

UC Berkeley

UC Berkeley Electronic Theses and Dissertations

Title

Justice and the Foreigner

Permalink

<https://escholarship.org/uc/item/7x57624s>

Author

MURTHY, HAMSA

Publication Date

2010

Peer reviewed|Thesis/dissertation

Justice and the Foreigner: Illegal Alienage and the Dilemmas of Law and
Government in Modern America

By

Hamsa M. Murthy

A dissertation submitted in partial satisfaction of the

requirements for the degree of

Doctor of Philosophy

in

Jurisprudence and Social Policy

in the

Graduate Division

of the University of California, Berkeley

Committee in Charge:

Professor Lauren Edelman, Chair

Professor Sarah Song

Professor Leti Volpp

Professor Marianne Constable

Fall 2010

Abstract

Justice and the Foreigner: Illegal Alienage and the Dilemmas of Law and Government in Modern America

by

Hamsa M. Murthy

Doctor of Philosophy in Jurisprudence and Social Policy

University of California, Berkeley

Professor Lauren Edelman, Chair

Illegal alienage in the U.S. is among the most visible contemporary symbols of law's failure, or rather of its failure to determine fully the state of the world through its declarations. The two major arguments of this dissertation flow from this insight. The dissertation makes two distinct, but related arguments about: 1) the fragmented nature of contemporary U.S. "(illegal alienage) law in action" and by extension, contemporary law and state power; and 2) latent normative implications of "work" in contemporary America.

First, this study of "illegal alienage in action" shows in detailed relief how modern U.S. "law in action" is not the product of a unified or unequivocally speaking sovereign, but rather a result of the organizationally and institutionally mediated actions (or careful attempts at "inactions") of often conflicting sets of street-level bureaucrats in a federal administrative state. These bureaucrats are often overwhelmingly concerned with their own unique normative goals rather than with illegal alienage. This dissertation demonstrates how the institutionally mediated actions of various bureaucratic officials matter even, or especially, for something as seemingly one dimensional as "belonging" or "not belonging" in the United States.

Second, in light of the fact that justice in matters of immigration and alienage is particularly uncertain, an important question of what, besides "the prior pronouncements of the federal government" has normative salience vis-a-vis illegal alienage emerges. Put slightly differently, the operative questions here are: On what normative ground do illegal aliens most successfully make claims against the state or against the citizens of the state? And relatedly, on what

normative ground do street level bureaucrats most successfully intervene to protect or expand the rights of illegal aliens within their jurisdictions? This dissertation will show how “work” or “labor” is the normative ground that undergirds both of these processes, and it will consider the political theoretical importance of this.

To my parents

Table of Contents

Chapter 1	INTRODUCTION	1
Chapter 2	SOVEREIGNTY AND ITS ALTERNATIVES: ON THE TERMS OF ILLEGAL ALIENAGE IN U.S. LAW	11
Chapter 3	ON NON-IDEAL STATES: ILLEGAL ALIENAGE AND ANGLO- AMERICAN POLITICAL THEORY	39
Chapter 4	ILLEGAL ALIENAGE AND THE SOCIOLOGY OF LAW	79
Chapter 5	ILLEGAL ALIENAGE, "SANCTUARY," AND "LABOR" IN TWO AMERICAN MUNICIPALITIES, 1985-2010	107
Chapter 6	CONCLUSION: WORK, JUSTICE, AND THE FOREIGNER	156

Acknowledgments

I am grateful to Professor Lauren Edelman for her unwavering confidence in me over many years. I am also grateful to Professor Marianne Constable, Professor Sarah Song, and Professor Leti Volpp, who, along with Professor Lauren Edelman have been the most generous dissertation committee a student could imagine. They are also among the most impressive people I have ever met.

I am grateful for the generous financial support of the Center for the Study of Law and Society, Jurisprudence and Social Policy Program, the Townsend Center for the Humanities at UC Berkeley, the UC Berkeley Institute for the Study of Social Change, UC Berkeley Graduate Division, and the National Science Foundation Law and Public Policy Dissertation Improvement Grant Program (Grant 0551347).

I am thankful to librarians at the UC Berkeley School of Law as well as the Doe Library. I am thankful also to faculty members in the Jurisprudence and Social Policy Program as well as faculty members in the UC Berkeley School of Law J.D. Program.

Being a graduate student on a campus as beautiful as UC Berkeley's campus has been a life altering experience to say the least. I am especially thankful to innumerable fellow graduate students for friendship, conversation, and sometimes commiseration. Spanning many fields, these graduate student friends shared a common enthusiasm for ideas and discussion, which I am lucky to have experienced. In particular, I thank Rachel Cane and Hilary Soderland who exemplify this generosity in spirit.

I thank Rebecca Wenk for being a loyal Berkeley co-adventurer, who has taught me a great deal about East Bay landscapes at precisely the times I needed to be outside rather than at my desk. I thank Elizabeth Rudy for going through virtually every day of graduate school with me, if from the opposite coast, and for being my friend for over sixteen years. I never imagined I would have such wonderful friends.

Finally, I would like to thank my brother Girish for his example of good humor. And I would like to thank my father and mother for always believing in my capacity to do anything, even and especially when I have doubted myself.

CHAPTER 1

INTRODUCTION

In August 2005, the *Oakland Tribune* published a cartoon on its editorial page depicting two figures, one sporting a coonskin cap and the other clad in a cowboy hat. Both figures wield rifles and stand guard atop the roof of the Alamo. These would-be fathers of the Republic of Texas appear frustrated and beleaguered, as one remarks to the other, "We're badly outnumbered. What if we just offer them work visas, drivers' licenses and free health care?"

The cartoon substitutes modern day, ostensibly illegal immigrants from Mexico for General Santa Anna's famously large Mexican army come to put down the separatist rebellion of the then predominantly white immigrants from the U.S. to Mexico. By doing so, the cartoon plays with familiar tropes of contemporary immigration politics in the U.S.--those of invasion, siege and, ultimately, loss of sovereignty and control of a political community.

At its core, this dissertation probes the tensions that the cartoon humorously, if also uncomfortably, broaches. It considers attempts to govern, or rather govern around, illegal alienage in the contemporary U.S. federal administrative state.¹ The "work visas, drivers' licenses, and free health care" that the cartoon invokes are only the most familiar symbols of presumed illegal alien encroachment on the would-be exclusive rights and privileges of citizens. With respect to "free health care" in particular, much anti-immigrant discourse has seized on a constructed opposition between the illegal immigrant who uses

¹ Following Ngai (2004, xix-xx), this dissertation uses the terms "alienage," and "alien," and sometimes "illegal alien" rather than terms such as "unauthorized migrant," or "undocumented migrant." It does so not to be pejorative or to express any unfavorable normative position. Rather, as in Ngai's book, the use of the term "illegal alien" is meant to call attention to the term's specifically legal genealogy as well as the tension the term bears in contemporary legal and political discourse, where part of the normative dispute is indeed a matter of terminology or naming. On this last point, see Nunberg (2006).

The term "alien" is a particularly legal one, in a way that the term "migrant" is not. "Alien" in the context of U.S. law refers to any non-citizen. "Immigrant" refers to one who has come to the U.S. with permission to settle as a legal permanent resident (i.e. a "green card" holder). A "non-immigrant" refers to one who has entered the U.S. for a temporary stay--for business, tourism, to work, or to attend a university, for example. As such, "illegal alien" refers to one who has either overstayed a visa or one who has crossed the U.S. border without permission. While the cartoon and indeed most popular discourse on the subject presumes or suggests that most "illegal aliens" are border crossers, a significant portion are also visa overstayers.

U.S. emergency rooms as his free source of medical care, while his U.S. citizen counterpart is forced to struggle with the burdens of high health care costs and a seemingly intractably private system of health care provision in the U.S. In other words, while "free health care" is precisely not a condition of U.S. citizenship, at least before retirement, it is presumed by some to be a condition of U.S. illegal alienage, or at least portrayed as such, to make a polemical point about the upside down, inside out world brought into being by illegal alienage in America today.

As this dissertation will show, the world of illegal alienage may indeed be upside down and inside out, but not as the most vocal opponents of illegal immigrants would have it. Despite their familiarity as lightning rods in the contemporary immigration debate, "work visas, drivers' licenses, and free health care," or even ultimately legalization or "amnesty" do not comprise the bulk of the "concessions" of political and social incorporation made to illegal aliens. Rather, in the U.S. context, the on the ground "concessions" to illegal aliens, if they can even be thought of in that way, are much more modest. And they have to do primarily with the governmental preferences of overlapping and often competing street level bureaucracies in a federal, and decidedly administrative state that must contend with the realities of illegal alienage at the same time that it seeks to preserve its sovereignty.²

Thus, this dissertation will not primarily concern itself with the narrow normative question of whether various subfederal policies are in fact "concessions" or not. Nor will it primarily concern itself with the more conventionally sociological question of why pro-immigrant policies may appear in some municipalities, while anti-immigrant policies may appear in others. Rather, this dissertation addresses the arguably prior questions of precisely *how* illegal alienage is governed as a matter of U.S. law in U.S. society, and what these realities of "illegal alienage law in action" in turn reveal about modern law in the U.S. more generally, as well as about extant normative understandings of (illegal) alienage and citizenship in liberal democracies.

Consequently, this dissertation resolutely focuses on matters having to do with "us"-- the entire political community and its laws--rather than on just "them"-- the nominal outsiders. The chapters which follow use illegal alienage as a prism through which to study the shapes, contours, and most importantly, the limits of law in the contemporary U.S. These are matters that affect us all.

Ultimately, illegal alienage in the U.S. is among the most visible contemporary symbols of law's failure, or rather of its failure to determine fully the state of the world through its declarations. The two major arguments of this dissertation flow from this insight.

² The term "street level bureaucracy" is taken from the work of Lipsky (1969; 1980).

First, this study of “illegal alienage in action” shows in detailed relief how modern U.S. “law in action” is not the product of a unified or unequivocally speaking sovereign, but rather a result of the organizationally and institutionally mediated actions (or careful attempts at “inactions”) of often conflicting sets of street-level bureaucrats in a federal administrative state. These bureaucrats are often overwhelmingly concerned with their own unique normative goals rather than with illegal alienage in particular. This dissertation demonstrates how the institutionally mediated actions of various bureaucratic officials matter even, or especially, for something as seemingly one dimensional as “belonging” or “not belonging” in the United States. Illegal alienage thus reveals not only that “law in action” deviates from “law on the books,” but also, more importantly, that much “law on the books and law in action” today is unwritten bureaucratic “policy.” Under U.S. law, the federal government’s sovereignty is made manifest in part through the power to declare and to write the final laws of alienage.³ Given this inextricable link between nation-state “sovereignty” and the power to speak the law unilaterally, the socio-legal terrain of illegal alienage in subfederal, institutional contexts is necessarily played out in the interstices of speech, writings, and silences, as this work will show.

Illegal alienage therefore reveals “the law on the books and in action” to be quintessentially positive law -- (1) posited, but not able to determine exhaustively the state of the world, as discussed in the preceding paragraphs; and (2) law, but not necessarily just law or justice. “Positive law” refers to law enacted as a system of written rules; these rules emerge from an identifiable source. Most importantly, “positive law” has no necessary relation to justice.⁴ The validity of positive law is not a question of its justice, but rather a question of its source. The lack of connection between law and justice is particularly evident and important in contemporary U.S. jurisprudence of immigration and alienage, which, as noted above, relies explicitly upon the concept of “inherent nation-state sovereignty” to determine both “law” and “justice.” Justice, especially in matters of immigration and alienage, is thus often in question.

This leads directly to the second major argument of this dissertation. In light of the fact that justice in matters of immigration and alienage is particularly uncertain, an important question of what, besides “the prior pronouncements of the federal government” has normative salience vis-a-vis illegal aliens emerges. Put slightly differently, the operative questions here are: On what normative ground do illegal aliens most successfully make claims against the state or against the citizens of the state? And relatedly, on what normative ground do

³ This is on account of a legal doctrine called “federal preemption,” which Chapters 2 and 3 discuss in more detail.

⁴ See Constable (2005) for an elaboration of this point and also for a discussion of how silence, not natural law, is an important alternative to positive law because it shows positive law’s limits.

street level bureaucrats most successfully intervene to protect or expand the rights of illegal aliens within their jurisdictions? This dissertation will show how “work” or “labor” is the normative ground that undergirds both of these processes. Political theorists, legal scholars and immigrant activists may proclaim that immigrant “personhood” ought to lead to more rights for illegal aliens or even legalization. But this dissertation will show that immigrant “personhood” does not translate into rights or recognition as a matter of U.S. law. Instead, the activity of “work” confers a greater status of belonging than “personhood,” as a matter of “illegal alienage in action.” This insight, about the significant normative value of “work,” both in U.S. society and law, suggests the need for political and legal theorists in particular to re-think extant prescriptions about how to “solve” or even to understand the normative dilemmas that illegal alienage brings forth for liberal democracies.

The monolithic model of nation-state power vis-à-vis foreigners has been deeply entrenched in the liberal political theory of the late 20th century and also in other works, many of them sociological, that implicitly or explicitly accept the vision that liberal political theory proffers.⁵ Most notably, in *Spheres of Justice*, Michael Walzer forcefully and now famously noted that, “The primary good that we [citizens of liberal democracies] distribute to one another is membership in some human community.” Walzer further argued that, “At some level of political organization, something like the sovereign state must take shape and claim the authority to make its own admissions policy, to control and sometimes restrain the flow of immigrants” (Walzer 1983: 31,39).⁶ Despite his defense of both closed borders and the right of a nation-state to admit and refuse immigrants based its own criteria, Walzer’s fundamental commitment to a “separation of normative spheres” led him to argue that once admitted to a nation-state, foreigners must be given the same rights as citizens.⁷ In addition, the harshness or illiberality of a nation-state’s border policy was for Walzer the unfortunate but necessary price to pay for a charmingly open and egalitarian

⁵ The field of the “sociology of immigration,” or rather more specifically the “sociology of immigrants,” accepts this monolithic model of nation-state power without much discussion. See, for example, a recent work by Bloemraad (2006).

⁶ Although Walzer’s book traversed a variety of spheres, from “Security and Welfare,” to “Money and Commodities,” to “Free Time,” to “Kinship and Love,” Walzer’s argument has received prolonged attention in the field of immigration studies because of the importance Walzer gave to questions of membership in political communities as a first question of distributive justice. Chapter 3 takes a closer look at this work.

⁷ Suggesting, though not explicitly stating, that his principle of equality between resident aliens and citizens does not apply to illegal aliens, Walzer begins his discussion of resident aliens by stipulating, “Let us assume that they are rightfully where they are.” Only then does Walzer ask, “Can they claim citizenship and political rights within the community where they now live?” (Walzer 1983: 52). Chapter 3 of this work takes up this point in more detail.

society within these borders. "Neighborhoods," Walzer posited, "can be open only if countries are at least potentially closed" (Walzer 1983: 38).

Linda Bosniak has brought attention to the "hard-on-the-outside, soft-on-the-inside" model of citizenship and alienage found in Walzer's analysis as well as in liberal political theory more generally (Bosniak 2006: 103). She has usefully pointed out that as a matter of U.S. immigration and alienage law, a Walzerian "separation of spheres" has never existed. As Bosniak has noted, the federal government's powers to deport illegal aliens from within the nation's interior and also to make a whole range of distinctions between the rights of citizens and non-citizens, both now firmly entrenched in U.S. law, are only the most evocative examples of the reach of "hard" sovereignty into the would-be "soft" territorial inside (Bosniak 2006). But Bosniak leaves the issue there, with the diagnostic insight that Walzer's separation of spheres is a mere political theoretical fiction.

In essence, the chapters that follow accept Bosniak's insight about U.S. legal doctrine and push further in a socio-legal direction. These chapters develop in various ways the dissertation's two distinct, but related arguments about: 1) the fragmented nature of contemporary U.S. "(illegal alienage) law in action" and by extension, contemporary law and state power; and 2) latent normative implications of "work" in contemporary America. The following paragraphs describe in detail the arguments of each of the chapters of this dissertation.

Chapter 2 sets the stage for the entire dissertation by analyzing the federal laws that create and govern illegal alienage in the U.S. In doing so, the chapter draws on the writings of Hannah Arendt in order to demonstrate the significance of declarations of law and sovereignty as well as the significance of a bifurcation between "political and economic injury that separates the law of refugee status from the law of illegal alienage."⁸ Specifically, by juxtaposing canonical U.S. case law on "citizens," "refugees," and "illegal aliens," the chapter shows how two particular alternatives to "sovereignty" – "ethical territoriality" and the "social," – emerge as the grounds upon which U.S. law declares some rights for illegal aliens. The chapter also shows how "sovereignty" and "ethical territoriality" may be seen as two sides of the same coin. The chapter ends by suggesting that relegation of illegal alienage to a "social" or "economic" sphere as opposed to the "political sphere" limits the claims that illegal aliens may be able to make against the state by way formal law; it suggests the importance of subsequent re-thinking of not only the political causes of "merely economic" injury, but also the political implications of unauthorized work. Chapter 2 advances the two main arguments of the dissertation by: (1) shedding new light on the multiple (as opposed to a

⁸ While Arendt is well-known for her concern with refugees and stateless persons, illegal alienage was not on Arendt's radar. Nonetheless, her work is instructive for this dissertation's examination of illegal alienage, as Chapter 2 will show.

singular) normative justifications for the rights in U.S. law of illegal aliens; and (2) by drawing attention to embeddedness of “economic injury” and work in canonical American “law on the books” of illegal alienage.

Chapter 3 analyzes conceptions of sovereignty, borders, illegal alienage, and law found in contemporary political theory---mainly in writings of John Rawls, Michael Walzer, Rogers Smith and Peter Schuck, and Seyla Behabib. The chapter shows that while questions of sovereignty have recently returned to the scholarly agendas of political theorists, political theorists generally pay little attention to specific forms and pronouncements of law in addressing questions of sovereignty and illegal alienage. The chapter argues that while Rawls, Walzer, and Schuck and Smith presume that both the “nation-state” and “citizenship” are relatively monolithic in liberal democracies, Benhabib, in contrast, presents a fragmented portrait of citizenship and the state that is most resonate with modern U.S. “law in action.” The chapter also identifies what Rawls, Walzer, and Schuck and Smith each presumes is the most salient dilemma that illegal alienage creates for liberal democracies; it argues that both the U.S. “law on the books” and “law in action” have addressed many of these dilemmas. The chapter thus creates a much needed dialogue between political theory about liberal democratic states, and the law that emerges in one such state. The chapter then moves to Benhabib’s notion of “democratic iterations” --- a term meant to indicate that rights for non-citizens emerge iteratively on account of the presence of non-citizens within democracies and the disaggregation of citizenship and rights. This chapter argues that such a thesis (or hope) is problematic, at least in the U.S., precisely because of the strong link in U.S. law between sovereignty and the power to declare the rights of non-citizens.

The second part of Chapter 3 thus takes a socio-legal turn and attempts to evaluate and institutionally contextualize Benhabib’s concept of “democratic iterations.” Specifically, the chapter turns to an archival case study of New York City’s “sanctuary” policy concerning illegal alienage and the federal case law addressing this policy. It shows how subfederal entities in the U.S. today struggle to govern illegal alienage through means other than the declared, positive law that has become the sign, if not the substance, of modern nation-state sovereignty. Chapter 3 thus concludes by showing the limits and administrative terms of possible "democratic iterations" as a matter of U.S. law. And it argues that the term “democratic iteration of alienage” may be more usefully replaced with the term “administrative iterations and non-iterations,” at least in the U.S. context.

Chapter 3 advances the two major arguments of this dissertation by showing, first, the importance for political theory of recognizing the multiple sources and shapes of state pronouncements and power. Second, particularly in the sections about Benhabib’s writings, the chapter shows how “work” rather than “personhood” endowed immigrants protestors with culturally and

politically resonant meaning. The final section of Chapter 3 serves as a bridge between Chapters 2 and 3 and Chapters 4 and 5 because this final section of Chapter 3 marks a turn from a macro level of analysis (federal law and liberal democratic political theory) to a micro level of analysis (street-level law, both “on the books” and “in action.”).

