street Harassment*

Employment and housing are not the only areas of life where immigrants are subject to discrimination. An immigrant may be singled out not only on his or her “objective” alien/citizen immigration status, but also based on *perceived* immigration status and history.

Private anti-immigrant activity was most visible and well-documented in the mid-1990s when nativist legislation was proposed on the federal and state levels. However, it has not subsided.⁴⁹ In 1994, Californians approved Proposition 187, which was ostensibly intended to cease government benefits to undocumented immigrants.⁵⁰ Following the passage of Proposition 187, there was a documented rise in discrimination against Latina/o immigrants and citizens based on their *perceived* immigration status.⁵¹ Latinas/os and immigrants were denied access to private businesses and were harassed on the streets.⁵² State and federal laws, however, only prohibit exclusion from public accommodations if motivated by race, national origin, or ancestry.⁵³ Statements like “go back where you came from” do not directly imply a specific race or national origin animus except with reference to the target of the speech. Similarly, being asked for a green card was a common act in California after the passage of Proposition 187.⁵⁴

One might argue that a demand for papers is not discrimination based on race or national origin unless one’s race or national origin is specifically

49. See, e.g., MICHELE LAMONT, *THE DIGNITY OF WORKING MEN: MORALITY AND THE BOUNDARIES OF RACE, CLASS AND IMMIGRATION* 92-94 (2000) (detailing the attitudes of working-class Black and White workers, where immigrants are sometimes viewed positively, and sometimes as welfare cheats and marriage frauds); Pat Milton, *Illegal Workers Causing Tension*, ASSOC. PRESS, Apr. 23, 2001 (describing disputes over day laborer centers on Long Island, New York for immigrants from Latin America, Asians, West Indian Blacks, and White Europeans); E.A. Torriero, *Immigration Drive Tests Iowa*, CHI. TRIB., May 4, 2001 (Iowa’s attempt to bring more immigrants into the state met with an anti-immigrant group arguing that the plan would fuel a rise in crime and change the character of the state).

50. Nancy Cervantes, et al., *Hate Unleashed: Los Angeles in the Aftermath of Proposition 187*, 17 CHICANO-LATINO L. REV. 1, 1 (1995). The measure was never enforced because it violated the federal government’s plenary power over immigration. *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 757, 763-87 (C.D. Cal. 1995).

51. *Id.* at 8-21.

52. *Id.* at 13-14. (including examples of people asked for immigration papers when attempting to open a bank account and seeking medical attention from private doctors, neither of which would have been required if Proposition 187 had become law).

53. Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619 (2000). In California, the Civil Rights Act’s prohibition of discrimination in public accommodations, which is based on “arbitrary characteristics” may prohibit discrimination based on immigration status, but the statute does not explicitly mention immigrant status. See CAL. CIV. CODE § 51 (2002).

54. See Cervantes, *supra* note 50, at 24.

mentioned or targeted.⁵⁵ The demand for papers also expresses a general hostility towards those “not from here” that may not explicitly relate to any race or national origin. If we equate being called “illegal” with national origin or ancestry discrimination against Latinas/os we legitimate the common assumption that part of Latina/o ancestry or heritage is illegal immigration. To call such epithets discrimination based on *perceived* immigration status is at least technically more accurate, although still based on a false reading of the immigrant histories of Latinas/os and other immigrant groups.⁵⁶

Although harassing speech by itself would not be actionable even on the basis of race or national origin, the hate violence that sometimes accompanies vague statements about immigration history could be prosecuted as a hate crime only if it is proven that the violence was based on the victim’s race or national origin. Statements like “go back where you came from” are racially coded, yet a jury may see only “immigrant” in such language. Discrimination may have yet another back door, and these ills will exist in legal darkness without any remedy.

D. *The Mutually Constitutive Nature of Law and Society*

This Essay has described legal doctrine that renders invisible harms to immigrants in public accommodations and hate crimes. In addition, this Essay has shown how race and immigration status are conflated under Title VII and the Fair Housing Act, and how remedial options for immigrants are inferior to others who suffer discrimination. Scholars have shown that constitutional jurisprudence and immigration law can be outwardly hostile toward the construction of immigrants’ identities.⁵⁷ The question then is how much credit we will give the law’s effect on the production of individual and collective identities. Many scholars explore how law shapes consciousness.⁵⁸ For this Essay, the question is how law has constructed the

55. The Supreme Court in *Espinoza v. Farah Mfg. Co.* clarified that the term “national origin” in Title VII specifically refers to “the country where a person was born, or, more broadly, the country from which his or her ancestors came.” 414 U.S. 86, 88 (1973).

56. I have found the same stereotypical assumptions in the judicial treatment of the “wetback” epithet. The term has become synonymous with Mexicans in national origin jurisprudence, even though by its terms, it is not limited to Mexicans. See *Zapata v. IBP, Inc.*, No. CIV.A. 93-2366-EEO, 1998 WL 717677 (D. Kan. Sept. 29, 1998) (finding “wetback” epithet used against plaintiff and other Mexicans was evidence of race, national origin and ancestry discrimination).

57. See Garcia, *supra* note 7, at 142-44; see also Kevin Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 716-28 (2000) (discussing how exceptions to Fourth Amendment protections for immigrants harms Latinos/as and other nonwhites); Romero, *supra* note 15.

