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### Author

Olivas, Michael A

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Undocumented College Residency, Race,  
and Reaction**

Michael A. Olivas

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**Storytelling Out of School:  
Undocumented College Residency, Race, and Reaction**

*Michael A. Olivas*

*I never even knew I was Mexican, I mean really Mexican. I thought I was born in Magnolia or the East End, since that's all I really remember. Except when my class went on a trip to NASA, I've never really left Houston. Except we went to Corpus [Christi] with my grandfather when the Aquarium opened. So I thought all along I was Mexican American, you know, Chicano, until "la IRCA" came along. My mother took me down to the "Migra," and we waited in line with a green bag full of papers, you know, with a twister tie on it like for grass and leaves. That was when I found out I was really Mexican, not Chicano. Born in Mexico. Except to talk to my grandfather and that, I don't even speak Spanish very well. Now I'm afraid to leave town, cause the "Migra" is, like, really coming down on illegals. Now, it turns out I'm illegal even though I've got my drivers' license and that, even the SAT. If I'm illegal, what about these Mexicans who stand around the corners? I think the law should round them up, not me. I've been like a citizen up to now. It was "la IRCA" that made me illegal, but the lawyer said I could become a permanent resident and get a green card. I thought I could vote when I was 18, but now I have to become a citizen first. I'm gonna do it, but I'm not going to tell anybody, cause I want to go to college. I can go to college, can't I?*

*It wasn't until they had the amnesty that I found out I wasn't born in Texas. We grew up in Laredo, but my parents got divorced and I moved to Houston with my mother and my sisters. She doesn't speak English, but she wants me to go to school. She cleans offices downtown, like law offices and a bank building. She can't help me with my homework, but she makes me do it before [I can watch] TV. If I can go to college, it's because she made me want to go. It's like for her. But now I found out I'm mojado, but we're going to get legal papers. [The lawyer] had me bring in my school grades to show that we were in the U.S. before the time. My sisters knew we were mojados, but I didn't. They said I was pocho, like tourists. But now I can go to college, maybe be a lawyer or doctor. (Interviews with "Manuel H." and "Jose G.", high school valedictorian and salutatorian in Houston, Texas, during 1987 interview.)*

*... night [law] schools enrolled a very large proportion of foreign names ... emigrants [sic] covet the title [of attorney] as a badge of distinction. The result is a host of shrewd young men, imperfectly educated ...all deeply impressed with the philosophy of getting on, but viewing the Code of Ethics with uncomprehending eyes. (Dean Harry S. Richard, University of Wisconsin Law School, and Chair, ABA Section on Legal Education and Admission to the Bar, 1908-1909.)<sup>1</sup>*

*...there is one story in the world, and only one. (John Steinbeck, East of Eden)*

## I. Introduction

In *Rashomon*, Akira Kurosawa's brilliant 1950 film, the same event is told in four different ways by four different persons. Moviegoers are drawn into the competing stories, and are left with no clear resolution of which story is the most nearly true.<sup>2</sup> The law is often like this, with trial lawyers arguing that complex transactions were predatory pricing or just regular business practices,<sup>3</sup> or that the failure of the savings and loan industry was due either to vindictive, harassing regulators or massive industry greed.<sup>4</sup> The best, most successful, and widely admired trial lawyers are often world class raconteurs, able to tell their client's story in moving and cinematic fashion.<sup>5</sup> At its core, law is storytelling.

This essay is about a *Rashomon*-like case, in which students wanted to attend college. It is, alternatively, an admissions case, an immigration matter, a taxpayer suit, a state civil procedure issue, an issue of preemption, a question of tuition and higher education finance, a civil rights case, and a political issue. In addition, although the story is true and really happened, it is also representative of the stories of many other similarly-situated persons who seek admission to college; in the social science sense, this case is a subset of admissions cases, and a particularized subset at that: it is an immigration-related admissions case. At bottom, though it is a story about college aged kids who have lived virtually all their lives in the United States and who want to attend college and enjoy the upward mobility a college degree provides.

Although this story has some of the attributes of legal storytelling affiliated with critical race theory, a genre of legal analysis begun in the 1980's which has as its aim to develop "outsider narratives" and "counterstory jurisprudence" and to offer critical, alternative versions of stock legal stories,<sup>6</sup> I do not believe it is truly in this genre. The most practiced writers in this emerging tradition—Derrick Bell,<sup>7</sup> Jerome Culp,<sup>8</sup> Richard Delgado,<sup>9</sup> Charles Lawrence,<sup>10</sup> Mari Matsuda,<sup>11</sup> Patricia Williams,<sup>12</sup> Robert Williams<sup>13</sup>—are people of color whose work often blends traditional legal analytic tools with personal narratives, literary criticism, and even fictional stories to make a larger point about law and society. Thus, readers know these writers' family origins,<sup>14</sup> dreams,<sup>15</sup>

experiences,<sup>16</sup> and humiliations,<sup>17</sup> and recognize their fictional characters<sup>18</sup> and folktales.<sup>19</sup> If it were a more profound, synoptic, complex tale, this essay could be situated in this river, within the streams of storytelling/counterstorytelling, structural determinism, and race/sex/class intersections—critical race theory themes identified by Richard Delgado and Jean Stefancic, the movement's bibliographers.<sup>20</sup> However, it is actually a simple narrative, one that turns on definitions, tainted by prejudice and misplaced scapegoating.

The story is "about" undocumented college students, i.e., persons whose legal presence or status in the United States may be unauthorized or undocumented, and who apply to or have been admitted to an institution of higher education. As will be shown, many colleges and universities will not admit undocumented students, or, in some public institutions, do not allow undocumented students to claim in-state residency status. Although the U.S. Supreme Court has not ruled directly on this issue, it has ruled on several dozen residency and domicile cases, including the near-identical issue of charging tuition to undocumented school children in K-12 public schools.<sup>21</sup> Dozens of postsecondary residency/alienage cases have appeared on state court dockets, with mixed results.<sup>22</sup> In addition, several higher education institutions and systems have acted to accommodate the undocumented, exercising their fourth traditional academic freedom, the right to determine for themselves "who shall attend" their institution.<sup>23</sup>

This issue occurs during a broad background of rising xenophobia and immigration restrictions, modern day responses to the story and reality of the United States as a nation of immigrants. Economic downturns have historically led to scapegoating alien workers, said to be stealing jobs from U.S. workers;<sup>24</sup> this folktale has been particularly popular in California, where a sluggish economy in the 1990's and a contraction in the country's largest state higher education systems have exacerbated resentment against the state's substantial immigration—legal and illegal—of Latinos and Asians.<sup>25</sup> This story, then, is also about prejudice and retrenchment.

The higher education system in the United States is one of the things we do right. The vast system, with over 3300 collegiate campuses, offers both elite, highly competitive, selective institutions and easily accessible, convenient, inexpensive community colleges or open door

institutions.<sup>26</sup> And it is attractive to students from all over the world, enrolling more than 800,000 international students in 1991,<sup>27</sup> as well as many others who were foreign-born but have since become permanent residents or citizens. By a wide margin, U.S. colleges serve as receiver schools for more students than those in any country in the world.<sup>28</sup> In some fields of study, particularly in the sciences and engineering, a substantial percentage of graduate students are foreign born. In 1992, for example, 58% of all engineering Ph.D.'s, 32% of all life sciences Ph.D.'s, and 43% of all physical sciences doctorates in the United States were awarded to either permanent residents or other non-U.S. citizens.<sup>29</sup>

Although undocumented students, even if freely admitted into colleges and accorded resident tuition, would be a small number, fierce competition and scarce openings in some of the California institutions have combined to cast their admission as a matter of displacement, both of Anglo students and citizen students of color. Legal permission to enroll and become resident-tuition paying students, earned in a series of cases in the 1980's,<sup>30</sup> was denied by a 1991 case, *Bradford v. University of California*.<sup>31</sup> While other states have taken more generous routes, California's admissions and residency policies make a larger difference, inasmuch as the scale of the postsecondary systems (the University of California, the California State University System, and the California Community College System total nearly 150 campuses and 1.5 million students)<sup>32</sup> and location (nearly 40% of the undocumented population in the U.S. is estimated to reside in the state)<sup>33</sup> combine to make it the most important venue for the college opportunities of aliens. It is no exaggeration to suggest that as California goes, so goes alien education. New York, in contrast, has reacted more expansively, as have Arizona and Illinois.<sup>34</sup> As will be seen, Texas, the other major destination for undocumented college students, has an uneven record due to its decentralized higher education systems.<sup>35</sup>

This story, therefore, is also one of administrative and regulatory law: of residency statutes, agency implementation, and administrator discretion. Above all, however, this story is about 18-22 year olds, whose birthplace was, quite literally, an accident of birth, who have resided in and maintained domicile in the United States virtually all their lives, who have vied successfully

in a highly competitive admissions process, and who find themselves constructively precluded from attending colleges into which they have been admitted. Domiciled in and residents of a state, they find themselves barred from establishing higher education residence as a benefit, in contrast to residency as a benefit in virtually all other legal settings.<sup>36</sup> This Article proceeds as follows. Part II thoroughly investigates the residency system in postsecondary education. Public colleges enroll nearly 80% of all undergraduates, and every state has enacted a tuition scheme to differentiate between residents, who pay lower tuition, and non-residents, who pay substantial tuition differentials.<sup>37</sup> In many states, this mechanism is used to deny undocumented aliens—even those who meet all the traditional tests for establishing domiciles—the opportunity to pay in-state resident tuition. Part II describes basic legal and fiscal operations of residency requirements, with special emphasis upon alienage issues; distinguishes "residence" from "domicile" for alien students; categorizes state governance mechanisms for determining residency and exemptions; and reviews problems with current institutional practices, particularly those concerning undocumented aliens.

With this background, Part III examines how courts have addressed this problem. I trace the development of two judicial themes: undocumented students cannot meet the traditional test for establishing residence inasmuch as their presence is unauthorized, and a second, mutually exclusive theme that these students are entitled to establish their domicile if they meet all the durational and intentional criteria required of all transient students.

Part IV briefly examines the social science of undocumented alien students, including ethnographic studies and extensive case histories. Here, I analyze the judicial themes as separate stories, noting how the telling of the same tale can result in different endings, or "morals" of the stories. I then attempt to use the individual data and research findings to answer the objections of those who would not admit or grant residence benefits to undocumented alien college students. In this new account, aliens are characterized as having positive features and posing no genuine threat to the polity. This narrative draws from the extensive literature on college choice, and concludes in Part V that the higher education enterprise is enriched and strengthened by their admission. A brief



note incorporates reference to Proposition 187, the recent anti-alien initiative enacted in California, and its treatment of college admissions.

I write from the perspective that the admission of undocumented students into college has been improperly cast as a complex geopolitical act when, in fact, each instance is rather a personal transaction. Being undocumented does not always mean the students have done anything wrong. Treating these individuals on their own academic merits and credentials is a desirable end, one that acknowledges the complex situation of the undocumented in a multicultural society, one where talent transcends cartography.

## **II. The Law and Policy of Residency Requirements**

Public colleges draw distinctions between resident students and non-residents on the premise that tax-supported, public institutions should be available at lower costs to those taxpayers and their families whose money support the colleges; as a corollary, nonresidents, or nonstate taxpayers, can be expected and required to pay a higher share of the costs.<sup>38</sup> These differences can be quite substantial: in the 1990's, the ratio in Texas has been approximately 6 to 1, with non-residents paying six times as much in tuition as did Texas residents.<sup>39</sup> At the University of California, undergraduate non-Californians paid three times the tuition and three times the fees that California residents were required to pay in 1993.<sup>40</sup>

Court cases dating back to 1882 have clearly established that states can charge these differentials and can reasonably determine which students are entitled to be classified as residents.<sup>41</sup> In most situations this procedure works well enough, because state institutions spell out the basic residency requirements and students seem to understand the rules. There is an intuitive, appealing symmetry to this arrangement, one that recognizes the important benefit available to those who pay for it, however indirectly. With full realization that a mix of in-state and out-of-state students is a good, officials in most states have made it possible for students to cross borders and to migrate to their public colleges, as long as the higher tuition costs "equalize" the tax

burden upon residents.<sup>42</sup> This presumption, too, seems fair, especially in a country with highly decentralized postsecondary state systems. The balance properly favors resident taxpayers yet does not fence out those who wish to change locations and attend schools without having made a tax contribution to that state's coffers. This arrangement also distributes students and acts as an incentive for states to establish strong public postsecondary sectors. It does so by preventing a mass migration to states with lower charges and by engendering loyalties, both political and academic, to state institutions. By means of compacts and state consortia agreements, it can also distribute scarce places in highly specialized and expensive curricula, such as optometry, pharmacy, and veterinary medicine, where not all states offer such programs.<sup>43</sup> The practice of residence, however, lacks the elegance of its theoretical premise. In a surprisingly large number of situations, applicants or students have presented increasingly sophisticated claims to residency, where residency practices (either laws or regulations) had not envisioned such complex claims. In many respects, immigration poses such a challenge.

By employing several approaches, this Part reviews the law, theory, and administration of residency requirements. First, basic operational definitions of the legal and fiscal issues are outlined, including the vexing problems of "domicile" and "residence." It is well established that reasonably drafted regulations can be legally administered. As will be seen, however, even such reasonable practices are fraught with systemic flaws. Second, the governance structures of the states are categorized according to their formality and level of decision-making; this makes it possible to analyze the various state practices by comparing similarly situated residence requirements. Third, the extensive system of exemptions, exceptions, and waivers will be discussed. It is such a patchwork that one commentator noted the "inconvenience and even injustice, to which such dissimilarity in practices gives rise," and concluded that "this heterogeneity is neither in the interest of the students, of the states, nor of the nation."<sup>44</sup> Fourth, problems with institutional practice are discussed: there is considerable administrative discretion at the institutional level in the indices and criteria of residential intent, the burden of persuasion, the evidentiary requirements, and the weight accorded criteria.

In many respects, these requirements are troubling: the residency statutes, regulations, and practices are often confusing and illogical; potential students "forum shop" among colleges and exploit technical loopholes; and many statement-of-intent criteria are difficult to administer or verify. Worse, the flaws in the system invite circumvention and dishonesty. Moreover, the complex technicalities often work against aliens, who do not always have the requisite paperwork or documents for establishing their residence; immigration categories themselves are often a bramble bush of conflicting definitions and technical distinctions.

For persons who have lived in a single state for many years and attend a state institution, it is easy to consider such students as residents; conversely, if a student moves from State A to State B solely for the purpose of attending B state college, it is equally clear that he or she is a nonresident, at least at first. The wide space between these two occurrences, however, is the rub. As a general rule, states will allow a person who "moves" to a state to become reclassified as a resident after a specified period of time. This time period ranges from ninety days (for example, the District of Columbia)<sup>45</sup> to twelve months (a period employed by nearly all the states).<sup>46</sup> No state with a durational test currently employs a waiting period of more than twelve months, and in several states (for example, New York<sup>47</sup> and Tennessee),<sup>48</sup> it is possible to become reclassified immediately upon arrival. Absent other exceptions or complications, when the specified time passes, a state with a simple durational requirement (eight states)<sup>49</sup> will allow a citizen student to pay the lower tuition as a resident. This is usually an objective standard, with certain proof about continuous presence required for the reclassification. To be sure, this objective standard is subject to measurement problems, as even the seemingly simple standard of X period of days can become complicated: Do holidays away from the state count? Does the "clock" begin when the person moves to the state? When she obtains employment? When she registers to vote? When she buys a house? It is easy to imagine many possible variations on these themes, and an experienced registrar is bound to have heard them all. Immigration makes these rules particularly difficult.

As difficult as this "objective" measurement becomes, forty states have complicated matters by requiring more than mere duration: these states also require that residents establish domicile, by

forming the legal intention of making that state their "true, permanent, and fixed abode."<sup>50</sup> This is a very complicated requirement, both conceptually and operationally. Instead of merely counting the requisite waiting period (already noted as deceptively complicated), states that employ domicile also require a legal declaration and evidence to prove that residents consider the state their principal establishment. Confusion frequently arises because the terms "residence" and "domicile" are often used interchangeably, or "residence" is measured with language denoting intentionality, which is not required for mere residence.<sup>51</sup> In law, "domicile" includes "residence," but has a more specific meaning than does "residence."<sup>52</sup> To constitute a domicile, two elements must occur: (1) residence and (2) an intention to make that residence the home and abode. Persons may maintain more than one residence, but only one domicile.<sup>53</sup> For example, many students plausibly maintain several residences, some simultaneously (summer state, mother's and father's state, the state in which they live and vote). Incidentally, the place where students vote is not necessarily their domicile, as mere residence and brief waiting periods are the requirements to register for voting in local or federal elections.<sup>54</sup> To determine residency in the immigration context is even more complex.

Given the high degree of difficulty in ascertaining student intentions, why do states employ domicile as a determinant of residence? The logic is threefold: to ensure, as strongly as possible, that students establish and maintain genuine ties to the state; to ensure that students not "forum shop" and pick from several states where they can manufacture or allege contacts; and to make the declaration of residence more meaningful and seriously considered than mere presence requires. Taken individually, these intentions do not always substantially advance the state interests, except through the attendant complexity that discourages (to a limited extent) frivolous claims and thereby protects the states' fiscal resources. This unarticulated premise appears to be a strong driving force behind several residency policies or practices.<sup>55</sup>

Forty states require the establishment of domicile and a waiting period,<sup>56</sup> while an additional two states require domicile with no specified durational period.<sup>57</sup> This leaves nine states with pure durational requirements absent intention. Upon closer examination, however, the rationales for the widespread practice of exacting declarations of intention fail to advance any

substantial guarantees for establishment of domicile beyond those provided by mere durational requirements. The cost of administering intentions is high, both in dollar terms and in the considerable ill will it exacts. None of the three ostensible reasons for domiciliary requirements truly guarantees loyalty or tax contributions. In fact, none of the three rationales for strict domiciliary requirements assures states that the newly arrived nonresidents have been transformed into genuine residents.<sup>58</sup> This is as true for citizens or permanent residents as it is for undocumented aliens.

That students establish a legitimate principal home and abode is no guarantee that as graduates they will remain in the state beyond commencement or contribute to the tax system while they are enrolled in school. In all likelihood, students will move wherever employment is available or the quality of life, family considerations, and circumstances allow. To some extent, the second purpose may be met, as students cannot maintain more than one domicile. However, a variety of permutations is possible for students, and more than one legal residence can be maintained, which can give sufficient evidence for students to meet residency requirements in more than one state.<sup>59</sup> A greater problem is the possibility that students may have to relinquish residence or domicile in the "home" state to establish sufficient contacts in a new state. This has led, in many instances, to students having no one state in which they can successfully claim a domicile for tuition purposes.<sup>60</sup> The third rationale, making declarations more meaningful, is only exhortatory and unlikely to prove efficacious in determining domicile. There is no legal means to ensure that students remain in the state after consuming the postsecondary resources.

Despite the demonstrable defects of domiciliary requirements, particularly those that also include waiting periods, states and institutions persist in requiring them. In addition, more than lower resident tuition lies in the balance, as many other benefits may accrue to state residents in public or private colleges, such as preferential admissions, scholarship or loan assistance, inclusion in quota programs, eligibility for consortia or exchange programs, and participation in specialized programs negotiated among states in legislative compacts.<sup>61</sup> It is these stakes, not merely the tuition differentials (which, in certain instances, can be "equalized" by federal need-

based aid formulae) that have contributed to the overall rise in residency litigation. For example, the University of California draws a distinction between residence for purposes of admission and for fee determination.

To complicate matters, there is an extraordinary number of exemptions, exceptions, and waivers to state residency practices.<sup>62</sup> The most common areas singled out for special treatment are dependents or minors, marital status, military personnel, and alienage, four areas in which nearly all states make some special mention in their practice. States also employ special treatment for a wide range of categories, totalling thousands of exceptions to residency requirements. Table 1 summarizes state data on special treatment, but as complicated as these practices are, they significantly understate the exemptions. For those seventeen states with institutional autonomy to devise their own residency requirements, only a flagship system or campus was sampled; the residency requirements in those states vary from institution to institution, and exemptions are no different.

**TABLE 1**

Exemptions, Exceptions, and Waivers to Postsecondary Residency Requirements

Category	No. of State Provisions*
Alienage	71
Marital Status	81
Military	173
Minors/dependents	27
Other miscellaneous provisions (33 categories)	173

\*Each state could and many did have more than one provision per category. Therefore the totals are higher than 51.

Source: Olivas, 1986, at Table 2, Appendix II.

Other groups frequently singled out for special treatment include university employees (seventeen states), financially needy students (sixteen states), and senior citizens (ten states). These exemptions are undoubtedly even more widespread than the data suggest, due to the many ways employed to treat residency or confer exemption. For example, states may use fiscal riders, revenue bills, or appropriations language to enact exceptions (for one year or several), and these or other quasi-legislative means could not be discovered in a statute search. As one example, Texas uses an appropriations bill each session to limit out-of-state enrollments in public law schools to a certain percentage of their total.<sup>63</sup>

The most striking feature among these patterns is how few exemptions or special treatment have anything to do with the fundamental concepts of duration or domicile. In some instances, the exceptions are aimed at classes of persons who are mobile (military, migrant workers) or for whom domicile is difficult to determine (children, Indians).<sup>64</sup> However, the largest class is those for whom residency (or tuition waivers) is a conferred benefit, without reference to duration or intent. Although the data in Table 1 are not arranged to show each state's exemptions (due to the wide number of exceptions), some states are truly spectacular in their legerdemain around strict requirements. Texas, although not the most unusual example, offers more than eighteen categories of exceptions or special treatment to a strict domiciliary requirement with a one year waiting period: from graduate assistants, to recipients of "merit" scholarships, to certain border non-residents.<sup>65</sup> In nearly every instance, the benefit is conferred to reward a characteristic or class of persons, such as graduate students (as an employment prerequisite), meritorious students (those who receive scholarships), certain fortunate employees, or good neighbors (certain adjoining states).<sup>66</sup> Few can really lay claim to exemption on intentional or durational grounds, but all claim statutory preference as an exception carved out over time by the legislature. Ironically, in other respects, the Texas legislature has sought to make state residency even more difficult to achieve, especially for undocumented aliens residing within its borders.<sup>67</sup>

Some of these exemptions may not pose bad results, but they are, for the most part, unprincipled, except when they ease the evidentiary burden upon groups for whom duration or

domicile genuinely poses a particular problem. Graduate students rarely are paid well and certainly provide important instructional or research services to institutions. Paying their tuition seems a modest benefit and one well worth preserving, but using the residency requirement to deem the students "residents" is a curious bookkeeping maneuver, one that undermines the residency determination system. Particularly troubling are the many discretionary means to confer residency upon the advantaged, as in the instance of scholarship recipients or children of employees of choice industries lured to states by such special treatment as exemptions and (for the companies) tax abatements.<sup>68</sup> As weak a system as has been erected to regulate migration of out-of-state students, it is being undermined by the growth of arbitrary and unprincipled exceptions, exemptions, and waivers.