Chapter 4 moves formally to the sociology of law. Drawing on Robert Ellickson’s well-known phrase “order without law,” the chapter lays the foundation for revealing how illegal alienage presents instances of “order without law,” albeit in distinct ways not anticipated by Ellickson. Furthermore, Chapter 4 situates questions of citizenship and alienage within the sociology of law. It shows how sociology of law’s historic focus on “second class citizenship” has meant that relatively few extant works in the fields of sociology of law and law and society take up alienage. Chapter 4 also reviews the tradition of anthropological and sociological methodological approaches that pay particular attention to the organizational mediation and construction of law within particular jurisdictions. Chapter 4 argues ultimately that behaviorist socio-legal approaches to law are particularly ill-suited to studying “illegal alienage in action,” while socio-legal approaches that focus on the organizational and institutional contexts of “law” or “policy” makers are particularly well-suited to studying “illegal alienage in action.” Chapter 4 advances the two major arguments of the dissertation by first showing the usefulness of approaches to “law in action” that situate law as the organizational and institutionally contextualized actions of various street-level bureaucracies, and second, by showing how the on-going, day to day “work” of such bureaucrats is also an important normative engine for the “law in action of illegal alienage” in particular.

Chapter 5 begins by setting the stage for the ensuing empirical case studies of “illegal alienage in action” in California and Texas, the two U.S. states with the greatest overall numbers of illegal aliens. The chapter first discusses the divergent state labor law frameworks of the two states. It also discusses the demographic features of San Francisco and Houston, the two municipalities within the states chosen as field sites. The chapter then moves to analysis of the conceptual contours of immigrant “sanctuary” and “day labor regulation, key sites where questions of illegal alienage come to the fore as a matter of everyday governance in American municipalities.

Chapter 5 then analyzes the contrasting histories of immigrant “sanctuary” and day labor regulation in San Francisco and Houston through presentation of original archival, observational, and interview data. Ultimately, the comparative analysis contained in Chapter 5 is a four-fold comparison of two particular issues, “sanctuary” and “day labor,” across two distinct jurisdictions. Most importantly, Chapter 5 demonstrates empirically that immigrant “labor” or “work” --rather than immigrant personhood, vis-à-vis immigrant “sanctuary” --

has been *both* the socio-legal phenomenon and the normative ground upon which street-level bureaucrats have most successfully expanded the “rights in action” or belonging of illegal aliens. Chapter 5 also argues that “immigrant sanctuary” particularly in San Francisco, uniquely reveals the shortcomings of consequentialist grounds for the rights of illegal aliens. Specifically, to the extent that “immigrant sanctuary” has been justified in terms of crime prevention across a population, “immigrant sanctuary” has been built on a very unstable foundation, as the chapter will show. Further, Chapter 5 shows, particularly with reference to San Francisco, which has been the U.S. city with the longest and most complicated “sanctuary debate,” how various street-level bureaucrats have insisted on developing written laws of sanctuary, how they have struggled to write these laws over time, and what they have subsequently ascribed to the written laws. Therefore, Chapter 5 presents a case study of the politics of making positive, written law.

Chapter 5 also advances a particular methodological goal of this dissertation. It seeks at once to present “law in action” over time and to analyze the political theoretical implications of various incarnations of this “law in action.” Chapter 5 thus refuses binaries between “law on the books” and “law in action” as well as “sociology of law” and “political theory.”

Chapter 5 directly advances the primary arguments of the dissertation first, by painting in detail a portrait of various street-level bureaucrats working to craft local “policies” regarding illegal alienage, and second, by once again showing the greater normative power of “work” than that of “sanctuary for all *persons*, even illegal aliens.”

Chapter 6 concludes the dissertation and recasts relevant political theoretical and socio-legal questions about illegal alienage and ultimately also citizenship in federal and administrative liberal democracies today. It does so in light of the study of “law in action” that all the previous chapters together have comprised, and it does so with reference to the issue of work or labor. Put slightly differently, the chapter asks what the labor or work of non-citizens may portend for contemporary citizenship and alienage law and politics in the U.S. As the final chapter in this dissertation, Chapter 6 seeks both to revisit the insights of prior chapters and also to frame important new questions for further exploration.

Although Chapter 5 contains the bulk of the information gleaned directly from fieldwork, the experience of fieldwork has informed all the chapters of this dissertation. Specifically, the attention to “law in action” that pervades each of the chapters is directly traceable to the local perspective on illegal alienage that fieldwork allowed. As the above summary of chapters and this discussion of fieldwork suggests, this dissertation seeks to create a much needed integration between political theory and sociology of law--two subfields of legal scholarship that often take up the same topics, if in (artificial) disciplinary isolation. Also as

discussed above, in bringing to light the peculiarly local and therefore quintessentially socio-legal conundrums of law and government exposed by illegal alienage in the U.S. today, this dissertation purposely pays close attention to sub-federal and administrative aspects and forms of state power and language.

The emphasis on the peculiarities and limits of propositional legal language is a crucial one. As an ongoing methodological commitment, this dissertation pays careful attention to the mediation of law through language. In doing so, it heeds the insight that “legal language is a creative speech which brings into existence that which it utters” (Bourdieu 1991: 42). Further, the dissertation engages with political theory and with sociology of law in a critical mode in an effort to augment the prevailing treatment of law within these two fields. Such an approach, which often involves close textual analysis, allows for taking notice of not only what is said, but also what remains unsaid or rather unwritten or unwritable. In addition, the approach employed in this dissertation refuses an often implicit and problematic artificial distinction between “mere” words and behavior, thereby failing to recognize that words are behavior, where law is concerned.

Finally, the title of this dissertation, *Justice and the Foreigner* is a modification of the title of Bonnie Honig's book, *Democracy and Foreigner*.⁹ The turn from Honig's lens of “democracy” to that of “justice” in this work is meant to signal new attention to the fact that the where non-citizens are concerned, questions of justice are arguably prior to or at least distinct from questions of democracy and democratic incorporation. “Foreigner,” which appears in the title, seldom appears in the body of this dissertation. “Alienage,” “aliens,” or “immigrants” --all terms with legal valences in U.S. law---appear instead in the body. This prominent use of a non-legal term in the title is meant to suggest that the legal terms can and should be re-conceptualized.

One of this work's major themes is that “justice,” perhaps even more so than “democracy,” remains an open question and recurrent institutional dilemma where the foreigner is concerned.¹⁰ At the same time, the dissertation

⁹ In her work, Honig (2001) argues that foreigners, rather than creating problems for modern liberal democracies, actually solve problems in so far as they personify the consent to government on which liberal democracies depend, at least in theory. Honig points out that foreigners consent to citizenship and make citizenship appear choice-worthy to increasingly disaffected native born citizens who acquire it by birth. Chapter 3 takes up Honig's argument in more detail.

¹⁰ A more conventional work of political theory might offer a full new model of what justice requires with respect to the illegal alien, but would pay little, if any, attention to law. The aim here is not to develop a normative theory that is internally consistent but also possibly unrelated to the workings of U.S. legal institutions. Rather, the aim throughout this work is to relate political theory to “law in action” in the U.S. and, as such, to ground normative recommendations in the possible contingencies of institutional realities.

proceeds with the modest hope that seeing questions of justice and the foreigner in new lights may herald new possibilities for nation-state sovereignty, for politics, for citizenship, and for law, and therefore new possibilities for us all--citizens and foreigners alike.

CHAPTER 2

SOVEREIGNTY AND ITS ALTERNATIVES: ON THE TERMS OF ILLEGAL ALIENAGE IN U.S. LAW

Happiness is . . . official identification documents.

Millions of "economic" and other migrants have taken advantage of improved communications in recent years to seek new lives in more developed countries. However, they should not be confused (as they often are) with refugees, who are fleeing persecution or war, rather than moving for personal or financial reasons. Modern migratory patterns can be extremely complex and contain a mix of economic migrants, refugees, and others. Separating genuine refugees from various other groups through fair asylum procedures, in accordance with the 1951 Convention, can be a daunting task for governments.

**Office of the United Nations High
Commissioner for Refugees¹**

The concept of human rights can again be meaningful only if they are redefined as a right to the human condition itself and the right never to be dependent on some inborn human dignity, which de facto, aside from its guarantee by fellow men, does not exist.

Hannah Arendt
The Burden of Our Time

Men do not wield or submit to sovereignty. They wield or submit to power. Authority and power are facts. . . sovereignty is not a fact.

F.H. Hinsley
Sovereignty

¹ Both quotations are taken from documents posted on the United Nations High Commissioner for Refugees (UNHCR) website, <http://www.unhcr.org/basics.html>, last accessed October 20, 2010. The first is from a document entitled "The World's Stateless People, Q&A. A publication date is not noted. The second is taken from a document entitled "1951 Refugee Convention Questions & Answers," published September 2007.

Introduction

In 1951, Hannah Arendt wrote in *The Origins of Totalitarianism* that stateless persons had become by then, "the most symptomatic group in contemporary politics" (Arendt 1951: 277). She wrote of a post World War I world in which "out of the liquidation of the two multinational states of pre-war Europe, Russia and Austria-Hungary, two victims groups emerged whose sufferings were different from those of all others in the era between the wars" (268). These new victims, Arendt noted, were the "stateless and the minorities," who had no governments to represent and to protect them (268-9). These *apatrides* and post-war refugees, rendered so by mass denationalizations and civil wars, were prevented from maintaining even their supposedly "inalienable" or "human" rights.

For Arendt, the post World War I explosion in the number of stateless persons and refugees revealed not a lack of "civilization," but rather that "there was no longer any 'uncivilized' spot on earth" (297). Nation-states had come to insist upon the prerogative to exclude as a fundamental incident of their sovereignties. These nation-states had come to occupy fully the inhabitable surface of the world. The "abstract nakedness of being human" (299) turned out to be concomitant not with the realization of "basic human rights," as might have been hoped or expected. Rather, "the abstract nakedness of being human" turned out to be concomitant only with exclusion and deprivation.

This chapter asks how it is that while refugees or stateless persons may continue to be, in the now well-known terms of Hannah Arendt, "symptomatic" of the paradoxes of nation-state sovereignty and human rights in late modernity, it is rather the "illegal alien" that has become in the last three decades, "the central and singularly intractable problem of [U.S.] immigration policy. . . and a lightening rod in domestic national politics more generally," (Ngai 2004: 265). The aim here is not to assert that refugees and stateless persons no longer exist as meaningful political and juridical categories in U.S. law, nor to assert that the almost universally harrowing problems of refugees and stateless persons have been somehow "solved." Nor is the aim to assert that conceptual distinctions between refugees, stateless persons, and illegal aliens ought to be collapsed. Rather, the task here is to inquire into precisely how illegal alienage has become a most vexing feature of U.S. law and politics and law and politics in other countries as well since the mid-twentieth century.

As this chapter will show, the emergence and development of the category of illegal alien has occurred in relation to the categories of refugees and stateless persons, as well as to the category of citizens. This chapter will also show how this relational genealogy of illegal alienage has important but heretofore relatively ignored ramifications.

On a basic level, the attention garnered by illegal alienage in U.S. law and politics has increased since quotas were imposed on migration from the Western Hemisphere in 1965, and also as refugee adjudication became formally part of U.S. law in 1980. With the formalization of refugee adjudication in particular, illegal alienage has thus emerged as beyond the scope of legalized humanitarian charity and thus the ultimate category of “remainders” in U.S. immigration and alienage law.²

And on another, less illuminated register related to the points above, as refugee status in particular has come to occupy fully the category of bona fide political injury in immigration and alienage law across countries, illegal aliens have been cast as primarily economic actors, especially in the late twentieth century. This bifurcation, between the authentically politically injured migrants and the authentically political sovereign nation-state on the one hand, and the merely economically injured or economically motivated migrants on the other hand, limits the ability of illegal aliens to make cognizable claims against sovereign nation-states in formal immigration and alienage law. In other words, where “political sovereignty” lurks as the ultimate trump card, as it does in immigration and alienage law, conceptual exclusion from the realm of the political limits the claims illegal aliens can make against sovereign nation-states.

Political theorists may argue that the “rights to control the territory,” is simply an attribute of “sovereignty” (see e.g. Krasner 1999). This may indeed be the case as a matter of political theory. But in making this equivalence summarily as a matter of theory, political theorists tend not to pay attention to how law articulates and concretizes these concepts in ways that differ from this theoretical proposition. In other words, because political theorists generally do not attend to specific articulations of law, they tend to miss the fact that “sovereignty” and “territoriality” are distinct and often oppositional normative grounds in U.S. alienage law. Therefore, political theorists generally elide the contextual meanings of these words in law as well as the fact that these words animate different state institutions.

While “sovereignty” generally refers to a prerogative that rests with Congress, “territoriality,” in U.S. legal discourse, generally empowers the federal judiciary to insist upon certain rights for foreigners. “Sovereignty” and

² The term “remainders” is borrowed from the text of Bonnie Honig’s book *Political Theory and the Displacement of Politics* (1993). In her book, Honig uses the term “remainders” to refer to political disputes and political action that the state is not able to contain by way of administrative plan or distributive program. Honig, like other theorists who celebrate the agon or conflict inherent in democracy, views the uncontrollable aspects of modern “statecraft” or political life with great fondness. My use of the term “remainders” is less normatively celebratory than Honig’s, but I also mean to signify that which remains and does not fit into any easily governable category, despite the nation-state’s best efforts to stipulate that it does not exist.

“territoriality” have thus emerged as alternative normative registers, the former generally for the withholding rights from non-citizens, and the latter generally for the granting of rights to non-citizens in U.S. law, as this chapter will show. In addition to “sovereignty,” and “territoriality,” illegal alienage brings forth concerns about “social and economic productivity,” which in turn also undergird rights for illegal aliens.

Five sections comprise this chapter. The first details further how Arendt’s work serves as a useful lens through which to consider the past and the present of immigration and alienage law in the U.S. The second section juxtaposes Arendt’s critique of any articulated “right to have rights,” with a near total occlusion of this very critique in subsequent secondary legal writing on U.S. citizenship that invoke Arendt. Together, these two sections draw out the implications of Arendt’s critique of the positive law of nation-state political communities for contemporary studies of immigration and citizenship.

The third section marks a move from cases about citizenship to cases about alienage. As the second section and third sections taken together show, while the pair of cases discussing Congressional power to strip citizenship reconfigures completely the sovereignty of the nation-state (second section), the cases discussing alienage and illegal alienage (third section) leave sovereignty nominally intact while constructing its possible alternatives.

The fourth section discusses important legal scholarship that probes the further possibilities for contemporary alienage law and also suggests the limits of “territoriality” as a ground for the rights of non-citizens in U.S. law. The fifth section highlights the development of language of “economic productivity” and “social concerns” in alienage law, and it considers the political theoretical implications of this language. Taken as a whole, this chapter seeks to show the extant terms of the U.S. law of (illegal) alienage--terms such as “citizenship,” “sovereignty,” “territoriality”--in new lights.

On the Relevance of Hannah Arendt’s Critique of Positive Laws of Political Community for a Contemporary Study of Illegal Alienage in the U.S.

Both legal scholars and political theorists working within the liberal tradition generally presume that all modern law is necessarily written, positive law, and that the lack of written, positive law signifies (undesirable) pre-legality.³

³ Again, as noted in Chapter 1, by “positive law” I mean law as an enacted system of rules that is written, emerges from an identifiable source, and has no necessary relation to justice. The validity of positive law is not a question of its justice, but rather a question of its source. See Constable (2005) for an elaboration of this point and also for a discussion of how silence, not simply “natural law,” is an important alternative to positive law because it shows positive law’s limits. Positive law’s lack of relationship to justice is an aspect of positive law that most legal scholars,

This section seeks, following Arendt, to show by contrast how the need for written, positive law is itself contingent and has the effects of strengthening the authority of the institutions that promulgate this law. In addition, as Arendt's work illuminates, written positive law also has the effect of rendering other forms of human interaction, speech, and political action as extra-legal and therefore normatively suspect.⁴ This has particular implications for immigration and alienage law, which, more than any other forms of modern law, trade in the terms of status rather than action. Henry Maine (1877) famously described the development of western law as a progressive move "from status to contract," where the individual is seen increasingly in terms of contract and action rather than status. Immigration and alienage laws, which developed in earnest in the nineteenth century in the U.S., reintroduce the concept of "status," albeit in a new, seemingly less illiberal light.⁵

More than any other prominent political theorist or philosopher of the twentieth century, Hannah Arendt recognized the centrality of questions of human migration and the rapidly developing positive laws of immigration and alienage for the most urgent political questions of the day. As she wrote in *Origins of Totalitarianism*:

The state inherited as its supreme function the protection of all inhabitants in its territory no matter what their nationality, and was supposed to act as a supreme legal institution. The tragedy of the nation-state was that the people's rising national consciousness interfered with these functions. In the name of the will of the people the state was forced to recognize only "nationals" as citizens, to grant full civil and political rights only to those who belonged to the national community by right of origin and fact of

trained as they are to search for "the law" in statute books and case law, scarcely consider. Illegal alienage, however, is a contemporary phenomenon that seems to highlight that "law" and "justice" are not necessarily the same, that illegal alienage may be normatively more than simply about "law-breaking."

⁴ Critical theorists, who share an intellectual tradition with Arendt, have brought up this problem of unwittingly strengthening state institutions particularly with reference to feminist legal reform projects. Wendy Brown (1995), for example, has argued that appealing to the state for redress sometimes has the unfortunate side effect of strengthening the power of the state to construct identity and also to promote certain essentialist conceptions of gender. The question of whether appeals to state institutions have the undesirable side effect of strengthening the state becomes even more complicated in analyzing the politics of immigration and alienage, as the identity category at issue, namely alienage, is entirely a product of the state. Nonetheless, looking at immigration and alienage law through the warnings posed by critical theorists suggests that the "state" may not be as unitary or as powerful as critical theorists presume.

⁵ The "statuses" of which immigration and alienage law speak are arguably less illiberal than the feudal "statuses" of which Maine writes because a person's immigration and alienage status could change in a way that a person's status — as a laborer, aristocrat, etc. — could not. But there is more to "status" in immigration and alienage that meets the eye, as we shall see.

birth. This meant that the state was partly transformed from an instrument of law into an instrument of the nation (Arendt 1951: 123).

To be sure, the paradigmatically “tragic” nation-state that ultimately came to recognize “only ‘nationals’ as citizens” was, for Arendt, the German nation-state that had been engaging in the practice of denationalization at least since World War I. But the fundamental problematic that Arendt poignantly identified, namely the pivoting of the state “from an instrument of law” into an “instrument of the nation,” all “in the name of the will of the people” is, in essence, still the primary theoretical conundrum of immigration and alienage law in all modern liberal democratic nation-states.

Admittedly, it is not fully clear from the passage above, or from elsewhere in her writings, what exactly would be for Arendt a state that is “fully an ‘instrument of law.’” Nor is it clear what exactly Arendt meant by “law,” though as will be discussed below, “law,” in its most valuable form, for Arendt, likely had something to do with the establishment of an open public sphere of self-representation, speech, and relations between people. Nonetheless, bracketing these questions for the time being, the important point here is that even the United States, the modern political entity that had, for Arendt, come closest to achieving the “condition of nationless statehood,”⁶ struggled in her own time, and continues to struggle today, with the questions of when and how the principles of nationalism--or rather more specifically, the combined principles of “national sovereignty” and “democracy”--necessitate the exclusion and/or the differential treatment of non-citizens.

The above point about democracy is crucial. Although in recent years “nationalism” and its close cousin, “national sovereignty” have been met with suspicion among political theorists, “democracy” has remained generally unassailable. Arendt, however, pointed to the deployment of “democracy” as a powerful justification for the differential treatment of foreigners when she noted that the shifting of modern states from “instruments of law” to “instruments of nations” has happened “*in the name of the will of the people*” (emphasis added). Careful interrogations of explicit and implicit deployments of “democracy” as justification for the exclusions of foreigners in various ways remain elusive.⁷ But

⁶ The phrase is taken from Ronald Beiner’s essay, “Hannah Arendt as a Critic of Nationalism.” See Beiner (2003: 140).