58. See, e.g., Wendy Espeland, *Legally Mediated Identity: The National Environmental Policy Act and the Bureaucratic Construction of Interests*, 28 LAW & SOC’Y REV. 1149 (1994)

immigrant as deserving few legal protections, except where protection serves the interest of white society by regulating the supply of immigrant labor through incomplete protection of labor rights. Law is built on, and simultaneously reinforces, the social idea that immigrants should pull themselves up by their own bootstraps or go home. This story says nothing about the legal/illegal distinction that has been used to make undocumented immigrants completely illegitimate. The hostility of contemporary politics shows that the legal/illegal distinction means little to immigrants seeking government benefits.⁵⁹

Legal categories divide us by making legal protection under Title VII and the other civil rights statutes dependent on citizen/alien status.⁶⁰ These categories simultaneously homogenize us by treating people of color from other countries essentially the same as U.S.-born people of color. Immigrants certainly share many similarities with the U.S.-born, but it is a mistake to think that immigrants fit into this racial paradigm for all purposes. This, in fact, is one of the central premises of LatCrit Theory.⁶¹

Explicit legal recognition of discrimination based on perceived or actual immigrant status as a category, *in addition* to race or national origin, would be a first step toward protecting a greater number of immigrants. Such a category would conflate different immigrant groups together; every immigrant's history is different and should be regarded as such. In spite of this, legal recognition of immigrant status prevents the subordinated from slipping through the cracks of the existing legal categories, and also

(stating, "When groups question the implications of [legally] imposed subjectivity, the politics of identity may become a forum for resistance."); Elizabeth Mertz, *A New Social Constructionism for Sociological Studies*, 28 LAW & SOC'Y REV. 1243 (1994) (stating, "[The question is] not whether law reifies, but how, to what degree, and with what consequences. Nonetheless . . . it may still be the very fixing of identity into static categories itself that some people take as the starting point for their struggle with the law."); see also LISA LOWE, IMMIGRANT ACTS, OR, ASIAN AMERICAN CULTURAL POLITICS 8 (1996) (describing how laws operated in a contradictory manner to both place Asian immigrants within U.S. borders for the purpose of labor and then to exclude Asians from full participation in U.S. society); EFRÉN RIVERA RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO (2001) (examining the hegemonic force of law and legal constructs on the national identity of Puerto Ricans).

59. The 1996 Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. 104-193, 110 Stat. 2105 (1996) (codified as amended in various sections of Title 42, United States Code) ended many federal government benefits for noncitizens, whether "legal" or not. Some of these benefits were later restored, but merely as grandfather clauses. See Noncitizen Benefit Clarification and Other Technical Amendments of 1998, Pub. L. No. 105-306, 112 Stat. 2926 (1998) (codified as amended at 8 U.S.C. § 1611(b)(5)); see also *Lewis v. Thompson*, 252 F.3d 567, 582-88 (2d Cir. 2001) (denying prenatal care to children of undocumented immigrants was not a violation of equal protection).

60. See Elvia R. Arriola, *Foreword: March!*, 19 CHICANO-LATINO L. REV. 1, 30 (1998).

61. See Chang & Aoki, *supra* note 4; Cameron, *supra* note 6; Sandrino-Glasser, *supra* note 18.

recognizes immigrant status as an additional basis for subordination related to race and national origin. Just as race and national origin are independent, yet related, categories so too should immigrant status and history be an independent basis for protection.

III. THE OTHER SIDE: COLLECTIVELY CONSTRUCTING INDIVIDUAL IDENTITIES

If my proposal for legal recognition of actual or perceived immigrant status is an acceptable first step, is there a promised land? Part of the answer may be found in how individuals and communities construct their own identities, quite apart from any legal imprimatur, or of workable legal solutions that rely on objective characteristics that courts can use to fit cases into one box or another. Legal scholars identify a difference between chosen identity and legally or socially imposed status.⁶² Would immigrant status as a legal category lead people to identify themselves as immigrants even if they were U.S.-born and lived in the U.S. throughout their lives? In other words, does “immigrant identity” exist among immigrants, and should it be recognized as something different from objective facts about alien or citizen status? The debate is similar to the one revolving around whether biological facts about race should determine legally protected categories.⁶³ This Essay thus returns to the following questions: How do people construct identity on an individual and collective level, and what are the consequences of those choices for law, solidarity, and social change?

First, let us look at how immigrants *appear to have asserted* immigrant identities, because it is impossible to know exactly which identities any person or group holds, or which identities they are asserting when they act. Immigrant organizing within labor unions is a good point of view from which to examine these issues. Immigrants form the backbone of the U.S. economy and have been a substantial and growing presence in labor unions.⁶⁴ Immigrants also have been targets of nativist sentiment from some employers and unions. Despite this resistance, immigrants continue to arrive, and continue to form labor unions or worker organizations for their own “mutual aid or protection.”⁶⁵ That they have done so, even in the face

62. See, e.g., Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1260 n.2 (2000) (describing the difference between self-identity (how I see myself) and attributional identity (how others perceive me)).

63. See, e.g., Ian F. Haney-Lopez, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 10 LA RAZA L.J. 57 (1998); Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Silence” of American Racial Thought*, 10 LA RAZA L.J. 127 (1998).

64. Rebeca Myers, *To Boost Ranks, Unions Recruit Illegal Workers*, CHRISTIAN SCI. MONITOR, Mar. 15, 2001, at 3 (discussing the activities of the Mexican-American Workers Association organizing immigrant workers in New York City).

65. Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, protects the right of

of the consequences employers threaten is astounding. So far, few have explored this phenomenon besides Hector Delgado's empirical study of undocumented immigrants' willingness to risk deportation by unionizing.⁶⁶ Although more work of this kind should be done, Delgado's work refutes the notion that undocumented immigrants are harder to organize because of the constant threat of deportation. As one explanation, Delgado points to the various legal protections that exist if the undocumented are fired in retaliation for union activity. Delgado identifies several court cases in which undocumented immigrants were found to be employees within the meaning of the NLRA, and thus subject to its protections.⁶⁷ And, as described above, courts in many cases have limited backpay and reinstatement to those who can show they are legally available to work in the United States.⁶⁸

Despite the legal constraints on the behavior of employers and immigrants, law has not changed either the propensity of employers to violate the NLRA and IRCA with respect to immigrants, or the propensity of immigrants to form strong and militant labor organizations. Several labor studies scholars have addressed the importance of race in mobilizing collective action with the goal of changing power relations in the workplace, and its role in stifling solidarity because of race conflicts between workers.⁶⁹ Little work has been done, however, to decipher whether it is immigrants' (sometimes) common race that builds solidarity, or their common experience as *immigrants* that provides the unifying principle. Labor studies scholars have attempted to measure immigrants' propensity to organize unions, and to predict how collective organization may succeed or fail based on the racial homogeneity of various groups of workers.⁷⁰ These studies have found that racially homogenous groups are

workers to organize into traditional unions, as well as nontraditional worker organizations, for "mutual aid or protection." 29 U.S.C. § 157 (2000).

66. See generally HECTOR L. DELGADO, *NEW IMMIGRANTS, OLD UNIONS: ORGANIZING UNDOCUMENTED WORKERS IN LOS ANGELES* (1993) (challenging the thesis that labor law or immigration status hinders undocumented immigrants organizing unions). See also ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA (Ruth Milkman ed., 2000) [hereinafter ORGANIZING IMMIGRANTS].

67. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891-92 (1984).

68. See *supra* note 22.

69. See, e.g., PHILIP S. FONER, *ORGANIZED LABOR AND THE BLACK WORKER, 1619-1973* (1974); ROGER HOROWITZ, "NEGRO AND WHITE, UNITE AND FIGHT!": A SOCIAL HISTORY OF INDUSTRIAL UNIONISM IN MEATPACKING, 1930-90 (1997); DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (1999); Maria L. Ontiveros, *A New Course for Labour Unions: Identity-Based Organizing as a Response to Globalization*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES* 417 (Joanne Conaghan et al. eds., 2002).

70. See ORGANIZING IMMIGRANTS, *supra* note 66, at 3.

There have been few previous efforts to document and analyze the relationship

more likely to organize into unions than are racially diverse groups because: (1) racism among the union members did not hamper the organizing drive, and (2) the employer could not use endemic racism in society to divide the workforce against itself. More importantly, recent studies find that immigrants have a high willingness to organize into unions.⁷¹

The idea that race plays a role in union organization, and that racial identity both helps and inhibits union organization, still leaves unanswered questions about immigrants. Labor studies statistics do not control for the number of immigrants among supposedly homogenous ethnic groups. Do immigrants see themselves in solidarity with the U.S.-born Latinas/os who, like them, are struggling to obtain power and a voice in the workplace? These are but a few of the empirical questions that are yet to be answered.

Until more empirical work is done, it is illuminating to look at historical case studies of immigrants in unions and how they have asserted their interests in the workplace. Consider, for example, the work of Bert Corona and Hermandad Mexicana Nacional in organizing undocumented Spanish speakers into unions. The Hermandad succeeded in a time when many unions had U.S.-born Latina/o organizers who could not speak Spanish, and who maintained exclusionary practices for non-citizens, non-English speakers, and the undocumented.⁷² Did Hermandad's explicit focus on immigrants, in tandem with Corona's belief in the promise of labor unions, serve to mobilize so many immigrants? LatCrit scholars should explore questions like these in the years to come.

Other important foci of immigrant mobilization are the immigrant worker centers in many cities that provide needed services to immigrants and that reinforce a sense of pride and solidarity among immigrants of many different races.⁷³ These centers have historical antecedents in immigrant

of immigrants to unionism in the contemporary United States From the outset, there were many instances in which "ethnic bonds . . . served to cement labor organization." On the other hand, the diversity of nationalities within the United States was a challenge for union organizers from the earliest period.

DAVID BRODY, IN *LABOR'S CAUSE: MAIN THEMES ON THE HISTORY OF THE AMERICAN WORKER* 108 (1993).

71. Miriam J. Wells, *Immigration and Unionization in the San Francisco Hotel Industry*, in *ORGANIZING IMMIGRANTS*, *supra* note 66, at 109, 119.