On the one hand, it is understandable that exceptions would occur and desirable that some flexibility would be available for the institutions that must administer strict residency requirements; play in the joints is always useful for large organizations, and reasonable accommodations seem a social good. On the other hand, the extensive and unprincipled exemptions in this area have gone far overboard from their original purpose, and the practices, particularly those found in statutes and regulations, suggest that the basic residency requirements are so outmoded or wrongheaded that only institutionalized circumvention can make the system work.<sup>69</sup> This Goldbergian scheme is neither rational nor reasonable, and institutional practices, discussed next, only add to the confusion.

A first step in understanding the discretionary practices is an examination of indices and criteria. As has been noted, domiciliary requirements entail subjective as well as objective, measurable evidence. In the purest sense, one who has never left a state and never intends to leave incontestably meets all the presence, duration, and intent criteria; at the other end, someone who has never been in a state and never intends to go there is just as clearly not its domiciliary. Between these two points, however, there is much room for judgment. In most instances, the first level of inquiry is: do the circumstances indicate any presence in the state, and if so, was it of sufficient duration to meet the durational requirement? Some institutions, in anticipation of difficulties in



determining this criterion, allow a set "grace period" for counting time. As simple as this appears to be, counting the time periods frequently poses problems: When does the clock start? When does it stop? Do absences from the state count? If brief ones do not count, what about prolonged ones? A review of admissions practices revealed that nearly half the sampled institutions required that applicants for residence status reside in the state for the appropriate period, counted backwards from the date of application, on the theory that events could change between that time and the time of enrollment; the other states permitted students to run the clock until enrollment, a practice that can substantially shorten the waiting period.<sup>70</sup>

The measurement of intent is even more inexact than is the measurement of duration, and the forty states with domiciliary requirements and waiting periods and two states with domiciliary requirements without waiting periods predictably employ a wide range of criteria to determine the concept.<sup>71</sup> Often, other measures of long-term residence and community ties are used: for example, voter registration is a less stringent form of residence widely used by institutions. In truth, it is a poor proxy, for voting residency periods are by law of short duration, usually ninety days to six months, and rarely are probative of long-term intent.<sup>72</sup> People may regularly vote in their domicile, but they need not do so. Conversely, not being registered to vote in a new state is likely to be interpreted as not having established domicile. In any event, the extensive litigation in student voting rights cases suggests the great degree of difficulty in measuring intentionality for meeting voting residency requirements.<sup>73</sup> However, every state sampled either allowed or required voter registration as a criterion of domiciliary intent.

The problems of evidence and burden of proof are important, for determining both "objective" facts (for example, how long have students resided) and subjective intent (where is their true, permanent, and fixed abode), but those states that hold students to durational standards appear to exact the same evidentiary requirements as those states where domicile must be proven. Therefore, even where subjective intent is not required, similar proof—including items that measure or count toward intentionality—is exacted.<sup>74</sup> This curious finding suggests that even

nondomiciliary states are employing domiciliary criteria and evidence, higher standards than the technical requirements of the statutes or regulations.

The kinds of evidence allowed to prove residence or domicile are summarized in Table 2, data gathered in a survey of all state practices. The data show a remarkable consistency, for nearly every state required or allowed the following as evidence: Internal Revenue Service (IRS) returns; automobile registration, property ownership, or other tax records; voter registration card; paycheck stubs; affidavits from landlords, employers, or others; students' sworn statements; transcripts; and other documents, testimony, or proof of residence.

**TABLE 2**

Documentation Allowed or Required by States as Evidence of Residency or Domicile

Evidence	No. of States*
IRS returns, W-2, W-4 forms, state tax returns	51
Voter registration	51
Drivers license	48
Car or property papers	48
Proof of housing (rental or owned)	48
Payroll checks, stubs	45
Affidavits (from landlords, employers, others)	44
Applicants' affidavits	44
Other	
(transcripts)	35
(immigration papers)	30
(military papers)	26

\*50 states and DC.

Source: Olivas, 1986, at Table 3.

Many states grant wide latitude for the evidence allowed to prove residence, but it is the patterns of the evidence that administrators rely upon to make their determination. For instance, a student holding all the documentation listed in Table 2, but voting in another state, will likely be classified a nonresident; even if the student registered to vote in the new state, many registrars would likely start the clock at the point of reregistration. The burden of proof is always upon the student in classification cases, and courts will likely uphold the state practice unless it includes an irrebuttable presumption (that is, that students, once classified nonresidents, can never become residents)<sup>75</sup> or an unconstitutional provision (for example, where states attempt to do what only the federal government can do, namely, regulate immigration).<sup>76</sup> Thus, to overcome the burden of proof, students will not only be required to show that they are residents or domiciliaries of the state, but that they are not domiciliaries or residents elsewhere. These are heavy burdens to overcome, and although the requirements for duration are less stringent than those for domicile, the evidence deemed necessary for one is no less than that required for the other.

The weight accorded the evidence does not substantially differ between determinations of residence or domicile. In both instances, states rely upon similar records (the portfolio of evidence) and accord the evidence the greatest weight when the records show uninterrupted presence as well as abandonment of domicile elsewhere. As noted earlier, even durational requirement determinations have elements of intentionality, and "taking into account the whole picture" inevitably considers intentions. The care with which materials are scrutinized can depend on a range of elements, including political or legal considerations. For example, even in those institutions that enjoy considerable autonomy in residency matters, admissions numbers and policies can subtly affect whether or not institutional strict scrutiny is applied to residency petitions: when enrollments are down or when substantial tuition increases occur, it may prove efficacious for institutions to be more lenient in borderline residency cases rather than risk losing students.<sup>77</sup> If a school has differential admissions practices for transfer students—requiring higher GPA's for transfer admissions than those required for enrolled students—such flexibility may actually be a way to improve the quality of students. Of course, such practices cannot be articulated as formal

institutional policy, lest state auditors investigate or students begin to expect easier reclassification in the future. There are also occasions where institutions reinterpret state legislation or regulations, as in one state, where a virtually unenforceable provision of dubious constitutionality was ignored by the state institutions in an unspoken compact.<sup>78</sup> This has also happened in states where the existing practice has been struck down by a court decision. A study found a number of states whose practices regarding alien students had not been brought into conformity with a United States Supreme Court postsecondary residency decision, several years after such requirements had been found unconstitutional.<sup>79</sup> Nonetheless, other institutional officers were aware of the court case and had been advised by legal counsel to ignore the requirements and abide by the Court's decision.<sup>80</sup> The fluctuations of enrollments, institutional priorities, and legal criteria all contribute to the accordion-like tightening and loosening of the evidentiary requirements, burdens of proof, legal standards, and discretionary factors in residency determination. Like the multiple exemptions found in nearly all states, the wide swings evident in the administration of residency suggest the deterioration of the system into one that does not always protect either the institution's interest or the students' rights. As troubling as the system is for citizens simply moving to a new state, even more complex is the calculus for aliens, particularly undocumented aliens.

### **III. Courts, Colleges, and Undocumented Aliens**

*Plyler v. Doe* stands at the apex of immigrants' rights in the United States, particularly the rights of undocumented aliens.<sup>81</sup> The legislation that prompted the case also symbolizes the meanspiritedness directed against undocumented aliens: in this instance, Texas sought to deny a free public education by charging alien children tuition to attend elementary and secondary schools.<sup>82</sup> It is not surprising that such repressive anti-Mexican legislation would have originated in Texas, as it is the jurisdiction widely regarded to have "a legacy of hate engendered by the Texas Revolution and the Mexican American War."<sup>83</sup> According to historians, this history of conflict has "generated distrust and dislike between Anglos and Texas Mexicans. Most important, it shaped

Anglo attitudes towards Mexicans by (a) justifying the inferior status to which they were relegated, (b) legitimizing the stereotype of Mexicans as 'eternal enemies' of the state, and (c) encouraging their denigration. Additionally this legacy undergirded the historical attitude of Anglo disparagement of Mexican culture and the Spanish language."<sup>84</sup>

Justice Brennan, in his majority opinion striking down the statute, characterized the Texas argument for charging tuition as "nothing more than an assertion that illegal entry, without more, prevents a person from becoming a resident for purposes of enrolling his children in the public schools."<sup>85</sup> He employed an equal protection analysis to find that a State could not enact a discriminatory classification "merely by defining a disfavored group as non-resident."<sup>86</sup> He then considered and dismissed arguments proffered by Texas in support of the challenged statute.

First, the state argued, the classification or subclass of undocumented Mexican children was necessary to preserve the state's "limited resources for the education of its lawful residents."<sup>87</sup> A similar argument had been rejected in *Graham v. Richardson*,<sup>88</sup> where the court had held that the concern for preservation of state welfare resources could not justify an alienage classification used in allocating those resources.<sup>89</sup> Furthermore, the findings of fact from the *Plyler v. Doe* litigation<sup>90</sup> were that the exclusion of all undocumented children would eventually result in some small savings to the state,<sup>91</sup> but since both state and federal governments based their allocations to schools primarily on the number of children enrolled, those savings would be uncertain and barring those children would "not necessarily improve the quality of education."<sup>92</sup> "In terms of educational cost and need. . . undocumented children are 'basically indistinguishable' from legally resident alien children."<sup>93</sup>

The State also argued that it had enacted the legislation in order to protect itself from a putative influx of undocumented aliens.<sup>94</sup> The court acknowledged the concerns of the state due to any increase in the undocumented population, but found that the statute was not tailored to meet the stated objective: "Charging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration."<sup>95</sup> Immigration and naturalization policy is within the exclusive powers of federal government.<sup>96</sup> A state may enact legislation affecting aliens only if

the power to regulate in this area is delegated to the states, the law mirrors federal policy, and the statute furthers a legitimate state goal. However, the court found no conceivable educational policy or any state interests that would justify denying undocumented children an education.<sup>97</sup>

Finally, the state maintained that undocumented children were singled out because their unlawful presence rendered them less likely to remain in the United States and therefore to be able to use the free public education they received in order to contribute to the social and political goals of the United States community.<sup>98</sup> The court distinguished the subclass of undocumented aliens who have lived in the United States as a family and for all practical purposes permanently from the subclass of adult aliens who enter the country alone and whose intent is to earn money and stay temporarily.<sup>99</sup> For those who remain with the intent of making the United States their home, "[i]t is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime."<sup>100</sup>

As in many equal protection cases, an important issue in *Doe v. Plyler* was the level of scrutiny to be accorded the Texas statute<sup>101</sup> that denied state funds to school districts enrolling children who were not "citizens of the United States or legally admitted aliens"<sup>102</sup>—undocumented alien children. Undocumented aliens, prior to *Plyler*, had won constitutional protection in fourth,<sup>103</sup> fifth,<sup>104</sup> and sixth<sup>105</sup> amendment cases, as well as in a range of civil litigation.<sup>106</sup> However, the Supreme Court had never been faced with the question of whether undocumented aliens could seek fourteenth amendment equal protection.<sup>107</sup> The Supreme Court had earlier held that undocumented aliens are "persons,"<sup>108</sup> and that undocumented persons are protected by the due process provisions of the fourteenth amendment.<sup>109</sup> However, the State of Texas argued that because undocumented children were not "within its jurisdiction,"<sup>110</sup> they were not entitled to equal protection. Justice Brennan rejected this line of reasoning, drawing upon the legislative history of the fourteenth amendment<sup>111</sup> and concluding that there "is simply no support for [the] suggestion that 'due process' is somehow of greater stature than 'equal-protection' and therefore available to a larger class of persons."<sup>112</sup>

Once he had determined that undocumented aliens were entitled to equal protection, Brennan decided upon the extent of scrutiny to be applied in the case. He discarded strict scrutiny, noting that undocumented aliens were neither a "suspect class"<sup>113</sup> nor was education a "fundamental right."<sup>114</sup> He also rejected the minimal scrutiny inherent in a two-tiered standard.<sup>115</sup> Instead, he chose the "intermediate' scrutiny" standard of *Craig v. Boren*,<sup>116</sup> and found that the statute did not advance "some substantial state interests."<sup>117</sup> Therefore, he affirmed United States District Court and Court of Appeals judgments invalidating the statute.<sup>118</sup>

He reached this conclusion by stretching the suspect classification and the fundamental right and, although he did not reach the claim of federal preemption,<sup>119</sup> he did draw a crucial distinction between what states and the federal government may do in legislating treatment of aliens.<sup>120</sup> In stretching the "suspect" classification, Brennan drew analogies to legitimacy classifications<sup>121</sup> in concluding that undocumented children were not responsible for their own citizenship status and that treating them as Texas law envisioned would "not comport with fundamental conceptions of justice."<sup>122</sup> However, he was more emphatically concerned with education and elaborating the nature of the putative entitlement. While he reaffirmed *Rodriguez* in finding public education not to be a fundamental right,<sup>123</sup> he recited a litany of cases holding education to have "a fundamental role in maintaining the fabric of our society."<sup>124</sup> Moreover, he felt that "[i]lliteracy is an enduring disability,"<sup>125</sup> one that would plague the individual and society. This weighting enabled him to rebut the State's assertions, which the Burger dissent had found persuasive, that the policy was legislatively related to protecting the fiscal economy of the State.<sup>126</sup> The nature of education seems to have been a more important factor to the *Plyler* Court than it had been to the in *Rodriguez* Court.<sup>127</sup> Additionally, while the Court has upheld state statutes governing alien employment<sup>128</sup> and unemployment benefits,<sup>129</sup> these narrow areas mirrored federal classifications and congressional action governing immigration.<sup>130</sup> In *DeCanas*,<sup>131</sup> the Supreme Court had held that if Congress had addressed an immigration issue and delegated aspects of its administration to states, the states could enact their own legislation to regulate the area. In

public education, however, Brennan wrote, "we perceive no national policy that supports the State in denying these children an elementary education."<sup>132</sup>

The framework employed by the majority, couched as it was in moral tones, seems to be the very type of "legislating" Justice Rehnquist feared in *Craig v. Boren*, the earliest use of heightened scrutiny.<sup>133</sup> However, the Court could have, in its own terms, found undocumented alienage of children to be suspect or, more satisfactorily, provided criteria for measuring the "enduring disability,"<sup>134</sup> so that legislatures could fashion more acceptable ends-means formulations in such instances. Heightened scrutiny could have arisen from two different directions: one suggested by Judge Seals in the original trial court decision in *In re Alien Children's Education Litigation*,<sup>135</sup> which apparently was not considered by the Court but was envisioned in the *Rodriguez* case;<sup>136</sup> and a second, an outgrowth of race, national origin, and alienage cases in which stricter scrutiny has been employed.<sup>137</sup>

Judge Seals applied "strict judicial scrutiny" in his District Court opinion,<sup>138</sup> "when the absolute deprivation [of education] is the result of complete inability to pay for the desired benefit."<sup>139</sup> Such a standard would have required the State show a "compelling governmental interest."<sup>140</sup> In contrast to the *Rodriguez* fact pattern that provided a concededly - unequal funding base for Texas minority school children but did not constitute "an absolute deprivation,"<sup>141</sup> the charges to undocumented aliens were substantial,<sup>142</sup> and the District Court had found "the effect of the new statute is to exclude undocumented children from the Texas public schools."<sup>143</sup> Therefore, one of the "fundamental right" ingredients, the denial of minimum access to education, missing in *Rodriguez* was present in *Plyler*.

Another way in which the Supreme Court could have employed strict scrutiny was to hold that undocumented alien children are a "suspect class." Brennan categorized these classifications as reflecting "deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective," requiring furtherance of a "compelling governmental interest."<sup>144</sup> Although the record seems replete with such animus towards undocumented aliens in Texas,<sup>145</sup> he held that undocumented entry is "the product of voluntary action"<sup>146</sup> and therefore "not irrelevant to any



proper legislative goal."<sup>147</sup> This reasoning, while arguably applicable to the parents, is repudiated by Brennan himself as being inapplicable to undocumented children.<sup>148</sup> The children's surreptitious entries were not effected voluntarily by the children; in traditional domicile terms, children's domiciles are those of their parents.<sup>149</sup> He failed, therefore, to provide an internally consistent or satisfying reason for not holding the children to be members of a suspect class. He also could have reviewed the classification in light of the Court's previous national-origin and alienage cases,<sup>150</sup> which, read together, provide a considerable record of the "deep-seated prejudice" so manifestly evident in Texas' and other States' treatment of undocumented aliens. The Court acknowledged the scrutiny due aliens in two other cases the same term, with which *Plyler* would have been consistent had it adopted a more searching standard of review.<sup>151</sup>

Although undocumented college students were not at issue, *Toll v. Moreno*<sup>152</sup> was the first postsecondary residency case construing a state statute affecting non-immigrants, aliens with permission to remain only temporarily in the United States.<sup>153</sup> Justice Brennan also wrote the majority opinion in *Toll*. After reviewing the confusing history of the case,<sup>154</sup> he held that the University of Maryland's policy of denying domiciled treaty organization aliens the opportunity to pay reduced, in state tuition constituted a violation of the Supremacy Clause,<sup>155</sup> and therefore did not reach the questions of due process or equal protection, which had been considered by the District Court<sup>156</sup> and Appeals Court.<sup>157</sup> The opinion follows a simple logic: the Federal Government is preeminent in matters of immigration policy and states may not enact alienage classifications, except in limited cases of political and government functions.<sup>158</sup>

The District Court had held in 1976 that the original policy denying residency was a violation of due process and constituted an irrebuttable presumption.<sup>159</sup> The United States Supreme Court had held in 1978 that G-4 visa holders could be United States domiciliaries,<sup>160</sup> and certified a question to the Maryland Court of Appeals to determine whether G-4 aliens and dependents could be Maryland domiciliaries.<sup>161</sup> The Maryland Court determined that they were capable of acquiring domicile,<sup>162</sup> rendering erroneous the University's previous reliance upon non-establishment of domicile. Before the Court rendered its opinion, the University's Board of

Regents issued a "Reaffirmation of In-State Policy"<sup>163</sup> that actually constituted a substantial retreat from its previous position, although it still did not allow residency tuition for Moreno.<sup>164</sup> The Supreme Court, noting that the University's action had "fundamentally altered" the domicile issue, remanded the case to the District Court.<sup>165</sup>

On remand, the University lost once again. The District Court reaffirmed that even though the University's "paramount consideration" was no longer domicile, the original policy had denied due process to G-4 aliens,<sup>166</sup> and the revised policy was also found to be defective on fourteenth amendment equal protection and supremacy clause grounds.<sup>167</sup> In the Court's view, the "revised" policy concerning alienage (which made domicile only one of several criteria) could not survive strict scrutiny<sup>168</sup> and, further, it impermissibly encroached upon federal immigration prerogatives.<sup>169</sup> The Appeals Court affirmed,<sup>170</sup> rendering both the policies invalid: the original practice on due process and irrebuttable presumption grounds concerning the establishment of domicile, and the revised practice on equal protection for alienage and preemption grounds. While Justice Brennan's opinion only reached the issue of the supremacy clause,<sup>171</sup> his opinion in *Plyler v. Doe*, decided upon equal protection grounds with less-than-strict scrutiny for undocumented aliens,<sup>172</sup> suggests that he also would have found the revised policy invalid on equal protection grounds.<sup>173</sup>

Brennan reviewed *Takahashi*,<sup>174</sup> *Graham*,<sup>175</sup> and *DeCanas*,<sup>176</sup> reading them for the principle that "state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress."<sup>177</sup> He found both that Congress had allowed G-4 visa holders to establish domicile in the United States,<sup>178</sup> and also had conferred tax exemptions upon G-4 aliens "as an inducement for these [international] organizations to locate significant operations in the United States."<sup>179</sup> Therefore, Brennan reasoned, it was clearly the congressional intent that G-4 visa holders not bear the "additional burdens" Maryland sought to impose: "The State may not recoup indirectly from respondents' parents the taxes that the Federal Government has expressly barred the state from collecting."<sup>180</sup>

On the merits of the case, Brennan mustered a 7-2 vote, with Justice O'Connor concurring in the result. Blackmun's concurring opinion was aimed at rebutting the dissent by Justice Rehnquist, in which he argued at length that treaty organization aliens should not be strictly scrutinized, as they were an advantaged group, not the disadvantaged aliens envisioned as requiring protection in *Graham v. Richardson*.<sup>181</sup> Additionally, Rehnquist found the majority's preemption analysis flawed: "First, the Federal Government has not barred the States from collecting taxes from many, if not most, G-4 visa holders. Second, as to those G-4 nonimmigrants who are immune from state income taxes by treaty, Maryland's tuition policy cannot fairly be said to conflict with those treaties in a manner requiring its preemption."<sup>182</sup>