⁷See Song (2009) for discussion of the ways in which defenders of citizenship in liberal democratic nation-states must better defend closed national borders vis-à-vis democratic theory. Contemporary democratic theory, Song argues, suggests, at least at first glance, the need for radical inclusion of non-citizens and those beyond a state’s territorial borders in so far as the state’s actions affects these (nominal) outsiders.

“democracy,” too must be looked at closely, in theory and on the ground, as both a mode of justification for the exclusion of foreigners, and as a mode of their inclusion.

In sum, Arendt’s theoretical apparatus is thus instructive for any analysis of immigration and alienage in the U.S., or any other contemporary liberal democracy, not because Arendt was necessarily a theorist of “open borders,” but precisely because Arendt was more generally critical of declarations of law in modern, large nation-states, where law seeks to declare borders, belonging, and rights in the name of citizens. And the utility of Arendt’s framework for analysis of contemporary immigration and alienage law goes well beyond Arendt’s point about the importance of citizenship for rights in the twentieth century, or her sympathetic concern for refugees (the two propositions for which scholars of immigration most frequently cite her) to the more fundamental attributes of her political thinking.

As this chapter will show, new insights into the law, socio-legality, and the politics of contemporary immigration and alienage emerge by way of looking through the lenses of: (1) Arendt’s critique of liberal conceptions of law as necessarily positive law and necessarily the final or ultimate word;⁸ (2) Arendt’s agonistic conception of politics (closely related to point 1 above), where a local politics of inter-subjective relations between people always escapes the total control of the state; and 3) Arendt’s concern about the encroachment of “social” (or economic) justifications and modes of thinking into the sphere of political life. This chapter explores (1) and (3) in detail in the context of U.S. immigration and alienage law. The next chapter, Chapter 3, explores the limits and possibilities of point (2) as it finds expression in some extant political theoretical writings on the rights of non-citizens. Chapter 5, which present studies of illegal alienage “in action” in Texas and California, takes a background conceptual cue from point (2), which suggests that the local street corner may be a most important site of immigration politics in so far as it involves the face to face reckonings of

⁸See Honig (1993) for a discussion of Arendt’s critique of how liberal political theory mistakenly views (and normatively values) “politics” as not self-representative contest in the public sphere, as Arendt would have had it, but rather as administration from on high. One does not have to accept fully Arendt’s critique in order to acknowledge that seeing politics as Arendt did, as everyday agonistic contest in the public sphere, opens up new, once occluded questions and sites of research into U.S. and transnational politics. Immigration and alienage law are arguably the realms of U.S. law that illustrate most poignantly that positive law does not have the last word, that there is a politics that escapes and/or exists in spite of the legislative best efforts of rule makers to assure that this politics does not exist. This concept of a kind of de facto politics and law fits nicely with the law and society movement’s inclination to look at “law in action.”

For writing in the field of political theory that appears to notice the theoretical significance of this “not quite under control” aspect of immigration and alienage law, see the work of Peter Nyers (2003).

immigrants, citizens and local officials, far away from the declarations of federal authorities.

While other scholars have highlighted Arendt's normative celebration of new forms of political speech and agonistic politics generally, the objective here is different. It is less normative and more analytical for the time being.⁹ The goal here is to examine what specifically about contemporary immigration jurisprudence and socio-legality Arendt's critiques of liberalism and her focus on agonistic politics make newly visible or audible. In other words, the basic claim here is that because Arendt put agonism at the center of her conception of politics, her work offers a particularly salient lens through which to apprehend anew the complexities of immigration and alienage law in the current moment in a large federal administrative state, where immigration and alienage politics seem increasingly to be emerging, or rather erupting, in seemingly unlikely places.¹⁰

The "local" as a site of immigration law and politics now officially concerns legal scholars, who debate primarily whether such subfederal eruptions of anti-immigrant ordinances are "laboratories of bigotry" that must be shut down (Wishnie 2001), or rather important sites of "immigrant integration" (Rodriguez 2008) that ought to be encouraged in the name of radically participatory democracy, without regard to whether xenophobic or xenophilic elements drive the engine of this would be "integration." This chapter brackets this now familiar debate for the time being to take an important step back to re-think the specific terms of illegal alienage in U.S. federal law.

⁹ For example, Jeremy Waldron (2000: 202) notes, "Commentators notice what is sometimes referred to as Arendt's *agonistic* conception of politics-- politics as a stage for action and distinction, a place where heroic deeds break through the barriers of the mundane, and live on in memory as something extraordinary and exhilarating . . . Alternatively, commentators notice that in her darker moments, Arendt puts almost all her faith in what one might call irregular or extra-political action-- the spontaneous councils of citizens that spring up at moments of crisis or revolt." Similarly, Honig (1993:2) notes that she looks to Nietzsche and Arendt to provide a view of politics that contrasts with those of liberal theorists Immanuel Kant, John Rawls, and Michael Sandel. Specifically, she characterizes the perspective offered by Nietzsche and Arendt as one in which "agonistic conflict is celebrated and the identification or conflation of politics with administration is changed with closing down the agon or with duplicitously participating in its contests while pretending to rise above them."

¹⁰ Cristina Beltran (2009) has recently written on the usefulness of Arendt's theories for understanding the nationwide demonstrations for immigrants' rights that occurred in 2006. Beltran argues that Arendt's non-consequentialist view of politics is particularly useful for understanding the marches. The analysis in this chapter focuses rather on Arendt's critique of nation-state positive law, and as such, her critique of citizenship as the right to have rights. Further, this chapter and this dissertation draw more broadly on Arendt, to understand not just the immigrant protests of 2006, but also rather the implications of law's inability to fully contain or determine migration to the U.S.

The next section turns to the terms of U.S. federal law, which, in an era of nation-states and of positive law, must necessarily declare the grounds of the rights of citizens and foreigners alike.

When Hannah Arendt Goes to the Supreme Court: On Re-historicizing Citizenship as “the Right to Have Rights”

In 1958, in the case of *Perez v. Brownell*,¹¹ then Chief Justice Earl Warren objected strenuously to the Supreme Court’s upholding of a Congressional statute that stripped Clemente Martinez Perez of his U.S. citizenship. Writing in dissent, Warren argued that Congress was acting beyond the rightful scope of its authority when it posited in 1940 that a native-born citizen of the U.S. would necessarily forfeit his U.S. citizenship if he were to vote in a foreign election.¹² “Citizenship,” Warren proclaimed, “is man’s basic right for it is nothing less than the right to have rights.”¹³

Clemente Martinez Perez’s life story, which gave Warren the occasion for his famous pronouncement on citizenship, was a narrative that exemplified the conundrum of running into an incrementally constructed and equally incrementally legalized U.S./ Mexico border. As such, Clemente Martinez Perez’s case is arguably the first modern illegal alienage case, though not legally framed as such.¹⁴ Perez was born in El Paso, Texas in 1909, a time when unregulated movement across the U.S. / Mexico border was commonplace. He lived with his parents in Texas until age nine or ten, at which point he moved to Mexico with his parents. In 1928, he learned that he had been born in the United States.¹⁵

¹¹ *Perez v. Brownell*, 356 U.S. 44 (1958).

¹² Specifically, at issue in the case was Section 401 (e) of the Nationality Act of 1940, 54 Stat.1137. Lower courts had ruled that Perez lost his U.S. citizenship for the additional reason, stipulated in Section 401 (j) of the same Act, of having remained “outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States.” The Supreme Court in *Perez* declined to rule on the constitutionality of the latter provision.

¹³ *Perez v. Brownell*, 356 U.S. at 64 (C.J. Warren, dissenting).

¹⁴ Ngai (2004: 127-128) makes a similar point about Perez, but her emphasis is on Perez as an exemplar of “the heterogeneous and transnational character of the Mexican/ American political subject.” My interest here is in the language through which the *Perez* Court conceived of possible relationships between nation-state sovereignty and Perez’s would be “citizenship” rights, given the facts that the Court had before it.

¹⁵ *Perez v. Brownell*, Brief for the Petitioner, 3.

Meanwhile, in 1924, the federal government passed a law that required passports and visas for entrance to the United States,¹⁶ and in 1929, it began using its discretionary administrative powers to deny these newly necessary visas to Mexicans on grounds of putative illiteracy and likelihood to become a public charge (Ngai 2004: 54-55). In 1943, Perez entered the United States as a Mexican contract laborer, and he returned to Mexico in 1944. In 1947, he applied for admission to the United States as a U.S. citizen. The U.S. Immigration Service denied him entry on the grounds of his own statements that he had voted in a Mexican election and failed to register for the draft in the U.S. during World War II, thereby expatriating himself under the Nationality Act of 1940. In 1952, Perez entered the United States again as a contract laborer, and in 1953, he petitioned a federal district court in San Francisco for a declaratory judgment stating that he was in fact a U.S. citizen.¹⁷ Using the word “nationality” with more ease than the word “citizenship,” the district court ruled that Perez “lost his said nationality of the United States of America under the Nationality Act of 1940.”¹⁸

Perez’s attorneys argued that expatriation could only result from a voluntary relinquishment of citizenship on the part of a citizen, and that Congress may not create a set of other incidentally “expatriating acts.”¹⁹ Nonetheless, a majority of the Supreme Court could not accept this argument. The Court affirmed that Congress was acting within the rightful scope of its power in creating such “expatriating acts,” and that Perez could indeed have his U.S. citizenship so stripped.

The *Perez* majority reasoned that although the Constitution did not specifically grant to Congress the power to enact legislation for purpose of governing “foreign affairs,” Congress must nonetheless have such a power as an incident of the U.S.’s nation-state sovereignty (57). Further, although the Fourteenth Amendment stipulated that “All persons born or naturalized in the United States. . . are citizens of the United States,” no language in the Amendment, noted the Court, prevented Congress from taking this citizenship away (58). And even further, because voting in a foreign election was an act “pregnant with the possibility of embroiling this country in disputes with other

¹⁶ See Act of May 25, 1924, Sec 2(a).

¹⁷ *Perez v. Brownell*, Brief for the Petitioner, 3-4.

¹⁸ *Perez v. Brownell*, Transcript of Record, 11-12. In its very last sentence, the district court opinion notes, “. . . plaintiff is not a national or a citizen of the United States of America.” Warren notes in his dissent that in this case, it is disingenuous to speak in terms of loss of nationality only, as if loss of nationality is not loss of citizenship in this case. See *Perez v. Brownell*, 356 U.S. at 63 (C.J. Warren, dissenting). While “nationality” may have been a broader term, referring to those who were under U.S. rule despite not being citizens (as, for example, the citizens of contemporary Puerto Rico or formerly, the citizens of the Philippines), Warren’s statement reflected the then already apparent disparity between the “rights of nationality” and the “rights of citizenship.”

¹⁹ *Perez v. Brownell*, Brief for the Petitioner, 4-6.

nations,” (60) Congress must necessarily be allowed to strip the citizenship of one who could so potentially embarrass the United States. As such, the Court, painting the image of a strikingly insecure nation-state, reasoned that Clemente Martinez Perez’s lost birthright U.S. citizenship must necessarily remain lost.

A mere nine years later, in *Afroyim v. Rusk*, the Court concluded that it had been totally wrong in *Perez*.²⁰ *Afroyim* presented the Court with a Polish-born, naturalized U.S. citizen who voted in an Israeli election in 1951 and thus ostensibly lost his U.S. citizenship at the altar of the same federal statute that had stripped even the less intentioned, ostensibly more hapless Perez of his birthright U.S. citizenship. But for the *Afroyim* Court, “inherent nation-state sovereignty” no longer entailed the power to take away U.S. citizenship from those who would not willingly relinquish it, as it had for the *Perez* Court just nine years prior.

In 1967, in *Afroyim v. Rusk*, the Court declared that “In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship” (257). For the *Afroyim* Court, the Fourteenth Amendment’s silence on the issue of citizenship-stripping meant not that Congress could engage in the practice if it wished, as the *Perez* Court had reasoned, but rather precisely that Congress could not. For the *Afroyim* Court, the Fourteenth Amendment’s words, “All persons born or naturalized in the United States. . . are citizens of the United States,” contained “no indication of a fleeting citizenship, good at the moment it is acquired but subject to destruction by the Government at any time” (262). As such, a once permissive silence in the Fourteenth Amendment became a prohibitive silence. And because the *Afroyim* Court formulated “sovereignty” to rest now upon the shoulders of “the people,” the government could not reduce the logically prior “people” by stripping some, or perhaps potentially even all among them, of their citizenship. U.S. citizenship, it seemed, was finally secure. But it was secure because the Supreme Court finally declared it to be so in an era when such declaration had become necessary.

Perez v. Brownell, thus relegated to the nefarious category of fully overturned U.S. Supreme Court case law, has nonetheless continued to be cited in legal scholarship on account of Earl Warren’s proclamation and protest that “Citizenship is man’s basic right for it is nothing less than the right to have rights.”²¹ However, as Warren himself noted later in the passage, as a technical matter of U.S. law at the time, citizenship was not in fact the only basis or ground for rights. Aliens did enjoy some rights, despite always being subject to possible deportation. But for Warren, such technicalities aside, the centrality of nation-state citizenship to rights appeared unquestionable by 1958.

²⁰ *Afroyim v. Rusk*, 387 U.S. 253 (1967).

²¹ See, for example, Aleinikoff (1986: Note 42).

As others have noted, Warren echoed Hannah Arendt, though he did not directly cite her.²² In 1951, in *The Origins of Totalitarianism* Arendt had written:

We became aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organized community, only when millions of people emerged who have lost and could not regain these rights because of the new global political situation (296-7).

The "new global political situation" to which Arendt was referring was the post World War I era, during which new nation-states were carved out of Eastern European soil. Ethnic or national minorities within these new states, wrought from the remnants of the Austro-Hungarian Empire, suffered discrimination and citizenship stripping.

But the "new political situation" of the early twentieth century only made excruciatingly visible something that, for Arendt, had begun with the French Revolution. The French Declaration of the Rights of Man marked the moment in which "man, and not God's command or the customs of history," became "the source of Law." (290). Ironically, as quickly as man emerged as the source and speaker of law unto himself with certain so-called inalienable rights, "he disappeared again into a member of a people" (291). Arendt thus eulogized the "rights of man" as simply man. She illuminated the fact that man, by the end of World War I, had to have his belonging confirmed or rather declared by the positive law of a nation-state in order to be assured of any rights at all, despite, or rather perhaps because of his emergence as a lawgiver during the French Revolution. For Arendt, the nation-state and its monopolistic ability to declare the rights of citizenship, and consequently, also of alienage, had come to efface not only man, as the ostensibly liberated source of law, but also the loss of other important forms of political belonging. These occluded forms of political belonging were engendered, organized, and made by man's own speech and actions in an open public sphere of actors rather than by prior or posterior declarations of legislatures or judges.²³

²² The only work published after 1951 which Warren cites to support this proposition is a comment in the *Yale Law Journal*, 64 Yale L.J. 1164 (1955). This comment does not cite Arendt. Aleinikoff (1986) appears to be the first U.S. legal scholar to remark upon this similarity between the words of Arendt and Warren.

²³ Arendt privileges speech and political action over work. The view of citizenship that owes to Arendt and is introduced in this chapter is likely what others (e.g. Bosniak (2006)) dismiss as "high citizenship." But it does not have to be necessarily thought of as "high," or "anachronistic," but more practice or action-based, and thus less adequately delimited by positive law. Again, positive law presents a particular problem of justice in matters of alienage

As such, despite the similarity between Warren's words and Arendt's, and despite legal scholars' quickness to equate their statements, Warren and Arendt made very different points in 1958 and 1951 respectively. While Warren wrote declaratively "Citizenship is man's basic right. . .," Arendt wrote more generally that after World War I, "We became aware of the existence of a right to have rights. . ." Arendt strikingly did not use the word "citizenship," suggesting that this problem of a "right to have rights" is not limited to citizenship. She historicized and lamented the emergence of this first or enabling right, whatever may be its foundation or name. Warren, in contrast, dehistoricized and naturalized nation-state citizenship.

Perhaps because they have come to see Arendt's text through Warren's famous dissent, or perhaps because they are immediately concerned with arguing in a normative tenor against particular deprivations of citizenship, U.S. legal and socio-legal commentators have generally missed Arendt's fundamentally historicizing critique of nation-state citizenship as "the right to have rights," and have themselves arguably unwittingly reified national citizenship in the process.

Most importantly, in equating Warren's no doubt contextually "progressive" position with that of Arendt, legal commentators have overlooked Arendt's more general critique of the positive laws of political membership. Under the lens of Arendt's critique not of citizenship or statelessness per se, but rather of the modern nation-state law that necessitated citizenship and made it so crucial in the twentieth century, *Perez v. Brownell* and *Afroyim v. Rusk* appear as fundamentally similar artifacts rather than the former nefarious and the latter magnanimous. Under one legal theory of sovereignty and the Fourteenth Amendment, citizenship could be taken away for a particular act. Nine years later, under another judicial view of the same set of words, citizenship could not

because it evaluates persons not primarily on the basis of actions, but rather on the basis of status as non-citizens.

As a matter of legal history, which, by showing law's past also opens up possibilities for its future, the mixed jury, where community was based on language, and law and community were conceived to inhere primarily in language and custom, presents a less positivist conception of both law and citizenship (Constable 1994). Because we in the present are so accustomed to thinking of citizenship as necessarily a status determined by closed borders and the positive law that makes these borders closed, thinking "outside these borders," as it were, appears difficult.

Thinking in terms of "transnationalism" or "cosmopolitanism," two words that invoke overcoming, surpassing, or transcending still wholly constituted nation-states with likely "transnational" or "cosmopolitan" forms of positive law is not as oppositional as may first meet the eye (c.f. Honig 2001). The goal here is to suggest another way of thinking, namely that there are limits to the power of positive law in matters of immigration, alienage, and national politics in general, and that these limits have already opened up new possibilities for present and future law.

be taken away for this very act. As the *Perez* and *Afroyim* cases taken together demonstrate, in the post war era, judge-made nation-state law became ultimately necessary to determine the security and meaning, ironically, of even citizenship, ostensibly the primary bulwark against the exercise of nation-state sovereignty, whatever it may be. In terms of Arendt's critique, that the courts had to declare that Congress could not strip one's U.S. citizenship against his will suggested not necessarily only progressive legal "development," or the "securing" of important rights for historically subordinated persons, but also that some prior certainty about citizenship had been lost.

From the Dilemmas of Citizenship Back to the Dilemmas of Alienage

The prior discussion has argued that the emergence of a need for a judge-made law to prevent U.S. citizenship stripping in the post World War II era reveals how, even in a liberal democratic country that prided itself on adherence to principles of freedom and limited government, questions of citizenship and nation-state sovereignty had, by 1958, become profoundly unstable. In moving from a discussion of the terms of a U.S. nation-state law of "citizenship" to the U.S. nation-state law of "alienage," new questions emerge: If, as a matter of law, U.S. citizenship ultimately became secure from involuntary withdrawal only because the Fourteenth Amendment conceivably nullified Congress's implied power to regulate foreign affairs on the backs of citizens, were it not for whom Congress itself would not exist, then what are the terms of "alienage," where aliens are precisely not part of "the people?" This section addresses these questions and shows how alienage cases reveal alternatives to "nation-state sovereignty" in a way that the citizenship cases discussed above did not and needed not.

The U.S. nation-state law of alienage began primarily in the face of Chinese immigration to the U.S. that threatened the racially limited conception of U.S. nationhood in the late nineteenth century. The nineteenth century terms of the U.S. law of alienage reveal the gradual consolidation of nominally unfettered Congressional authority to limit entry into the territory. Where this sovereign authority is limited, it is not limited through a complete reformulation of sovereignty, as in the citizenship cases discussed above, but rather by way of invocation of the "territorial jurisdiction" of the federal courts. While scholars of U.S. immigration and alienage law generally see these two lines of cases as oppositional, with the former as generally "anti-immigrant" and the latter as "pro-immigrant," considering the two lines of cases anew from the vantage point of Arendt's critique of the law of nation-states suggests their profound similarity. Crucially, both lines of cases have the effect of constituting and buttressing national territorial consciousness and the power of a "national" state through declarations of law. While the former trades in inherent authority, or "nation-

state sovereignty," to delimit exit and entry at the national border, the latter applies law throughout a national territory. Both constitute the nation through declarations of law, the former through the imagery of borders, and the latter with reference to a uniformity of law across the territorial inside. While legal scholars interpret the latter cases in particular to stand for the proposition that there exists a norm of "universal personhood" in U.S. Constitutional law, they overstate the extent to which personhood alone is, or rather can now be spoken of, as a viable ground for rights. The discussion below demonstrates this point.