72. MARIO T. GARCÍA, *MEMORIES OF CHICANO HISTORY: THE LIFE AND NARRATIVE OF BERT CORONA* 290-95 (1994).

73. Examples of immigrant worker centers are manifold. *See, e.g.*, Jennifer Gordon, *Immigrants Fight the Power*, *NATION*, Jan. 3, 2000, at 16; Lisa Lowe, *Work, Immigration, Gender: New Subjects of Cultural Politics*, *SOC. JUST.*, Fall 1998, at 31 (describing the work of Asian Immigrant Women Advocates in Oakland, California); Patrick J. McDonnell, *Center Offers Garment Workers a Voice*, *L.A. TIMES*, April 14, 2001, at B1 (describing the challenge of the Garment Worker Center in Los Angeles to "transcend ethnic differences in a work force that is mostly Latino, but includes substantial numbers of Asians, including Thais, Chinese and

organizations in the early years of the labor movement before immigrants were admitted into most AFL-CIO unions.⁷⁴ Other organizations include the California Immigrant Workers Association, the Korean Immigrant Workers Association in Los Angeles, and the Labor Immigrant Organizing Network (LION) in the San Francisco Bay Area.⁷⁵

The successful Justice for Janitors strike in Los Angeles in 2000 is a further example of an immigrant workforce banding together to obtain a victory. Was the victory due to the fact that many of the workers recognized that employers in Los Angeles had sapped immigrant labor for too long without adequately paying for it?⁷⁶ Many labor scholars point to the background that Latina/o immigrants bring from their home countries as a reason for the increased militancy of the Justice for Janitors

Vietnamese"); Peter Rachleff, *Seeds of a Labor Insurgency: A Page From History?*, NATION, Feb. 21, 1994, at 22b (describing an immigrant worker center in Boston that "offers legal aid and English classes, while also organizing picnics, celebrating ethnic cultures, and disseminating labor news in Spanish and in Haitian creole"); Teófilo Reyes, *After a Firing, Immigrants Form a Union*, LAB. NOTES, July 2001, at 5 (describing how the Chicago Workers Center, formed as a collaborative project of community groups serving the Latino, Polish and Asian communities, assisted the Iron Workers Union in organizing a largely Mexican immigrant shop); see also Gary Delgado, *How the Empress Gets Her Clothes: Asian Immigrant Women Fight Fashion Designer Jessica McClintock*, in BEYOND IDENTITY POLITICS: EMERGING SOCIAL JUSTICE MOVEMENTS IN COMMUNITIES OF COLOR 81 (John Anner ed., 1996) (focusing on the efforts of the Asian Immigrant Workers Association); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, The Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. REV. 407 (1995).

74. VERNON M. BRIGGS, JR., IMMIGRATION AND AMERICAN UNIONISM 67 (2001) (describing the insurgent immigrant group that split from the United Garment Workers in 1914 to form the American Garment Workers Union); Barbara M. Posadas, *Ethnic Life and Labor in Chicago's Pre-World-War-II Filipino Community*, in LABOR DIVIDED: RACE AND ETHNICITY IN UNITED STATES LABOR STRUGGLES, 1835-1960, at 63 (Robert Asher & Charles Stephenson eds., 1990) (describing the role of Filipino community centers); Gerald E. Poyo, *The Impact of Cuban and Spanish Workers on Labor Organizing in Florida, 1870-1900*, in UNIONS AND IMMIGRANTS: ORGANIZATION AND STRUGGLE 284 (George E. Pozzetta ed., 1991) (discussing late 19th century union organizing and militancy among Cuban and Spanish workers in Florida).

75. See Robert Lazo, *Latinos and the AFL-CIO: The California Immigrant Workers Association as an Important New Development*, 4 LA RAZA L.J. 22 (1991). In the case of the Korean Immigrant Workers Association, the bonds that might exist between those of similar nationality and immigrant backgrounds are frayed indeed because many of the business owners who have exploited Korean Immigrant Workers in Southern California are themselves Korean immigrants. It is thus unclear what legal recognition of immigrant status would accomplish except in the cases where the fault lines between aliens/citizens and the documented/undocumented exist. Like other intersecting identities, however, class identity will affect the assertion of immigrant identity.

76. See Saúl Sarabia, *The Victory of the Janitors Is a Sign of Things to Come*, ST. PAUL PIONEER PRESS, June 3, 2000, at 15A (stating, "By not relegating immigrants to the side, but by drawing on the leadership skills they bring from their home countries, movements for social justice can be revitalized.").

movement.⁷⁷ Meanwhile, some African-American janitors marched alongside Latina/o janitors because of the common interests they saw in their struggle for dignity on the job, while other African Americans and native born workers claimed that their interests were not represented in the new immigrant-centered Justice for Janitors unions.⁷⁸ It is an open question whether legal recognition of immigrant status would serve to heal these wounds or would exacerbate the tensions.

Evidence that immigrant-centered organizing can succeed across racial lines also comes from the recent hotel strike in Minneapolis, which provided a context for immigrants of many different races to come together. In bargaining for a new contract in the summer of 2000, Hotel Employees and Restaurant Employees Local 17 adopted an explicitly pro-immigrant stance in negotiations and on the picket line, resulting in a contract victory that not only obtained benefits for the immigrant workforce, but established common bonds between immigrant workers of all races.⁷⁹ This cross-racial solidarity also coalesced around the cause of the "Minneapolis Eight"—eight Latina/o workers at a Minneapolis Holiday Inn Express who were fired on the pretext of their undocumented status after they engaged in union activities.⁸⁰

Finally, the current campaign for amnesty for the undocumented reflects a sense on the part of immigrants that, despite a legal system that grants

77. Roger Waldinger, et al., *Helots No More: A Case Study of the Justice for Janitors Campaign in Los Angeles*, in ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES (Kate Brofenbrenner et al. eds., 1998); Jane Williams, *Restructuring Labor's Identity: The Justice for Janitors Campaign in Washington D.C.*, in THE TRANSFORMATION OF U.S. UNIONS: VOICES, VISIONS AND STRATEGIES FROM THE GRASSROOTS 203, 213-15 (Ray M. Tillman & Michael S. Cummings eds., 1999).