The dissent is not helpful in clarifying the problems glossed over in the majority opinions. First, it is not disadvantage per se that provokes the need for strictly scrutinizing alienage statutes, but rather aliens' conceded powerlessness in political disputes.<sup>183</sup> Treaty organization aliens, like all other non-immigrant classes, cannot vote or participate in the electoral process. However wealthy or advantaged World Bank employees may be—and these plaintiffs surely could not invoke the same moral claims as did undocumented alien children<sup>184</sup>—the University's additional charges for non-residents clearly constituted a burdensome extra cost which the University was ultimately required to refund.<sup>185</sup> Moreover, in attempting to suggest that the Maryland tuition policy was not in conflict with the State's tax exemption,<sup>186</sup> Rehnquist was simply wrong. Not only did the University concede openly that the surcharges were calculated in an attempt at "granting a higher subsidy" and "achieving equalization,"<sup>187</sup> both tax terms, but in their brief the University noted that the non-resident tuition differential was "roughly equivalent to the amount of state income tax [a G-4 alien] is spared by [the state] treasury each year."<sup>188</sup>

What Rehnquist might have queried was the extent to which public universities may appropriately regulate their admissions policies concerning residence, particularly policies concerning foreign nationals, following *Toll*. A significant number of states have residency requirements that functionally resemble Maryland's practice, and not all have granted G-4 alienage tax exemptions. Given the complexity of administration in foreign student affairs, it is likely that

many administrators in public and private universities frequently do not understand their legal responsibilities to foreign nationals who apply for admission, in-state tuition, or state financial assistance.<sup>189</sup> Therefore, the majority's broad language ("we cannot conclude that Congress ever contemplated that a State, in the operation of a university, might impose discriminating tuition charges and fees solely on account of the federal immigration classification")<sup>190</sup> is unhelpful to guide admissions officers in drafting acceptable guidelines. For example, how can a state university "track" relevant federal immigration statutes in admissions and financial aid, so as to meet the requirements of the preemption doctrine? How may states regulate tuition charges for other similarly-situated nonimmigrants who are not G-4 aliens?<sup>191</sup> Read with *Plyler v. Doe*, *Toll* raises several important questions concerning the "residency clock" for undocumented adults: does the proper determination for establishing domicile begin when they enter the country? When they apply for a formal status? When they receive formal, adjusted status?<sup>192</sup> What happens if the state has no common law on alien domicile? While *Toll* may have resolved the narrow issue of domiciled G-4 aliens in states that grant tax exemptions, it is clear its significance lies beyond this narrow setting, likely in discussions of Congressional preemption.<sup>193</sup>

### ***Leticia "A" and Undocumented College Students in California's Public Institutions: Plyler Goes to College***

Soon after *Plyler* and *Toll v. Moreno* were decided, their postsecondary applications were tested in a California case, *Leticia "A" et al. v. The Board of Regents of the University of California et al.*<sup>194</sup> Five undocumented students who had been admitted into the University of California for the fall term, 1984, were notified by the University that they were required to pay non-resident tuition and fees because they were not entitled to California in-state resident status.<sup>195</sup> The five plaintiffs had graduated from California high schools and had resided continuously in California for an average of seven years each, ranging from three years to eleven years; all were brought to the United States as children by their parents.<sup>196</sup>

The California legislature revised its residency statute in 1983, including an amended reference to aliens: "an alien, including an unmarried minor alien, may establish his or her residence, unless precluded by the Immigration and Nationality Act from establishing domicile in the United States."<sup>197</sup> The University of California read this statute as precluding undocumented aliens from establishing California residence. A non-resident, under Section 68018, is a person who did not meet the code definition; a resident is "a student who has a residence, pursuant to Article 5 (commencing with Section 68060) of the Chapter in the state for more than one year immediately preceding the residency determination date."<sup>198</sup>

The statutes, while employing the term "residence," exacted the traditional criteria for establishing a "domicile"; for example, a resident could only maintain "one residence"<sup>199</sup> and "residence can be changed only by the union of act and intent."<sup>200</sup> The University argued that the undocumented students could not establish the requisite intent, as Section 68061 stated, "every person who is married or 18 years of age, or older, and under no legal disability to do so, may establish residence."<sup>201</sup>

The University's position was buttressed by a state Attorney General's Opinion that determined that the University could deny resident status to the students because the California legislature had only intended to make the Statute conform to *Toll*, and had not intended to incorporate undocumented aliens.<sup>202</sup> The California Superior Court judge,<sup>203</sup> however, was not persuaded by the University's argument or the Attorney General's Opinion. He enjoined the University to treat undocumented students "in the same manner and on the same term as United States citizens" in residency determinations, and declared the University's policy unconstitutional.<sup>204</sup> He quickly dismissed the state's "clean hands" argument, noting that the plaintiffs had been brought into California as children.<sup>205</sup> The United States Supreme Court had similarly dismissed this line of Texas' reasoning in *Plyler*, although not as clearly as did Judge Kawaichi.

As the court has also done in *Plyler*,<sup>206</sup> Judge Kawaichi stretched education to be more than a minimal interest requiring a mere rational relationship. He cited evidence of the "importance

of [public] higher education in California,"<sup>207</sup> and applied heightened scrutiny for "determining whether there is a `substantial' state interest served by the classification."<sup>208</sup> He found no interest.

Rather, unlike the Attorney General's Opinion which did not even attempt to mount a constitutional justification for its result,<sup>209</sup> Judge Kawaichi showed a sophisticated grasp of immigration law relative to student residency issues: he discerned that not all undocumented aliens are similarly situated; as an example, one of the plaintiffs was in the process of becoming a permanent resident, even during the trial.<sup>210</sup> In truth, several of the undocumented students became eligible to apply for permanent resident status and were not subject to deportation.<sup>211</sup>

He then pointed to the difficulty in employing federal immigration residency as criteria for determining students' domiciles:

The policies underlying the immigration laws and regulations are vastly different from those relating to residency for student fee purposes. The two systems are totally unrelated for purposes of administration, enforcement and legal analysis. The use of unrelated policies, statutes, regulations or case law from one system to govern portions of the other is irrational. The incorporation of policies governing adjustment of status of undocumented aliens into regulations and administration of a system for determining residence for student fee purposes is neither logical nor rational.<sup>212</sup>

Under this reasoning, it would be "a difficult legislative task"<sup>213</sup> for a state to track federal immigration law for purposes of student residency requirements, without violating principles of equal protection or preemption.

In a traditional equal protection vein, the United States Supreme Court had, in *Plyler*, prohibited the very same governmental attempt to charge a form of non-resident tuition to undocumented children: "A state may not however, accomplish what would otherwise be prohibited by the Equal Protection Clause, merely by defining a disfavored group as non-resident. And illegal entry into the country would not, under traditional criteria, bar a person from obtaining domicile within a State."<sup>214</sup> *Toll v. Moreno*, decided within two weeks of *Plyler*, held that states

may not deny aliens the ability to establish domicile unless federal law precludes establishing such domicile, as when aliens are admitted to the United States on temporary visas and are required to retain domicile in their country of origin.<sup>215</sup>

*Plyler, Toll, and Leticia "A"* appeared to erode the ability of states to employ federal immigration criteria irrebuttably to their postsecondary residency determinations.

However, in an unusual resuscitation of the issue in California, a University of California, Los Angeles employee refused to administer the residency policy, claiming it was encouraging illegal immigration.<sup>216</sup> He quit and filed a taxpayer suit in California state court, asserting that the Attorney General's opinion overruled in *Leticia "A"* was correct and that the Education Code residency provision struck down by *Leticia "A"* should be considered valid.<sup>217</sup> To do so would restore the state provision that had occasioned *Leticia* and would make it impossible for undocumented students to be considered California "residents" for tuition purposes.

By this time, state higher education officials had become converts to Judge Kawaichi's ruling. The state and the universities had not appealed his 1985 ruling, and had since come to believe that the alien students deserved to be considered as residents, provided they met all the other tests for in-state status.<sup>218</sup> Several undocumented students in state institutions did quite well in school, and the floodgates had not loosed: in a public postsecondary education system of several hundred thousand students, University of California and California State University officials estimated fewer than 1000 students in the two systems were undocumented when admitted; fewer than one half of one percent of the total enrollment was undocumented.<sup>219</sup> One study of San Diego, the city closest to the border, estimated that only 80-90 of the 35,000 students in the San Diego campus of California State University were undocumented, and only one student in the new CSU-San Marcos campus was out of status.<sup>220</sup> The open door community college system estimated that fewer than 1% of their 1.5 million students were undocumented.<sup>221</sup>

Even so, on May 30, 1990 the Los Angeles County Superior Court ruled against UCLA and the State, in *Bradford v. Regents of the University of California*.<sup>222</sup> The Court ruled that the original Education Code provisions (pre-*Leticia "A"*) were constitutional and that the state was

The institutions came to see the issue as one where they could accommodate the wishes of the original undocumented plaintiffs.<sup>232</sup> However, with the ostensibly-competing decisions, the state institutions did not wish to be whipsawed on this issue, especially when they were being criticized for management practices and were bracing for financial cutbacks.<sup>233</sup>

The issue was addressed by a collateral taxpayer case, *American Association of Women (AAW) v. California State University*,<sup>234</sup> brought by the Federation for American Immigration Reform (FAIR), an immigration restrictionist group, to force the state's hand. In *AAW*, Judge Robert O'Brien of the Los Angeles County Superior Court considered the discrepancies between *Leticia "A"*, as modified, and *Bradford*, and decided there were no conflicts.<sup>235</sup> He held that Judge Kawaichi's "clarification" constituted a substantive shift in the holding: "Unlike the original injunction the *Leticia "A"* clarification no longer requires CSU automatically to treat undocumented students the same as U.S. citizens. Thus, although the trial court does not specifically follow the law established by *Bradford*, it has tempered its original holding so that it in effect gives credence to *Bradford*, as well as the process required by Section 68062(h)."<sup>236</sup>

By finessing this issue and creating a distinction without a difference, the court found that the modified *Leticia "A"* was *res judicata*, completely tried and determined on its merits and that there was no "substantial identity of parties or those who are in privity with a party."<sup>237</sup> He held that *Bradford* was "the only relevant California appellate court decision, [and] controls this case on the legal issues involved."<sup>238</sup> Finally, he ordered the CSU system to "cease, desist, and refrain from, directly or indirectly, by any means whatsoever, violating Education Code sections 68050 and 68062(h) or from treating undocumented aliens as residents, for purposes of tuition, without first establishing them as such in accordance with Education Code section 68062(h)."<sup>239</sup>

The University of California considers itself bound by *Bradford*, while the California State University System has appealed *Leticia "A"*, as modified, in order to have an Appeal Court resolution of the conflict.<sup>240</sup> Thus, by Summer, 1994, undocumented students are eligible to establish residency in the CSU, but not in the UC or in the 110 public California Community College campuses.



This case is a quintessential residency dispute, as the residency determinations turn on fact patterns of intent. *Bradford* and *AAW* hold that the undocumented cannot establish the requisite intent, while *Leticia "A"* holds that they are not prevented from establishing residence.<sup>241</sup> Judge Kawaichi's holdings, in *Leticia "A"* and its clarification, are clearly the more correct of the two competing versions, both because *Bradford* and *AAW* misrepresented the elements of domicile and residence, and because neither carefully distinguished among the forms of undocumented alienage, including those who are able to establish domicile in the state.

The Appeal Court, for example, inverts the Education Code's statutory language: aliens can be residents "unless precluded by the Immigration and Nationality Act. . . from establishing domicile in the United States," requiring undocumented aliens to prove they are permitted to adjust their status.<sup>242</sup> This judicial requirement deftly reverses the burden set out under the statute, which affirms aliens' rights to establish residence unless they are specifically not allowed to do so.<sup>243</sup> To slip this knot, the *Bradford* court mocked the University's argument as "Daedalian but unpersuasive" and as "senseless".<sup>244</sup> Further, by equating the acts of "not precluding" with "authorizing," the court ignored the precedent of *Toll v. Moreno*, where the U.S. Supreme Court had certified the question of whether Maryland state law enabled long term non-immigrant employees' children to establish domicile for postsecondary tuition purposes.<sup>245</sup> By requiring the state court to answer this technical question, it is clear that the Supreme Court envisions the acquisition of postsecondary residency as a matter of state law, not federal statute.<sup>246</sup> If, as in California, the controlling state statute incorporates a federal classification ("unless precluded by the INA"), a state court cannot invert the statute's presumption so as to defeat an alien's ability to establish domicile under state law.<sup>247</sup>

This error then enabled the *Bradford* court to misapply California law concerning residency, where, in *Cabral v. State Board of Control*, a California Appeal Court had earlier held that undocumented aliens are state "residents" for purposes of establishing standing for state benefits.<sup>248</sup> The *Bradford* court held that *Cabral* was not controlling, because it "arose under a statute which contain[ed] no definition of the term 'resident.'"<sup>249</sup> However, the court misapplied

the *Toll* test for interpreting Education Code 68062(h), by acting as if federal law controlled for one purpose (i.e., finding that Congressional language was "unremarkable" but controlling) but state law controlled for another (i.e., the existence of a state residence statute distinguished what would have otherwise been a controlling construction of state domicile).

Moreover, if federal law were controlling for determination of domicile purposes, the *Bradford* and *AAW* courts misunderstood the extent to which the INA enables and in some cases requires domicile in the United States for longterm undocumented aliens who eventually apply for the various forms of relief from deportation. First, once aliens enter the United States, either surreptitiously or through actions that render them out of legal status, they may be removed only through an elaborate proceeding of deportation, where the government has the burden of proof by "clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true."<sup>250</sup> The Supreme Court has further held that this standard "applies to all deportation cases, regardless of the length of time the alien has resided in this country."<sup>251</sup> Additionally, several statutory means of gaining legal status are available only to long term undocumented residents, as is an array of discretionary reliefs from deportation. For example, suspension of deportation, the relief provision at issue in *Chadha*,<sup>252</sup> requires "a continuous period of not less than seven years immediately preceding the date of such application,"<sup>253</sup> while registry provisions are available only to undocumented persons who entered the U.S. before January 1, 1972 and have resided in the United States "continuously since such entry."<sup>254</sup> In both instances, statutes and practice have evolved to ensure that the aliens had established residence in the United States and had not maintained domicile elsewhere or even physically left the country for more than brief periods of time.<sup>255</sup> Thus, *Bradford*<sup>256</sup> and *AAW*<sup>257</sup> misconstrue federal law concerning undocumented domicile as well as California state law determining residence. In its most recent undocumented student case, *Martinez v. Bynum*,<sup>258</sup> the U.S. Supreme Court affirmed *Plyer v. Doe*,<sup>259</sup> upholding a post-*Plyer* Texas statute<sup>260</sup> as applied, in which undocumented Mexican parents could establish residence for *Plyer* protection only if the children were not residing in a school district primarily for the purpose of attending school.<sup>261</sup>

For a postsecondary *Martinez* to occur, Leticia "A" and the other undocumented college students would have had to enter surreptitiously in order to attend college or, in the alternative, would have had to be in nonimmigrant status as students and then done something in violation of their visa requirements (e.g., holding unauthorized employment while in student status).<sup>262</sup> The record makes it clear that the plaintiff students in *Leticia "A"* were longterm residents, graduating from California high schools. Several of them adjusted their status to become permanent residents in the course of the trial.<sup>263</sup> There was no indication that higher education is a "pull factor" in attracting illegal entry to the country, and every indication that the aliens intended to reside in the United States.<sup>264</sup> This intention, combined with actual presence, constitutes residence or domicile in California. Federal immigration law contemplates relief for long term residents but only for those who remain in the country in uninterrupted fashion.<sup>265</sup>

That federal law does not preclude the undocumented from establishing domicile is clear from careful readings of *Plyer* and *Martinez*, as well as the INA provisions. Even *Toll v. Moreno*, on the issue of non-immigrants, appears to rule out such arbitrary residency requirements: "we cannot conclude that Congress ever contemplated that a State, in the operation of a university, might impose discriminating tuition charges and fees solely on account of the federal immigration classification."<sup>266</sup>

As a final piece to this puzzle, the treatment of legalization benefits also suggests that federal law does not preclude aliens from establishing domicile under state laws that incorporate the INA. The *Bradford* Appeal Court attempts to trump the *Leticia "A"* analysis by arguing that even the generous amnesty to legalize the undocumented status of some aliens under the Immigration Reform and Control Act (IRCA) did not contemplate generosity toward the undocumented:

Federal law, too, discriminates against undocumented aliens in the most basic way: it forbids their entry into the country and authorizes their arrest and deportation. Even undocumented aliens given preferred status under federal law—those authorized under the Immigration Reform and Control Act of 1986 to become lawful temporary residents and thereafter permanent residents—are

disqualified for five years from most federal programs of financial assistance to the needy. If federal financial assistance may be withheld from newly legalized aliens who, under the 1986 amnesty law, 'are to be welcomed as full and productive members of our nation,' surely the state is not constitutionally required to subsidize the university education of other aliens who have never legalized their status.<sup>267</sup>

But the Court, in its pell mell rush to close every door, gets it wrong, for IRCA does the opposite. The only public benefits legalizing aliens were entitled to during their probationary status were those considered most essential, and these specifically included access to the various college student financial aid provisions of the Higher Education Act of 1965; moreover, the INS promulgated 1994 guidelines, noting that no federal legislation had ever been enacted "that would permit states or state-owned [sic] institutions to refuse admission to undocumented aliens or to disclose their records" to the INS.<sup>268</sup> Thus, financial aid eligibility was available to these "welcomed" aliens. In their rush to show otherwise, the Appeal Court misread the very benefits statute they were using to buttress their argument that federal law did not reference undocumented aliens. In this light, it is not "senseless" but sensible and possible to interpret the California Education Code provision literally, and to find that undocumented aliens are not precluded from establishing residence.

#### **IV. The Social Science of Alienage**

This Part reviews the social science literature on residency determinations, research on alien students, and alien benefit studies. These areas pose unusual research problems, as studying undocumented students presents unusual ethical and social science limitations.<sup>269</sup> Even the most obvious questions—including how many undocumented aliens there are in the United States—are mixed social science/political questions.<sup>270</sup> There has been a longstanding history of overestimating the number of aliens for political purposes and "law enforcement" expediencies,

while questionable research findings gain receptive public audiences and even traffic as authoritative "evidence" for judges in immigration cases.<sup>271</sup> Therefore, great care must be accorded any social science research that is used to buttress an immigration case or to establish the effect of undocumented immigration upon U.S. labor markets, public benefits, or social services.

Indeed, it is virtually impossible to tell the tale of undocumented communities in the U.S. through traditional social science, as even the best social science labors in the shadow of historical U.S. attitudes towards "foreigners," often, ironically, attitudes held by persons descended from groups once themselves reviled as "dangerous elements" or "foreign influences."<sup>272</sup> The preeminent political historian Richard Hofstadter characterized these nativist manifestations and scapegoating of unpopular groups in his book, *The Paranoid Style in American Politics and Other Essays*:

The recurrence of the paranoid style over a long span of time...suggests that a mentality disposed to see the world in the paranoid's way may always be present in some considerable minority of the population. But the fact that movements employing the paranoid style are not constant but come in successive episodic waves suggests that the paranoid disposition is mobilized into action chiefly by social conflicts that involve ultimate schemes of values and that bring fundamental fears and hatreds, rather than negotiable interests, into political action...[This] paranoid tendency is aroused by a confrontation of opposed interests which are (or are *felt* to be) totally irreconcilable, and thus by nature not susceptible to the normal political processes of bargain and compromise.<sup>273</sup>

In a perceptive review of U.S. nativism in the U.S. - Mexico context, demographer Wayne Cornelius has written,

[if] surges of anti-Mexican nativism are viewed as a cyclical phenomenon—something that seems to happen at least once in a generation—it could be argued that the U.S. is now overdue for another such nativist spasm. The point is that

the attitudes, perceptions, fears and prejudices that underlie such movements do not go away once the immediate stimulus of an economic recession or international reverse of some kind passes. They remain latent in the body politic, waiting to be tapped and manipulated by politicians and special interest groups that have no reservations about: appealing to the baser instincts of their constituents. Indeed, we may be entering a period in which such appeals to nativism are increasingly respectable, because they can be cloaked in an aura of protecting our basic values as a society, the hard-won living standards of the middle class, or even the national security.<sup>274</sup>

Cornelius, writing a decade ago, may have been anticipating the cynical manipulation of the war on drugs to justify the shameful treatment of unaccompanied refugee minors in dreadful, Dickensian conditions in INS detention facilities in Texas and California;<sup>275</sup> appeals to national security in the interdiction at sea of Haitian boat people desperately fleeing poverty and political oppression in their country;<sup>276</sup> or legislative proposals to make asylum claims more difficult to advance and easier to deny, in the wake of the first domestic terrorist attack on U.S. soil, alleged to have been perpetrated by Islamic aliens.<sup>277</sup> In this vein, the manipulation of social science data for advancing anti-immigrant arguments has reached fever pitch in the case made against the undocumented in the United States. This discourse, as I will note in the last section of Part IV, has dire consequences for the issue of undocumented college students.

The area of college residency determinations is in need of fresh insights, as no ethnographic study and few administrative law studies have emerged to shed light on the important role administrators play in interpreting residency rules and making residency determinations. The gap is considerable, because redefinition and reinterpretation occur between the enactment of statutes or promulgation of regulations and the institutional determination of a student's residency status. One knowledgeable scholar of residency practices has noted, "most classification officers would be likely to stress that the difficulties of making either or decisions in individual cases should not be underestimated."<sup>278</sup>

One scholar who has begun to examine the administrative law of residency determinations is Richard Padilla, who has written a doctoral dissertation and undertaken two studies on the discretionary aspects of residency.<sup>279</sup> In a 1989 study, Padilla asked registrars and residency officials in a state (where all institutions were required to employ the same criteria and procedures) to review twelve "cases" of student transcripts, applications, and residency information.<sup>280</sup> Using a very carefully controlled interview protocol, he could not get all the administrators to agree unanimously on any of the cases, save one where all would have denied residency status; in five of the twelve cases, no majority could conclusively agree on whether to deny or grant residency.<sup>281</sup> Most tellingly, they split 5-4 on the case of a student who had been granted political asylum in the United States.<sup>282</sup> In the case facts, the student had been in the state for six months as an applicant for asylum, and eight months more after he had received formal asylum status: under the state's law, he was clearly entitled to be treated as a resident student.<sup>283</sup> In two other immigration-related hypotheticals, facts were given for undocumented students: one was brought surreptitiously into the country as a child while the other had been in student status on a F-1 visa but had left school several years before in violation of the terms of his visa. He had lived and worked in the state for six years since leaving school and owned a home in the state. When polled on these hypothetical cases, two officials voted nonresident for the former, and seven would request more information, while for the latter, seven voted non-resident and two would have sought additional information.<sup>284</sup> In neither case did any official agree to grant residency status to the undocumented students, even though the state law concerning undocumented college students is vague enough to permit the granting of residency.<sup>285</sup> Virtually all the registrars considered the undocumented students to be "foreign students," even though in the first case, the facts would likely not permit the applicant to obtain "residency" in his former "home" country.