In immigration and alienage law, the fact of nation-state sovereignty is itself constantly constructed and reconstructed through the very positing of the immigration and alienage law it ostensibly merely grounds. The act of positing the law draws the boundaries of the political community, whose seemingly already existing sovereignty as a political community ostensibly grounded the law that was just posited. This sovereignty, like the people of "we the people" is at once ostensibly the source of the emanating judgment, and yet also a product of this judgment.

Jacques Derrida (1986: 10) makes a similar point about the performative aspects of certain similarly declarative legal moments in his essay on the U.S. Declaration of Independence. Derrida notes, "The 'we' of the declaration speaks 'in the name of the people.' But this people do not yet exist. They do *not* exist as an entity, it does *not* exist, before this declaration, not *as such*... The signature invents the signer."

Unlike the founding of the American republic, the performative aspects of immigration and alienage law have not to do with the initial constitution of a newly wrought and suddenly speaking, and potentially equal group of citizens, as in "we the people." Rather, in modern immigration law, what is at stake is the construction of an already existing community's "sovereignty" against a changing but always necessarily outside set of foreigners. In modern alienage law, at stake are the rights that non-citizens may or may not share with citizens, coupled with exposition of the grounds for the extension or non-extension of such rights. The performative dynamic that Derrida describes thus repeats itself again and again in a unique way in immigration and alienage law. The "sovereignty" that justifies territorial exclusion and the reserving of certain rights for citizens is at once ostensibly the source of the emanating judgments and also a product of those very judgments. This construction implies a particularly positivist conception of law, as the analysis of the deployment of the concept of sovereignty in foundational U.S. immigration and alienage law reveals below.

Defending Congressional statutes passed in 1882 and 1888 that severely restricted the immigration of Chinese nationals, the U.S. Supreme Court declared in 1889 in *Chae Chan Ping v. U.S.*, a case referred to by one recent commentator as "the granddaddy of all immigration cases" (Legomsky 2002: 13):

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as part of the sovereign powers delegated by the Constitution, the right to its exercise at any time when in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of anyone.²⁴

The *Chae Chang Ping* Court's language, delivered in the face of silence on the part of the U.S. Constitution as to Congress's authority to regulate immigration, depended on the notion of intrinsic nation-state sovereignty to overcome the lack of an enumerated immigration power in the U.S. Constitution. The "judgment of the government" as to the "interests of the country" is the sole relevant consideration where the foreigner is a subject of law and where exercise of nation-state sovereignty against the foreigner is at issue. The case provided the view that law and also justice for the foreigner are whatever Congress declares them to be. In this most positive of laws, there is transparently no necessary link at all between law and justice; the "validity" of law inheres in law's source rather than its content.

A subsequent 1892 case, *Ekiu v. the United States* extended Congress's broad power to speak the justice of foreigners in whatever a manner it saw fit to the executive branch. *Ekiu* posited unabashedly, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law."²⁵ And rounding out the foundational inquiry into the relationship between nation-state sovereignty and alienage, the 1893 case *Fong Yue Ting* provided that the power to deport (not just the power to exclude at the border) was also an inalienable right of "sovereign" nations, and one that may be exercised entirely through administrative officers.²⁶

"Sovereignty" is thus a most prevalent, if shadowy, figure in U.S. immigration and alienage law. But as legal commentators repeatedly and sometimes triumphantly point out, the bodies of immigration law and alienage law in the U.S. evince not just one, but rather two tropes – "sovereignty" as rule, and "territoriality" or "ethical territoriality" as its exception. Conventionally and often joyously opposed to the three cases discussed above is the 1896 case *Wong Wing v. United States*, nominally the first case about "illegal alienage" to reach the U.S. Supreme Court.²⁷

In 1892, four men charged with being "Chinese persons unlawfully within the United States" were sentenced by a commissioner in a federal court in

²⁴ *Chae Chang Ping v. U.S.*, 130 U.S. 581, 583 (1889).

²⁵ *Ekiu v. U.S.*, 142 U.S. 651 (1892).

²⁶ *Fong Yue Ting v. U.S.*, 149 U.S. 698 (1893).

²⁷ *Wong Wing v. U.S.*, 163 U.S. 228 (1896).

Michigan to sixty days of hard labor and then deportation to China, pursuant to an 1892 Congressional statute. Counsel for the Chinese nationals argued that the provision of the statute that prescribed hard labor prior to deportation inflicted “an infamous punishment” and thus conflicted with the Fifth and Sixth Amendments of the Bill of Rights, which together declared “that no person shall be held to answer for a capital or otherwise infamous crime unless on the presentment or indictment of a grand jury, and that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. . .” (234).

In declaring the portion of the statute that imposed hard labor prior to deportation to be unconstitutional, the Court spoke of infelicitous jurisdiction rather than of any universal, non-citizen personhood. According to the *Wong Wing* Court, “To declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial” (237). As such, according to the Court, the commissioner who sentenced the Chinese men to hard labor acted not unjustly, but rather “without jurisdiction.” (238). In naming the relevant infelicity to be one of an improper declaration rather than injustice, the Court revealed the centrality of a law that was characterized by its commonality to the national territory, and indeed, constitutive of this territory. The Court also revealed little concern as to the content of justice in this law. In other words, the Court did not appear to be categorically against the imposition of hard labor prior to deportation. It rather insisted that such a penalty would be a criminal penalty and as such, that guilt must be established by a judicial trial.

In coming to its conclusion, the *Wong Wing* Court drew heavily upon an 1886 case, *Yick Wo v. Hopkins*, in which the Supreme Court had held that San Francisco could not use a facially neutral law to curtail the businesses of legally resident, Chinese laundry operators.²⁸ As the *Wong Wing* Court noted, *Yick Wo* had indeed posited that, “The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: ‘Nor shall any State 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 law.’ These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or nationality” (238). For the *Wong Wing* Court, the Fourteenth Amendment’s deployment of the word “person,” and crucially, the *Yick Wo* Court’s seeming insistence that the “within its jurisdiction” applied both to the Due Process Clause of the Fourteenth Amendment, where the prepositional phrase does not appear, and to the Equal Protection Clause, where the phrase does appear, suggested that the Fifth and Sixth Amendments, which spoke of a “person” and “the accused” respectively,

²⁸ *Yick Wo v. Hopkins*, 118 U.S. 356

must also apply to non-citizens as well as to citizens. For the *Wong Wing* Court, all hypothetical persons and all accused persons that the Fifth and Sixth Amendments had spoken of had become conceivable only within a territorial jurisdiction.

Scholarly debate continues to this day as to whether *Yick Wo* was indeed “pro Chinese,” “pro alien,” or rather more simply and more crudely “pro laundry” in an era in which the federal government strongly disfavored the meddling of states and localities in any kind of profit producing enterprise.²⁹ While this discussion as to why *Yick Wo* came out the way it did is likely interminable, *Yick Wo*’s terms nonetheless crucially reveal an inextricable link between “personhood” and “territorial jurisdiction” in U.S. law by the end of the nineteenth century. In the Fourteenth Amendment and in the Fifth and Sixth Amendments, in *Yick Wo*, and in the recitation of *Yick Wo* found in *Wong Wing*, the words “person” or “accused” appear in places that one might expect to find the word “citizen.”³⁰ And the phrase “within the territorial jurisdiction” appears after the word “person” in the section of the Fourteenth Amendment that promises “equal protection of the laws,” if not in the Fifth and Sixth Amendments. But “jurisdiction,” or rather the speech of the law of the (territorial) community, always already preceded “personhood” (here the normative significance of being merely a person) in an age when communities were presumed to be made and remade only by nation-state positive law.

The 1982 decision *Plyler v. Doe* is the final case in the set of cases that legal scholars conventionally invoke to suggest “territoriality” as an alternative normative register to sovereignty and Congressional plenary power in modern U.S. immigration and alienage jurisprudence.³¹ As a decidedly late twentieth-century case, *Plyler* reveals “social” concerns and terms not in evidence in the late nineteenth-century *Yick Wo* and *Wong Wing* cases, as the subsequent subsection of this chapter will discuss in more detail. For the present discussion on jurisdiction, *Plyler* marks the site of the final answer to the question of whether jurisdiction could be anything other than “territorial,” or put slightly differently, whether there could be any personhood outside of the positive law of

²⁹ See, for example, Chin (2008).

³⁰ The historical reasons for this, though interesting on their own terms, is beyond the scope of the analysis here. Briefly, “citizenship” was ambiguous both during the founding of the U.S. (the period in which the Bill of Rights were crafted) and also after the emancipation of slaves after the Civil War (the period when the Fourteenth Amendment was crafted). During the founding period, the ambiguity of citizenship extended to the citizenship of the once British subjects who now together constituted “we the people.” The extent to which once British subjects could decide to no longer be British subjects in favor of being U.S. citizens was a most inconvenient issue. See Cohen (2007) for a discussion of this problem.

³¹ *Plyler v. Doe*, 457 U.S. 202 (1982).

the national territory. Unsurprisingly, the answer in *Plyler* was a resounding “no.”

In *Plyler*, the Supreme Court found itself addressing the constitutionality of a 1975 Texas statute which withheld from school districts state funds for the education of children not legally authorized to be in the United States. Further, the statute authorized school districts to deny illegal alien children enrollment in schools (206). Ultimately, in response to a class action filed by students of Mexican origin who could not prove legal immigration status, the Supreme Court held that the Texas statute violated the Equal Protection Clause of the Fourteenth Amendment.

More important, however, for the present discussion, is the *Plyler* Court’s commentary on the question of jurisdiction. The State of Texas argued that there could be no equal protection infirmity at hand because the Equal Protection Clause of the Fourteenth Amendment, unlike the Due Process Clause of the same, contained the “within its jurisdiction” phrase immediately after the word “person.” The State of Texas argued that because they were not lawfully admitted, illegal aliens were not within Texas’s jurisdiction and therefore could not be beneficiaries of whatever it was that was in this matter “the equal protection of the laws” (211).

The text of the *Plyler* case gives no indication that the State of Texas suggested that the illegal aliens within its borders were subject to a different kind of law, if not its territorial jurisdiction. In its brief to the court, however, Texas argued, “If an illegal entrant is not ‘within the United States,’ he is also not a person within a state’s jurisdiction.³²” But the State of Texas’s argument fell on ears deaf to such an argument at least since the late nineteenth century. The *Plyler* Court’s preferred imagery on the issue of jurisdiction was thus one of federal positive law totally infiltrating a territory, regardless of whether aliens had been blessed or anointed by law during admission. The Court noted in summary, “Use of the phrase ‘within its jurisdiction’ thus does not detract from, but rather confirms, the understanding that the protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State’s territory” (215). The subject of the predicate “reaches into every corner of a State’s territory” is unclear. Presumably, “protection” is that which “reaches into every corner of a State’s territory,” but in order for “protection” to extend, so too much the positive law out of which “protection” emerges. Ultimately, the image is profoundly one of the complete territorial reach of positive law and thus the complete construction and rule of the territory. There exists, in the imagery of *Plyler*, no conceptual outside to the territorial reach of federal law.

³² 1980 *U.S. Briefs* 1538, 24.

In sum, the aim here has not been to call into question the legal correctness, importance, or even the liberality of these three landmark U.S. Supreme Court cases. Rather, it has been to show these cases in lights different from those in which they are usually presented. Specifically, the aim here has been to show that what may be practical alternatives in alienage law, namely “sovereignty” and “territoriality,” are alike in at least one important sense: they together presume and rely exclusively upon an understanding of law as only territorial positive law. As the next section will discuss, this territorial conception of both law and justice bears particular tension in contemporary debates, even as it is a significant and important ground for the rights of illegal aliens in the U.S.

The Limits of ‘Ethical Territoriality’³³

For legal scholars of U.S. immigration and alienage law who are concerned with advocating for the rights of non-citizens, as a practical matter, “sovereignty” is generally the problem, and “territoriality” has generally become the preferred available solution, given the case law discussed above. They have considered and critiqued the strong trope of nation-state sovereignty found in these bodies of law, particularly in light of the failure of the U.S. Supreme Court to overturn the foundational statement of this sovereignty found in *Chae Chan Ping*. They have suggested that “territoriality” holds the antidote to sovereignty.

For example, T. Alexander Aleinikoff (2002: 183) has argued in a normative tenor that “both sovereignty and membership need to be reconceptualized in less rigid terms if we are to establish a political regime. . . that justly rules over the territory and inhabitants of the United States.” For Aleinikoff, a certain strong conception of the sovereignty of the nation-state vis-à-vis aliens appears to be the anachronistic obstacle obstructing the path to more legal rights for aliens on U.S. territory. Aleinikoff thus appears to suggest the replacement of “national sovereignty” with “national territory” as a more desirable normative engine for immigration and alienage law.

Linda Bosniak has pointed out that alienage law, as distinct from immigration law, does offer relatively more rights for the foreigner because “alienage as a legal category lies in the world of social relationships among territorially present persons” (Bosniak 2006: 38). Bosniak has further attended to the tension between the lack of relief for a foreigner at the border in the *Chae Chan Ping* case, and the more foreigner friendly holdings of *Yick Wo*, *Wong Wing*, and *Plyler v. Doe*, where the rights of territorially present aliens were at issue.

³³ Again, the term “ethical territoriality” is taken from Bosniak (2007: 389-90). She defines the term as “the conviction that rights and recognition should extend to all persons who are territorially present within the geographical space of a nation-state by virtue of that presence.”

Bosniak argues that taken together, these cases demonstrate “a separate sphere of constitutional rights and obligations available to all persons who are present within the United States territory, or some part thereof” (Bosniak 2006: 55).

Both Aleinikoff and Bosniak neglect the significance of the “territorial jurisdiction” that is a necessary precondition of the limited territorial rights of aliens. While “national sovereignty” and “territorial personhood” may appear to Bosniak and to Aleinikoff as fundamentally oppositional, with the latter as the best possible articulation of a ground for the generous treatment of territorially present aliens, from the point of view of Arendt’s critique of the positive laws of political community, as discussed above, national sovereignty and national territorial personhood are two sides of the same coin. Both reify national territory, national borders, and crucially the positive law that constructs this territory and these borders. Both say little about the actions of non-citizens.

Further, recognizable “universal personhood” would exist only within the territory, suggesting that legally relevant “personhood” somehow does not exist beyond the territory. In other words, grounding issues of justice and the foreigner primarily in the language of national territory suggests that those outside U.S. territory would never have moral claims to U.S. residence or citizenship, and that those inside the territory would have greater moral claims merely by virtue of their presence within the territory, not on account of their actions as persons. While these corollaries may be acceptable to some proponents of the “territorial personhood,” it does not follow why a “person” on the territorial inside is morally any different than a “person” on the territorial outside, if mere personhood is truly the only ground for rights (c.f. Bosniak 2007). As the above discussion has argued, the U.S. legal decisions that proffer the oxymoronic “universal territorial personhood” view may be seen rather to entail the construction and strengthening of a territorial state through the uniform application of territorial jurisdiction (*Yick Wo* and *Wong Wing*) and/or to manage, in addition, the concern about economic or other inherently social aspirations across the territory (*Plyler*).

More recently, Linda Bosniak has turned a critical eye toward the concept of “ethical territoriality” in U.S. alienage law. She has argued that “[ethical territoriality] promises more than it delivers. The rights and recognition it actually demands for territorially present noncitizens are limited” (Bosniak 2007: 409). To overcome the limits of territoriality as a ground for the rights of non-citizens, Bosniak suggests the need for a “normative political theory that attends to transnational connections.” Bosniak quotes hopefully and suggestively from a 2006 work of political theorist Iris Marion Young, which states that “Claims that obligations of justice extend globally for some issues, then, are grounded in the fact that some structural social processes connect people across the world without regard to political boundaries.” Bosniak herself adds, “In the meanwhile, those of us working on behalf of immigrants find ourselves facing a

lag-time between our social reality and our prevailing political concepts” (Bosniak 2007: 410). Young and Bosniak thus appear to offer transnational “social processes” and “social reality” as possible antidotes to even “territoriality” or “ethical territoriality,” though Bosniak concedes that the salience of “social processes” as a justificatory ground for immediate legal advocacy on behalf of immigrants is likely limited, presumably on account of the considerable stronghold of the “sovereignty” v. “territoriality” binary in U.S. law.

Nevertheless, an important new question emerges as to possible relationships between the concepts of “territoriality” and “social processes and reality” in law. Can recourse to “social process and reality” transcend the difficulties and limitations posed by “ethical territoriality” as a ground for the rights of foreigners? Young and Bosniak’s ostensible struggle to articulate how it is that transnational “social process” could be something more than “merely social” or even “merely international” in the face of the still powerful “nation-state sovereignty” is significant. This chapter next addresses the emergence of a consciousness about national economic productivity in the twentieth century U.S. positive law of illegal alienage.

On the Implications of the “Rise of the Social” in U.S. Immigration and Alienage Law

While the sections above have sought to demonstrate the implications of Arendt’s critique of positive law for the U.S. laws of citizenship, alienage, and illegal alienage, this final section takes as its point of departure something that, as noted above, evinces itself in the course of juxtaposing *Plyler* with the earlier nineteenth century cases that also confronted legal alienage and illegal alienage. Though it held that illegal alien children were not a suspect class requiring special constitutional protection, nor that education was a fundamental right, the Court in *Plyler* nonetheless also held that the State of Texas could not deny public primary and secondary school education to illegal alien children. In doing so, the *Plyler* Court spoke of “the observation of social scientists” that public schools “inculcate fundamental values necessary to the maintenance of a democratic political system” (221). In addition, the Court noted that, “education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all” (221). The *Plyler* Court thus deployed terms of sociality and future economic productivity of a population in a way that the *Yick Wo* and *Wong Wing* Courts did not.³⁴ The text of *Plyler* thus reveals a “rise of the social” where

³⁴ Constable (1993) takes up these very passages and analyzes them with reference to Foucault’s conception of the interplay of sovereignty and governmentality in modern law. Drawing on Foucault, Constable makes a similar point to the one made here with reference to Arendt. A

illegal alienage is at issue. By turning to a "social" justification, the *Plyler* Court was able to grant educational rights to the children of illegal aliens at the same as it reaffirmed that education was not a "fundamental right" and held that the children of illegal aliens were not a "suspect class" deserving of special protection. The "social" in *Plyler* may be "pro alien" in its ultimate effect. But with what significant limits or unexpected consequences? The *Plyler* case suggests that a turn to the "social" in alienage law effaces political recognition at law. Despite employing some language about "fundamental values" and a "democratic political system" the *Plyler* Court ultimately characterizes the children of illegal aliens as potential resources, rather than as an unambiguously politically deserving class.

Here again, the work of Arendt is instructive. Though her ostensible contempt for the "social" has offended many of her readers (Canovan 1998: xiii) and has no doubt contributed to her contemporary characterization as a theorist of now anachronistic "high" citizenship, a major preoccupation of Arendt's work was the transformation of political society into an increasingly producing and consuming one, particularly in the twentieth century. If, for Marx, this was part of an inevitable historical transformation, for Arendt, the process was much more contingent. While she may have scoffed at the "economic" and "social" as modes of government in light of her celebration of individual deliberation, speech, and action in an "autonomous political sphere," whatever that may be exactly, Arendt's identification of the rise of social concerns in politics is borne out in the language of the twentieth-century U.S. law of political community and indeed in contemporary normative scholarly work on immigration and alienage. At its core, Arendt's critique of the "social," found primarily in *The Human Condition*, had primarily to do with the presumption of lack of political will and political recognition that the "social" as a ground for decision-making often brings with it. As such, Arendt's concern was with a "social" that effaces the "political," or rather depoliticizes the political and dehumanizes political subjects, capable of unique thought and actions, into instruments of production, to be merely governed for their productivity (Arendt 1958: 22-73).