78. Williams, *supra* note 77, at 203, 213-15 (describing the dismay of some Black workers in the Washington D.C. locale over the increasing emphasis on Latinas/os in the Justice for Janitors campaign).

79. Peter Racheleff, *A Union of Immigrants Wins Minneapolis Hotel Strike*, LAB. NOTES, Aug. 2000, at 1, 14 (describing the union's outreach in seventeen different languages during strike); Terry Fiedler, *Hotel Workers OK Five-Year Contract on Eve of Convention*, MINN.-ST. PAUL STAR TRIB., June 29, 2000, at 1A (describing the union's membership consisting of Somali, Tibetan and Latino/a immigrants); Peter Racheleff, *Workers Who Understand Struggle*, DOLLARS AND SENSE, Sept. 2000, at 21 (interview with Jaye Rykuny, Local 17's principal officer, stating that the union was successful in the negotiations because immigrant workers "understand struggle.").

80. Kimberly Hayes Taylor, *Illegal Workers Get to Stay in the U.S.*, MINN.-ST. PAUL STAR TRIB., Apr. 26, 2000, at 1B (reporting that the INS gave seven undocumented immigrants who tried to form a union at a downtown Minneapolis hotel "deferred-action" status for two years; the eighth was deported immediately because he had been caught entering the U.S. without documents once before in 1998). There are, of course, examples where competing notions of immigrant identity cause division. See, e.g., Timothy Aepfel, *Long Strike Breeds Immigrant Factions*, WALL ST. J., June 12, 2001, at B1, B4 (describing divisions between Bosnians and Laotians at a strike in Des Moines, Iowa).

them fewer protections than other persons, they believe that the work they do to keep the economy running means that they should not have to live in fear. Their slogan—"We demand because we produce: Amnesty for All"—reflects that basic reciprocal commitment. The slogan also rings of a gay rights movement refrain: "We're here. We're queer. Get used to it." Indeed, in an example of reciprocal support from another community with few legal entitlements, gay and lesbian organizations and pro-amnesty groups in Oregon united in 2000 to support the call for amnesty and defeat of an anti-gay ballot initiative on the November 2000 ballot.⁸¹

These case studies all suggest immigrant status and identity is an important basis for collective action. They also are examples of how immigrant identity might exist independent of any legal recognition of it. It is important to know whether immigrant janitors organize together because they are immigrants, because they are Latinas/os, Latina/o immigrants, or simply low-wage workers. I raise these questions because of what they imply for a legal recognition of immigrant identity, and what they imply for our continued construction of LatCrit Theory. These examples illuminate the kinds of political and legal coalitions that could result from centering our immigrant identities, in conjunction with our analysis of race, gender, sexual orientation and other identity axes.⁸² Based on these examples, I posit one or more of the following: (1) identification as immigrants may drive immigrant collective action and militancy, (2) immigrant identity may interfere with broader identification with non-immigrant workers, and (3) race may compound these solidarity and exclusion effects. Given these possibilities, this Essay now turns to the implications of legal recognition of immigrant status and identity.

IV. THE BORDERLANDS OF THE LEGAL AND POLITICAL: POSSIBLE IMPLICATIONS OF IMMIGRANT IDENTITY

By first discussing law, and then labor struggles, this Essay points out how the conflation of immigration and race is both a sword and a shield. Immigration status and race can be a sword, used against communities of color as in Proposition 187 and antidiscrimination law, while immigrant identity can be a political shield and basis for organizing across races. Thus, this Essay argues for the separation of race and immigrant status in the legal realm, and greater attention in the political realm to organizing around

81. See Quiroz-Martinez, *supra* note 39, at 18-20 (describing cross-racial alliances in Chicago that have fueled support for immigrant legalization, and quoting Denise Dixon, "an African-American food service worker born and raised in South Chicago" who described a march on September 23, 2000, that had a substantial Black presence: "People expected the undocumented to come out for themselves But they didn't expect African-Americans to be standing next to them.").

82. See Chang & Aoki, *supra* note 4.

immigrant identity and history. Further, this Essay has argued that law has constitutive power, or, put another way, the personal is political and the political is legal. Now, this Essay discusses whether this paradigm is desirable, possible, or both.

If immigrant identity is shaping social practice, should the law protect it? This question requires us to consider why law protects certain categories of people, and with what consequences. The responses come from across the political spectrum. To some, immigrant identity is another example of identity politics run amok.⁸³ Immigrants have been victimized by historical discrimination similar, though not equivalent, to race and gender discrimination. Thus, a conservative who at least recognizes the utility, economic or otherwise, of preventing discrimination may be swayed by a look at history. Indeed, the law protects “identities” of race, gender, and national origin, so it is unclear why it should stop with immigrant identity.