These cases point to another complexity, that of the variegations of "foreign students," ranging from the more traditional F-visa holder to other immigrant and non-immigrant visa categories. In Texas, the state where Padilla conducted his studies, the state specifies the possibility of obtaining residency for foreign students who hold visas with A-1 or A-2

(diplomatic), G-1, G-2, G-3, G-4 (treaty organization), K (finances or fiances), and OP-1 (qualified immigrants from underrepresented countries) classifications, as well as those who have been classified as refugees, asylees, parolees, conditional permanent residents, or temporary residents (i.e., undergoing amnesty under the Immigration Reform and Control Act). In addition, there is a special provision for aliens who are part of NATO forces and a reciprocity agreement for Mexican nationals who reside in Mexican border states to attend Texas colleges in border counties and to pay in-state tuition.<sup>286</sup> Moreover, these provisions are not unique to Texas; a 1986 study of residency exemptions found more than seventy different alienage provisions in the fifty states and the District of Columbia.<sup>287</sup> As an additional twist, public institutions in fifteen states each devise their own residency criteria, including alienage requirements. Thus, Eastern Michigan University treats A-visa holders (diplomats) one way for residency determination, while a dozen miles away, the University of Michigan does the opposite.<sup>288</sup>

Moreover, it is not always clear who is undocumented and who may be eligible for a more permanent category or adjustment of status. *Leticia "A"* and her colleagues eventually adjusted to become permanent residents.<sup>289</sup> The Immigration and Nationality Act is chock-full of safe havens, exceptions, loopholes, and interstices that may render yesterday's undocumented alien today's permanent resident or citizen.<sup>290</sup> These categories and opportunities exist quite apart from any legislative or executive amnesty provisions that are enacted for groups who would otherwise be subject to deportation or who could not successfully negotiate residency.<sup>291</sup> Chinese students in the U.S. may have a gift from heaven given them, in the form of the Chinese Student Protection Act.<sup>292</sup> To paraphrase Tolstoy, not all the undocumented are alike, and each may be unique in a different way. Of course, the length of time in the U.S. is an important criterion of eligibility for a number of these reclassifications, and many undocumented aliens may have "inchoate permission" to remain in this country, virtually forever.<sup>293</sup>

In order to measure change in residency practices that had been triggered by the IRCA amnesty legislation and other immigration statutes and regulations, Padilla readministered his case study portfolios in 1991 to registrars at the same nine Texas public colleges he had surveyed



earlier; his respondents included five of the same respondents and three new respondents.<sup>294</sup> One was unable to participate. His findings further revealed the confusion and imprecision inherent in making discretionary judgments on complex evidence and unclear categories.

Four of the five original respondents reversed course concerning the asylum-seeker applicant in the follow-up study, but there was still no consensus on whether or not he would be eligible for resident status.<sup>295</sup> This was all the more surprising in that the Texas Attorney General's office had since issued an opinion on this issue, indicating that a student with these facts clearly was eligible for residency reclassification.<sup>296</sup> In the two hypothetical cases involving undocumented students, one brought to the country as a child by his parents and another who violated the terms of his original student status, the respondents again overwhelmingly indicated they would not reclassify them as residents.<sup>297</sup> Indeed, in extramural remarks, two respondents emphatically indicated that they would report the latter student to the Immigration and Naturalization Service, despite no obligation to do so, and that they would not admit him even as a non-resident, international student. Padilla also again found substantial disagreement among the respondents on the issue of when resident "clocks" began to toll. He concluded: "there can be little doubt that immigration status has a direct impact on the practice of residency determination for tuition purposes. The complex circumstances of students are made even harder to understand and interpret when viewed through the two hazy windows of immigration and the residency laws, rules, and regulations. Consequently, similarly situated students receive inconsistent residency classifications."<sup>298</sup> These are important findings, as the inconsistencies in administering postsecondary residency appear as "ludicrously ineffectual" as the Texas efforts had been in controlling undocumented alien children's immigration in *Plyler*.<sup>299</sup> *AAW*, so badly reasoned, also flies in the face of this practicality test: it, like *Bradford*, ignores the administrative aspects of establishing domicile.<sup>300</sup>

In a more recent study, a Houston demographer confirmed the earlier findings by Padilla, who had interviewed Texas registrars. Of the 12 Houston-area colleges, admissions officials from only 1 institution acknowledged a practice of admitting undocumented students, and then only if

they paid international student fees.<sup>301</sup> Nestor Rodriguez found the same inconsistencies as had Padilla, and even probed within-institution discrepancies: "Interestingly, in two universities where upper-and mid-level administrators had indicated earlier that they would be receptive to undocumented students, lower-level staff contacted by the study responded they would exclude undocumented students. The lower-level staff were ignorant of upper-level decisions. In one of the two cases, an admissions-office worker indicated that his response to applicants seeking admission varied by the characteristics of the applicants. The office worker simply directed applicants who 'look immigrant' or spoke with a marked accent to the admissions office for international students. Hispanics and Asians were usually the applicants sent by the office worker to the international-student admissions office."<sup>302</sup> This resembles discriminatory hiring practices, such as those prohibited by the Immigration Reform and Control Act. In a 1990 Government Accounting Office study, nearly 20% of the employers surveyed conceded they had discriminated against job applicants or employees either by engaging in illegal national origin discriminatory practices or by deliberately not hiring "foreign-appearing" or "foreign-sounding" job applicants—even if the applicants had employment authorization documents or were otherwise eligible to work in the United States.<sup>303</sup>

The Rodriguez study also uncovered enrollment inconsistencies, depending upon the funding sources of the programs. Area colleges, particularly community colleges, enrolled students without regard to their citizenship status in federally-and state-funded citizenship, English, and General Equivalent Diploma (GED) courses, but required immigration eligibility for enrolling in English as a Second Language (ESL), adult basic education, and GED coursework funded by other federal funds.<sup>304</sup> When the IRCA funds for citizenship classes began to flow, the Houston Community College received so many funds that a scandal arose over its enrollment tactics and lavish curriculum purchases.<sup>305</sup> However, once the aliens had completed these classes but prior to having gained permanent residence, they were not allowed to attend regular academic credit or technical courses in the same institution.<sup>306</sup>

Not one of the students, even those with some college experience outside the United States, entered the U.S. in the hope of attending college.<sup>307</sup> All had come to avoid war in their country, to make a better life with their families, or for another related reason. *Martinez v. Bynum*, the followup case to *Plyler v. Doe*, made it clear that aliens whose families did move solely for taking advantage of education benefits without residing in the district could be legitimately denied those benefits.<sup>308</sup>

Even so, a casual reader of newspapers and other materials would think that aliens, alien students, and alien college students were overrunning the states, California in particular.<sup>309</sup> This climate of hysteria has been fuelled by California's economic recession, false impressions created by inaccurate studies, and shameless racebaiting attempts to scapegoat undocumented aliens as a greedy and dangerous population. While closer examination reveals the claims to be incorrect or exaggerated, the discourse of this campaign has largely succeeded in halting any genuine reform efforts or counterstories to place the issue in a more balanced light.

California Governor Pete Wilson is the chief cheerleader for anti-immigrant sentiment, including his words and actions against undocumented alien college students.<sup>310</sup> In a variety of settings he has preached his message of how California's troubles have been caused by undocumented aliens in the areas of public services, jobs and employment, prisons and the criminal justice system, health care and hospitals, and education in public schools and colleges. His inflammatory remarks have been widely reported in the media.<sup>311</sup>

To document his charges, he has drawn from several studies, particularly one conducted to measure the relative costs and benefits of immigration for Los Angeles, California County. This ambitious 1992 project, "The Impact of Undocumented Persons and Other Immigrants on Costs, Revenues, and Services in Los Angeles County," is one of the more comprehensive governmental analyses of immigration economic costs and benefits.<sup>312</sup> The study concluded that immigrant groups—who constitute 25% of the LA county population—consumed \$947 million of County services, or 30.9% of the total net L.A. County costs for 1991-92; it also estimated that they contributed \$4.3 billion in all tax revenues, including \$139 million to the County.<sup>313</sup> While these

figures seem lopsided against the County, this group of immigrants also generated 9 times more California State revenue and 18 times more federal revenue than they did LA County revenue.<sup>314</sup> These data, which show a net contribution to tax revenues but an inefficient reimbursement/outlay distribution of costs to the County from other tax entities, were seized upon by Gov. Wilson and others to fan a campaign of inaccurate anti-alien sentiment generally,<sup>315</sup> to veto legislation aimed at solving the college residency problem,<sup>316</sup> and to introduce restrictionist legislation designed to make aliens ineligible for other public benefits.<sup>317</sup>

The study, even though it documented a substantial net contribution paid by the immigrant groups, was confusing, as it misleadingly lumped together permanent residents since 1980, aliens who legalized their status since the 1986 IRCA amnesty, citizen children of undocumented parents, and the undocumented.<sup>318</sup> Of course, these groups bear little relationship to each other except in a vague, undifferentiated sense of dispossessed immigration shorthand. Permanent residents since 1980 are persons who either came to the United States by family relationships or employment preferences, who adjusted status from non-immigrant visas to become permanent residents, or who employed one of a number of other legal means to remain permanently in the United States.<sup>319</sup> After five years, permanent residents can, in most instances, become naturalized citizens.<sup>320</sup> Therefore, this group was "thinned out" by post-1980 permanent residents who chose to become citizens, and who would be statistically indistinguishable from the citizen population.<sup>321</sup> The legalizing population overlaps with the first group, as they have begun adjusting status through the amnesty provisions of IRCA, after a brief classification period of Temporary Resident Status.<sup>322</sup> By 1992-1993, many of the persons had begun to naturalize as citizens; thus, one year after the LA County study, this group would have begun to overlap with the citizen population. Third, the true LA County 1992 undocumented population was estimated to be 140,000 minors and 559,000 persons 18 or older (or 7.6% of the total County population of 9.187 million persons).<sup>323</sup> This group was estimated to "cost" \$308 million in County services, or approximately 10% of the total.<sup>324</sup> Finally, citizen children of the undocumented were also

included as part of the "immigrant" population, even though as U.S.-born residents they have all the rights accorded other citizens.

Thus, the loose definition of "illegal alien" or "immigrant," including longtime permanent residents, intending citizens, and actual citizens renders the study less helpful in understanding the true costs of the undocumented. For undocumented children, presumably the most needy consumers of services and least-likely tax contributors, the study found only 117,000 in a county population of 2.505 million children under 18.<sup>325</sup> The study's findings are consistent with other studies that showed virtually no participation in welfare programs by the undocumented. For example, in studies of California IRCA amnesty applicants, only 2% of the formerly-undocumented aliens had received welfare services, 1.2% had received general assistance, and 4.2% had received food stamps.<sup>326</sup> These data inflated the undocumented participation rates, as they counted even citizen members of undocumented families as undocumented. An Urban Institute reanalysis of the same LA County data found that the 1992 County report overestimated costs by \$140 million and underestimated tax revenues paid by immigrants by \$848 million.<sup>327</sup>

To be sure, Governor Wilson and others are not arguing elegant econometric models, arithmetic calculations, or fine-grained immigration status distinctions. Instead, he inaccurately lumped together all the "other" categories to inflate their social service participation—as when he incorrectly averred that "two thirds of all babies born in Los Angeles public hospitals are born to parents who have illegally entered the United States."<sup>328</sup> But in his most cynical discourse, he waxes eloquent about how allocating resources to the undocumented deprives legally resident children of services.<sup>329</sup>

The LA County data, whatever the assumptions and data flaws, corroborate virtually all other studies conducted since the 1970's that measure undocumented alien benefit rates and tax contributions.<sup>330</sup> Julian Simon, one of the leading scholars in this field, estimated in 1985 that the undocumented pay five to ten times greater an amount of taxes than they consume in services;<sup>331</sup> in his 1989 book, *The Economic Consequences of Immigration*, he estimated that immigrants' net contribution (tax payments minus benefits received) was over \$1300 per person.<sup>332</sup> A 1986

RAND Corporation study of Mexican immigration in California summarized that the taxes paid by Mexican immigrants were greater than the costs of all benefits received, except those of education.<sup>333</sup> This was confirmed by a 1985 Urban Institute study, *The Fourth Wave*.<sup>334</sup> A similar 1984 study conducted on Texas undocumented aliens showed a substantial net gain of revenues over expenses, as did a California State Department of Finance 1991-92 study<sup>335</sup> and a 1990 U.S. Department of Labor study.<sup>336</sup> Virtually all the thorough and non-partisan studies show the same result.<sup>337</sup>

Careful scholars have even shown how entire markets are created or restructured by immigrants, many of whom bring traditional U.S. values of hard work, beliefs in family and achievement, and a willingness to undertake tasks not considered attractive to U.S. workers. For example, a recent housing study conducted in Houston revealed that during the city's economic downturn of the early 1980's, the overbuilt condominium, housing, and rental apartment industry was kept from collapsing entirely by the influx of undocumented immigrant populations who were recruited to the formerly Anglo, middle class tenant markets.<sup>338</sup> The former regimes of strict rules, limits on the number of children, and restrictions on multiple-family housing arrangements were relaxed or ignored in order to accommodate the undocumented and other immigrant communities. In the late 1980's, once the city rebounded and began to recover from its recession, another market restructuring occurred, ratcheting the rules to be more selective, raising rents to reconstitute the "mix" of the tenants, and attracting more Anglo, higher income tenants.<sup>339</sup>

These studies concentrate upon more basic benefits of housing, welfare, health care, and elementary/secondary education, with virtually no data on higher education participation. Those that do include such data estimate or measure negligible rates. In San Diego, California's second largest city and largest border community, a State Auditor study reported from CSU estimates that only 86 students were undocumented, 85 at CSU-San Diego and 1 at CSU-San Marcos.<sup>340</sup> The CSU system overall estimated as few as 1% and as high as 3% of their students on some campuses were undocumented,<sup>341</sup> while the more selective University of California system estimated that only 100-125 of their nearly 165,000 students were affected by *Bradford*.<sup>342</sup> As Table 3 notes,

there have been very few undocumented UC students. The most accessible public system in the State is the 110-campus, open admissions California Community College (CCC) System. whose officials estimated that fewer than "several hundred" students were undocumented;<sup>343</sup> the CCC System had first faced this issue in a 1981 case, *Gurfinkel v. Los Angeles Community College District*,<sup>344</sup> and was considered to be bound by *Bradford*.<sup>345</sup>

The small numbers affected and the perceived inequity had led the California State Legislature to pass a *Bradford/Leticia "A"* bill that would have resolved the issue and allowed the undocumented students to establish domicile after a waiting period.<sup>346</sup> Governor Wilson vetoed the bill, in a state where legislative overrides are extremely rare.<sup>347</sup> The issue in California remains unresolved at the *Leticia "A"* Appeal Court stage.<sup>348</sup> Other states have either settled lawsuits,<sup>349</sup> enabling the undocumented to establish residency, or have determined without litigation that undocumented students who can meet all other residency criteria may establish residence for tuition purposes.<sup>350</sup> In addition, other states and institutions treat this issue on an ad hoc, discretionary basis: for example, one college treats undocumented students as residents if they were brought to the country surreptitiously by their parents, if they otherwise are residing in the state for the requisite period of time, and if they attended high school in the state.<sup>351</sup> This same school excludes the undocumented who came on a visa but violated the terms of the visa (e.g., for holding unauthorized employment while in a tourist or student category). This is a modified "clean hands" approach to resolving the issue, inasmuch as the student's ability to enroll depends upon whether the undocumented status is due to his or her own actions or those of the parents.

**TABLE 3**

University of California Fall 1993 Enrollment by Campus by Citizenship Status

Campus	U.S. Citizens	Noncitizen U.S. Residents	International Students	Other	Total
Berkeley	24,266	4,074	1,924	77	30,341
Davis	19,065	2,748	650	23	22,486
Irvine	12,347	3,796	497	175	16,815
Los Angeles	27,137	5,528	1,703	79	34,447
Riverside	8,339	62	263	13	8,667
San Diego	15,262	1,980	600	9	17,851
San Francisco	3,285	321	125	0	3,731
Santa Barbara	16,492	1,584	502	3	18,581
Santa Cruz	9,271	745	138	19	10,173
Total	135,464	20,838	6,402	398	163,102

Notes:

"Noncitizen U.S. Residents" category includes students in the following categories: permanent resident, refugee, amnesty recipient defined by INS, approved petitioner for immigrant visa, awaiting immigrant visa number, political/religious asylee as defined by INS.

"International Students" category includes students in the following visa categories: A1, A2, A3, B1, B2, C1, C2, C3, E1, E2, F1, F2, G1, G2, G3, G4, G5, H, H1, H2, H3, H4, I, J1, J2, K1, K2, L1, L2, M1, and M2.

"Other" category includes students who:

- (1) are in the process of establishing permanent residency, but not currently maintaining a visa status (e.g., their former visa status may have expired and permanent residency status is imminent so another visa is not issued);
- (2) are in the process of changing visa type where the initial visa has lapsed;
- (3) have an unusual visa type that the University generally does not track;
- (4) have asked for but not yet been granted political asylum; and
- (5) are undocumented.
- (6) unknown = SLR unclear

Source: UC System Office data, February 1994 (on file with author)



## V. Conclusion: The Discourse and the Danger

I have been actively involved in residency reform and study since 1975, when I was a doctoral student and campus recruiter at Ohio State University. As a chicano student, I was drawn to recruit other Latinos to campus, but in Ohio, the only pockets of Mexican - origin residents were living in the Northern part of the state, where tomatoes and other perishable crops were grown and processed. I discovered that a number of talented Mexican American and Puerto Rican farmworkers were interested in attending college, especially since the tomato and pickle crops were being mechanized and Latinos were not being hired in the canneries that ringed the Northern border of the state. However, each year these students and their families followed the crops, from Texas onions through the midwest vegetables to tree fruits in Michigan; these travels meant they could not establish residency in any state, even those at either end of the migrant stream (such as Texas or Ohio) where they maintained a legal domicile. In my typical graduate student way, I did not know the complexity of the interstate residency systems, and so I asked, why not? I formed a group of advocates in Columbus, and we convinced the state legislature and coordinating board to enact a change in Ohio law that enabled agricultural workers to aggregate their residence period of twelve months over the space of three years.<sup>352</sup> Breaking up the time period seemed, in my amateur's way at the time, a fair way to allow these farmworkers a chance at college.

To this day, I remember our big meeting with Ohio Board of Regents officers. We showed them "Harvest of Shame," the classic Edward R. Murrow investigation into the plight of U.S. farmworkers. Their biggest fear was that non-farmworkers would pose as the new "protected class" in order to avail themselves of this benefit. That someone not a migrant would try and pass had never occurred to me: not even Cesar Chavez had ever glamorized the profession enough to make it fashionable. I whipped out an application I had brought in my files, and showed the administrators what a migrant academic transcript looked like: grading periods for the same 7 high schools, for the same 4 weeks over each of 4 years. Once administrators saw the transcript, once the discourse was in terms they could understand, their concerns were allayed. Once the migrant

students were admitted, they were entitled to other grants and curricular benefits as well, and, through a formal interstate compact agreement, to residency benefits in other reciprocal states.

This was my first professional taste of how benefits are accorded by place and duration, and my first high-level political success. In the years since, I have established residency as my subfield of study, by conducting research,<sup>353</sup> litigating cases,<sup>354</sup> serving on campus residency appeals committees,<sup>355</sup> being an expert witness in residency cases,<sup>356</sup> and, in an ironic twist, being sued for my university committee's denial of the residency appeal by one of my law students,<sup>357</sup> and serving both as a hostile fact witness and expert in that case. I know residency.

But others do not, or they misperceive it. These students have met all admissions criteria, have met all traditional residence requirements, and displace no one. Except for the different fee bills they receive, they are indistinguishable from other college students. Even in the state where 40% of all undocumented residents are assumed to live, undocumented college students constitute an almost invisible minority of students. The colleges have accustomed themselves to the students' presence, and, since 1985, have administered their enrollment without incident—even though federal financial aid funds are unavailable to this population.<sup>358</sup> No study has shown them to be a substantial number, even in border-area colleges; through expert testimony and research, it is evident that the lure of college is not a "pull" factor to attract illegal immigration.<sup>359</sup> Congress felt strongly enough about the need for college that it made federal assistance available to legalizing aliens undergoing amnesty.<sup>360</sup> Although the Supreme Court has never faced the question squarely, *Toll v. Moreno*,<sup>361</sup> *Plyler v. Doe*,<sup>362</sup> and a host of other residency cases<sup>363</sup> make it clear that California cannot exclude long term undocumented aliens who have met all the traditional tests for establishing domiciles from establishing postsecondary residency. Even as harsh an opinion as *AAW* concedes the students may be admitted into colleges, albeit as non-residents. *Leticia "A"* is a well-reasoned, careful opinion that grasps the essential issue; the California Appeal Court, still considering the matter in 1995, should affirm it. Proposition 187 would turn public higher education in California to the *Braford* state. Litigation has tied up enforcement of the Proposition.<sup>364</sup>

But this analysis turns on whether objections to undocumented alienage and higher education are rooted in careful research and analytic study. My reading of the hateful discourse and xenophobic scapegoating leads me to believe that the David Bradfords of the world do not object on meritocratic or substantive grounds: Governor Wilson's objections that the money used for serving undocumented aliens deprives lawfully resident aliens of their benefits ring hollow.<sup>365</sup> Not only is there considerable resistance even to permanent residents receiving benefits—so much so that there is an entire legal literature devoted to the topic —<sup>366</sup> but the imprecise, undifferentiated, and broad-brush swipes at "illegals," "immigrants," and "aliens" generally tar all the groups. One is reminded of how racist Japan-bashing led to the murder of Vincent Chin, a Chinese-American.<sup>367</sup> Free-floating racial animus often leads to a generalized resentment against all people of color, or "others." Governor Wilson has even been so mean-spirited as to advocate a "repealing" of *Plyler v. Doe*<sup>368</sup> and the Constitutional provisions that enable native born children to be U.S. citizens,<sup>369</sup> irrespective of their parents' immigration status. All of these arguments, mixed in a cauldron amidst shrill warnings about the rights of "real Americans," lead inevitably to a sense of divisiveness, racial superiority, and undifferentiated prejudice. In California, dozens of anti-alien bills have been introduced,<sup>370</sup> as if the aliens were the source of the sputtering economy, even though government studies have shown that immigrants—however defined—are net economic contributors.