As Hanna Pitkin has noted, the concept of "the social" is a pervasive and yet profoundly unresolved one in the corpus of Arendt's writings (Pitkin 1998). Yet Arendt's concern with the "rise of the social," whatever its ultimate role in Arendt's theorizing, is strikingly borne out both in the *Plyler* Court's concern about the future economic productivity of a population and in the general characterization of illegal aliens as primarily "merely economic migrants."

distinction, however, between the discussion of *Plyler* here and Constable's discussion of the same case is that the analysis here seeks to juxtapose "territoriality" and "the social" as alternate grounds for the rights of illegal aliens.

Whatever its limitations, Arendt's critique of "the social" suggests the significance of any conceptual opposition of the "pure politics" of "national sovereignty" and "purely political persecution" on the one hand, against the "mere economics" of illegal alienage on the other hand. As the refugee, a figure prominent in Arendt's mind, has become the paradigmatic figure of recognizable political injury in twentieth-century U.S. law and international law, the illegal alien has been constructed in opposition as a "merely economic" migrant. The illegal alien is recognized by the state only because of territorial presence, not on account of anything specific having to do with her "personhood," experiences, thoughts, or actions. As such, the illegal alien is (asymmetrically) a potentially productive resource at best, but also always, already a violator of law and the state's sovereignty, which ultimately undergirds the law of territory. Consequently, the *Plyler* Court extended the privilege of public education to the children of illegal aliens as a matter of policy, not of law (c.f. Constable (1993)). Where "law" recognizes the claimant as deserving political actor vis-à-vis the sovereignty of the state, "policy" recognizes only the state and its prerogatives.

The ultimate category of "remainders" or rather "persons not suitably dealt with" in U.S. immigration and alienage law thus shifted significantly from refugees and stateless persons to illegal aliens, between 1951 when Arendt published *Origins of Totalitarianism*, and 1982, when the U.S. Supreme Court published its *Plyler* opinion. In 1951, when Arendt published *Origins of Totalitarianism*, there were one million officially recognized stateless peoples in addition to another ten million *de facto* stateless peoples and refugees (279). With dictatorships as well as liberal democracies such as the United States then engaging in denationalization and denaturalization, and with nation-state sovereignty securely and intractably in place in the realm of international politics, Arendt predicted that the number of stateless peoples and refugees would only rise.

In its 2005 Statistical Report, the Office of the United Nations High Commissioner on Refugees reported that "the total population of concern" to it was then 21.5 million. This included: 8.7 million refugees; 773,000 asylum seekers; 1.1 million refugees who returned to their countries of origin; 6.6 million persons displaced by war or other disasters within their home countries, known as "internally displaced persons;" 519,000 such internally displaced persons who returned to their homes; some 2.4 million stateless persons; and 960,000 "others of concern."³⁵

Although Arendt was correct in her diagnosis of the intractability of the "refugee problem" in twentieth-century political life, the legal terrain of the

³⁵ 2005 Statistical Yearbook, April 2007; Available at: <http://www.unhcr.org/basics.html> (Last Accessed October 20, 2010).

problem has shifted significantly since 1951. As Macklin (2007:336) has noted, just as Arendt was publishing *The Origins of Totalitarianism*, a new kind of international positive law on refugees was emerging, as were new international administrative institutions ostensibly determined to address the issue.³⁶ The Office of the United Nations High Commission on Refugees came into being on January 1, 1951. In July, 1951 the Geneva Convention on the Status of Refugees was signed. The 1951 Convention concerned itself only with the aftermath of the European wars of the previous decades; the Office of the High Commissioner on Refugees was expected to solve its assigned problem and therefore work itself completely out of existence in three years. Unsurprisingly, the "refugee problem" persisted. Furthermore, despite the 1951 Convention's undeniable post War War II, European genealogy, it became evident that refugees existed beyond the European continent. As such, a 1967 Protocol to the 1951 Convention eliminated the temporal and geographic limitations of the 1951 Convention (Anker 1994), suggesting that what was once conceived of an exceptional situation of emergency had come to be understood by then as a normal state of modern politics.

As a matter of U.S. law, in 1980 Congress passed the Refugee Act, which drew heavily on the 1951 Geneva Convention and its 1967 Protocol for its statutory definition of a refugee.³⁷ The Act also provided, in the fashion typical of an administrative state, for the establishment of an "Office of Refugee Resettlement" within the Department of Health and Human Services. The Office was charged with implementing "The Federal Refugee Resettlement Program," a program "to provide for the effective resettlement of refugees and to assist them to achieve economic self-sufficiency as quickly as possible after arrival in the United States."³⁸

Today, the Refugee Act continues to provide for ongoing determination by the President of the number of refugees and asylum seekers who may be admitted for permanent residency in the U.S. during the upcoming fiscal year.³⁹

³⁶ In her text, Arendt was particularly dismissive and critical of the League of Nations, which was then charged with safeguarding the rights of those whom the Minority Treaties covered. She wrote, "Not that the minorities would trust the League of Nations any more than they had trusted the state peoples. The League, after all, was composed of national statesmen whose sympathies could not but be with the unhappy new governments which were hampered and opposed on principle by between 25 and 50 percent of their inhabitants. Therefore, the creators of the Minority Treaties were soon forced to interpret their real intentions more strictly and to point out the "duties" the minorities owed to the new states. . . "(Arendt 1951: 272).

³⁷ See Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (1980).

³⁸ See INA §§ 411-414. On the American penchant for molding refugees as quickly as possible into "self-sufficient" subjects, see the ethnography of Aihwa Ong (2003) on Cambodian refugees.

The President, with the consultation of Congress, may allow for the admission of as many refugees and asylum seekers as he sees fit.⁴⁰ However, echoing the 1951 International Convention, the Refugee Act of 1980 requires that one who seeks admission to the U.S. as a refugee or asylum-seeker demonstrate, "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."⁴¹

Important precedents in U.S. refugee case law thus rehearse in text such questions as what "fear" means, what it means for a fear to be "on account" of persecution, and what it means to have held a "political" opinion. Despite trading in the ineffable terms of human subjectivity, U.S. refugee law ultimately turns on whether a foreign government has behaved in such a way that is a "legitimate exercise of sovereign authority" or not.⁴² Most importantly, individuals cannot qualify for entry as "refugees" on account of poverty, or often even the violence of war. Those unqualified for refugee or asylum designation but nonetheless already in the United States, though without lawful immigration status, are necessarily illegal aliens. An illegal alien, unlike a refugee, is presumed to have a government willing to offer her protection and therefore not to suffer from a sufficiently political injury. The political causes of the material conditions of her life are deemed irrelevant, given this bifurcation between paradigmatic "political" migrants and not sufficiently political, or "merely economic" ones.

The narrowness of the U.S. statutory law of the refugee renders the nationals of many countries "merely illegal aliens" rather than "deserving refugees." Refugee and asylum admissions to the U.S. number in the few thousands each year; refugees become legal permanent residents. Those deemed bona fide refugees join a recognizable trajectory toward citizenship, should they desire to naturalize. They become immediately embedded in the broader categories of "legal permanent residents" and then "citizens."

In contrast, illegal aliens join no such trajectory and are added to a growing number of already present illegal aliens. Therefore, illegal alienage has emerged in the last three decades as the ultimate category of the remainders, and

³⁹ The term "refugee" is meant to designate those who are not in the U.S. or at the U.S. border. The term "asylum-seeker" is meant to designate those who have already at the U.S. border or have already entered U.S. territory. The legal analysis of the injury suffered by both groups is the same (Legomsky 2002: 851).

⁴⁰ See Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (March 17, 1980).

⁴¹ See INA §101(a)(42).

⁴² See *Matter of Izatula*, 20 I.&N. Dec. 149. As a matter of U.S. administrative practice, this determination has turned on the extent to which the offending government at issue is friendly or unfriendly to the U.S. government. For discussion of how El Salvadorian applicants for asylum were systematically turned down on account of the U.S.'s support for the government of El Salvador in the 1980s, see Coutin (1993; 2000; 2007).

the paradigmatic problem of U.S. immigration and alienage law, at once created by law but also perceived as necessarily outside of the law (c.f. Ngai 2004; Coutin 2000).

A key point that this chapter has sought to make is that illegal aliens are indeed at once created by law and also outside the law, but not only because they are unauthorized and therefore live sociologically within “shadows” or “spaces of illegality,” as other scholars have noted. Rather, illegal aliens are also outside the law because they are currently cast conceptually by law as (merely) economic or social migrants – precariously within the territory, which accords them some rights in the name of its own “territorial jurisdiction,” but at once outside the sphere of the political. The ramifications of this latter conceptual exclusion merit more attention from political and legal theorists as well as socio-legal scholars.⁴³

While there may indeed be valid reasons for prioritizing the claims of those who suffer particular types of political persecution, the enduring question with which Arendt’s critiques of positive laws of nation-state political communities and of the “rise of the social” leaves us is the question of how to re-contextualize in more nuanced political terms the claims of the now “merely economic” migrant. Chapter 6 attempts the beginnings of an answer to this question with reference to the political theoretical implications of working, or seeking to work.

But to ground further the political theoretical analysis of the topic in the realities of U.S. legal institutions, Chapter 6 briefly considers the implications of the action of “work” for contemporary questions of citizenship and alienage only

⁴³ Although her work emerges out of a different scholarly tradition (the sociology of organizations) and addresses a different area of U.S. law (post-1964 anti-discrimination law), Lauren Edelman makes a similar point about the problematic nature of a distinction in legal reasoning between “economic” and “non-economic” spheres. As such, Edelman’s writings have informed the argument here. Edelman has argued that judges charged with adjudicating civil rights cases have come to defer to seemingly “natural,” or presumably primordial (i.e. non-socially constructed) markets, and the prevailing business practices that strategically invoke these markets. Edelman thus points out that the deference to the “economic, ostensibly fully rational” status quo impedes the promises of anti-discrimination law, and that U.S. courts fail to recognize the role of discriminatory practices in constituting the very markets they defer to. See Edelman (2004; 1992) and Edelman, Uggan, and Erlanger (1999).

Here, the argument is nominally inverted, but nonetheless similar. The characterization of migrants as “primarily economic actors” does not make their claims more salient, as economic language does for the defendant employers whom Edelman writes about. Rather, in the realm of immigration and citizenship, attribution of economic motives makes the claims of illegal aliens less cognizable, in light of the constructed opposition between “economic migrants” on the one hand, and the political sovereignty of the nation-state and the paradigmatically political injury of the refugee. A juxtaposition of the legal construction of “purely economic” motives and/or economic rationality of domestic private sector employers v. that of other kinds of actors (international private sector, illegal aliens, alien workers, etc.) merits more analysis, but is beyond the scope of this chapter.

after the intervening chapters' socio-legal analysis of what two U.S. municipalities have done with respect to putatively illegal alien residents and workers, from 1985 to the present. This socio-legal analysis begins after the next chapter, which moves more formally from U.S. law to political theory, to ask how numerous contemporary political theorists have understood and contended with the phenomena of sovereignty, alienage, and illegal alienage, and what these views presume about law.

CHAPTER 3

ON NON-IDEAL STATES: ILLEGAL ALIENAGE AND ANGLO-AMERICAN POLITICAL THEORY

The ideal type of republic may be a small unitary state with no crime, no physical or mental illness, and no children. The United States, however, is a large federal state with crime, illness, children--and resident aliens.

*-Gerald Neuman, *Strangers to the Constitution: Immigrants, Borders and Fundamental Law**

We are a Nation of immigrants as we are a Nation of laws.

-Representative Sheila Jackson Lee (D-TX), Transcript from Hearing on "New York City's Sanctuary Policy and the Effect of Such Policies on Public Safety, Law Enforcement, and Immigration," Before the Subcommittee on Immigration, Border Security, and Claims of the Committee on the Judiciary, House of Representatives, U.S. Congress, February 27, 2003¹

Introduction

In her book *Democracy and the Foreigner*, Bonnie Honig argues that "switching the question" of foreignness in politics reveals important things. Construing foreignness not as a problem to be solved, but rather as a solution to problems, Honig promises to show "foreignness operating in a less conventionally familiar way, with a seldom-noted positive content and effect"

¹http://commdocs.house.gov/committees/judiciary/hju85287.000/hju85287_0f.html (Last Accessed October 20, 2010). Although this chapter is about illegal alienage in the field of political theory, the quotations for the chapter's epigraph come from non-political theoretical texts. As the chapter will show, political theorists often elide the tensions between law and non-citizenship that these quotations both invoke. While Professor Neuman's quotation directly suggests this tension, Representative Jackson Lee's quotation betrays the tension indirectly, by insisting on being both, at once, "a Nation of immigrants" and "a Nation of laws."

(Honig 2001:3). She argues that the foreignness of foreign-founders in the origin stories of western democratic political theory "may represent the departure or disruption that is necessary for change," and "might also be a way of marking and solving a perennial problem of democratic founding in which the people must be equal under the law and cannot therefore receive it from any one of their own number"(4). She writes further:

By inviting us to switch the question – from “How should we solve the problem of foreignness?” to “What problems does foreignness solve for us?” – the foreign-founder gives us a more promising way to proceed in our efforts to study the diverse, intimate relations between liberal democracy and its would-be others. Such an alternative analysis shows how certain anxieties endemic to liberal democracy – -the paradox of democratic power (given up just as it might have been gained), the alienness of the law, the lack of a sense of choiceworthiness or the periodic need to have that sense refurbished, the distance or inaccessibility of consent – -themselves generate or feed an ambivalence that is then projected onto the screen of foreignness. The ambivalence is testified to by Rousseau’s curiously foreign lawgiver who is both loved and feared by the people he founds (12-13).

For Honig, the foreigner, maligned or lamented as he may be, is an important (re)founder upon whose arrival and actions a receiving liberal democratic political community depends for its very constitution as such a political community. Political xenophobia is thus for Honig sublimation of anxiety over the foreigner's necessity. Such an essential foreigner may be one who does something as grand as founding a democracy, as in Rousseau's *The Social Contract*. Or he may be the much more of-this-world "All American," or even "Hyper American," foreigner next door.²

With reference to the specific, “next door” context of modern American politics, that which is of most interest here, Honig argues ultimately that the foreigner's aspiration to American citizenship importantly reaffirms the native-born American's sense that American citizenship is valuable and worthy of affective reverence. Further, if liberalism as a form of government depends upon (rituals of) human will in order to sustain itself, then the immigrant, not the citizen, Honig perceptively notes, crucially "fulfills our liberal fantasy of

² The reference to an “All American” or “Hyper American” foreigner is meant to invoke the foreigner’s often extra burden of performing belonging in her adopted home country, an implicit theme of Honig’s book.

membership by way of consent" (78) in a country where most ascend to citizenship by mere birth within the territorial boundaries.

To sum up, for Honig, here a student of democratic theory, the foreign founder's arrival heralds a new, positive ("in content and effect") moment of democratic origin in the constitutive texts of western democratic theory. And in a more contemporary, sociological key, the foreigner's arrival on American soil, and his eventual naturalization, both reinvigorate this democratic founding and enact the consent on which a liberal democracy conceptually depends.

If in law and politics, as in life more generally, unambiguously happy tales inevitably arouse suspicion, one may be tempted to ask whether this particular happy tale of a secret, or at least sublimated, reliance of American liberal democracy on the foreigner is possible for Honig because her primary frame of analysis is that of democratic theory, and not the institutional realities of contemporary U.S. law. Honig does point out that American political culture has its share of xenophobia as well as xenophilia (76). But her argument, that the xenophobia results from an anxiety-inducing reliance on the foreigner, is, at its core, a happy one of vindication, at least from the perspective of the foreigner. How might things look substantively different, one may wonder, when apprehended through the lens of American law--the often messy, but nonetheless indispensable and omnipresent institutional apparatus of American liberal democracy? Things begin to look different in two specific ways.

First, the naturalizing immigrant's asking for and consenting to membership in the polity may indeed buttress modern American liberal democracy on some important symbolic register. But as any immigration lawyer in the country will attest, asking for and consenting to it (or even deeply wishing for it) is hardly enough to bring about legal membership for a client, regardless of whether the client "fulfills our liberal fantasy of membership by way of consent" (Honig 2001: 78). Those most eager for American residence and citizenship, as demonstrated by what they would do to get it, are often the most likely to be turned away. Indeed, since at least the late colonial period, the U.S. has been "a nation by design," as Aristide Zolberg has recently put it. This "nation by design" took pains to exclude European convicts and the poor from its shores since its inception (Zolberg 2006: 74-5). And it continues to do so with respect to those who are "likely to become public charges," and those who have "criminal histories," broadly defined. In short, there is more to the story of "democracy and the foreigner" that crucially involves the political choices of even liberal democratic states as to who is desirable and who is not. And further, such states exercise the prerogatives to inspect and test each applicant for

admission and citizenship, and to exclude unilaterally certain categories of applicants.³

The imposition of this kind of legal real politik frame onto Honig's argument, while perhaps slightly unfair to Honig, nonetheless usefully illustrates that as far as the figure of the foreigner is concerned, modern American law, with its own languages, histories, rituals, and institutions is a sufficiently different entity than modern American democracy, especially in theory. It would be perhaps fantastic, in the many senses of the word, to think otherwise.

Second, as far as the starring role played by foreigners in the origin stories of western democratic theory, it is striking to note that through another, more jurisprudential lens, the precise moment of any foreigner's founding or "law giving" can also be seen as a "moment of origin of positive law" and therefore also a "moment of conquest," where the propositions of the foreign conqueror replace unwritten customs of the community (Constable 1994:3). These unwritten customs of the community possibly constituted the community and were, seen in different lights, a prior, if not positive (in the sense of "posited") law (Constable 1994: 3-4; 67-8). In other words, the point here is that there is nothing to say that "democracy" requires a law written in propositional forms. Nor is there anything to say that the law that existed before a "would-be democratic" founding was necessarily either "un-democratic," or in and of itself "not law."⁴

Honig's presumption about the *necessary* alienness of democratic law, or rather her conflation of the bringing of democracy with the bringing of propositionally articulated law, is perhaps something that Honig, like other political theorists, inherits from Rousseau⁵. Regardless of the specific genealogy of this conflation between democracy and law in Honig's work, the important point here is "law brought by a foreigner" is neither a necessary or sufficient

³ See, for example, *Kleindienst v. Mandel*, 408 U.S. 753, 765-66 (1972). (on the non-reviewability of the decisions of consular officials); INA §212 (on the inadmissibility of certain kinds of aliens) and INA § 312 (requiring a naturalization exam for acquisition of citizenship).

⁴ Constable (1994: 67) makes the point that historians of the English common law "view communities governed by custom as somehow non-or prelegal," and that this could be seen as "odd, given our culture's traditional reverence for the common law or for the judge-made law which is said to have been passed down from time immemorial and is sometimes referred to as customary or unwritten law." My point here is related, but distinct. My point is that a strand of a similar conflation between "modern" and "pronounced and written" exists in political theory, particularly (and perhaps even ironically) in democratic theory.

⁵ Honig focuses on the foreign agent of democratic law in Rousseau. This foreigner brings positive law, which is but one form of law. Habermas (1996: 243) appears to repeat this same problematic conflation between law and democracy, in so far as he presumes that law and democracy are "co-original." As the chapter will show in its penultimate section, Behabib's concept of "democratic iterations" also carries with it this problematic view of a simple one-to-one relationship between democracy and law.

condition for “democracy.” Relatedly and most importantly, contemporary law is not a constantly rearticulated, direct product of some “democratic will,” despite what political theorists may implicitly presume.⁶

The purpose of this discussion has been to illustrate that attending to the specifics of law as a distinct act and practice-- as posited or not, as legislative or administrative in its generation, as institutionally distinguished and functionally independent from any cultural or symbolic democratic politics, and most importantly, as a complex repository of various kinds of often conflicting normative aspirations and commitments--ultimately makes a crucial difference to how we understand the work that “foreignness” does for, or rather “to,” or “in,” contemporary liberal democracies. In other words, law has a rhetorical and sociological life independent of democracy or the “democratic will,” as envisioned by democratic theorists. And law as language escapes the full control of its promulgators. All this shapes the foreigner’s very construction as such, and also molds the foreigner’s inception into any political community, which necessarily happens through the media of law and language.