The left critique of legal protection for immigrant identity might not be so different from the right critique: we cannot allow yet another legal category to divide us when we should be united around our commonalities. The argument relates to those who say racial divisions prevent us from realizing common class or race interests.⁸⁴ Further, the explicit recognition of immigrant status as an independent legal category will exacerbate already serious divisions in our communities along alien/citizen and legal/illegal lines. LatCrit scholars have correctly recognized the internalized hierarchies that immigration status categories create.⁸⁵ I do not underestimate those concerns here, but I have the following responses. To say that Latina/o immigrants, or any immigrants, should identify with one existing racial group or another is simultaneously to make immigrants invisible and to buy into the idea of eventual assimilation, either with “white” America or with the domestic minority with which they share the most similarities. LatCrit Theory must pioneer a *reverse assimilation*—in which we re-assimilate our immigrant roots and recognize the ties that bind us.⁸⁶ Moreover, as I have

83. See generally PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA'S DISASTER* (1995).

84. See TODD GITLIN, *THE TWILIGHT OF COMMON DREAMS* 226 (1995); see also MICHAEL J. PIORE, *BEYOND INDIVIDUALISM* 164-66 (1995). One might legitimately ask whether immigrant identity is simply class solidarity by other means. I do not mean to deny the role that class plays but, at the same time, it must be viewed within the lens of many other intersecting identities—race, gender, national origin, and immigrant history.

85. See Johnson, *supra* note 14; see also Garcia, *supra* note 7, at 141.

86. See generally Devon W. Carbado, *The Ties that Bind*, 19 CHICANO-LATINO L. REV. 283 (1998) (discussing various methods of coalition building outside the Black/White paradigm); Lowe, *supra* note 58, at 35 (stating, “The specific history of Asian immigration in relation to U.S. citizenship is different from the histories of other migrant or racialized groups such as African-Americans, Native Americans, and Chicanos/Latinos, yet the Asian American critique of citizenship generated by its specific history opens the space for such cross-race or cross-national

argued above, the conflation of race, national origin, and immigrant status can harm both groups. The immigrant history of U.S. born Latinas/os will be distorted by anti-immigrant sentiment, and immigrants will be expected to fulfill the myth of “immigrant success” even though they become part of a racially subordinated group upon entry into their new country.⁸⁷

Perhaps there is a danger that LatCrit Theory will lose its roots in Critical Race Theory by attempting to move the discussion away from a primary focus on race and immigrants or by attempting change through judicial expansion of legal categories, rather than through politics and narrative.⁸⁸ I believe that LatCrit Theory, if it is to continue its evolution as a distinct body of scholarship, must be willing to advocate legal change when appropriate and necessary, even outside explicit racial paradigms. I would also argue that Critical Race Theory is not inconsistent with the notion that legal change should be attempted with respect to immigrants, as long as the realities of race are remembered.⁸⁹

possibilities.”).

87. As Kevin Johnson has discussed, the conflation of “immigrants” and “Latinos” could have deleterious effects on both groups. See Johnson, *supra* note 14, at 207. When compared to “bootstrap” immigrants, U.S. born Latinas/os may seem less worthy of affirmative action. See Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 890 (1995). Others argue that immigrants have not suffered the same history of discrimination as U.S.-born minorities to entitle them to affirmative action. See Peter H. Schuck, *Alien Ruminations*, 105 YALE L.J. 1963, 2000-03 (1996) (book review).

88. It would not be the first time that I have received this criticism. See, e.g., Stephen Shie-Wei Fan, *Immigration Law and the Promise of Critical Race Theory: Opening the Academy to the Voices of Aliens and Immigrants*, 97 COLUM. L. REV. 1202, 1233-34 (1997) (commenting on my advocacy of an equal protection challenge to Proposition 187).

Ruben Garcia’s answer to discriminatory legislation—to subject Proposition 187 and similar legislation to the strict scrutiny standard of judicial review—can in fact be viewed as representative of the most obvious form of this kind of hybrid: a combination of some variety of narrative and an interpretation of traditional equal protection jurisprudence.

Id. at 1233-34 n.163. Shie-Wei Fan called my approach “only a limited fulfillment of the aims of critical race theory” because

[a]n experientially-informed proposal to equate alienage with race for the purposes of judicial scrutiny acknowledges clearly the raced nature of social and legal systems, but stops short of recognizing the intrinsic constraints of the legal regime itself. Such a proposal might subject more anti-immigrant legislation to judicial scrutiny, but the built in limitations of traditional rights jurisprudence would nevertheless insure than [sic] many examples of legislation would pass constitutional muster at the judicial level.

Id.

89. See Angela P. Harris, *Foreword: Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741

The creation of legal classifications on the basis of characteristics such as race, sex, and disability, has recognized a history of invidious discrimination on those grounds. The history of discrimination against immigrants has been closely related to the history of racial discrimination. The immigrant discriminator may use code words with apparent impunity if he or she is careful: "Go back where you came from," "You people are taking all our jobs," and "They keep coming."⁹⁰ The courts have generally seen phrases like these as racial discrimination when applied to Latinas/os, Asians, and Africans. But are they any less repugnant when applied to Ukrainians, Serbians, or other "White immigrants?" Historically, these code words were directed against those now considered "white," such as the Irish, the Italians, and Jews. My position is that the continued treatment of anti-immigrant sentiment as a proxy for racial discrimination, and the failure to treat anti-immigrant sentiment as evidence of discrimination, avoids coming to grips with the historical and present xenophobia against newcomers or those whom we perceive as outsiders to our community. The failure to see immigrant discrimination on its own ultimately has deleterious effects on all outsiders.