Much is made of the detrimental effects of immigration: that criminals are not deterred from entering the country, that aliens are stubbornly monolingual in languages other than English, that they take jobs and services from citizens, that they undercut or depress wages, that they do not understand the American character, that their general lawlessness or unlawful presence is itself a sign of an unwillingness to abide by rules or accept responsibility for their actions.<sup>371</sup> Of course, these traits, to the extent that they are accurate, do describe some aliens in legal status or in undocumented status, just as they surely describe some natives. However, if there were a group that holds promise to become productive, longterm residents and citizens, alien college students would surely be that group. With the generally dismal schooling available to these students,<sup>372</sup> that

even a small percentage could meet the extremely high standards of the University of California or moderately high standards of the California State University is extraordinary. Given their status and struggle, each represents a success story of substantial accomplishment.

The truth is, the United States needs this talent pool. In many highly technical fields, foreign scholars enroll in high numbers and, after consuming the benefit, return to their countries.<sup>373</sup> This is as it should be, as learning respects no borders, and U.S. institutions are surely enriched by recruiting internationally. However, the undocumented have every incentive to remain in the United States, to adjust their status through formal or discretionary means, and to contribute to the U.S. economy and polity. My own experiences over the years with these students are that they are extremely loyal to the United States. Despite their undocumented status, many are more Americanized than are most native born students. They believe in the immigrant success story, having lived it in most instances. Some, like "Jose" and "Manuel," the two students cited at the beginning of this article, have literally never known any other life. Why deny these students the benefit of resident tuition?

In my native New Mexico each year, Santa Feans ritualistically burn *Zozobra*, or "Old Man Gloom," a 40-foot straw figure, to expiate the year's accumulation of grief and indignities. Fiesta-goers are not aware of their culture's sociological significance, and would be astounded to find themselves the subject of an anthropologist's probing of their community norms and mores. The inner logic of their acts of expiation is not questioned or even manifest; they do it each year because the community did it the year before. The celebration is widely regarded as an Indian-Hispanic ritual, despite its origins in Santa Fe's Anglo artist traditions.<sup>374</sup>

After examining all the arguments raised by immigration restrictionists on the issues of undocumented college residence, I have come to believe that those who raise objections, particularly those who act upon these beliefs—the David Bradfords, FAIR members, conservative elected officials—do so to burn *Zozobra* and thus to expiate their own fear and loathing of the unknown. Just as 19th century California officials banned pigtailed prisoners and oppressed them through a series of measures to keep Chinese immigrants in their place,<sup>375</sup> these storytellers

have resorted to false stories and scapegoating in their campaign to vilify immigrants. Their own data show negligible undocumented participation in the state's vast higher education system, far less than 1%. Unconcerned with the true data, they have told tales out of school, of massive displacement and lawlessness.<sup>376</sup> Neither of these is true. On balance, immigrants, whether lawfully admitted or undocumented, are present and future contributors. California, for its part, benefits tremendously by their stories and loyalties. Precluding their incorporation into California society through higher education is a foolishly shortsighted policy, and those who actively oppose the integration of long term undocumented college students should be ashamed of themselves for their actions. Important public policy should not be premised upon such prejudice.

## ENDNOTES

1. Cited in SUSAN K. BOYD, *THE ABA'S FIRST SECTION: ASSURING A QUALIFIED BAR* 17 (1993).
2. R. AKUTAGAWA, *In a Grove*, in *RASHOMON AND OTHER STORIES* 19 (T. Kojima, trans. 1970).
3. Roger Parloff, *Fare's Fair, Why the Predatory Pricing Case Against American Airlines Got to Trial -- And No Further*, *Am. Law.* (Oct., 1993) at 60 (analysis of 1993 Texas airline pricing case); Andrea Sachs, *A Rare Loss for Joe Jamail*, *A.B.A.J.*, Nov., 1993, at 16 (reviewing reputation of attorney Jamail, "whose persuasive powers are legendary").
4. See, e.g., the special issue on the savings and loan crisis, 2 *STAN. L. & POL'Y REV.* 21 (1990), especially the article by the major protagonist, Charles H. Keating, Jr., *Quest for Truth: A Search for Sanity in a \$500 Billion Tragedy*, 2 *STAN. L. & POL'Y REV.* 147 (1992) (politicians and regulators caused collapse of S & L industry). But see, Michael Waldman, *The S & L Collapse: The Cost of a Congress For Sale*, 2 *STAN. L. & POL'Y REV.* 47 (1992) (Keating bought Congressional influence and mismanaged Lincoln Savings and Loan).
5. GERRY SPENCE and ANTHONY POLK, *GERRY SPENCE: GUNNING FOR JUSTICE* (1982); see also RICHARD ABEL, *AMERICAN LAWYERS* (1989).
6. See, for example, Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 *MICH. L. REV.* 2411 (1989); Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 *HARV. WOMEN'S L. J.* 1 (1988). For news stories about Critical Race Theory, see, e.g., Stephanie Goldberg, *The Law, A New Theory Holds, Has a White Voice*, *N. Y. Times* (July 17, 1992) at B8; Steven Wiener, *Law Profs Fight the Power*, *The Nation* (Sept. 4/11, 1989) at 246.
7. DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* (1992); Derrick Bell, *The Price and Pain of Racial Perspective*, in MICHAEL A. OLIVAS, *THE LAW AND HIGHER EDUCATION: CASES AND MATERIALS ON COLLEGES IN COURT* (1989) at 1038-1041.
8. Jerome Culp, *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 *VA. L. REV.* 539 (1991); Jerome Culp, *Voice, Perspective, Truth, and Justice: Race and Mountain in the Legal Academy*, 38 *LOY. L.A. L. REV.* 61 (1992).
9. Delgado, *supra* note 6; Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 *U. PA. L. REV.* 561 (1984); Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later* 140 *U. PA. L.*

- REV. 1349 (1992); Richard Delgado and Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Express Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992).
10. Charles Lawrence, *A Dream: On Discovering the Significance of Fear*, 10 NOVA L. REV. 627 (1986); Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).
  11. Mari Matsuda, *supra* note 6; Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2330 (1989); Mari Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L. J. 1329 (1991).
  12. PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991); Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989).
  13. Robert A. Williams, *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1984); Robert A. Williams, *Gendered Checks and Balances: Understanding the Legacy of White Patriarchy in the American Indian Cultural Context*, 24 GA. L. REV. 1019 (1990).
  14. *See, for example*, Culp, *Autobiography*, *supra* note 8 (discussing father's occupation as a miner and how that affects his own sense of self as teacher); Patricia Williams, *Obliging Shell*, *supra*, note 12 (remembering her father's "walking trepidatiously" into recently - desegregated stores).
  15. *See, for example*, PATRICIA WILLIAMS, ALCHEMY, *supra* note 12; Charles Lawrence, *Dream*, *supra* note 10.
  16. Charles Lawrence, *Id*, *supra* note 10 (recounting his daughter's favorite book, which he considers to include racist caricatures); Richard Delgado, *Imperial Scholar*, *supra* note 9 (recounting advice he received to concentrate upon mainstream legal topics); Matsuda, *Public Response*, *supra*, note 11 (recounting anti-Asian violence occurring on a trip).
  17. Charles Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L. J. 431 (recounting racist childhood rhyme); Patricia Williams, *Obliging Shell*, *supra* note 12 (remembering racist incident at Stanford); PATRICIA WILLIAMS, ALCHEMY, *supra* note 12 (story of being locked out of Benetton store during store hours); Derrick Bell, *Price and Pain*, *supra* note 7 (recalling humiliating teaching incident at Stanford).
  18. *See, for example*, DERRICK BELL, NOT SAVED, *supra* note 7 (introducing fictional "Geneva Crenshaw"); Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L. J. 1357 (1992) (fictional "Rodrigo" featured in book review of DINESH D'SOUZA, ILLIBERAL EDUCATION (1991)).
  19. *E.g.*, Richard Delgado and Helen Leskovic, *The Politics of Workplace Reforms: Recent Works on Parental Leave and a Father-Daughter Dialogue*, 40 RUTGERS L. REV. 1031 (1988); Richard Delgado, *Storytelling*, *supra* note 6.
  20. This attention has been both supportive of and critical towards the movement. For examples of the former, see Leslie Espinoza, *Masks and Other Disguises: Exposing Legal*

- Academia*, 103 HARV. L. REV. 1878 (1990); Kimberle Crenshaw, *Race, Reform, and Retrenchment; Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Anthony Cook, *Reflections on Postmodernism*, 26 NEW ENG. L. REV. 751 (1992). As examples of the latter, see Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989); Daniel Farber and Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993); Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L. J. 251 (1992); Edward Rubin, *On Beyond Truth*, 80 CAL. L. REV. 889 (1992); Mary Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683 (1992).
21. BELL, SAVED, *supra* note 7; BELL, FACES, *supra* note 7; PATRICIA WILLIAMS, ALCHEMY, *supra* note 12.
  22. Critical Race Theory scholars meet each summer to read and critique each others' work, while other groups have met to contribute their research, as occurred in the legal storytelling symposium papers published in 87 MICH. L. REV. 2073 (1989). See generally, Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665, 675 (1993); and Richard Delgado and Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993).
  23. Richard Delgado and Jean Stefancic, *Bibliography*, *supra* note 22; Richard Delgado, *A Reply*, *supra* note 22.
  24. The most dyspeptic assessment comes from Professor Lino Graglia: "There can be no sin for which reading Professor Derrick Bell is not, for me, adequate punishment ... [THE CHRONICLES are] wails of embittered, hate-filled self-pity . . . ." in Lino Graglia, *Book Review*, 5 CONST. COMM. 436, 437 (1988).
  25. Richard Delgado and Jean Stefancic, *Bibliography*, *supra* note 22; Richard Delgado, *A Reply*, *supra* note 22.
  26. *Plyler v. Doe*, 457 U.S. 202 (1982).
  27. *Gurfinkel v. Los Angeles Community College District*, 121 Cal. App. 3d 1 (1981) (higher education not a fundamental right); *Leticia "A" v. Board of Regents of the University of California*, California Superior Court, Alameda County, No. 588982-4 (May 30, 1985) ("Leticia A.") (undocumented students can establish residency); May 19, 1992 Clarification ("Leticia A - clarification"); *Regents of the University of California v. Superior County*, 225 Cal. App. 3d 972, 276 Cal. Rptr. 197 (2d Dist. 1990) ("Bradford") (undocumented aliens not eligible to become residents); *American Association of Women, et al. v. The Board of Trustees of the California State University et al.*, California Superior Court, Los Angeles County, No. BCO61221 (September 28, 1992) ("AAW") (undocumented aliens not eligible to become residents). See generally, Michael A. Olivas, *Plyler v. Doe, Toll v. Moreno, and Postsecondary Admissions: Undocumented Adults and 'Enduring Disability'*, 15 J. L. & EDUC. 268 (1986); PETER ROOS, POSTSECONDARY PLYLER (1991) (Institute for Higher Education Law and Governance Monograph No. 91-7).
  28. See generally, ROOS, *supra* note 27; *Judith A. v. Arizona Board of Regents*, Arizona Superior Court, Maricopa County, No. CV87-21579 ("Judith A.") (November 24, 1987)(undocumented aliens may become residents); *Alarcon v. Board of Trustees of the University of Illinois*, Illinois Circuit Division, No. 87-Ch. 02858 (July 14, 1987) ("Alarcon") (same); William O'Connell, *College University Attendance by Out-of-Status and Undocumented Students*, February, 1992 (New York state survey of college residency



- practices) (on file, available from author). For an analysis of the academic freedom dimensions, see Michael A. Olivas, *Professorial Academic Freedom: Second Thoughts on the 'Third Essential Freedom,'* 45 STAN. L. REV. 1835 (1993).
29. For examples of scholarship documenting the scapegoating phenomenon, see THOMAS MULLER, *IMMIGRANTS AND THE AMERICAN CITY* (1993); ALAN DOWTY, *CLOSED BORDERS: THE CONTEMPORARY ASSAULT ON FREEDOM OF MOVEMENT* (1987); RITA SIMON, *PUBLIC OPINION AND THE IMMIGRANT: PRINT MEDIA COVERAGE, 1880-1980* (1985). For a recent story on how immigrants fit into a community, see Deborah Sontag, *New Immigrants Test Nation's Heartland*, N.Y. Times, October 18, 1993, at A1 (immigrants who "do the plant's dirty work presented no economic threat").
  30. A full length annotated bibliography would be necessary to sample this growing literature. For some sample articles, see Tim Ferguson, *California Feels Anti-Immigrant Tremors*, Wall St. J., Dec. 29, 1992, at A10; Scott Armstrong, *California Melting Pot Boils Over As Illegal Immigrants Enter State*, Chris. Sci. Monitor, Apr. 6, 1993 at 1; Frank Acosta and Bong Kim, *Race-Baiting in Sacramento*, L.A. Times, May 3, 1993, at B7; William Hamilton, *Harvest of Blame: Californians Turn on Illegal Immigrants*, Wash. Post, June 4, 1993, at A1.
  31. There is a life's worth of reading on this topic. Some of the better works in this genre include ALICE CHANDLER, *OBLIGATION OR OPPORTUNITY, FOREIGN STUDENT POLICY IN SIX MAJOR RECEIVING COUNTRIES* (1989); BRUCE JOHNSTONE, *SHARING THE COSTS OF HIGHER EDUCATION* (1986); MAUREEN WOODHALL, *STUDENT LOANS AS A MEANS OF FINANCING HIGHER EDUCATION: LESSONS FROM INTERNATIONAL EXPERIENCE* (1983); INSTITUTE OF INTERNATIONAL EDUCATION, *OPEN DOORS, 1990-91* (1991).
  32. IIE, *supra* note 31. See also Alice Chandler, *Looking at Trendlines: Foreign Student Issues For the 90's*, unpublished paper, May, 1992, at 9 (reporting 1991 IIE data of 408,000 foreign students in the U.S. of a worldwide total of 868,000) (copy on file with author).
  33. *Id.* at 9 (showing France to have 132,000 foreign students in 1991).
  34. Denise Magner, *Blacks Earned Fewer Doctorates in 1992 Than in 1991, Study Finds*, Chron. Higher Educ., September 29, 1993, at A18 (reporting 1992 doctoral data).
  35. *Plyler v. Doe*, *supra* note 26; *Martinez v. Bynum*, 461 U.S. 321 (1983) (states may regulate undocumented aliens who commute or reside in district for sole purpose of attending schools); *Leticia "A"*, *supra* note 27. But see *Bradford*, *supra* note 27; AAW, *supra* note 27 (states may preclude undocumented aliens from establishing domicile).
  36. *Bradford*, 225 Cal. App. 3d 972, 276 Cal. Rptr. 197 (2d Dist. 1990).
  37. NATIONAL CENTER FOR EDUCATION STATISTICS, 1989 (1991), cited in *THE ATLAS OF AMERICAN HIGHER EDUCATION* 209 (James Fonseca and Alice Andrews, eds.).
  38. Deborah Sontag, *Analysis of Illegal Immigrants In New York Defies Stereotypes*, N.Y. Times, September 2, 1992, at A11 (analyzing INS data showing percentage of national undocumented population decreased in California from 50% in 1987 to 40% in 1993, and increased during same period in New York City from 10% to 15%).

39. *Supra* note 28 (provisions in Illinois, Arizona and New York to allow undocumented residency).
40. Olivas, *Enduring*, *supra* note 27 (study of Texas requirements). *See also* RICHARD PADILLA, IMMIGRATION STATUS AND RESIDENCY DETERMINATION FOR TUITION PURPOSES, (Institute for Higher Education Law and Governance, Monograph 91-4); NESTOR RODRIGUEZ, UNDOCUMENTED IMMIGRANT STUDENTS AND HIGHER EDUCATION: A HOUSTON STUDY, (Institute for Higher Education Law and Governance, Monograph 90-10).
41. For example, a student who leaves one state for another may sever all ties with the former state yet not meet the residency durational requirements in the new state. For tuition purposes, this leaves many students with no verifiable formal residence in either state. For one such example, see *Frame v. Residency Committee*, 675 P. 2d 1157 (Utah 1983) (married couple unable to establish Utah residency after foreign study period).
42. *See* Patricia Lines, *Tuition Discrimination: Valid and Invalid Uses of Tuition Differentials*, 9 J. C. & UNIV. L. 241 (1982-83).
43. For this discussion of residency, I draw from earlier research on the subject, including Michael A. Olivas, *State Residency Requirements: Postsecondary Authorization and Regulation*, 13 C. L. DIG. 157 (1983); Michael A. Olivas, *Administering Intentions: Law, Theory, and Practice in Postsecondary Residency Requirements*, 59 J. HIGHER EDUC. 263 (1988); and Michael A. Olivas, *The Political Economy of Immigration, Intellectual Property, and Racial Harassment: Case Studies of the Implementation of Legal Change on Campus*, 63 J. HIGHER EDUC. 570 (1992).
44. For example, at the University of Houston, a public institution, 15 graduate semester hours resident tuition in 1990-91 cost \$300, while for a non resident, the charge was \$1800; when all the additional fees were factored in, the differential was still 4 to 1 (\$2010 to \$510). UNIVERSITY OF HOUSTON GRADUATE AND PROFESSIONAL STUDIES, 1990-1992, at 28 (on file with author). *See also*, Joye Mercer, *Many States Toughen Policies on Non-Resident Students, Raising Tuition and Stiffening Residency Requirements*, Chron. of Higher Educ., June 2, 1993, at A18.
45. Discussion with Mr. Manuel Gomez, UC-I Associate Vice Chancellor, October, 1993. There have been unanticipated consequences of the UC tuition hikes, even for the more well-to-do and citizen populations. Louis Freedberg, *College Students Fleeing California*, S.F. Chron., Aug. 3, 1993, at A1 (describing steep rise in California residents attending colleges in other states). For a reaction to this phenomenon, see UC Office of the President, *The Effect of Fee Increases on New California Resident Freshman Enrollment at the University of California: Fall 1990 to Fall 1992* (1993); Dear Colleague letter from Dennis Galligani, UC Assistant Vice President, Student Academic Services, August 19, 1993 (copies on file with author).
46. *Priest v. Regents of University of Wisconsin*, 54 Wis. 159, 11 N.W. 472 (1882) (upholding institution's right to charge out-of-state surcharge).
47. Jonathan Varat, *State 'Citizenship' and Interstate Equality*, 48 U. CHIC. L. REV. 487 (1981); James Morgan, *Tuition Policy and the Interstate Migration of College Students*, 19 RES. IN HIGHER EDUC. 183 (1983).
48. Michael Olivas, *Administering Intentions*, *supra*, note 43; David Palley, *Resolving the Nonresident Student Problem: Two Federal Proposals*, 47 J. HIGHER EDUC. 1 (1976);

- ROBERT CARBONE, STUDENTS AND STATE BORDERS (1973); ROBERT CARBONE, ALTERNATIVE TUITION SYSTEMS (1974).
49. ROBERT CARBONE, RESIDENT OR NONRESIDENT? TUITION CLASSIFICATION IN HIGHER EDUCATION 2 (1970).
  50. For example, there are a variety of provisions for relief from deportation: registry, suspension of deportation, and certain agricultural worker provisions. *See infra* note 260.
  51. D.C. Law 1-36, § 31-1711. *See also*, UNIVERSITY OF THE DISTRICT OF COLUMBIA STATEMENT OF ADMISSIONS AND FEES (on file with author); *See, e.g.*, Michael Olivas, *Administering Intentions*, *supra* note 43, at 287-290 (App. I).
  52. N.Y. EDUC. LAW § 302.1 (State University of New York); *see* Olivas, *Administering Intentions*, *supra* note 43, at App. I.
  53. TENN. CODE ANN. § 49-3342 (University of Tennessee); *see Id.*, at App. I.
  54. *Id.* at App. I (Alaska, Hawaii, Illinois, Indiana, Kansas, Louisiana, Missouri, Nevada).
  55. *See generally*, J. Corson, *Reform of Domicile Law for Application to Transients, Temporary Residents and Multi-Based Persons*, 16 COLUM. J. L. & SOC. PROBS. 327 (1982).
  56. RESTATEMENT OF CONFLICT OF LAWS, § 11(2): "Every person has a domicile at all times and, at least for the same purpose, no person has more than one domicile at a time."
  57. RESTATEMENT, § 11(2), (3).
  58. *Id.* *See also*, G. Josephs, *A Checklist for Determining Domicile*, 27 THE PRACTICAL LAW. 55 (1981); A. Schiff, *State Discriminatory Action Against Nonresidents: Using the Original Position Theory as a Framework for Analysis*, 22 HARV. J. ON LEGIS. 583 (1985).
  59. J. Bollhofer, *Disenfranchisement of the College Student Vote: When a Resident is Not a Resident*, 11 FORDHAM URB. L.J. 489 (1983) (reviewing voting practices affecting students who live in campus housing).
  60. Discussion with University of Houston residency officer, October, 1993; *See generally*, Lines, *supra* note 42; Varat, *supra* note 47.
  61. Olivas, *Administering Intentions*, *supra* note 43, at App. I.
  62. *Id.* at App. I (Tennessee and the State University of New York (SUNY) system in New York State).
  63. For example, because the intent requirement cannot be measured or enforced until after the educational resource is consumed (i.e., after graduation or the completion of studies), the true measure is likely to be manifest too late. In an earlier work, I proposed a time-shifting alternative that would tie tuition benefits to a rebate *after* the completion of studies. *Supra* note 43, *Administering Intentions*, at 284-285.
  64. For example, the "home state," the school state, the parents' state(s), a holiday or summer job location, etc.