This suggests that any relevant and timely inquiry about the role of foreignness in modern political life must contend with the laws that define and delimit foreignness. Such an inquiry then must also contend with the sociology of a complex legal system that questions its own various and often conflicting normative commitments in the face, sometimes quite literally, of the foreigner.⁷

⁶ To be clear, political philosophers and political theorists often first propose what they consider to be “just” or “more just” outcomes, and then argue that law ought simply to change to be in accordance with their “more just” proposals. There exists in the work of most political theorists more attention to the question of “what the law ought to be” than knowledge or discussion of “what the law is (e.g. legislative or administrative in origin and logic)” or “how the law is likely or unlikely to change.” Lack of attention to the complex institutional contexts of law does not detract in itself from the normative analysis of political theorists, but it suggests that political theorists systematically underestimate the complexity of “what the law currently is” and “how it may or may not change” when positing “what law ought to be.” Here, an excerpt from the text of political theorist Stephen Macedo (2007: 73) is a good, illustrative example. Macedo writes, “As members of a political community, we are joined in a collective enterprise across generations through which we construct and sustain a comprehensive system of laws and institutions that regulate and shape all other associations, including religious communities and families.” As a strict, factual matter, Macedo is of course correct. But to those familiar with the *de facto* pluralism and considerable complexity of law-making in contemporary liberal democracies, Macedo’s statement borders on bucolic. Indeed, citizens do collectively create laws and agencies, but both laws and agencies often subsequently take on lives of their own, in a manner of speaking. I make this point not to criticize political theorists for not dealing closely with law, but rather to point out an important underlying presumption in much contemporary political theoretical writing about the facility of making and re-making law with facility and indeed with haste.

⁷ In essence, the U.S. Supreme Court cases presented in Chapter 1 do exactly this. Each must address what to do, *vis-à-vis*, (illegal) aliens in the face of other normative legal commitments reflected in other bodies of law. Law provides an important site for political theoretical analysis

This chapter thus considers the foreigner not so much as one who initiates or reinvigorates (democratic?) sovereignty through (re)founding or consenting, as Honig suggests. Rather, this chapter considers the foreigner as one who, no matter what else she might do, arrives after some prior founding, after the establishment of some prior political community, with some prior articulation(s) of its values.⁸ This chapter considers the foreigner as one who arrives after the co-mingling --perhaps the excessive co-mingling, according to some commentators--of "nation-state sovereignty" and "the power to exclude."

With these important "real law" and "real politics" lenses firmly in place, this chapter examines a set of works of Anglo-American political theory with reference to the illegal alien, the foreigner arguably most adversely affected today by this pre-existing sovereignty, whatever its terms may be. This chapter thus asks an important, and yet also relatively ignored set of fundamental questions: How does the figure of the illegal alien appear in prominent texts of political philosophy or political theory? What work does *it* do? And further, what presumptions about law and political community do these texts of political philosophy or political theory make amidst their broader normative claims about closed or open borders and the rights of (illegal) aliens? How do these presumptions about law and political community reflect, or rather fail to reflect, relevant normative pronouncements in U.S. law?

As the chapter will demonstrate, liberal egalitarian, communitarian, and liberal legal commentators (represented by John Rawls, Michael Walzer and Peter Schuck and Rogers Smith, respectively) each highlight different unsettling attributes of (illegal) alienage, suggesting that illegal alienage may in fact *do* multiple things in or to liberal democratic states. Rawls stipulates closed borders and thus no dilemmas of legal or illegal alienage; his conception of justice has primarily to do with ready and facile provision of economic welfare to the poorest citizens. Although alienage does not appear in Rawls's work, it is nonetheless important to trace the implications of Rawls's theory for contemporary immigration and alienage law and politics. This is the case not only because of the importance of Rawls's work for contemporary political philosophy generally, but also because Rawls's theory provides a powerful justification for closed borders, which other political theorists have made explicit.

not because political theory can be used to "fix" the law, but rather because law contains within it a certain ordering of priorities, which political theory must in turn address.

⁸ Honig's own reading of illegal alienage appears to derive fundamentally from her reading of the naturalizing immigrant as a symbolic boon for American democracy. For Honig, while the naturalizing immigrant is loved, the illegal immigrant is the evil "other" to the naturalizing immigrant. As such, given the relational nature of her treatment of illegal alienage, Honig does not take up the analytically distinct question of what illegal alienage in particular does for, or rather to, nation-state sovereignty and its pronouncements in positive law.

In contrast to Rawls, Walzer addresses at least legal alienage directly and seeks to minimize its occurrence on account of his concerns about “subordination” of a particular kind. The section on Walzer’s text will closely analyze the specific nature of this subordination. Schuck and Smith go farther than both Rawls and Walzer in so far as Schuck and Smith address illegal alienage directly and argue that illegal alienage shakes the very foundations of liberal democracies. For Schuck and Smith, illegal alienage purportedly makes a mockery of consent in American political life.

This chapter analyzes each of these three distinct arguments in detail. I draw out the instabilities and the presumptions of each of these normative claims by closely reading these important works under new lights. Yet as different as the works of Rawls, Walzer, and Schuck and Smith may be with respect to the complicated issue of (illegal) alienage, all three works nonetheless share one major thing in common. They all reflect a conception of monolithic nation-state power vis-à-vis foreigners and correspondingly monolithic conceptions of citizenship and of law. As such, these are portraits of nation-state power that are problematic, in light of U.S. law’s situation of the illegal alien as a subject of multiple discourses of law and administration in the modern federal administrative state, as described at the end of Chapter 2 and as described further in this chapter.

The crucial point here is not merely that these political philosophers and theorists fail to appreciate or fail to account for the institutional complexity of contemporary American law. Rather, the more important point is that in advocating particular policies or normative stances vis-à-vis aliens, these texts evince significant ambiguity as to what is “necessary” for modern nation-state sovereignty versus what is desirable or fortuitous for other normative ends. The close analysis that follows seeks to illuminate what these other ends might be, how law contextualizes these ends, and how (illegal) alienage presumably adversely affects these ends. I seek to decouple these ends from the admittedly fraught, seemingly catch-all category of “nation-state sovereignty.”

In contrast to Rawls, Walzer, and Schuck and Smith, Seyla Benhabib, in her book *The Rights of Others*, posits that nation-state power vis-à-vis foreigners is less monolithic than ever before, and that this disaggregation of citizenship presents new opportunities for progressive realignments of the rights of non-citizens in liberal democracies. Among prominent extant political theoretical takes on the issue, Benhabib’s analysis is the one that is most imbued with a sense of the de facto political agonism inherent in immigration and alienage (described in Chapter 2, Section I of this work), even if, as this chapter will show, there is a pervasive ambiguity in Benhabib’s work about the salience of the claims of refugees and asylum seekers, on the one hand, and the claims of illegal aliens on the other. Nonetheless, writing from the perspective of deliberative democracy, Benhabib offers the account of (illegal) alienage that is most nuanced

in its treatment of law. Specifically, Benhabib suggests that new “democratic iterations” that provide more rights for foreigners are readily emerging.

This chapter makes particular effort to evaluate this proposition in abstract and also in specific terms. In the service of the latter goal, the final section of this chapter presents a case study of the emergence and transformation of New York City’s alien “sanctuary law” (or rather “policy”) in light of local political forces as well as litigation in U.S. federal courts.⁹ This case study reveals that would-be “democratic iterations” may not be possible, or rather not sayable or writable, in liberal democratic states such as the U.S. because of the construction of nation-state sovereignty in particularly linguistic terms. As the chapter will discuss, federal preemption, or the right of the nation-state rather than states and localities, to say definitively the rights of foreigners, may limit what localities may say, and as such, may limit the possibility of “democratic iterations,” at least as a matter of positive law. Political theorists have thus far almost entirely ignored this inherently linguistic and rhetorical issue of “preemption,” despite the fact that it has interesting and fundamental ramifications for core questions of both justice and the foreigner and also democracy and the foreigner.

In sum, five sections comprise this chapter, which seeks at once to be both “political theoretical” and “empirical” throughout. The first section takes up John Rawls’s *A Theory of Justice*. The second analyzes Michael Walzer’s *Spheres of Justice*. The third section analyzes Peter Schuck and Rogers Smith’s *Citizenship Without Consent*. The fourth section takes up Seyla Benhabib’s *Rights of Others*. The fifth section presents the case study of New York City’s “sanctuary” policy from 1983 to the present, in order to illustrate the “law in action” of (illegal) alienage in the U.S. and to refract institutionally the arguments of the texts discussed in the preceding sections.

Taken as a whole, this chapter closely analyzes the terrain of political theoretical works on alienage in order to draw attention to how law in general and (illegal) alienage in particular appear in these works. On another level, this chapter also sketches the various fundamentally normative philosophical issues at stake in the sociological everyday “law in action” presented in chapters to follow. Finally, this chapter seeks to set the stage for drawing out the distinctions between extant political theoretical approaches to (illegal) alienage, and an alternate one to be sketched out in Chapter 6.

Redistributive States: On the Specter of Immigration in Rawls’s *A Theory of Justice*

⁹ The distinction between “law” and “policy” is meant to call attention to the fact that while “law” presumes a public writing, “policy” may not necessarily be so presented.

The title of this chapter contains the phrase “non-ideal states.” I use the word “non-ideal” to suggest, on one level, the current situation in U.S. immigration law and politics, where, as Chapter 2 noted, illegal alienage seemingly evinces a profound contemporary failure of law. But on another, more conceptual level, I use the phrase “non-ideal states” to invoke the political philosopher’s tool of “ideal theory.” Made famous outside the field of political philosophy by John Rawls in *A Theory of Justice*, “ideal theory” connotes the methodological move of deriving abstract principles first, with the benefit of simplifying assumptions, and then advocating in turn for the adjustment of law and social policy to most reflect one’s ideal theory. With reference to his “theory of justice,” Rawls thus writes:

The intuitive idea is to split the theory of justice into two parts. The first or ideal part assumes strict compliance and works out the principles that characterize a well-ordered society under favorable circumstances. It develops the conception of a perfectly just basic structure and the corresponding duties and obligations of persons under the fixed constraints of human life. My main concern is with this part of the theory. Non-ideal theory, the second part, is worked out after an ideal conception of justice has been chosen; only then do the parties ask which principles to adopt under less happy conditions (Rawls 1971: 245-6).

Rawls’s recourse to “ideal theory,” has a particularly important aspect for our purpose here. Before deriving his conception of “justice as fairness,” Rawls stipulates a society without immigration, a “society [that] is a more or less self-sufficient association of persons who in their relations to one another recognize certain rules of conduct as binding and who for the most part act in accordance with them” (Rawls 1971: 4).

Some readers who are familiar with the work of Rawls may object strenuously to my invocation of Rawls’s *A Theory of Justice* in a chapter about immigration and alienage, given that Rawls did not have much to say about these topics in his book. I begin with reference to this particular work of John Rawls not to critique or to chastise Rawls for not taking immigration (authorized or unauthorized) into account. Rather, I begin with Rawls, on one level, because of the importance of Rawls’s book to the political thought of the last quarter of the twentieth century. Even more importantly, I begin with Rawls because I seek to understand the conceptual work that the *absence* of aliens and immigrants does in Rawls’s influential book. That Rawls refuses the possibility of aliens and immigrants is significant in so far as this refusal underwrites a certain understanding of (liberal democratic) citizenship. And it is the salience, intuitive

staying power, and limitations of this understanding of citizenship that I seek to illuminate and analyze here.

Furthermore, while Rawls may not have explicitly addressed immigration and alienage, others have nevertheless subsequently used Rawls's texts in order to argue, curiously, for both increasingly open and increasingly closed borders.¹⁰ Rawls's work, silent on immigration though it may be, is thus nonetheless a crucial initial site of analysis for any student of the contemporary political theory of immigration and alienage in liberal democracies.

And finally, I also begin with Rawls's work to draw out contrasts between the work of Rawls and that of Michael Walzer. Political theorists and philosophers conventionally regard these two writers to be alike with respect to immigration. Most theorists and philosophers of contemporary immigration tend to label both Rawls and Walzer as fundamentally alike because both Rawls and Walzer appear to suggest that citizens have special obligations to one another (See e.g., Macedo 2007: 64, 74). Thus, scholars conventionally place Rawls and Walzer in a single camp vis-à-vis immigration and alienage. They also conventionally place "cosmopolitans" -- those who argue in essence that human beings have obligations to one another without much regard for nation-state borders-- -- in the opposite camp. Given this conventional binary, I begin with Rawls's work here also because I seek to draw out important, if currently overlooked differences between the arguments of Rawls and those of Walzer. By drawing out these differences, I seek to suggest that the most useful and practically important distinctions in the contemporary political theory of immigration and alienage may not actually be between the (unapologetic and/or reluctant) supporters of nation-state citizenship (i.e. the "civic" theorists), and their would-be rivals, the "cosmopolitans." I seek to show rather that the most practically relevant differences may instead be between various kinds of civic theorists.

Turning thus to Rawls's text, for Rawls, "citizenship" or "membership" is important only in so far as such citizens or members are counted among the "more or less self-sufficient association of persons" that together make up "society." There exists, by design, no immigration and/or pervasive plurality of nation-states, some richer and some poorer than others, in *A Theory of Justice*.¹¹

¹⁰ Joseph Carens (1995) is an example of an "open borders" theorist who draws on Rawls, and Stephen Macedo (2007) is an example of a theorist who, drawing also on Rawls, suggests that justice may require reduced immigration to the U.S. I discuss the Carens's text further in a subsequent note, and I discuss Macedo's text further in the body of this section.

¹¹ Section 58 of the book does take up "the extension of the theory of justice to the law of nations," but it does so in the context of the then (and again now) particularly poignant question of "justification of conscientious refusal" of citizens in times of war. In other words, this extension of the theory of justice to nation-states does not have primarily to do with immigration and/or international trade in goods.

“Society” rather involves by design a purely “domestic” amalgamation of (differently) productive persons, all engaging in “a cooperative venture for mutual advantage,” (Rawls 1971: 4). These persons must in turn consider how to distribute the fruits of this collaboration.

“Justice,” for Rawls, is “social justice,” which is always already a question of how “the major social institutions distribute the fundamental rights and duties and determine the division of advantages from social cooperation” (Rawls 1971: 7). If the “advantages from social cooperation” may be seen to be another way of characterizing the economic surplus that ensues from division of labor in modern society, then Rawls’s theory of “justice as fairness” provides an order of operations for appropriately (or rather “justly,”) distributing this surplus.

After first requiring that all citizens have equal basic liberties (ostensibly “fundamental” liberties of a non-economic nature such as free speech, free association, and free exercise of religion), Rawls then makes a proposal for the just distribution of the social surplus. For Rawls, in order for such a distribution to be “just,” “social and economic inequalities” ought to be distributed in such a way as to be of greatest benefit to the least advantaged members of the society. In other words, “the social order is not to establish and secure the more attractive prospects of those better off unless doing so is to the advantage of those less fortunate” (Rawls 1971: 75).¹²

Although he is concerned with economic inequality between citizens, Rawls does not propose strict economic equality between citizens. Rawls’s theory suggests that having some inequality among citizens may ultimately lead to greater generation of aggregate wealth than if strict economic equality were mandated. If Rawls thus accepts capitalism and its corresponding inequalities on account of capitalism’s capacity for efficient allocation of productive resources and incentives to labor, he also suggests that a robust welfare state is necessary to mitigate the effects of inequality by improving the position of the worst off. In

¹² It is useful to present a summary of Rawls’s theory here in order to relate the theory to issues in immigration and alienage. In my brief discussion of Rawls’s work, I have not described the “liberal principle of fair equality of opportunity,” in which Rawls requires that all positions and offices in the society be open to all, on a non-discriminatory basis. Rawls lays out this principle in earnest only after describing his “difference principle,” which I have described above. See Rawls (1971: 83-90). For Rawls, this mandate of something like non-discrimination in employment appears to be not grounded in a quest for efficiency, but rather to “express the conviction that if some places were not open on a basis fair to all, those kept out would be right in feeling unjustly treated even though they benefited from the greater efforts of those who were allowed to hold them” (84). Here, Rawls appears to acknowledge what is known among sociologists of law as “the expressive or symbolic power of law.” Further, the question of “fair equality of opportunity,” could be seen (from the vantage point of sociology of law) to be more difficult to enact than income redistribution in so far as it likely involves mobilization by individual, subjectively motivated plaintiffs.

other words, Rawls powerfully suggests that a robust welfare state is necessary for capitalism to produce a morally acceptable result, which, for him, is distinct from the mere maximization of economic output.

Returning to our themes of immigration and alienage in general, and illegal alienage in particular, it is important to note that Rawls's theory requires as little ambiguity as possible in identifying the "the least well off." For "the least well off" are the proverbial canaries in the coal mine of the project of determining the justice of any social institution. And the "least well off" are, for Rawls, those "the least well off" *within* the "more or less self-sufficient association of persons." By "persons" Rawls thus presumably means those persons formally within the national polity (citizens), rather than those within the national territory but not the national polity (territorially present aliens). Where income redistribution is a powerful or indeed primary mandate of "justice," the ambiguities of belonging brought forth by (illegal) alienage present particularly inconvenient, non-ideal dilemmas.

But if Rawls provides a powerful defense only of the income redistribution mandates of the modern welfare state, then the protection of the welfare state has in turn come to ground an important (liberal egalitarian) political theoretical defense of closed nation-state borders.¹³ In other words, a fundamentally Rawlsian political theory-based defense of closed borders is likely to be articulated not in the language of inherent nation-state sovereignty, as in the canonical U.S. legal cases on "border closure" discussed in Chapter 2, but rather in the language of remembering obligations to the domestic poor.¹⁴ For example, drawing on primarily Rawls, Stephen Macedo (2007:80) writes that:

¹³ Both Song (2009) and Pevnick (2007) are ultimately interested in the relationship between immigration and the modern welfare state and in critically evaluating the claims of other political theorists about the presumed necessity of strong *national* identity for a robust welfare state. Song (2009: 31) asks, "Why does civic solidarity matter? First, it is integral to the pursuit of distributive justice. The institutions of the welfare state serve as redistributive mechanisms that can offset the inequalities of life chances that a capitalist economy creates, and they raise the position of the worst-off members of society to a level where they are able to participate as equal citizens." Anticipating political questions brought into being by immigration, Song ultimately notes that "the challenge then is to develop a model of civic solidarity that is 'thick' enough to motivate support for justice [ostensibly understood as welfare redistribution] and democracy while also 'thin' enough to accommodate racial, ethnic, and religious diversity" (32). Pevnick (2007: 147) also sets out to critique the proposition that "Because admitting immigrants disrupts the shared identity of the citizenry, erodes support for the welfare state, and so, obstructs the realization of justice, there is good reason to restrict immigration." These important arguments demand further institutional and legal contextualization, as this chapter shows.

¹⁴ Joseph Carens (1995: 237) has argued (in a "with Rawls, against Rawls" mode) that the application of Rawls's "veil of ignorance" on an international scale would lead to "a basic agreement among those in the original position. . .to permit no restrictions on migration (whether emigration or immigration)." Further, he has noted that "one cannot justify restriction on the grounds that immigration would reduce the economic well-being of current citizens. . .[because]

There is reason to believe that current patterns of immigration do raise serious issues from the standpoint of social justice: high levels of immigration by poor and low-skilled workers from Mexico and elsewhere in Central America and the Caribbean may worsen the standing of poorer American citizens. Furthermore, such immigration may lessen the political support for redistributive programs.

“Political support for redistributive programs,” (Macedo 2007: 80), or rather “social trust,” (Pevnick 2007: 146-7) or rather “civic solidarity” (Song 2009:31) seem extremely important to political theorists, despite the fact that these terms seldom find expression in law. This is because these terms appear to name the ephemeral, but necessary binding agent that makes possible the modern welfare state, the main edifice of a particular (political theoretical and philosophical) understanding of “justice.”¹⁵ And immigration, it seems, might just be the proverbial fly in this proverbial ointment (or glue).