What would be the effect of White immigrants suddenly claiming immigrant status protection? National origin protection, besides being unavailable on an alien/citizen basis, does not capture the historic nature of discrimination against the immigrant *as an immigrant*. Those considered "White," at any given point in history, have been primarily responsible for vilifying immigrants. Yet the definition of who is White shifts over time.⁹¹ Can we rely on existing race or national origin categories to protect immigrants if such categories are socially constructed? If courts someday should find Latinas/os, or Asians actually "White," what protections will

(1994).

CLS writers had argued "that rights were malleable and manipulative, that in practice they served to isolate and marginalize rather than empower and connect people, and that progressive people should emphasize needs, informality, and connectedness rather than rights." Patricia Williams, Richard Delgado, and Mari Matsuda, however, all rejected this yearning to go beyond rights to more direct forms of human connection, arguing that, for communities of color, "rights talk" was an indispensable tool.

Id. at 750-51.

90. All of these statements might not pass muster in a Title VII suit based on race or national origin or ancestry if no particular race or national origin was targeted or mentioned, but presumably would be good evidence in a suit based on immigrant status even if there was no other evidence of racial animus.

91. See generally IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996).

remain for the immigrant excluded or attacked as a “wetback” or as “illegal”?

I do not mean to suggest that race is not at the core of anti-immigrant hate today.⁹² But, as I discuss here, race incompletely captures the basis for solidarity among groups. A West African immigrant housekeeper may find solidarity among dishwashers from El Salvador, as shown in the recent Minneapolis hotel strike. A substantial minority of California’s Latina/o population voted for Proposition 187, revealing stratification along alien/citizen lines.⁹³ If we separate race from alienage, we may avoid some of the corners that we have often been backed into by nativist legislation.⁹⁴

Would immigrants gain anything from an immigrant classification besides a marginally greater number of people receiving legal protection? Such a classification might serve to remind us of the ties that bind us to each other, even in all our diversity. All groups inside the U.S. have a history of migration. African-Americans suffered forced migration for slave labor to the United States.⁹⁵ Native Americans suffered forced migration from their homelands to reservations in the name of greed. Asians and Latinas/os are forced from their home countries by the hegemonic political and economic forces that pull them into the United States. To the extent that LatCrit Theory recognizes these ties, it will remain a force for coalition building.

The threat of essentialism remains a persistent presence in any discussion of law, politics, and identity. Like any civil rights classification, immigrant identity conflates race and immigration, but it also relies on a shared history of subordination.⁹⁶ Even Silicon Valley high tech immigrant workers, otherwise known as “H1-Bs” for the statutory name of their non-immigrant visa, might liken their situation to agricultural *braceros*—temporary labor used when needed.⁹⁷ Especially in the

92. In fact, I have argued this point in a prior article. See generally Garcia, *supra* note 7.

93. See *id.* at 131 (citing exit poll data showing approximately that one in four or about twenty-two percent of Latinos voted in favor of Proposition 187).

94. See Shie-Wei Fan, *supra* note 88, at 1227 (discussing the essentialism that resulted from the confluence of race and alien status in the debate over Proposition 187).

95. See generally Anthony Paul Farley, *All Flesh Shall See It Together*, 19 CHICANO-LATINO L. REV. 163 (1998) (commenting on Sandrino-Glasser, *supra* note 18: “Slavery is our nation of origin.”).

96. See Cheryl Little, *Intergroup Coalitions and Immigration Politics: The Haitian Experience in Florida*, 55 U. MIAMI L. REV. 717, 739 (1999) (discussing the coalition of Nicaraguans, Cubans, and African-Americans that called for equal treatment for Haitian immigrants as accorded those groups covered by the Nicaraguan and Central American Relief Act).

97. Carrie Kirby, *H-1Bs Fear They Will Be Sent Home*, S.F. CHRON., Mar. 21, 2000; *Dilemma Facing Foreign Workers in the U.S. When Laid Off of Work* (National Public Radio Broadcast, All Things Considered, May 31, 2001), available at 2001 WL 9434982 (quoting Murali Devorkanda of the Immigration Support Network (ISN), a national advocacy group for H1-

September 11 aftermath, Arab-Americans and other dark-skinned individuals are targeted by racial profiling at the same time that the racial profiling of Blacks continues. I am hopeful that this proposal for greater recognition of immigrant status and identity can build jurisprudential and political bridges between different types of subordinated people without denying their unique histories. Immigrant identity is not the only bridge between us, but it deserves recognition as another one of the links between us in difficult times.⁹⁸

Nevertheless, I do not want to de-emphasize the consequences and fallacies in normative, undifferentiated constructions of diverse groups. LatCrit has powerfully shown the major gender differences among different immigrant groups such as Cubans, Mexicans, as well as the differences between U.S. born Latinas and Latinos. Immigrant identity is no doubt a social construction, and, even as a reformulated legal construction, would continue to leave many people within our borders with meager and fractured protection. The potential threat to intragroup solidarity must also be considered. Will Latinas/os have any incentive to worry about the "undocumented" if their legal fate is not bound up with the law's treatment of immigrants? We saw an example of this solidarity when Latina and Latino civil rights organizations opposed employer sanctions under IRCA and Proposition 187 because of the threat it might pose to all Latinas and Latinos.⁹⁹ One might think that these organizations would not take up the cause of immigrants if the race and immigration status were jurisprudentially separated, but the fact is that the fortunes of native-born Latinas/os and immigrants will remain inexorably tied.