65. See, e.g. *Frame*, *supra* note 41.
66. See, e.g., ROBERT CARBONE, *STUDENTS AND STATE BORDERS* (1973). For example, with only 14 schools of optometry in the United States, the University of Houston School of Optometry reserves a setaside of its places for residents of other states, who "contract" with UH for those places in each year's class. Discussion with UH officials, January, 1994.
67. Michael A. Olivas, *Postsecondary Residency Requirements: Empowering Statutes, Governing Types, and Exemptions*, 16 COLL. L. DIG. 268 (1986)
68. See Michael A. Olivas, Invited Testimony to Texas House of Representatives, Committee on Postsecondary Education, April 1985 (copy on file with author); Legislative Budget Board Recommended General Appropriations Bill, 1986-87 Biennium, 11 January 1985, pp. III 104-105 (§ 19)
69. Olivas, *Exemptions*, *supra* note 67; James Y. Henderson, *The Question of Non-resident Tuition for Tribal Citizens*, 4 AMER. IND. L. REV. 47 (1976) (analyzing residency classifications that conflict with domicile determinations for reservation Indians).
70. See, Olivas, *Invited Testimony*, *supra* note 68; TEX. EDUC. CODE, Title 3, 54.052; 54.059; 54.063. For an extreme example, the state provides non-resident tuition waivers for federal prisoners incarcerated in Texas correctional facilities, provided the inmate designates a Texas domicile. TEX. A.G.O. No. H-559 (March 20, 1975); State Bill Rider No. 18, III-47 (providing that all inmates of Texas Dept. of Criminal Justice are eligible for resident tuition); see also *Coordinating Board Memorandum* (February 18, 1992) (Texas regulations for inmates to establish resident status) (on file with author).
71. For a good example of the waivers for the fortunate few, see recent certifications registered under TEX. EDUC. CODE ANN. § 54.052(h): employees (and families) of Citicorp (August 16, 1993); Venture Stores (July 30, 1993); Southwestern Bell Telecom (August 2, 1993); and Menasco Aerosystems (August 3, 1993) (copies on file with author).
72. In April, 1993, a bill was introduced in the Texas Legislature to address the problems of intending permanent residents or persons permanently residing under color of law (PRUCOL). It died in committee. See H.B. No. 2510 Introduced Version, 73rd Regular Session, April 28, 1993 (on file with author). For excellent studies of PRUCOL aliens, see Peter Reich, *Public Benefits for Undocumented Aliens: State Law Into the Breach Once More*, 21 N.M.L. REV. 219 (1991); John Gundelsberger, *Equal Protection and Resident Alien Access to Public Benefits in France and the United States*, 67 TUL. L. REV. 669 (1992); Robert Rubin, *Walking a Gray Line: The "Color of Law" Test Governing Noncitizen Eligibility for Public Benefits*, 24 SAN DIEGO L. REV. 411 (1987).
73. *Supra* note 71.
74. See, e.g., Olivas, *Administering Intentions*, *supra* note 43, at 276-278 (likening practices to "one-hoss shay").
75. Olivas, *Enduring Disability*, *supra* note 27 at 44-46.
76. Olivas, *Administering Intentions*, *supra* note 43, at App. I.
77. *Dunn v. Blumstein*, 405 U.S. 330 (1972) (striking down one year voter registration

- residency requirement); *see also*, Bollhofer, *College Student Vote*, *supra* note 59.
78. *Dunn*, 405 U.S. 330, 334-335.
  79. Olivas, *Administering Intentions*, *supra* note 43, at 274-277 (analyzing problems of evidence and burden of proof in residency/domicile determinations).
  80. The leading "irrebuttable presumption" case arose in the area of postsecondary residency requirements. *Vlandis v. Kline*, 412 U.S. 441 (1973) (striking down irrebuttable presumptions in out-of-state college applications).
  81. *Toll v. Moreno*, 458 U.S. 1, 9-10 (1982) (striking down state college residency requirement for G-4 aliens on preemption grounds).
  82. Discussion with UH residency officer, September, 1993.
  83. The requirement was that a Texas resident be "gainfully employed." TEX. EDUC. CODE ANN. § 54.052(e). This requirement has been finessed to mean "substantially," "more than part time," "non-work study," or "not a public charge," i.e., not on welfare. Discussions with registrars, residency officers, Spring, 1993.
  84. *See* Olivas, *Administering Intentions*, *supra* note 43, at 35-55.
  85. *Id.*
  86. *Plyler v. Doe*, 457 U.S. 202 (1982). For careful studies following the decision, see Jose Cardenas and Albert Cortez, *The Impact of Plyler v. Doe Upon Texas Schools*, 15 J.L. & EDUC 1 (1986) (finding a "minimal" impact upon Texas schools, with a greater impact upon urban areas and certain border districts); Manuel Garcia y Griego, *The Rights of Undocumented Mexicans in the United States After Plyler v. Doe: A Sketch of Moral and Legal Issues*, 15 J. L. & EDUC. 57 (1986) (reviewing normative obligations to undocumented aliens in the U.S.).
  87. The provision reads: "(a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.  
  
(b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.  
  
(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are over five and not over 21 years of age at the beginning of the scholastic year if such persons or his parent, guardian or person having lawful control resides within the school district." TEX. EDUC. CODE ANN. § 21.031.
  88. GUADALUPE SAN MIGUEL, "LET THEM ALL TAKE HEED": MEXICAN AMERICANS AND THE CAMPAIGN FOR EDUCATIONAL EQUALITY IN TEXAS, 1910-1981 (1987); ARNOLDO DE LEON, THEY CALLED THEM GREASERS (1983).

89. SAN MIGUEL, *supra* note 88 at 32, citing RODOLFO ACUNA, OCCUPIED AMERICA (1981).
90. *Plyler v. Doe*, 457 U.S. 202, 227 (1982).
91. *Id.* at 227.
92. *Id.*
93. 403 U.S. 365 (1971)
94. The classification was state welfare benefits. *Id.*
95. 458 F. Supp. 569 (1980)
96. 458 F. Supp. 569, 575-576 (1980).
97. *Id.* at 229, *citing* 458 F. Supp. at 589.
98. *Id.* at 229, *citing* 458 F. Supp. at 589.
99. *Id.* at 229.
100. *Id.* at 228-229, *citing* 458 F. Supp. at 585.
101. *Id.* at 224-226.
102. *Id.* at 225-226 ("we perceive no national policy that supports the State in denying these children an elementary education").
103. *Id.* at 229-230.
104. *Id.*
105. *Id.* at 230.
106. TEX. EDUC. CODE ANN. § 21.031 (a)-(c); *supra* note 87.
107. *Id.*
108. *United States v. Barbera*, 514 F.2d 294, 296 (2d Cir. 1975) (undocumented alien has standing to assert fourth amendment violation).
109. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (all aliens are "persons" subject to due process guarantees of the fifth amendment); *Matthews v. Diaz*, 426 U.S. 67, 81 (1976) (undocumented aliens protected by the fifth amendment from invidious discrimination by the Federal Government).
110. *Wong Wing*, 163 U.S. at 238 (all persons within territory of United States entitled to the protection of sixth amendment).
111. *Torres v. Sierra*, 89 N.M. 441, 553 P.2d 721 (1976) (undocumented alien is "person" within meaning of Wrongful Death Act); *Arteaga v. Litterski*, 82 Wis. 2d 128, 265 N.W. 2d 148 (1978) (undocumented aliens may bring suit in personal injury actions); *Ayala v.*

- California Unemployment Ins. Appeals Bd.*, 54 Cal. App. 3d 676, 126 Cal. Rptr. 210 (1976) (eligibility of undocumented aliens for disability payments), *cert. denied*, 425 U.S. 903 (1976).
112. "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.
  113. *Wong Wing*, 163 U.S. at 228 (1896).
  114. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (Fourteenth amendment provisions "are universal in their application, to all persons").
  115. *Plyler*, 457 U.S. 211.
  116. *Id.* at 214..
  117. *Id.* at 213. In the dissent, Chief Justice Burger concurred that the equal protection clause applies to undocumented aliens. (Burger, C.J., dissenting, *Id.* at 243).
  118. *Id.* at 209-210. The Supreme Court did not address the issue of preemption.
  119. *Id.* at 216, 219.
  120. *Id.* at 218.
  121. *Id.* at 223. See generally Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 17 (1992). *Craig v. Boren*, 429 U.S. 190 (1976), cited in *Plyler v. Doe*, 457 U.S. 218 (1982). Footnote 16 also cites *University of California Regents v. Bakke*, 438 U.S. 265 (1978), quoting A. Cox, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT, 114 (1976): "Only when concerns sufficiently absolute and enduring can be clearly ascertained from the Constitution and our cases do we employ this standard to aid us in determining the rationality of the legislative choice."
  122. 457 U.S. at 230.
  123. *Id.*
  124. *Id.* at 210. *Toll v. Moreno*, 458 U.S. 1 (1982), in contrast, turned on preemption.
  125. *Id.* at 219 (citing *DeCanas v. Bica*, 424 U.S. 351 (1976)).
  126. 457 U.S. at 220 (citing *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)).
  127. *Id.*
  128. *Id.* at 221 (citing *Rodriguez*, 411 U.S. 1 (1973)).
  129. *Id.* (emphasis deleted).
  130. *Id.* at 222 (construing *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); *Abington School Dist. v. Schempp*, 374 U.S. 203, (1963); *Ambach v. Norwick*, 441 U.S. 68, 76 (1979); *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)).

131. *Id.* at 249 (Burger, C.J., White, J., Rehnquist, J., O'Connor, J., dissenting).
132. 457 U.S. at 223.
133. *DeCanas v. Bica*, 424 U.S. 351 (1976).
134. 126 Cal. Rptr. 210 (1976).
135. *E.g.*, 26 U.S.C. § 3304(a)(14)(A) (Supp. III, 1979); and 8 U.S.C. § 1101 (Supp. IV, 1980).
136. 424 U.S. 351 (1976).
137. 457 U.S. at 226.
138. 429 U.S. 190, 221 (Rehnquist J., dissenting). At the time, he was the only member of the Burger Court not to have employed this standard of heightened or intermediate scrutiny.
139. 457 U.S. at 222.
140. 501 F. Supp. 544, 582 (S.D. Tex. 1980).
141. 411 U.S. at 37. "Whatever merit appellees' argument might have if a State's financing system occasioned an *absolute denial of educational opportunities to any of its children*, that argument . . . [would not prevail in this setting]." (emphasis added).
142. For example, in *Mathews v. Diaz*, 426 U.S. 67 (1976), the Supreme Court struck down a residency requirement that necessitated a five year wait for a Medicare benefit. While this case is widely regarded as having import for the condition of permanent residents, the plaintiffs also included two parolees. *Id.* at 69-71. Parolees have not even effected an entry into the United States, although they may be physically residing here. 8 U.S.C.A. § 1182 (d)(5); see also *Matter of Castellon*, 17 I & N Dec. 616 (BIA 1981) (analyzing discretionary nature of parole). Undocumented aliens, in contrast, have entered the U.S., giving rise both to an ability to establish domicile and to the right to a deportation hearing if apprehended and given a show-cause order by immigration officials. While *Mathews*, absent more, does not render the undocumented eligible for Medicare provisions, they have made more of an entry than have parolees. For excellent discussions of alien eligibility, see *GUIDE, infra* note 273, at 36-39; Janet Calvo, *Alien Status Restrictions on Eligibility for Federally Funded Assistance Programs*, 16 N.Y.U. REV. L. & SOC. CHANGE 395 (1987-88).
143. 501 F. Supp. at 582.
144. 501 F. Supp. at 582 (citing *In re Griffiths*, 413 U.S. 717 (1973)).
145. *Id.*
146. 411 U.S. 1, 20 (1973).
147. 458 F. Supp. 569, 571 (1978) (\$1600 per year in Tyler ISD).
148. 501 F. Supp. at 555.
149. 457 U.S. at 217.



150. See, e.g., Jorge Rangel and Carlos Alcala, *Project Report: DeJure Segregation of Chicanos in Texas*, 7 HARV. C.R.-C.L.L. REV. 307 (March 1972); Salinas and Torres, *The Undocumented Mexican Alien: A Legal, Social, and Economic Analysis*, 13 HOUS. L. REV. 863, n. 4 (1976); SAN MIGUEL, *supra* note 88; DE LEON, *supra*, note 88.
151. 457 U.S. at 219.
152. *Id.* at 220.
153. *Id.* ("legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.") He also suggests that being undocumented is not an "absolutely immutable characteristic," as aliens may seek reclassification; this would also not obtain for children who cannot themselves seek reclassification.
154. *Supra* note 57. See also *Martinez v. Bynum*, 461 U.S. 321 (1983) (reviewing residence and domicile of undocumented aliens).
155. See generally *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Castaneda v. Partida*, 430 U.S. 482 (1977) (race and national origin classification are suspect); *Oyama v. California*, 332 U.S. 144 (1938) (national origin classifications are suspect); *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage classification is independently suspect). For an excellent treatise on national origin in the employment context, see Manuel del Valle, *National Origin*, in MERRICK ROSSEIN, ed., EMPLOYMENT DISCRIMINATION: LAW AND LITIGATION (1993).
156. *Toll v. Moreno*, 458 U.S. 1 (1982); *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (citizenship is "not a relevant ground for the distribution of economic benefits"). TEX. EDUC. CODE ANN. § 21.031(a), (b), (c) (Vernon Supp. 1976); TEX. EDUC. CODE ANN. § 21.032 (Vernon Supp. 1976); TEX. EDUC. CODE ANN. § 11.18 (Vernon Supp. 1976). See also *Bernal v. Fainter*, 476 U.S. 216 (1984) (alienage as suspect class).
157. 458 U.S. 1 (1982).
158. *Nyquist v. Mauclet*, 432 U.S. 1 (1977), was the first postsecondary education case construing a state statute affecting permanent resident college students. *Nyquist* struck down a New York State statute that prohibited lawful resident aliens from receiving college tuition assistance benefits.
159. 458 U.S. 1 (1982). See Olivas, *Enduring Disability*, *supra* note 27, at 29-33 (reviewing the several *Toll v. Moreno* cases).
160. In pertinent part: "This Constitution, and the laws of the United States. . . shall be the supreme Law of the Land..." U.S. CONST. art VI, cl. 2.
161. *Moreno v. Toll*, 489 F. Supp. 541 (D. Md. 1980).
162. *Moreno v. Univ. of Maryland*, 645 F.2d 217 (4th Cir. 1981) (*per curiam*).
163. 458 U.S. at 1.
164. *Moreno v. Univ. of Maryland*, 420 F. Supp. 541 (Md. 1976).
165. *Elkins v. Moreno*, 435 U.S. 674.

166. *Id.* at 668-69.
167. *Toll v. Moreno*, 397 A.2d 1009, 1019 (Md. 1979)
168. *Toll v. Moreno*, 441 U.S. 458, 461 (1979).
169. 441 U.S. 458.
170. *Id.* at 462.
171. *Moreno v. Toll*, 480 F. Supp. 1116, 1125 (1979).
172. 489 F. Supp. 658, 660-68 (D. Md. 1980).
173. 489 F. Supp. 658, 668 (D. Md. 1980).
174. *Id.* at 667-68.
175. *Moreno v. Univ. of Maryland*, 645 F.2d 217 (4th Cir. 1981).
176. 458 U.S. at 9-10.
177. See generally discussion on *Plyler v. Doe*, *supra* at notes 39-97.
178. *Plyler v. Doe*, 457 U.S. 202 (1982).
179. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (states cannot impose discriminatory burdens on aliens).
180. *Graham v. Richardson*, 403 U.S. 365 (1971) (states may not impose regulations upon aliens if the burdens are not contemplated by Congress).
181. *DeCanas v. Bica*, 424 U.S. 351 (1976) (Court upheld state law regulating employment of undocumented aliens).
182. 458 U.S. at 13 (quoting *DeCanas*, 424 U.S. 351, 358, n. 6). Justice Brennan allowed that the Court had upheld legislation limiting the "participation of noncitizens in the State's political and governmental functions." *Id.* at n. 17.
183. 458 U.S. 14 (1982).
184. 458 U.S. 16 (1982). Moreover, Maryland law tracked the federal exemption: MD. ANN. CODE, ART. 81, 280(a).
185. 458 U.S. 16 (1982). Justice O'Connor dissented from this characterization, but concurred in the opinion "insofar as it holds that the state may not charge out-of-state tuition to nonimmigrant aliens who, under federal law, are exempt from both state and federal taxes, and who are domiciled in the State." (O'Connor, J., concurring in part and dissenting in part, *Id.* at 24).
186. 458 U.S. 19-24 (1982) (Blackmun, J., concurring).
187. *Id.* at 33 (Rehnquist, J., dissenting) (emphasis deleted).

188. See, e.g., *Vance v. Bradley*, 440 U.S. 93 (1979) (early retirement age for Foreign Service officers violates due process clause of fifth amendment); *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (Civil Service Commission regulation which barred undocumented aliens from employment was invalidated).
189. See generally Gerald Lopez, *Undocumented Mexican Immigration: In Search of a Just Immigration Law and Policy* 28 UCLA L. REV. 615 (1981); See also Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENTARY 9 (1990) (examining discrepancies in treatment of aliens in equal protection theory); Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862 (1989) (criticizing judicial deference toward immigration legislation); Gerald Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275 (same).
190. 458 U.S. at 17-18.
191. MD TAX. REV. CODE ANN., § 280a (1977).
192. 458 U.S. at 7 (quoting App. to Pet. for Cert. 172a-174a).
193. 458 U.S. at 16.
194. Olivas, *Enduring Disability*, *supra* note 27; National Association of Foreign Student Advisors, ADVISER'S MANUAL OF FEDERAL REGULATIONS AFFECTING FOREIGN STUDENTS AND SCHOLARS (1992) (Alex Bedrosian, ed.)
195. 458 U.S. 1, 17.
196. The Immigration Reform and Control Act of 1986 (IRCA) provided additional independent non-immigrant status for relatives of employees of international organizations, or long term (16 years or more) G-holders. 8 U.S.C.A. § 1101 (a) (15) (N); 8 U.S.C.A. § 1101 (a) (27) I. See generally, Comment, *An Alien's Constitutional Right to Loan, Scholarships and Tuition Benefits at State Supported Colleges and Universities*, 14 CAL. W. L. REV. 514 (1979). See, e.g., *Nyquist v. Mauclet*, 432 U.S. 1 (1977) (State financial aid program requirement cannot compel resident alien to become citizen).
197. *Wong v. Board of Trustees*, 53 Cal. App. 3d 711, 125 Cal. Rptr. 841 (1st Dist. 1975) (omitted in official reporter by order of California Supreme Court, 15 January 1976) (Denying equal protection challenge to requirement that aliens hold permanent resident status for one year prior to determination of residence).
198. In Texas, as in many states, non-immigrants such as K-visa holders (fiancées or finances) and L-holders (intra-company transferees) are more easily accorded residence for tuition purposes, as federal immigration law does not require them to maintain a domicile in their home country. 8 U.S.C.A. § 1101 (a) (15) (K); (L). Non-immigrants on student visas (F), on the other hand, are required to maintain their original domicile in their home country; thus, by the terms of the F-visa application, they are not accorded permission to relinquish this domicile. 8 U.S.C.A. § 1101 (a) (15)(F).
199. Tentative Decision, Action No. 588-982-5, California Superior Court, Alameda County (April 3, 1985); Judgment (April 11, 1985); Judgment Vacated (June 10, 1985); Judgment Amended and Reinstated (June 19, 1985).
200. *Id.* at pp. 1-4. All subsequent references are to the text of the Tentative Decision, as

amended and reinstated (hereinafter, *Leticia "A" I or LA*). The California State University and College System, which had also employed the UC System practice, was also enjoined from continuing in that practice. The reinstated judgment (June 19, 1985), however, allocated the trial costs to the UC System.

201. *Id.*
202. CAL. EDUC. CODE § 68062(h) (citations deleted). This section draws upon Michael Olivas, *Enduring Disability*, *supra* note 27.
203. CAL. EDUC. CODE § 68018.
204. CAL. EDUC. CODE § 68062 (a).
205. CAL. EDUC. CODE § 68062 (d).
206. CAL. EDUC. CODE § 68061.
207. "The legislative history of Education Code § 68062, subdivision (h), demonstrates that the Legislature did not intend to, and the subdivision does not intend to, and the subdivision does not, permit undocumented aliens to establish residence for tuition purposes in California's public institutions of higher education." Op. Cal. Att'y. Gen. 84-101.
208. *Supra*, note 27 (Ken W. Kawaichi).
209. Judgment (April 11, 1985), at 2.
210. "It is neither applicable to the facts nor appropriate to the legal issues in this case." LA at 6. For an example of an alien college student whose actions made him undocumented and deportable, see *United States v. Bazargan*, 992 F. 2d 844 (8th Cir. 1993) (F-1 student violated terms of student visa).
211. "In sum, education has a fundamental role in maintaining the fabric of our society." *Plyler v. Doe*, 457 U.S. 202, 221.
212. LA at 7.
213. *Id.* at 8. (Emphasis deleted from original.) Moreover, Judge Kawaichi did not even sustain "any rational government basis for the policy in issue." *Id.* at 8.
214. In footnote 11, the Attorney General's Opinion notes, "It is possible that this interpretation of the statute raises constitutional issues of equal protection. (See *Plyler v. Doe*, 457 U.S. 202.) We have not been asked and have not considered such questions."
215. *Id.* at 9.
216. Indeed, several of the original plaintiffs, including Leticia "A", had changed their status during the course of the litigation. The original eight plaintiffs thereby shrank to four. By 1993, all had adjusted their status by one or another means. (Discussions with Multicultural Education, Training, and Advocacy (META) and Mexican American Legal Defense and Educational Fund (MALDEF) staff, October, 1993.)
217. LA at 9-10.