But while the theory that non-citizens threaten the foundations of the welfare state has powerful intuitive and maybe even political theoretical salience,

it would be necessary to show that immigration would reduce the economic well-being of current citizens below the level the potential immigrants would enjoy if they were not permitted to immigrate. But even if this could be established, it would not justify restrictions on immigration because of the priority of liberty. So, the economic concerns of current citizens are essentially rendered irrelevant” (240-41). As such, Carens has been the most well-known proponent of an “open borders” view, which has been regarded by many scholars as fundamentally utopian. This chapter does not analyze Carens’ argument in more detail primarily because the concern here is whether what, in particular, illegal alienage does in the specific contexts of various conceptions of (closed border) liberal democratic states; this is a reason distinct from objecting to the purported utopianism of Carens’s argument. More recently, Carens (2005: 11) himself appears to have retreated from his strong “open borders” position, turning instead to the question of “what we owe to people who stay.” Here, illegal alienage does make an appearance, and Carens argues that “the general principle—the longer the stay, the stronger the claim [to stay] applies even in the case of those who have settled without authorization, and for the same reasons. When people settle in a country they form connections and attachments that over time make them members of the society. After a while, the conditions of admission become irrelevant.” Ultimately, Carens advocates for amnesty for unauthorized residents as well as a kind of statute of limitations on deportation. He does so on the grounds that “social ties” overtake pronouncements of political sovereignty to exclude. This is a very different kind of argument than the would-be Rawlsian one he made in his prior work.

¹⁵Rather than necessarily supporting the view that “social trust” or “civic solidarity” as they are currently understood are necessary for justice, Pevnick and Song, two political theorists interested in the immigration, set out to evaluate critically the importance of these concepts. In that way, Pevnick (2007) and Song (2009) are fundamentally different than Macedo (2007). I engage in a similar critical project here, but unlike Pevnick and Song, I draw more on law than on political philosophy or theory to frame my critique.

it is striking and important to note that the U.S. legal cases that consider the intersection of alienage and welfare speak not in the terms of “threatened social trust” or “diminished civic solidarity,” but rather in the terms of the national or federal prerogative to determine what the conditions of alienage might be. Admittedly, political theoretical presumptions will deviate from law on the books. But here, the disconnect is particularly striking and important in so far as it suggests that other normative and institutional commitments enter into play when welfare provision and alienage are jointly at issue.

To illustrate, in the 1971 case *Graham v. Richardson*, a nearly unanimous U.S. Supreme Court held unconstitutional both a Pennsylvania statute denying public assistance to all noncitizens and an Arizona statute restricting public assistance to citizens and long time legal permanent residents. The Court did so, noting, first, that “a State’s desire to preserve limited welfare benefits for its own citizens is inadequate to justify [the statutes at issue],” and second, that “State laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with overriding national policies in an area constitutionally entrusted to the Federal Government.”¹⁶ Further, with respect to the question of whether aliens ought to be able to access a state’s public purse at all, the Court noted simply, “Aliens like citizens pay taxes and may be called into the armed forces” (376). A Court concerned primarily about the social trust or civic solidarity necessary to justify welfare provision to the citizens of Pennsylvania or Arizona would likely have been more deferential to the statutes passed by the Pennsylvania and Arizona state legislatures, and less impressed by either the tax contributions of non-citizens or the purported legislative overreaching of states.

To be sure, in a subsequent 1976 case, *Mathews V. Diaz*, the Court upheld the constitutionality of a federal statute that limited eligibility for Medicare supplemental medical insurance program to legal permanent residents who had been in the U.S. for at least five years. But in doing so, the Court apprehended the relevant question as being not “whether discrimination [by Congress] between citizens and aliens is permissible,” but rather “whether the statutory discrimination within the class of aliens – allowing benefits to some aliens but not to others – is permissible.”¹⁷ Again, the most important consideration for the Court was the origin of the legislation, not its specific content, or the conservation of welfare benefits for citizens rather than aliens. Congress, reasoned the Court, must have significant leeway to pronounce whatever law it wants with respect to non-citizens (81).

Some readers may object that the discussion above has focused on courts rather than legislatures, and that citizenship and welfare provision are more intimately linked when taken up as a legislative matter rather than as a judicial

¹⁶ *Graham v. Richardson*, 403 U.S. 365, 378 (1971).

¹⁷ *Mathews v. Diaz*, 426 U.S. 67, 81 (1976).

matter. However, even the record of U.S. Congressional action with respect to welfare and non-citizens suggests a more complicated normative portrait than liberal theories of distributive justice would suggest or presume. On the one hand, U.S. federal immigration laws have contained language requiring the exclusion of persons unable to take care of themselves without becoming public charges since at least the late nineteenth century. But until 1996, all the major federal benefits programs were open to lawfully present immigrants (Motomura 2006: 47, 51). And since 1996, Congress gradually reinstated welfare eligibility to legal permanent residents present before 1996 (Motomura 2006: 53).

The empirical story of the effects of immigration on welfare provision for citizens is thus far more complex than political theories of distributive justice suggest. If in the U.S. the extant and historical welfare provisions to citizens have been limited in comparison to other industrialized countries, particularly northern European ones, it is not at all clear that the U.S.'s status as a "nation of immigrants" is causally linked to this situation, given the legal history discussed above.

Further, and perhaps of most importance, are two main points which emerge from this discussion. First, the concern that high levels of immigration will necessarily erode support for the welfare state should be seen in new, more critical lights after the above discussion. Although generally not on the radars of political theorists, the U.S. laws of immigration and those of welfare provision have been operating by way of distinct normative, rhetorical, and institutional trajectories. This suggests that liberal theorists of distributive justice overstate the extent to which the provision of welfare, or "social citizenship" for citizens precludes the possibility of high immigration.¹⁸ Second, as discussed above,

¹⁸ The term social citizenship is taken from T.H. Marshall (1950) who argued that citizenship in western countries has been marked by a progression from civil rights to political rights to (in some fortuitous cases) social rights. Again, Pevnick (2007) also critiques the proposition that immigration is necessarily deleterious for the survival of a redistributive welfare state. Pevnick does this by taking on the proposition that because immigration arguably reduces "social trust" between the members of the political community, it also reduces support for the welfare state. By way of abstract reasoning, Pevnick concludes that "the social trust argument can only provide reason to limit claims of membership. The social trust argument provides no reason to forbid migrants from entering the territory" (156-57). Perhaps because of his primarily abstract reasoning, Pevnick appears to overestimate the extent to which "current laws appear to bundle claims of membership and residence without justification." As the above discussion has suggested, political theory discourse is more likely than U.S. law to engage in this problematic "bundling." Further, ostensibly to solve the dilemmas of contemporary immigration and alienage law, Pevnick proposes a kind of residence without membership which would include the right not to be deported (158). Although Pevnick is correct that "it is no objection [to his normative proposal for what law should be] that courts are likely to view such a position as inconsistent with current laws," (163) by taking deportation totally off the table for these "long-term residents," Pevnick appears to be coming closer to the heart of contemporary citizenship than perhaps he realizes.

although welfare rights had historically included immigrants, this is largely no longer the case after the federal welfare reform and immigration reform legislation of 1996.¹⁹ To the extent that federal and state welfare agencies wanted to exclude immigrants, they now can. As such, to those who would voice concern about the diminished salience of citizenship in the face of robust rights of alienage, citizenship in the U.S. has now become an almost exclusive right to access public assistance in a way that it has never been before. New normative questions thus emerge: If the welfare state has been reserved for citizens, does this address partly or even fully the critique of those who worry that high immigration may further subordinate the domestic poor? Should this reservation of welfare for citizens change the terms of reception for the labor of immigrants? Chapter 6 returns to this last question in particular. But first, the next section considers immigration and alienage through the lens of a substantially different conception of “distributive justice.”

Non-Subordinating States: On the Centrality of Immigration in Walzer’s *Spheres of Justice*

Michael Walzer’s *Spheres of Justice* has become a canonical point of departure for legal scholars of immigration and alienage. This is primarily because Walzer, unlike Rawls, does not simply stipulate closed borders. Walzer goes so far as to defend closed borders. And closed borders are currently the essential starting point for legislating and adjudicating matters of admission and civil rights for non-citizens, the topics which ultimately garner the detail-oriented attention and interest of most legal scholars.²⁰

¹⁹ See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub.L. 104-193, 110 Stat. 2105; see also Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. 104-208, Div. C, 110 Stat. 3009-546.

²⁰ Linda Bosniak (2006: 39-49) has provided the most extended reading of Walzer’s argument in the context of U.S. immigration and alienage law. Bosniak ultimately employs Walzer’s text to suggest that immigration law may indeed have to be “hard on the outside,” but then also ought to be “soft on the inside.” This is a modification of the conventional position in legal scholarship in so far as it adds something of a “condition subsequent” to the closed borders position. Thus, in Bosniak’s view, if “most immigration analysts, quite rightly, read Walzer as articulating a normative justification for national immigration restriction,” (Bosniak 2006:41), these same analysts appear to skip (at their peril) the section of Walzer’s book which suggests that “to the extent that immigrants who live and work within a national community are not recognized as members, they are subject to nothing short of ‘tyranny’” (Bosniak 2006: 41).

After critiquing legal scholars for overlooking this “soft inside the border” aspect of Walzer’s analysis, Bosniak details the way in which Walzer comes to his conclusion about the concurrent need for closed borders and robust rights of alienage. She then notes again that law does not exactly reflect Walzer’s theory, and that “contrary to Walzer’s representation, we do not all agree on separation of spheres when it comes to the status of aliens.” (Bosniak 2006: 48).

Like Rawls, Walzer presents his theory of justice as one of “distributive justice.” But contra Rawls, “distributive justice” for Walzer is about something more than equal opportunity and the surplus fruits of economic cooperation. For Walzer, “the idea of distributive justice has as much to do with being and doing as with having, as much to do with production as with consumption, as much to do with identity and status as with land, capital, or personal possessions” (Walzer 1983:3). Further, for Walzer, “there has never been either a single decision point from which all distributions are controlled or a single set of agents making decisions. No state power has ever been so pervasive as to regulate all the patterns of sharing, dividing, and exchanging out of which a society takes shape. Things slip away from the state’s grasp; new patterns are worked out — familial networks, black markets, bureaucratic alliances, clandestine political and religious organizations” (4). Indeed, for Walzer, “there has never been a fully successful distributive conspiracy” (4).

If Walzer presumably paints a more realistic portrait of a much less unitary, seemingly much less controlled world than that of Rawls, two important facets of Walzer’s portrait are important to discuss further. First, while Walzer does point to the necessary limitedness of state power, he locates these fractioning forces primarily outside of the state. Although he does point to “bureaucratic alliances” and “clandestine political organizations,” these things appear unlikely to be an integral part of modern statecraft itself. In other words, like most political theorists, Walzer appears to miss the multiple divisions of the modern state itself, both as a matter of acknowledging its “administrative” bodies and administrative lawmaking, as well as a matter of the state’s multiple jurisdictional levels in federal systems.

Second, and perhaps more importantly, there is an important irony inherent in Walzer’s critical and insistent pluralizing of the very idea of “distributive justice.” In pluralizing “distributive justice,” Walzer profoundly expands *its* reach. In other words, if for Walzer, “distributive justice,” entails

Bosniak then uses Walzer’s theory to identify a “chronic ambivalence that characterizes [U.S.] law’s approach to alien status.” (Bosniak 2006:46). As such, Bosniak uses Walzer to frame her ensuing descriptions of U.S. alienage law doctrine.

I have no particular disagreement with Bosniak’s reading of Walzer or with her suggestion that U.S. law ought to follow Walzer’s prescription of “hard on the outside” and “soft on the inside.” However, my analysis of Walzer here departs significantly from Bosniak’s in so far as I am less interested than Bosniak in why legal scholars may miss certain progressive aspects of Walzer’s theory, and the related question of how (or how not) Walzer’s theory lines up with U.S. alienage law. Instead, as part of the broader inquiry of this chapter, I am interested in something that Bosniak does not broach—the arguably prior question of how (illegal) alienage is presented, and what it reveals about Walzer’s particular conceptions of both statehood and justice.

“complex equality,” which means not the “elimination of differences,” but rather the building of “a society free from domination (xiii),” then the potential sites or “spheres” of possible domination have expanded multi-fold. Domination or unjust subordination occurs, according to Walzer, when high status, or an abundance of social goods, in one sphere necessarily leads to high status in other spheres. Those concerned with achieving “distributive justice” must thus “consider what it might mean to narrow the range within which particular (social) goods are convertible and to vindicate the autonomy of distributive spheres” (17).

With this general theory of “distributive justice,” laid out, Walzer moves to his first sphere, that of “membership,” to declare, “The primary good that we distribute to one another is membership. And what we do with regard to membership structures all our other distributive choices” (31). For Walzer, as for Rawls, “the idea of distributive justice presupposes a bounded world within which distributions take place” (31). But for Walzer, this means that there are explicit questions that must be answered, *within* the context of, rather than prior to the achievement of “distributive justice.” These questions are questions such as: “Whom should we admit? Ought we to have open admissions? Can we choose among applicants? What are the appropriate criteria for distributing membership?”

Walzer notes that the answers to these questions depend “on our understanding [of membership as a social good]” (32). He notes further that, “[Membership’s] value is fixed by our work and conversation. But we don’t distribute it among ourselves; it is already ours. We give it out to strangers -- not only by our understanding of those relationships but also by the actual contacts, connections, alliances, we have established and the effects we have had beyond our borders” (32). Thus, for Walzer, “The members of a political community have a collective right to shape the resident population -- a right subject always to the double control . . . described: the meaning of membership to the current members and the principle of mutual aid” (52).

Walzer no doubt overestimates the clarity of social “shared understandings” about membership, the primary “data” that ultimately drive his normative theory of the non-subordinating distribution of social goods. From a legal perspective, few political or social questions appear beyond contestation and dispute. Indeed, institutional concerns and prior institutional commitments rather than “shared understandings” or judicial clarification of “social meaning” are often what ultimately settle disputes about virtually everything.

But this point about Walzer’s blindness both to the complexities of legal pronouncements and to the institutional conflicts endemic to modern legalized states aside, Walzer does seem to suggest that sometimes, “understandings” are incomplete and that “actual connections” are what matter. This point echoes those who would argue that because they are “here,” and woven within the

fabric of society, illegal aliens ought to be allowed to stay, regardless of the extant pronouncements of law.²¹ But Walzer is not so clear about this point. Illegal alienage makes no direct appearance in Walzer's work. Instead, in a section on "Alienage and Naturalization," in which Walzer contemplates what to do about "refugees or immigrants newly arrived," Walzer simply stipulates, "Let us assume that they are rightfully where they are" (52). As such, the most important ensuing question for Walzer becomes the question of whether these new, ostensibly permanent arrivals might eventually expect to gain citizenship by way of naturalization.

At this point in his analysis, Walzer's overwhelming concern with a particular understanding of subordination takes over. Since in his portrait, all persons within a territory must have been admitted (i.e. no persons could have entered without inspection or overstayed non-immigrant visas), Walzer queries whether some people may have been admitted "to free the citizens from hard and unpleasant work" (52). If this is the case, then for Walzer, "the state is like a family with live-in servants" (52). And subordination or tyranny necessarily ensues because there now exists an unjust convergence of spheres. Where families ought to be ruled by the organizing principles of kinship and love, a modern family with "live-in" servants cannot and does not produce kinship, love, or even parental authority over these servants, as "servants seek households of their own" (53).

Although in his description above Walzer claims to be contrasting the ostensible non-dilemma of family life and servants in "pre-modern literature," with the dilemma of family life and servants in today's late modernity, it is clear that for Walzer the analogy of the "state" to "family" is relatively unproblematic. As such, the "metic" of the ancient Athenian polis, "almost literally a family with live-in servants," (53) haunts Walzer. For the Athenian metics were the ancient world's "guest workers," citizens of other cities who came to Athens on account of the economic opportunities present in Athens. But sadly, metics could never achieve Athenian citizenship. While metics were better off than slaves in so far as they were citizens of other places, they were nonetheless subordinated in Athens in so far as they were governed without consent (53-55). While the ancient Athenians may have debated and maybe even felt badly about slavery, they seemed to have had no problem with having metics. Or so Walzer notes. In short, while the metics of ancient Athens haunt his text, Walzer's ultimate question is more contemporary: "The question that apparently gave the Greeks no trouble is both practically and theoretically troubling today. Can states run their economies with live in servants, guest workers, excluded from the company of citizens?" Walzer asks(55).

²¹ See Carens (2005), as discussed above.

Perhaps unsurprisingly, Walzer's answer is "No, not if these modern states care anything at all about justice." But what is of most interest here is less Walzer's ultimate answer, and more the socio-legal presumptions he makes en route to this answer. Walzer locates the modern-day guest workers only in Europe. He asks his readers to consider "a country like Switzerland or Sweden or West Germany, a capitalist democracy and welfare state, with strong traffic unions and a fairly affluent population" (56). The United States is not part of Walzer's list, despite Walzer's references to U.S. law and policy in other sections of his book. This absence of the U.S. from this section is likely due to the fact that the paradigmatic story of post World War II guest workers, whose children, and whose children's children know no other countries besides the Western European countries in which they are perpetually resident aliens, is also a story of *jus sanguinis* (or blood based) conceptions of citizenship acquisition. The U.S., in contrast to many European countries, has had *jus soli* citizenship (especially since the passage of the 14th Amendment in 1868), whereby citizenship is automatically conferred to any child born in the territory. The next section of this chapter will take up this aspect of U.S. law in greater detail.

But for now, it is important to note that this difference between *jus sanguinis* v. *jus soli* citizenship frameworks does not render the U.S. immune from difficult normative questions about "guest work" and "guest workers" that Walzer's discussion brings up. For Walzer, the subordination of guest workers stems not from *jus sanguinis*, per se, but from the fact that:

Guest workers are excluded from the company of men and women that includes other people exactly like themselves. They are locked into an inferior position; they are outcasts in a society that has no caste norms, metics in a society where metics have no comprehensible, protected, and dignified place. That is why the government of guest workers looks very much like tyranny: it is the exercise of power outside its sphere, over men and women who resemble citizens in every respect that counts in the host country, but are nevertheless barred from citizenship (59).

In the spirit of (re)framing the difficult normative questions about guest workers that Walzer broaches with respect to the U.S., a few distinctions are in order. The "guest workers" in Walzer's discussions have possibly been admitted for permanent residence and have also possibly been admitted for temporary residence. Walzer is ambiguous on this point. In the parlance of U.S. immigration law, one set of Walzer's guest workers are "green card" holders, or rather, LPRs (legal permanent residents). With respect to these workers, U.S. law is formally in accordance with Walzer's proposed rule that immigration be a matter of both "political choice and moral constraint," while "naturalization is entirely constrained" (62). In other words, there is no prohibition in the U.S. on

any LPR naturalizing after five years of residence, provided that he demonstrates “understanding [of] the English language, history, principles and form of government of the United States” and refrains from committing one or more of a list of criminal acts.²² Those admitted for permanent residence to the U.S. on account of their skills are admitted under the “employment-based” visa program. But crucially, these LPRs are likely to be not the “necessitous” immigrants whom Walzer describes, but rather members of the middle, upper middle or upper classes of their countries of origin with significant education and skills. Indeed, in 1990 Congress doubled the ceiling on employment-based immigrants and assigned a higher priority to highly skilled and other professional workers, in a nod to the already ascendant computer age. At the same time, Congress reduced the number of green cards available for unskilled workers. And in 2000, Congress went even further and exempted most skilled employment-based immigrants from country quotas that continue to apply to those who are admitted to the U.S. as family-sponsored immigrants (Legomsky and Rodriguez 2009: 304-05). Even bracketing the considerable technicalities of U.S. immigration law, the important point here is that the category of persons who are formally admitted for permanent residence in the U.S. on account of their capacities to labor in the U.S. economy are neither excluded from eventual naturalization nor are they likely to arrive as economically underprivileged citizens of other countries, relatively speaking. Rather, they are likely to represent the U.S.’s acquisitive role in the phenomenon of “brain drain” from other countries.