Finally, if immigrant identity deserves greater recognition on its own, how far should it go? As I described earlier, discrimination on the basis of immigrant *status*, and even *perceived* immigrant status, lends itself to easy, "objective" verification. The court would ask the following question: "Is the person in fact an alien or a citizen, or was the person perceived to be an alien by the discriminator?" But should the inquiry be thus limited? Just as

Bs, on the problem of H1-Bs losing their immigration status once they are laid off); *see also* ISN web-site (<http://www.isn.org>) (last visited Sept. 9, 2002).

98. Of course, fault lines among Latinas/os are not always caused by different immigration statutes and histories, but simply the claimed entitlement of those who came to the United States earlier. *See* Arian Campo-Flores, *Brown Against Brown, As Hispanic Immigrants Flood Into the South and Midwest, "Mexicano" Workers Face Prejudice and Hostility—From "Chicanos" Who Arrived Decades Earlier*, NEWSWEEK, Sept. 18, 2000, at 49.

99. Much of the litigation over Proposition 187 was conducted by Latina/o advocacy groups under the theory that U.S.-born Latinas/os would suffer discrimination if Proposition 187 was enacted. But not all Latina/o organizations opposed employer sanctions. The Labor Council on Latin American Advancement, a group of Latina/o trade unionists, followed the position of the national AFL-CIO at the time and supported sanctions. *See* GOMEZ QUIÑONES, HISTORY OF MEXICAN AMERICAN LABOR 221 (2000).

other categories such as race, national origin, and ancestry have incorporated some notions of the person's background and choice to identify in certain ways, why should protection of immigrants stand or fall on the basis of one's current status as determined by the INS? Many in our communities continue to identify with their home nations even after they obtain U.S. residency and citizenship. Should immigrant identity be recognized legally, even after citizenship is obtained, in the way that national origin discrimination is legally cognizable long after a person leaves their "nation of origin?" These are the questions that LatCrit theorists should explore.¹⁰⁰

Immigrants are asserting themselves apart from any legal conception of identity. But can LatCrit Theory contribute to a conception of immigrant identities? I believe it has already done so in a number of areas, but labor/immigrant coalitions offer a further untapped resource.¹⁰¹ LatCrit theorists should systematically explore the many labor/community coalitions that have centered immigrants in labor struggles, such as immigrant worker centers. The intersectionalities of immigrant identity and gender can be explored in the work of labor activist groups, such as La Mujer Obrera, who advocate on behalf of immigrant women.¹⁰² LatCrit Theory should systematize and problematize the legal and global forces that allow exploitation of immigrants, even in the face of their collective action. Finally, at a minimum, LatCrit Theory must continue to examine the invisibility of immigrants in employment, fair housing, and access to the public and private goods that are necessary to live in our society.

100. I believe LatCrit Theory, because of its roots in Critical Race Theory and its emphasis on the marriage of theory and practice, is a good place for a discussion of a doctrine that attempts to make social change while recognizing the limits of law. Other commentators have suggested the special difficulties involved when attempting legal change on behalf of immigrants. *See, e.g.*, Johnson, *supra* note 37, at 365 ("In my mind, the true promise for change in the status of racial minorities in the United States is through political, as opposed to legal, means."). The approach I outline above, despite its limitations, is broader than is possible with traditional equal protection jurisprudence, because my approach touches a wide range of "private activity." Such an approach admittedly shifts the ultimate responsibility for discrimination from the state to private parties but it also avoids the inherent limitations of the state action requirement and equal protection doctrine. *See* Shie-Wei Fan, *supra* note 88, at 1233-34 (discussing the limits of equal protection doctrine).

101. *See, e.g.*, Christopher David Ruiz Cameron, *The Rakes of Wrath: Urban Agricultural Workers and the Struggle Against Los Angeles's Ban on Gas-Powered Leaf Blowers*, 33 U.C. DAVIS L. REV. 1087, 1093 (2000); Roberto L. Corrada, *Familiar Connections: A Personal Re/View of Latino/a Identity, Gender, and Class Issues in the Context of the Labor Dispute Between Sprint and La Conexion Familiar*, 53 U. MIAMI L. REV. 1065 (1999).

102. *See generally* MIRIAM CHING YOON LOUIE, *SWEATSHOP WARRIORS: IMMIGRANT WOMEN WORKERS TAKE ON THE GLOBAL FACTORY* (2001) (exploring Asian Immigrant Women Advocates in Oakland, Fuerza Unida in San Antonio, and La Mujer Obrera in El Paso, Texas).

V. CONCLUSION

This Essay suggests that immigrant identity exists in our communities, and that LatCrit Theory should do its best to measure identity and its implications for law and law-making. The bottom line is that current race and national origin paradigms in antidiscrimination law fail to appreciate animus against immigrants not only because of the color of their skin, *but because they are immigrants*. I believe that an appreciation of that fact will lead us to consider the “anti-newcomer” or “anti-outsider” dimensions of discrimination that harm not only immigrants but the native-born as well. The more we conceptualize immigrant status and identity as independent and related to racial, gender and other identities, the closer we will get to crossing the borders between us.