218. *Id.* at 10.
219. *Plyler*, 457 U.S. at 227, n. 22 (citations omitted).
220. *Toll v. Moreno*, 458 U.S. 1 (1982). In 1994, the INS made an important and little - publicized concession: "Congress has not adopted legislation that would permit states or state-owned institutions to refuse admission to undocumented aliens or to disclose their records" to the INS. INS Issues Guidelines on School Approval Petitions, 71 INTERP. REL. 347, 361 (March 14, 1994).
221. *Regents of the University of California v. Superior Court of Los Angeles County*, 225 Cal. App. 3d 972, 276 Cal. Rptr. 197 (2d Dist. 1990), rev. den., 1991 Cal. Lexis 1367 (Cal. 1991) (hereinafter *Bradford II*).
222. *Id.*, citing CAL. EDUC. CODE § 68062(h). Bradford argued he had been constructively fired for his action, but Judge Yaffe held that he had "voluntarily resigned" over the policy. Carol McGraw, *UC Worker Who Quit Over Fees Policy Loses Bid to Get Job Back*, L.A. Times, August 29, 1990, at B3.
223. Discussions with CSU legal staff, summer, 1992; Appellant's Opening Brief, *Board of Trustees of the California State University v. Leticia "A"*, A.C.S.C. No. 588982-2 (June 7, 1993).
224. Gary Libman, *Losing Out on a Dream?*, L.A. Times, Jan. 23, 1992, at E3, 11 ("The [*Bradford*] decision will affect only about 100 UC students but about 14,000 at state community colleges, officials estimate."); Larry Gordon, *Immigrants Face Cal State Fee Hike*, L.A. Times, Sept. 9, 1992, at A3, 20 (decision "could affect 800 of the 361,000 Cal State Students"). California public college students total over 2 million, including over 1.5 million in the community colleges. Fonseca and Andrews, *supra* note 37.
225. Auditor General of California, A FISCAL IMPACT ANALYSIS OF UNDOCUMENTED IMMIGRANTS RESIDING IN SAN DIEGO COUNTY (August 1992) (*SD STUDY*), at 119-120. The report did not estimate the undocumented students in the UC or community colleges in San Diego County, as any such students were being required to pay the full freight of out-of-state tuition. *Id.* at 120.
226. Gordon, *supra* note 224, at A3 (estimating that 14,000 of 1.5 million CCC students were undocumented). MALDEF officials have insisted that even these numbers overestimate the true enrollment, as most undocumented students cannot afford to pay either in-state or out-of-state tuition and are hesitant to enroll in college, possibly subjecting themselves to detection by the INS.
227. Los Angeles Community Superior Court, No. C-607748 (May 30, 1990), David P. Yaffe, J. (hereinafter *Bradford I*).
228. *Id.*
229. *Bradford II*, 276 Cal. Rptr. 197, 199.
230. *Id.* at 199; citing *Bradford I*.
231. *Id.* at 199. Discussion with CSU legal staff, summer, 1992.
232. *Id.* at 199.

233. *Id.* at 201-202.
234. *Regents of California State University v. Leticia "A"*, as clarified, Alameda County Superior Court, No. 588982-4 (May 19, 1992) (hereinafter, *Leticia "A" II* or *LA clarification*).
235. He ordered that the CSU be enjoined from denying in state residency benefits "to persons solely on the basis of their undocumented immigration status..." *Id.* at Clerk's Transcript 406-407. He also reiterated his earlier ruling that the undocumented students "shall be afforded a full and fair opportunity to demonstrate the *bona fides* of their residency." *Id.* at 407.
236. I and others encouraged then-CSU chancellor Dr. W. Ann Reynolds not to appeal the 1985 ruling, but to begin enrolling the students who were otherwise eligible to attend. During the pendency of the *Leticia "A"* litigation, UC officials did not charge non-resident tuition to the plaintiffs or others in their same status.
237. CSU also chose not to appeal *Leticia "A" II*. See *American Association of Women v. Board of Trustees of the California State University*, Los Angeles County Superior Court, No. BC 061221, Robert H. O'Brien, J. (Sept. 28, 1992) (*AAW*), at 7. It is a small world. By this time, Dr. Barry Munitz was Chancellor of the CSU system. I and others urged him not to appeal Judge Kawaichi's clarification.
238. At the time the *Leticia "A" II*, *Bradford*, and *AAW* cases were occurring, the University of California was in the papers on a regular basis for the exorbitant retirement package paid the retiring UC President, and for pending cuts in the UC proposed state budget. For a small sampling of the negative press stories, see a series of articles by Louis Freedberg in the San Francisco Chronicle: *UC Retirement Deal for Gardner Assailed*, S.F. Chron. April 3, 1992, at A1; *How UC Regents Tried to Downplay the Gardner Deal*, Apr. 16, 1992, at A1; *Gardner Successor Gets Similar Pay Package, UC Compensation Over \$400,000 a Year*, July 30, 1992; *Gardner Leaves UC With Plan to Close Huge Budget Gap*, Sept. 19, 1992, at A1. See also, Debra Sanders, *Fat Left to Trim on Wilson's Plate*, S.F. Chron. Nov. 2, 1992, at A14.
239. *Supra* note 237 (*AAW*).
240. *AAW* at 7 ("Bradford has cast a different light on CSU's process and Section 68062(h) which should be decided at the appellate level. . . [and] *Leticia "A"* is essentially a finished case with different parties and a different threshold issue relating to Section 62062(h)" [*sic*]).
241. *Id.* at 6.
242. *Id.* at 8.
243. *Id.* at 9.
244. *AAW*, Order Granting Peremptory Writ of Mandate and Preliminary Injunction, September 28, 1992, (Robert O'Brien, J.) at 4.
245. Appellant's Opening Brief, *supra* note 223. See the Dear Colleagues letter from Susanna Castillo-Robson, UC Student Affairs and Services, February 3, 1993 (including UC memo on undocumented residency) (copy on file with author). The case was argued by briefs, with no counsel argument. By August, 1994, there had been no decision reported.

246. *Bradford I* at 7-9; *Bradford II* 207; AAW at 9; *Leticia "A" I* at 6; *Leticia "A" II*, at 406-407.
247. *Bradford II* at 201 ("We do not interpret the federal immigration statutes, therefore, as *authorizing*, or not precluding, the establishment of domicile here by those whose very presence is unlawful"). (emphasis added)
248. CAL. EDUC. CODE § 68062(h). ("An alien, including an unmarried minor alien, may establish his or residence, *unless precluded* by the Immunization and Nationality Act from establishing domicile in the United States" (emphasis added; citations omitted).
249. *Bradford II*, at 200, 201.
250. *Elkins v. Moreno*, 435 U.S. 674, 668-669 (1978)(G-4 holders can be U.S. domiciliaries).
251. In the *Toll v. Moreno* case and its earlier incarnation *Elkins v. Moreno*, the Maryland Court certified that under state law, G-4 aliens were able to acquire and demonstrate domicile. 397 A.2d 1009, 1019 (Md. 1979).
252. In *Plyler v. Doe*, 457 U.S. 202, 226. (1982), the Court held that the undocumented "might be granted federal permission to continue to reside in this country, or even to become a citizen. . . [and enjoy] an inchoate permission to remain". In addition, the Court struck down the Texas statute that functionally resembled the California provision, noting, "A State may not, however, accomplish what would otherwise be prohibited by the Equal Protection Clause, merely by defining a disfavored group as nonresident. And illegal entry into the country would not, under traditional criteria, bar a person from obtaining domicile within a State." *Id.* at 227, n.22.
253. 112 Cal. App. 3d 1012, 169 Cal. Rptr. 604 (1980) (undocumented can establish California residency for purposes of state Victims of Violent Crimes Act standing).
254. *Bradford II* at 201.
255. *Woodby v. INS*, 385 U.S. 276, 286 (1966), codified at C.F.R. § 242.14(a).
256. *Id.* at n. 19.
257. *INS v. Chadha*, 462 U.S. 919 (1983)(finding that legislative veto provisions violated separation of powers).
258. 8 U.S.C.A. § 1254(a)(1). In *INS v. Phinpathya*, 464 U.S. 183 (1984), the Court upheld the strict residence requirements, even though the holding meant that a three month absence constituted ineligibility for suspension of deportation. This harsh result led to the Fifth Circuit denying suspension to an alien who had resided in the United States for twelve consecutive years, minus one night. *Sanchez-Dominguez v. INS*, 780 F.2d 1203 (5th Cir. 1986). Congress in turn decided that the "continuous" standard was being construed too literally, and amended § 1254 to enable aliens to have "brief, casual and innocent" absences, as long as they "did not *meaningfully interrupt* the continuous physical presence." 8 U.S.C.A. § 1254(b)(3). In short, it is clear that Congress not only assumes that domicile can be acquired by deportable aliens, but *requires* that domicile be established in the United States for these adjustments or reliefs from deportation.
259. 8 U.S.C.A. § 1259. The 1972 cutoff date was established by IRCA. Unlike the other "legalization" provisions, registry enables the alien to become a permanent resident immediately without the intermediate "Temporary Resident Status." 8 U.S.C.A. § 1255a.

260. Suspension of deportation and registry provisions are two excellent devices to regularize the status of an otherwise deportable alien, but they are by no means the only such provisions. For several excellent textbook treatments of reliefs from deportation, see ALEXANDER ALEINIKOFF and DAVID MARTIN, *IMMIGRATION PROCESS AND POLICY* (1991) (2d ed.), at 597-688; STEPHEN LEGOMSKY, *IMMIGRATION LAW AND POLICY* (1992), at 515-605; RICHARD BOSWELL AND GILBERT CARRASCO, *IMMIGRATION AND NATIONALITY LAW* (1991), at 517-589.
261. *Bradford II* at 199, citing *Bradford I*; *Bradford II* at 200-201.
262. *AAW* at 5-6.
263. *Martinez v. Bynum*, 461 U.S. 321 (1983).
264. 457 U.S. 202 (1982).
265. TEX. EDUC. CODE ANN. § 21.031.
266. *Martinez v. Bynum*, 461 U.S. 321 (1983) (holding that Texas could charge tuition to alien children if families were not domiciled in the State). See also *Matter of Sanchez*, 17 I&N Dec. 218 (BIA 1980) (eligibility for suspension of deportation *requires* establishment of domicile in U.S.).
267. The various forms of relief do not distinguish among the various forms of becoming undocumented. For example, § 212 (c) relief would be available to undocumented aliens whether they entered illegally under their own power, were brought here illegally by their parents, or entered as a non-immigrant and then did something to violate the terms of their visa (e.g., switching schools without permission or not maintaining full time student status). While this argument exceeds the scope of this article, it seems clear that the greatest moral and legal claims to equitable relief can be made by aliens whose parents surreptitiously brought them into the country. The children in this example have the domicile of their parents (or custodial parent, if only one), and once they reach majority age, can establish their own independent domicile through operation of law. Thus, if there is a "clean hands" argument to be made either in court or a legislature, these children are innocent of any illegal entry. *Plyler* mooted this point, in any event. 457 U.S. 202, 228-230 (striking down state's rationales for regulating immigration).
268. See, e.g., *Leticia "A" Clarification*, *supra* note 27, at 4-5 (Sonia "V" brought to U.S. eleven years before trial; Miguel Perez brought to U.S. at age of 14).
269. Testimony of Dr. Leo Chavez, anthropology professor at UC Irvine, in *Leticia "A" I* (Transcript, at 26-34); and *Leticia "A" II*, at 2-4 (children are brought to U.S. without any plans for them to enroll in college).
270. *Supra* note 258. See also, *Castillo-Felix v. INS*, 601 F.2d 459, 464 (9th Cir. 1979) ("To establish domicile, aliens must not only be physically present here, but must intend to remain"); *Lok v. INS*, 681 F.2d 107, 109 (2d Cir. 1982) (finding undocumented alien established domicile "when he established an intent to remain") (citations omitted).
271. 458 U.S. 1, 17 (1982).
272. *Bradford II*, at 201 (citations omitted).
273. 8 U.S.C. § 1255a(h). See generally, NATIONAL IMMIGRATION LAW CENTER,



GUIDE TO ELIGIBILITY FOR FEDERAL PROGRAMS (1992), at 53; *see also* Calvo, *supra* note 149. The U.S. Department of Education has attempted to construe Title IV financial aid eligibility narrowly, and denied eligibility to aliens undergoing legalization in the Family Fairness Program/Family Unity Program (FUP), the scheme by which mixed undocumented/ permanent resident/citizen families could stay together in the United States. Pub. L. 101-649, § 301. Following a successful federal court challenge to this interpretation, the Department notified colleges that legalizing aliens in the FUP who were beneficiaries of an INS-approved "Immigrant Petition for Spouse or Relative" would be eligible to apply for Title IV funds. *Gonzalez v. Wanda Gaines, et al.*, Civ. Action No. 9-92CV12, U.S.D.C. (E.D. Tex. 1993) (Robert Parker, Lufkin Div., June 9, 1993); *see also* Dear Colleague Letter, Division of Policy Development, U.S. Department of Education, March 4, 1993 (on file with author)

274. This growing body of work subdivides into two major areas, which I label for shorthand use, "how many are there/technical" and "how many are there/conceptual." The former includes issues of measurement error, population data, sampling techniques, and the like; *see, for examples of this genre*, Vernon Briggs, *Methods of Analysis of Illegal Immigration into the United States*, 18 INT'L MIGR. REV. 623 (1984); Frank Bean et al., *The Sociodemographic Characteristics of Mexican Immigrant Status Groups: Implications for Studying Undocumented Mexicans*, 18 INT'L MIGR. REV. 672 (1984). While the two areas overlap, the latter body of research concentrates more upon the underlying legal definitions and conceptual issues, such as how statutes and regulations define these properties. Classic examples include Kristin Couper and Ulysses Santamaria, *An Elusive Concept: The Changing Definition of Illegal Immigrant in the Practice of Immigration Control in the United Kingdom*, 18 INT'L MIGR. REV. 437 (1984); MANUEL GARCIA Y GRIEGO, *EL VOLUMEN DE LA MIGRACION DE MEXICANOS NO DOCUMENTADOS A LOS ESTADOS UNIDOS: NUEVAS HYPOTESIS [THE SIZE OF UNDOCUMENTED MEXICAN IMMIGRATION TO THE UNITED STATES: NEW HYPOTHESES]* (1979); Alejandro Portes, *Toward a Structural Analysis of Illegal (Undocumented) Immigration*, 12 INT'L MIGR. REV. 469 (1978).
275. DANIEL LEVINE et al., *IMMIGRATION STATISTICS: A STORY OF NEGLECT* (1985).
276. *See, for example*, Estevan Flores, *The Impact of Undocumented Migration on the U.S. Labor Market*, 5 HOU. J. OF INT'L L. 287, 294-302 (reviewing uncritical acceptance by courts of poorly-designed and flawed immigration studies). Flores reviews the flawed work of economist Donald Huddle, particularly his methodology in determining who was undocumented. Huddle's work in the field has most recently been sponsored by the Carrying Capacity Network, an immigration restrictionist organization. His research stands in contrast to Julian Simon's, *infra* at notes 357, 358, and appears to overestimate services and costs. DONALD HUDDLE, *THE COSTS OF IMMIGRATION, EXECUTIVE SUMMARY* (1993). For example, he does not provide data for his contention that immigrants (what he calls "legal immigrants") cost \$2.11 billion in public higher education for 1992 alone. Huddle at 9. He also assumes that bilingual education and "language deficiency instruction" costs (estimated to be \$1.07 billion in 1992) are attributable to the undocumented population. Huddle at 10. For higher education participation rates, he averaged the San Diego County Study and L.A. County Study and assumed from the only metropolitan border county in the country (as LA county did not measure higher education) that the undocumented constituted .97%; he then extrapolated to the entire U.S. postsecondary population. Huddle at Exhibit 5, p. 4-5. He also estimates that of "Legal Immigrants," Refugees, and Asylees entering in 1992, a quarter (25.45%) of the college aged attended postsecondary institutions and 7.3% received federal Pell Grants. These figures, premised upon his re-calculation of San Diego's data, are without support

and are likely inordinately high.

277. MEXICAN-U.S. RELATIONS, CONFLICT AND CONSEQUENCE (CARLOS VASQUEZ and MANUEL GARCIA Y GRIEGO eds.) (1983); MULLER, *supra* note 29; UNITED STATES COMMISSION ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR, CIVIL RIGHTS ISSUES IN IMMIGRATION (1980).
278. RICHARD HOFSTADTER, THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 9 (1965), *cited in* VASQUEZ and GARCIA y GRIEGO, eds., at 375.
279. WAYNE CORNELIUS, America in the Era of Limits: Migrants, or Nativists, and the Future of U.S.-Mexican Relations, in VASQUEZ AND GARCIA y GRIEGO, eds., at 373-374.
280. Michael A. Olivas, *Unaccompanied Refugee Children in the United States: Detention, Due Process, and Disgrace*, 2 STAN. L. & POL'Y REV. 159 (1990) (examining shameful conditions of confinement for refugee children in INS custody); *but see Reno v. Flores* 113 S.Ct. 1439 (1993) (allowing INS to continue custodial practices).
281. *Jean v. Nelson*, 472 U.S. 846 (1985) (holding that 11th Circuit should not have decided constitutional question of racial/national origin discrimination in treatment of Haitians). For the Clinton administration's disappointing handling of this matter, see Larry Rohter, *The Supreme Court: Rights Groups Fault Decision, As Do Haitians*, N.Y. Times, June 22, 1993, at A18.
282. Mary Tabor, *Specter of Terror: U.S. Indicts Egyptian Cleric as Head of Group Plotting 'War of Urban Terrorism'*, N.Y. Times, August 26, 1993, at A1 (immigration issues in 1993 World Trade Center bombing). Another myth involves the criminal proclivities of aliens. In 1992, for example, the alien prison population in California was 10.4%, less than the state's 15% alien population. John Miller, *Immigrant-Bashing's Latest Falsehood*, Wall St. J., Mar. 8, 1994, at A 14.
283. ROBERT CARBONE, STUDENTS AND STATE BORDERS 8 (1973).
284. RICHARD PADILLA, RESIDENCY CLASSIFICATION IN TEXAS COLLEGES: THE APPLICATION OF COMPLEX LEGISLATION TO THE COMPLEX CIRCUMSTANCES OF STUDENTS (Unpublished University of Houston doctoral dissertation, 1988); POSTSECONDARY RESIDENCY CLASSIFICATION: THE APPLICATION OF COMPLEX LEGISLATION TO THE COMPLEX CIRCUMSTANCES OF STUDENTS (1989) (University of Houston Institute for Higher Education Law and Governance, Monograph 89-6) (*Padilla*, 1989); IMMIGRATION STATUS AND RESIDENCY DETERMINATION FOR TUITION PURPOSES (1991) (University of Houston Institute for Higher Education Law and Governance, Monograph 91-4) (*Padilla*, 1991).
285. *Padilla*, 1989, *supra* note 284.
286. *Id.*
287. *Id.* at Table 1.
288. TEX. EDUC. CODE § 54.057(a), as applied by the Texas Higher Education Coordinating Board, RULES AND REGULATION: RESIDENCE STATUS, (1991).

289. *Padilla, 1989, supra* note 284, at Table 2.
290. *Id.* at 18-19 (hypothetical case of parolee).
291. TEX. EDUC. CODE ANN. § 54.052-§ 54.065 (Residents; Nonresidents; General Rules); *see also* § 54.203-§ 54.210, (SUBCHAPTER D. Exemptions from Tuition).
292. Olivas, *Exemptions, supra* note 67.
293. *Supra* note 43.
294. *Supra* note 216.
295. *See supra* note 260.
296. For example, the collapse of the Soviet Union has prompted several statutory schemes for accommodating Soviet scientists and other highly desirable aliens. *See* the extension of the Lautenberg Amendment, Pub. L. No. 102-511 (1992) and the Commonwealth and Baltic Scientists Immigration and Exchange Act of 1992, Pub. L. No. 102-509 (1992).
297. Publ. L. 102-404 (1992). For an analysis of the events leading up to the statute, see Jean LaRocque, *The Pro-Democracy Movement in the People's Republic of China and Its Immigration Implications for Chinese Students in the United States*, 9 WISC. INT'L. L. J. 257 (1991).
298. *Plyler v. Doe*, 457 U.S. 202, 226 (1982) ("It would of course be most difficult for the State to justify a denial of education to a child enjoying an inchoate federal permission to remain.")
299. *Padilla, 1991, supra* note 284, at 6-7.
300. *Id.* at 8-9.
301. *Id.* at 14 (noting that the respondent had incorrectly changed his vote).
302. *Padilla, 1991, supra* note 284, at 14-16.
303. *Id.* at 17.
304. *Plyler v. Doe*, 457 U.S. 202, 228 (1982), citing 458 F. Supp., at 585 ("[c]harging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration.")
305. For example, Judge O'Brien misreads *Leticia "A" II* as *not* being in conflict with *Bradford II*, because Judge Kawaichi clarified his *Leticia "A" I* holding. ("Unlike the original injunction the *Leticia "A"* clarification no longer requires CSU automatically to treat undocumented students the same as U.S. citizens. Thus, although the trial court does not specifically follow the law established by *Bradford*, it has tempered its original holding so that it in effect gives credence to *Bradford*, as well as the process required by Section 68062(h)." AAW at 6.) This is completely wrong, both because the "automatic" language is a false issue, and because *Leticia "A" II* cannot be read as "giv[ing] credence" to *Bradford I* or *Bradford II*. *Bradford II* holds that the undocumented cannot become residents, while both *Leticia "A"* opinions hold that they can. This an extraordinary misreading of Judge Kawaichi's clear language in both opinions.

306. NESTOR RODRIGUEZ, UNDOCUMENTED IMMIGRANT STUDENTS AND HIGHER EDUCATION: A HOUSTON STUDY (1990) (University of Houston. Institute for Higher Education Law and Governance, monograph 90-10), at 4, 47. This finding may be due to fear of disclosure, as I have personal knowledge of undocumented students attending at least 5 Houston colleges, public and private. *See also*, Nestor Rodriguez, Economic Restructuring and Latino Growth in Houston, in JOAN MOORE and RAQUEL PINDERHUGHES, eds. IN THE BARRIOS, LATINOS AND THE UNDERCLASS DEBATE (1993), at 101-127; ARNOLDO DE LEON, ETHNICITY IN THE SUNBELT, MEXICAN AMERICANS IN HOUSTON (1989); JOE FEAGIN, FREE ENTERPRISE CITY: HOUSTON IN POLITICAL AND ECONOMIC PERSPECTIVE (1988).
307. *Id* at 47-48.
308. *See generally*, U.S. GENERAL ACCOUNTING OFFICE, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION (1990). *See also* MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND & AMERICAN CIVIL LIBERTIES UNION, THE HUMAN COSTS OF EMPLOYER SANCTIONS (1989) (reporting individual cases of employer sanction-related discrimination against people of color).
309. Rodriguez, *supra* note 306, at 40-43. In both 1989 and 1990, HCC enrolled between 23,000 and 25,000 students in federally-funded amnesty programs. By 1991, it had declined to 10,000. *Reject HCCS Bonds*, Hou. Chron., Oct. 19, 1993, at 10B.
310. Karen Roebuck, *HCC Investigating Amnesty Ed Program, Unexpected Layoffs, High-Priced Tapes Subjects of Probe*, Hou. Post, Sept. 9, 1990, at A28. (former superintendent and state legislator overpricing materials for legalization classes).
311. In most cities, English as a second language courses and naturalization classes are filled to overflowing. *See, e.g.*, Deborah Sontag, *English is Precious: Classes are Few*, N.Y. Times, August 29, 1993, at 6 Y (with estimated New York City need to serve 1.36 million limited English proficiency residents, classes available for only 30,000).
312. *See generally, id.*, at 24-26. Discussion with Professor Rodriguez, October, 1993.
313. 461 U.S. 321 (1983) (allowing school districts to deny residency to undocumented aliens who move to district solely for purpose of attending school without establishing required domicile).
314. An entire clipping service would be necessary to report all the media attention paid this topic. For a small sample, see Robert Novak, *The Latest Entitlement*, Wash. Post, May 24, 1993, at A19 (claiming Mexican women enter U.S. to have their babies in Los Angeles County); Dan Morain and Mark Gladstone, *California and the West: Racist Verse Stirs Up Anger in Assembly*, L.A. Times, May 19, 1993, at A3 (state legislator circulates anti-immigrant poem in Sacramento); Jerry Gillam and John Schwada, *Wilson Defiant Over Immigration Issue*, L.A. Times, Aug. 19, 1993, at A3 (article suggesting Gov. Wilson is gaining political favor by anti-immigrant remarks); Andrew Murr, *A Nasty Turn on Immigrants: Wilson Declares the State 'Under Siege'*, Newsweek, Aug. 23, 1993, at 28 (article suggesting Gov. Wilson is immigrant-bashing due to poor political standing in polls); Daniel Weintraut, *Wilson Shifts Tack on Illegal Immigration*, L.A. Times, Aug. 25, 1993, at A3 (analysis Gov. Wilson's efforts to strike down sanctuary ordinances); James Clad, *Slowing The Wave*, 95 FOR. POL. 151 (Summer, 1994).
315. *Id*. In addition, he vetoed a bill passed by the legislature on May 24, 1991 that would have

clarified the *Bradford/Leticia "A"* confusion by allowing undocumented students to establish residency. See veto message accompanying A.B. 592 (June 21, 1991) (copy on file with author). He has counterparts in Congress. See, e.g., *House Considers More Immigration in Emotional Debate*, INTER. REL., Mar. 14, 1994, at 345 (Remarks of Rep. Rohrabacher).

316. *Supra* note 314.
317. Los Angeles County Board of Supervisors, THE IMPACT OF UNDOCUMENTED PERSONS AND OTHER IMMIGRANTS ON COSTS, REVENUES, AND SERVICES IN LOS ANGELES COUNTY (1992), (*IMPACT*).
318. *Id.* at 4, 7.
319. *Id.* at 8. A federal study also concluded that immigrant education programs are underfunded. U.S.G.A.O. IMMIGRANT EDUCATION: FEDERAL FUNDING HAS NOT KEPT PACE WITH STUDENT INCREASES (1994).
320. *Supra* note 314.
321. *Supra* note 315. See also Renee Koury, *School Denial Bills Stir Debate: A Movement to Ban Illegal Immigrant Children From Public Schools is Increasingly Being Discussed*, San Jose Mercury News, May 10, 1993, at B1.
322. Dan Morain, *Bill to Ban Illegal Immigrants From Schools is Defeated*, L.A. Times, Apr. 1, 1993, at A21; Jerry Gillam and John Schwada, *Wilson Defiant Over Immigration Issue*, L.A. Times, Aug. 19, 1993, at A3; Pete Wilson, *About Time We Stopped Rewarding Illegals*, Hou. Chron., Aug. 29, 1993, at F1 (editorial article). Interestingly, Donald Huddle, in a companion editorial, noted that Gov. Wilson was wrongly attributing all immigrant costs to the undocumented. Huddle, *Debate Must Begin With True View of the Costs*, Hou. Chron., Aug. 29, 1993, at F1 (editorial article); also see Huddle, *supra* note 276. But see Joel Kotkin, *Immigrants Lead a Recovery*, Wall St. J., Apr. 22, 1994, at A10 (immigrants in California substantially contributing to California economic recovery).
323. Each of these groups was separated out for measurement purposes, but the data are confusingly reported. For one example, there is no attempt to measure the context of costs, as immigrants with children "cost" more than do immigrants without children, yet no such comparative, contextual data are given. Moreover, the distributional data for several agencies are not explained (e.g., the calculations for property tax estimates), where rental payments are not analyzed fully for their tax payments. For a brief reply to the LA County study, see the Urban Institute response (Aug. 26, 1992), included in the study's appendix; see also Greg Miller, *Report Alleges Misleading Data on Immigrants to Los Angeles*, Hou. Chron., Sept. 4, 1993, at A19; Barbara Vobejda, *Study of Immigration In L.A. County Challenges Government View of Costs*, Wash. Post. Sept. 4, 1993, at A9 (study criticizing L.A. County data). For an analysis of the particular problems faced by citizen children of undocumented parents, see Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*. 64 NOTRE DAME L. REV. 35 (1988).
324. 8 U.S.C.A. § 1427. After permanent residence is obtained, a lawful "residence" is required: "the place of general abode...[which is the alien's] principal, actual dwelling place in fact, without regard to intent." 8 U.S.C.A. § 1101 (a) (33). This requirement is not the "domicile" that undocumented persons can acquire by abandoning their domicile in the native country on some other place that had been their domicile. See, generally, *Plyler v. Doe*, 457 U.S. 202, 227, at n. 22; *Martinez v. Bynum*, 461 U.S. 321 (1983). See

generally, Corson, *supra* note 55.

325. *Id.*

326. For example, The National Association of Latino Elected and Appointed Officials response to the LA County Study, reproduced in the Study's appendix, was critical of this point:

The number of non-citizen foreign-born residents in the Los Angeles-Long Beach SMSA as reported in the 1980 Census includes some number of undocumented immigrant residents of the SMSA who responded to the Census. However, it also fails to include some number of residents in the SMSA, the "undercount" of the 1980 Census; additionally, because legal permanent residents share some of the characteristics of those residents most likely to be undercounted (for example, low income and education levels, fear of responding to the Census because of their own or other family members' immigration status, and difficulties completing English-language questionnaires), the number of those undercounted residents includes some number of legal permanent residents. On the national level, according to estimates of demographers such as Warren and Passell, approximately 2.1 million undocumented immigrants were counted in the 1980 Census. However, the total number of undocumented residents of the nation, approximately 2.6 million exceeded the number of undocumented included in that Census. Consequently, we believe that at the very least, the number of undocumented immigrants included in the 1980 Census figure for non-citizen foreign born residents equals the number of legal permanent residents not included in that same figure because of the undercount, and we believe that it is very likely the number not included because of the undercount could even exceed the number of undocumented who were included. Assuming, at the very least, that those two numbers are equal, the 1980 Census figure for non-citizen foreign-born is a reasonable estimate of the legal permanent resident population because the number of undocumented included in that figure is offset by the number of legal permanent residents who are not included.

327. 8 U.S.C.A. § 1255(a) ("Temporary Resident Status").

328. *IMPACT* at 25 (Table 2).

329. *Id.* at 29.

330. *Id.* at 25 (Table 1). See Sam Verhovek, *Stop Benefits for Aliens? It Wouldn't Be That Easy*, N.Y. Times, June 8, 1994, at A1 (noting complexity of groups and regulations).

331. *Id.* at 33 (citing comprehensive Adult Student Assessment System study; Westat study).

332. Miller, *supra* note 323 (citing Urban Institute study); Vobejda, *supra* note 323 (same); Jenifer Bosco, *Undocumented Immigrants, Economic Justice, and Welfare Reform in California*, 8 GEO. IMM. L. J. 71 (1994).

333. Pete Wilson, *About Time We Stopped Rewarding Illegals*, Houston Chronicle, August 29, 1993, at F1 (proposing to eliminate eligibility for all public services to undocumented). This figure vastly overstates the number of undocumented births and misleadingly lumps together the variegated groups. For careful studies of this issue, see the Auditor General report on San Diego County, *supra* note 225, at 85-107. See also Leo Chavez, Wayne Cornelius, and Oliver Jones, *Mexican Immigrants and the Utilization of U.S. Health*

- Services: The Case of San Diego*, 21 SOC. SCI. MED. 93 (1985). JANET CALVO, IMMIGRANT STATUS AND LEGAL ACCESS TO HEALTH CARE (1993).
334. Wilson, note 333, at F1, F4. Seth Mydans, *California Trying to Bar Service to Aliens*, N.Y. Times, May 23, 1994, at A 10.
335. More than most fields of study, this field is susceptible to manipulation by one's assumptions. Every person, whether young or old, documented or citizen, healthy or ill, is a composite of cross-subsidization, tax relief, subsidy, abatement, and social service. I certainly believe that substantial quantitative skills should be brought to bear upon this problem of "economic costs," but I do not believe very many people fully pay for their own "costs." Pay-as-you-go is a high standard for the undocumented to bear, even though most studies show they do so. See, e.g., Larry Rohter, *Revisiting Immigration and the Open Door Policy*, N.Y. Times, September 19, 1993, at 4E (reviewing competing claims).
336. JULIAN SIMON, HOW DO IMMIGRANTS AFFECT US ECONOMICALLY? (1985).
337. JULIAN SIMON, THE ECONOMIC CONSEQUENCES OF IMMIGRATION (1989). See also JULIAN SIMON, POPULATION MATTERS: PEOPLE, RESOURCES, ENVIRONMENT, AND IMMIGRATION (1989). But see HUDDLE, *supra* at note 276.
338. KEVIN MCCARTHY AND R. BURCIAGA VALDEZ, CURRENT AND FUTURE EFFECTS OF MEXICAN IMMIGRATION IN CALIFORNIA (1986).
339. THOMAS MULLER AND THOMAS ESPENSHADE, THE FOURTH WAVE (1985); See also Miller, *supra* note 323 (reporting on 1993 Urban Institute Study); JEFFREY PASSEL, HOW MUCH DO IMMIGRANTS REALLY COST? (1994) (reviewing Huddle's work).
340. Sidney Weintraub, *Illegal Immigrants in Texas: Impact on Social Services and Related Considerations*, 18 INT'L. MIGR. REV. 733 (1984) (Texas); Comprehensive Adult Student Assessment System, A SURVEY OF THE NEWLY LEGALIZED IN CALIFORNIA (1989). See generally Leif Jensen, *Patterns of Immigration and Public Assistance Utilization, 1970-1980*, 22 INT'L MIGR. REV. 51 (1988). See also, DONALD HUDDLE, THE NET COSTS OF IMMIGRATION TO TEXAS (1994) (finding substantial job displacement by aliens).
341. MICHAEL GREENWOOD AND JOHN MCDOWELL, THE LABOR MARKET CONSEQUENCES OF U.S. IMMIGRATION: A SURVEY (1990).
342. RICHARD VEDDER et. al., IMMIGRATION AND UNEMPLOYMENT: NEW EVIDENCE (1994) (de Tocqueville Institution study concluding that immigrants create jobs in the aggregate); GEORGE BORJAS, FRIENDS OR STRANGERS (1990) (slight differences in welfare benefits to immigrant families are due to location of aliens); U.S. Department of Justice, Immigration and Naturalization Service, REPORT ON THE LEGALIZED ALLEN POPULATION (1992) (Costs for health care for legalized aliens was reimbursed by U.S. government at half the rate reimbursed for remainder of population); MARIA TIENDA AND LEIF JENSEN, IMMIGRATION AND PUBLIC ASSISTANCE PARTICIPATION: DISPELLING THE MYTH OF DEPENDENCY (1985) (refugees and immigrants participate in welfare plans with less frequency than do natives); CHRIS HOGELAND AND KAREN ROSSEN, DREAMS LOST, DREAMS FOUND: UNDOCUMENTED WOMEN IN THE LAND OF OPPORTUNITY (1991) (Study of Latina undocumented women showing one quarter had citizen children eligible for AFDC but only 5% received welfare benefits for which their children were eligible);

- JEFFREY PASSEL and MICHAEL FIX, *Myths About Immigrants*, 95 FOR. POL. 151 (Summer, 1994) (collective advantages of increased immigrants). *But see* Donald Huddle, *supra* note 276.
343. Nestor Rodriguez and Jacqueline Hagan, *Apartment Restructuring and Latino Immigrant Tenant Struggles: A Case Study of Human Agency*, 4 COMPAR. URB. AND COMMUNITY RES. 164 (1992); Nestor Rodriguez, *Economic Restructuring and Latino Growth in Houston*, in MOORE and PINDERHUGHES, *supra* note 313 at 101-127; Nestor Rodriguez, *Undocumented Central Americans in Houston: Diverse Populations*, 21 INT'L MIGR. REV. 4 (1987).
  344. Rodriguez and Hagen, *supra* note 343.
  345. *Supra* note 225 at ix.
  346. *Supra* note 224.
  347. *Supra* note 224. *See also*, letter from Stephen Arditti, UC Director, State Governmental Relations to Assemblyman Mickey Conroy, February 14, 1994 (on file with author).
  348. Discussion with CCCS official, Spring, 1993. Press reports later estimated that 14,000 or 1% of the 1.5 million total were undocumented. *Supra* note 231.
  349. 121 Cal. App. 3d 1 (1981) (finding that 12 month residency requirement is constitutional); *see also* *Center for Southeast Asian Refugee Resettlement v. Dumke*, Civ. 80-15286 (Cal. App. 2 Dist., Mar. 21, 1984) (refugees entitled to pay in-state tuition).
  350. 225 Cal. App. 3d 972 (1990).
  351. *Supra* note 315.
  352. A.B. 592, vetoed on June 21, 1991. *Supra*, note 329.
  353. The briefs on appeals are under consideration, Summer, 1994.
  354. *Supra*, note 28 (*Judith A, Alarcon* cases in Arizona and Illinois).
  355. As in New York State. *Supra*, note 28. For an account of how undocumented college students fare in New York, see Jeanine Amber, *Illegal Ed: The High Cost of Going to College*, Village Voice, April 19, 1994, at 10.
  356. Discussion with New York College registrar, Summer, 1994; California college financial aid officer, Summer, 1994.
  357. O.R.C. 3333.
  358. *Supra* note 43.
  359. I have served as a witness or consultant to plaintiffs in the *Leticia "A"* cases, *Bradford* cases, and the *Alarcon* case, and, with several Texas colleagues, will try or assist in trying a case challenging the Texas treatment of undocumented college students.
  360. I have served on the University of Houston's Residency Appeals Committee since its inception in 1987, and as a consultant to its University of Wisconsin counterpart during my



- year there as a Visiting Professor of Law, 1989-90. Each institution considers hundreds of appeals each year.
361. E.g., *Loren Smith v. Regents of the University of Houston*, 874 S.W. 2d 706 (Tex. App.-Houston [1st Dist.] 1994).
  362. *Id.*
  363. Between 1985 (*Leticia "A"*) and 1990 (*Bradford I*), the California Postsecondary Financial Aid Commission allowed resident undocumented students to receive State grants. However, as soon as *Bradford I* was decided, the Commission reversed itself and ruled them ineligible. Discussion with Commissioner Rafael Magallan, Summer, 1992.
  364. *Supra* note 269.
  365. GUIDE TO ALIEN ELIGIBILITY FOR FEDERAL PROGRAMS, *supra* note 273 at 52-53.
  366. 458 U.S. 1 (1982).
  367. 457 U.S. 202 (1982).
  368. *Martinez v. Bynum*, 461 U.S. 321 (1983).
  369. Fn updated to include Prop. 187
  370. *Wilson*, *supra* note 315.
  371. *Supra*, note 72.
  372. Vincent Chin, a Chinese-American died as a result of anti-Japanese sentiment, when unemployed white autoworkers beat him to death: "It's because of you fucking Japs that we're out of work!" See generally, Mari Matsuda, *supra* note 11 at 2330, n. 55 (reciting news stories on anti-Asian violence). Of course, his death would not have been excusable had he been Japanese, or a Japanese auto manufacturer. Professor Matsuda's well-made point is that a climate of racist violence and intimidation leads to undifferentiated violence and intimidation. *Id.* A recent study by a Quaker group similarly noted that most border violence occurs against Mexican-origin U.S. citizens and permanent residents. ROBERT KOULISH, et. al., FINAL REPORT OF THE BORDER INTERACTION PROJECT (1994).
  373. David Lauter and John Broder, *Clinton Differs with Wilson Ideas on Immigration*, L.A. Times, Aug. 13, 1993, at A1.
  374. *Id.*; Jerry Gillam and John Schwada, *Wilson Defiant Over Immigration Issue*, L.A. Times, Aug. 19, 1993, at A3.
  375. Scott Armstrong, *California Melting Pot Boils Over as Illegal Immigrants Enter State*, Chris. Sci. Monitor, Apr. 6, 1993, at 1 (describing legislative proposals); Frank Acosta and Bong Kim, *Race-Baiting in Sacramento*, L.A. Times, May 3, 1993, at B7 (describing "flood" of anti-alien bills in State Assembly).
  376. For an excellent analysis of this phenomenon in historical perspective, see RITA SIMON, PUBLIC OPINION AND THE IMMIGRANT: PRINT MEDIA COVERAGE, 1880-1980

- (1985). *See also*, Maria Ontiveros, *To Help Those Most in Need: Undocumented Workers' Rights and Remedies Under Title VII*, 20 N.Y.U. REV. L. & SOC CHANGE 607 (1993-94).
377. Latino students show poor educational achievement at virtually every level. *See generally*, Beatriz Arias, *The Context of Education for Hispanic Students: An Overview*, 95 AM. J. OF EDUC. 26 (1986); MICHAEL A. OLIVAS, ed. *LATINO COLLEGE STUDENTS* (1986). For a useful compendium of such data, *see* JENNIFER DAY, *POPULATION PROJECTIONS OF THE UNITED STATES, BY AGE, SEX, RACE, AND HISPANIC ORIGIN: 1993 TO 2050* (1993) (Census population report).
378. CHANDLER, *supra* note 31; NAFSA, *supra* note 194.
379. For a sharp exchange on *Zozobra* and its meanings, see Michael A. Olivas, *Torching Zozobra: The Problem with Linda Chavez*, 2 RECONSTRUCTION 48 (1993) (review of LINDA CHAVEZ, *OUT OF THE BARRIO: TOWARD A NEW POLITICS OF HISPANIC ASSIMILATION* (1991)); Linda Chavez, *A Response to Olivas* 2 RECONSTRUCTION 182 (1993); Michael A. Olivas, *A Reply to Chavez*, 2 RECONSTRUCTION 184 (1993).
380. This period, approximately 100 years ago, is widely regarded as the most overtly racist period of U.S. immigration policy. In addition to the petty harassments directed at Chinese workers, more substantial federal legislative onus was directed at all Asians: the "Chinese Exclusion" case. *See* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853 (1987); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545 (1990); Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law*, 34 ST. L. U. L. J. 425 (1990).
381. Even the director of the INS has described the scapegoating phenomenon: "In attempting to explain the current unease over immigration, [Doris] Meissner drew a comparison with attitudes a decade ago, saying, 'You didn't see this [outcry] in the 80's when California was growing and when this cheap labor ... really contributed very significantly to California's boom. Now you have an accumulation of people who look very different and a lack of jobs and a tremendous shock in the economy.'" Ronald Ostrow, *Immigration Chief: Instinct to Survive Accounts for Masses*, Hou. Chron., Oct. 30, 1993, at 16A. Promising approaches to reconstituting the discourse on vexing racial/legal struggles are offered by Kevin Brown, *The Legal Rhetorical Structure for the Conversion of Desegregation Lawsuits to Quality Education Lawsuits*, 42 EMORY L. J. 791 (1993) (in school desegregation litigation); by Lisa Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles,"* 66 SO. CALIF. L. REV. 1581 (1993) (in Black-Korean relations); and by David Hayes-Bautista, Werner Schink, and Maria Hayes-Bautista, *Latinos and the 1992 Los Angeles Riots: A Behavioral Sciences Perspective*, 15 HISP. J. OF BEH. SCI. 427 (1993) ("collective behavior" analysis of Latinos involved as victims and rioters).