But also bracketing the complex normative questions brought forth by “brain drain,” it is important for the present discussion to note that those who are most analogous to Walzer’s categories of “metics” or “guest workers” comprise two categories that Walzer does not fully contemplate, namely: 1) a category that U.S. law calls “non-immigrants;” and 2) “unauthorized workers,” or rather illegal aliens. The first category, “non-immigrants,” includes the now commonly invoked “H1B” visa recipients (paradigmatically, computer industry workers from South Asia, though also, per the same statute, “fashion models of distinguished merit and ability”) as well as the less commonly known “H2A” and “H2B” visa recipients (temporary agricultural workers and temporary

²² See INA § 312, 8 U.S.C.A. §1423. The Immigration and Nationality Act (INA) defines “understanding of the English language” relatively inclusively, as being able to “read or write simple words and phrases to the end that a reasonable test of his literacy shall be made and that no extraordinary or unreasonable condition shall be imposed upon the applicant.” Furthermore, there are exemptions for those who have developmental disabilities and those who are over fifty, fifty-five, and sixty-five years of age, varying based on time lived in the U.S. subsequent to a lawful admission. While the statute’s language suggests that the English language requirement ought not be an impediment to naturalization, administrative practice may admittedly render this requirement burdensome and exclusionary.

workers coming to perform “temporary labor or labor if unemployed persons capable of performing such service or labor cannot be found in this country”).²³ Admittedly, these workers come to the United States under terms similar to those Walzer describes: “They are brought in for a fixed time period, on contract to a particular employer; if they lose their jobs, they have to leave; they have to leave in any case when their visas expires” (Walzer 1983: 56-57). But Walzer continues, “They are either prevented or discouraged from bringing dependents along with them, and they are housed in barracks, segregated by sex, on the outskirts of the cities where they work” (57). When read, perhaps against Walzer’s intentions, in the U.S. context, it appears that Walzer paints his text with broad brushstrokes. While the first part applies to nearly all non-immigrant visa holders, the latter part of Walzer’s description no doubt applies to some non-immigrant work visa holders in the U.S. but certainly not to all of them. For example, the “H4” visa is a visa for the spouses and dependent children of those who are awarded “H1B” visas. These “H4” spouses cannot themselves work in the United States, which leads to other important normative and socio-legal questions, particularly if the majority of such visas go to married women who must then (by law) become financially dependent on their husbands in a new country of residence.²⁴

But this particular issue aside, refracting Walzer’s analysis through the details of contemporary U.S. immigration law leads to some important new, more specific questions that are not found in Walzer’s text: Does the existence of *jus soli* citizenship (for a successive generation) and a relatively open naturalization policy for legal permanent residents mitigate the injustice, or “subordination,” in Walzer’s terms, of “guest worker” programs? Put slightly differently, does the fact that there is no prohibition against a non-immigrant worker someday becoming a legal permanent resident—either through family-sponsored immigration (most quickly by becoming the spouse of a U.S. citizen, but also through the sponsorship of other relatives, who may have become U.S. citizens) or by qualifying for an employment-based green card—make a non-immigrant “guest work” system any less illiberal and more just? Do descriptions such as Walzer’s underestimate not only the agency of “guest workers,” but also the extent to which a transnational non-citizen may desire a “merely economic” relationship with the United States? Would it be more just to continue or even expand non-immigrant “guest work” programs than it would be to stop such

²³ See INA §101(a)(15)(H).

²⁴ See <http://www.path2usa.com/immigration/visacategory/h4l2.htm> (Last Accessed December 5, 2009), a website targeting would be immigrants from India to the U.S., which gives the following “helpful tip” for getting an H4 visa: “Make sure that the wedding album has sufficient marriage photographs. All the snaps must be very clear and easy to identify both the bride, and the bridegroom. Photographs showing some marriage rituals are must. Example: Few photographs around the agni ceremony, if your marriage is [a] Hindu marriage.”

programs all together, in favor of “jobs for Americans only,” or in favor of having less resident non-citizens, given the thorny questions of justice they raise? Furthermore, how might any non-immigrant guest worker system minimize subordination, or the potential for subordination, while also maintaining perhaps meaningful and necessary distinctions between citizens and non-citizens? And finally, is guest worker status a more liberal substitute for illegal alienage?

The answers to all of these new questions are beyond the scope of the analysis here. For now, this section has sought to show: how Walzer’s conception of distributive justice is distinct from that of Rawls and thereby implicates immigration differently; how “guest work”, rather than illegal alienage, figures explicitly as a problem to be fixed in Walzer’s analysis of “distributive justice;” and finally how illegal alienage is just beyond the threshold of “guest work,” despite Walzer’s attempt to stipulate it out of the picture.

Would-be Consensual States: On the “Blob” of Illegal Alienage in Schuck and Smith’s *Citizenship without Consent*²⁵

The two prior sections have sought to show how two distinct conceptions of “distributive justice” deal with questions of immigration and alienage. This section further examines an issue that arose in the context of juxtaposing U.S. immigration and citizenship law with Walzer’s critique of “guest work.” As I noted, the U.S.’s *jus soli* citizenship rule adds a new wrinkle, unexamined by Walzer, to the question of the justice of any “guest work” in the U.S. A *jus soli* citizenship rule declares as a U.S. citizen any child born to any woman--a tourist, a guest worker, or an illegal alien -- within the territory. This section

²⁵ I borrow the term “blob” from the title of Hanna Pitkin’s 1998 book *The Attack of the Blob: Hannah Arendt’s Concept of the Social*, likely the term’s most well-known appearance in political theory. As this section will discuss, illegal alienage is in many ways the “blob” that perhaps unfortunately swallows the most important parts of Schuck and Smith’s analysis of consensual and ascriptive traditions in the history of Anglo-American citizenship. To be clear, I wish to make no claims in this chapter about the current views of Schuck and/or Smith on illegal alienage in general or on birthright citizenship for the children of illegal aliens in particular. My goal in this section is to look closely at the 1985 text, its arguments, presumptions, and its internal instabilities. Therefore, when I say “for Schuck and Smith,” I mean “in the context of this 1985 text.” There is evidence to suggest that the authors later softened their views with respect to illegal alienage. For example, in a letter to Professor Gerald N. Neuman dated July 9, 1987 and reproduced in Legomsky and Rodriguez’s law casebook (2009: 1333), Professor Smith notes, “. . . there appears to be no prospect that Congress will try to adopt a policy of denying citizenship to children of illegal aliens. That fact makes me even happier than I expect it does you.” Schuck and Smith’s argument has been criticized by many other scholars, in addition to Honig (2001). See, for example, Neuman (1987).

begins with this aspect of U.S. citizenship in so far as it serves as the primary impetus for Schuck and Smith's analysis in their book *Citizenship without Consent: Illegal Aliens in the American Polity* (Schuck and Smith 1985).

A note about the subtitle of Schuck and Smith's work is in order here. Unlike the other three scholarly texts that this chapter examines, this particular text puts illegal alienage front and center. But perhaps a bit too front and center, as my analysis will suggest. One could imagine other subtitles for the same book--perhaps something like "Ascriptive and Consensual Traditions in American Law" or "Dilemmas of Citizenship in U.S. Law," -- which would have emphasized that U.S. citizenship generally, i.e. for the majority of U.S. citizens, not just those who happened to have been the U.S. born children of illegal aliens, suffers from a deficiency of explicit consent. As discussed at the beginning of this chapter, Bonnie Honig (2001) takes up this point when she argues that the naturalizing immigrant "solves" such consent deficit problems for liberal democracies when he naturalizes, thereby enacting consent for the rest of us non-consenters to see.

But questions of emphasis and subtitles aside, Schuck and Smith's book is unique among the works analyzed in this chapter on account of its explicit attention to illegal alienage. While even locating the figure of the illegal alien in the works discussed in the two previous sections required searching readings, this is certainly not the case here. Schuck and Smith note explicitly in the Introduction, "Today [presumably the early 1980s] the nation is experiencing a new, convulsive violation of consensually based political community, the dramatic increase in the number of undocumented aliens, most of whom are present in contravention of the expressed consent of the political community" (3).

Schuck and Smith note further that "The problem of illegal aliens is compounded, moreover by a second social transformation --- the emergence of the American welfare state. This development has undoubtedly spurred illegal immigration to some extent, but it has also increased the fears and resentments that accompany the presence of illegal aliens. Their need for many social services raises concerns that governmental programs will be seriously overburdened by demands made by people whom the community has designated as outsiders." And they continue, "Regardless of how well-or ill-founded these fears may prove to be (we shall see that the evidence by no means clear), the history of ethnic tensions in the United States and elsewhere suggests that their potential political consequences may be pernicious" (3-4).

To be clear, there are two distinct arguments above. First and foremost, for Schuck and Smith, illegal aliens are obstacles getting in the way of what appears to be a grand teleological walk of the law of U.S. citizenship on a highway from "ascriptiveness" to "consensualness." Schuck and Smith attempt to prove that such a highway exists in the next three chapters of their book, as we will see below.

Second, Schuck and Smith make a different argument, in some ways similar to the one that I have drawn out as implicit in the normative theories of those who would somehow make the modern welfare state a central facet of political justice, but yet also very distinct from these arguments. For Schuck and Smith, illegal alienage “compounds” or rather complicates welfare provision, but not just by creating ambiguity as to who is in and who is out, as we have seen in the texts discussed in the prior sections. Rather, illegal alienage, for Schuck and Smith, because it creates “fears and resentments” (3) among the citizen population (fears and resentments which may or may not be well-founded (3)) threatens to result in “pernicious” (4) political consequences on account of “the history of ethnic tensions in the U.S. and elsewhere” (3-4).

The argument about the difficulty of establishing and running a welfare state in the face of illegal alienage is susceptible to the same kinds of counterarguments reviewed in the first section of this chapter. Indeed, the 1996 welfare and immigration reform laws taken together suggest that regardless of what one thinks of the justice of denying welfare to both legal and illegal aliens, it is certainly possible, as a matter of positive law and bureaucratic functioning.

But what is most unique about Schuck and Smith’s discussion of the modern welfare state is the extent to which they co-join the question of citizenship, alienage, and the welfare state to another issue altogether, namely the infirm history of the U.S. on the issue of race. Illegal alienage, they suggest, may be just the straw that breaks the already shaky camel’s back, now that the welfare state provides a ground for resentment. At its core, the proposition that illegal alienage is a phenomenon that is prone to lead to bad “political consequences,” particularly because of the U.S.’s checkered history with race relations, is an empirical proposition that would be difficult to test. At the very least, it is a complex proposition even to defend. As Mae Ngai (2004: 7-8) has argued, while the comprehensive immigration laws of the 1920s did not numerically restrict the immigration of Mexicans, the administrative discretion born of restrictionism most adversely affected Mexicans, constituting them as the paradigmatic illegal aliens, despite a long history of “transnationalism” in the American Southwest. Further, in a more contemporary vein, the politics of immigration are sufficiently complex as to not be easily mapped onto race or ethnicity.

But these empirical issues aside, the most important things to note about Schuck and Smith’s argument are: 1) the extent to which they locate illegal alienage, the welfare state, and by extension the U.S.’s “history of ethnic tensions,” as things “social” and thus presumably always already outside the law,²⁶ and (2) the extent to which the “history of ethnic tensions” becomes a

²⁶ They write:

normative ground upon which to build the argument for taking Constitutional birthright citizenship away from the children of illegal aliens.

As Schuck and Smith themselves point out, if the consensual understanding of citizenship, that which Schuck and Smith seek ultimately to vindicate, had its origins in the texts of John Locke, Jean-Jacques Burlamaqui, and especially Emmerich de Vattel (Chapters 1 and 2 of Schuck and Smith's book), it was also in evidence at profoundly dark and illiberal moments in the nineteenth century, when denying citizenship to freed blacks and native Americans was on the judicial agenda (Chapter 3 of Schuck and Smith's book). However, in general, the courts "perpetuated the common law birthright citizenship rule, primarily out of concern about the problem of unlimited expatriation" (70). Nonetheless, as the authors also note, "arguments for the common-law ascriptive view often came to be perpetuated, ironically, by humanitarians who were greatly opposed to nonconsensual feudal doctrines but who admired the inclusiveness potentially provided by ascription of citizenship to all at birth" (70).

But perhaps this is not so "ironic" at all, given the particularities of the U.S. context. If the sovereign at the center of the ascriptive doctrine of perpetual allegiance had been replaced by popular sovereignty and limited government in the U.S., it is certainly plausible that a citizenship rule that was born in a feudalism could seem not so feudal in modernity, when the king is dead.²⁷ Regardless, the question itself highlights the way in which law, as language, necessarily and naturally escapes the complete control of its original promulgators, even, or especially, when it is difficult or impossible to know precisely what the original promulgators had in mind. And it also highlights the extent to which changing context could render that which may have once been ascriptive as nonetheless now liberal.

In an admittedly less post-structuralist and more conventional legal vein, Gerald Neuman (1987) has argued that Schuck and Smith's conclusion that "the Constitution leaves the issue [of whether the children of illegal aliens ought to receive birthright U.S. citizenship] open to the ordinary political process] is fundamentally erroneous. According to Neuman, if ever there was a question

Thus these two social developments [presumably illegal alienage and the rise of the welfare state, described in the two preceding paragraphs], which neither the Founding Fathers nor the framers of the Citizenship Clause could have anticipated, raise profound questions about distributional justice, national autonomy, and political community in contemporary American life. These questions cast the notions of consensual membership and birthright citizenship in a new and rather different light, dispelling the obscurity to which their long, unreflective acceptance has relegated them (4).

²⁷ See the recent work by Shachar (2009) entitled *The Birthright Lottery*, for another examination of how the *jus soli* rule of citizenship may have overlooked illiberal effects, even in late modernity.

about whether “consent of the already existing political community” should matter when interpreting the 14th Amendment’s statement that “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside,” then that question was definitively answered in the 1898 decision *Wong Kim Ark*. In *Wong Kim Ark*, the Supreme Court affirmed that the San Francisco born son of Chinese immigrants was in fact a U.S. citizen by birth, even if his parents could not naturalize on account of their race. Neuman notes:

The United States wanted Chinese labor, and had not yet perfected the technique of importing temporary workers. It denied the immigrants any opportunity for citizenship, then attempted to prevent more laborers from arriving, forbade their reentry if they left the country and began expelling those who had not secured certificates demonstrating the legality of their presence (488).

In other words, if any set of immigrants were not welcomed with open, happily consenting arms, it was certainly the Chinese immigrants of the mid to late nineteenth centuries. But still, the Court chose not to deny Wong Kim Ark birthright citizenship. As Neuman continues, “If the phrase ‘subject to the jurisdiction’ left Congress any flexibility for consent-based restrictions at all, surely the Court could have read it as leaving aliens whose reception was so chilly still ‘subject to the jurisdiction’ of their native land, and not of the United States” (489).

But bracketing this issue of whether Schuck and Smith’s proposal to make birthright citizenship a matter of Congressional statute rather than the Constitution would be legal under contemporary U.S. law, our discussion here continues to beg the question of what the purported conflict between ascriptive and consensual views of citizenship in the 14th Amendment has to do with immigration today. Put slightly differently, why then, for Schuck and Smith must the would-be “more liberal,” consensual view be vindicated in contemporary law and politics, if not for the circular reasoning that liberal states ought to be consistently liberal-looking, even if it’s unclear which of two “liberal” options ((1) birthright citizenship for all, or (2) some more exclusionary, but “more consensual” alternative) is more truly “liberal” in a particular context?²⁸

Schuck and Smith’s answer has to do with their ultimate concern with the development of the welfare state and specifically with “*Graham’s* [*Graham v. Richardson* (1981)] repudiation of citizenship as a criterion for allocating the

²⁸ In essence, the important thing to note is that “liberalism” has two different, sometimes unfortunately conflicting (as here) meanings: 1) the moral equality of all human beings; and 2) freedom and consent. See Scheffler (2001) for further exploration of this conflict.

welfare state's 'new property' entitlements" (107). "Graham," they continue, "marks an important milestone in the devaluation of citizenship" (107).

Curiously, *Mathews v. Diaz*, the 1976 decision which arguably profoundly takes the wind out of *Graham v. Richardson's* sails, as discussed above, is not mentioned in Schuck and Smith's 1985 text. And also as discussed above, the 1996 federal welfare reform and immigration statutes serve to decouple the welfare state from questions of alienege, thereby making objections to immigration on welfare terms slightly more complicated to defend.

But again, the legal aspects of the arguments aside, what is unique about Schuck and Smith's argument, vis-à-vis those discussed in the previous two sections, is the extent to which Schuck and Smith's argument is one about the diminishing value of U.S. citizenship for those already here. "It is welfare membership, not citizenship, that increasingly counts," they lament. "Political membership uniquely confers little more than the right to vote and the right to remain here permanently; the former is used at most by only a bare majority of eligible voters, while the latter, although undeniably valuable, is problematic for only a minority of legal aliens. Membership in the welfare state, in contrast, is of crucial and growing significance" (106).

Access to the welfare state is problematic for a larger group of legal aliens since 1996. But that does not get to the heart of Schuck and Smith's concern. Because citizenship is losing value to those who are already here, on account of low voter participation and the extension of welfare to non-citizens, it may be "simply morally perverse to reward law-breaking by conferring the valued status of citizenship, and it is even more perverse to plant the guarantee in the Constitution" (114). The 'slippery slope' at the heart of Shuck and Smith's argument is thus now visible. Political citizenship is already losing its value to insiders. So to give it constitutionally to those who are the children of "law-breakers" would only further cheapen the value of citizenship. Or so the argument goes.

At the heart of the problem, for Schuck and Smith, is the ambiguous content of "territorial jurisdiction." On the one hand, territorial jurisdiction augments nation-state power, in so far as it leaves no room for other kinds of authority. On the other hand, territorial jurisdiction ties the hands of the embattled political community, as it is also at the core of the "giving" of citizenship to the children of "lawbreakers" to whom the community has not consented.

Substantive legal objections to Schuck and Smith's arguments aside, the arguments beg an important set of further questions not yet encountered in our discussion. For example, does any declining salience of "political citizenship" justify more restrictive immigration and alienage policies? In other words, must "political citizenship" necessarily be the most important kind of citizenship? And taking a step back, can the content of "political citizenship" itself change

over time and place? Subsequent chapters will explore these questions socio-legally.

Each of the three sections above has analyzed a work of political philosophy or political theory with primary reference to the question, "What particular problem or set of problems does illegal alienage create in the world envisioned by these works?" While in the world of Rawls's "distributive justice," "legal aliene" and illegal aliene both presumably threaten the foundation and the administration of the welfare state, in the world of Walzer's "distributive justice," prolonged legal alienage represents the melding of two different spheres, and as such, constitutes unjust subordination. And in the world of Schuck and Smith, the bestowing of "non-consensual" citizenship on the U.S. born children of illegal aliens represents a further diminishing of the value of U.S. citizenship, regardless of any other normative ends a *jus soli* citizenship rule may serve.

While distinct, these three portraits share one major characteristic in common. They are either relatively blind to the possible disaggregation of citizenship from various other kinds of rights (e.g. welfare rights, labor rights, or voting rights) or rather presume that such disaggregation is necessarily undesirable or problematic. The work analyzed in the next section takes a different baseline approach with respect to the separation of "citizenship" and "rights," and as such, evinces a different view of law.

On Disaggregated States: Illegal Alienage in Contemporary Democratic Theory

The epigraph of Seyla Benhabib's book *The Rights of Others: Aliens, Residents, and Citizens* reads, "No human is illegal." The quotation is attributed to the Immigrant Workers' Freedom Ride in Queens, New York on October 4, 2003. At first glance, the phrase is unremarkable, and indeed precisely the kind of language that one would expect both at an immigrants' rights rally and as an epigraph in a book that takes up the topic of contemporary alienage law and politics. On closer examination, however, the quotation suggests a tension at the heart of both contemporary immigrants' rights movements and also at the heart of Benhabib's book. Specifically, while the proposition "no human is illegal" suggests that humanity qua humanity is the ground of rights that are yet to be realized, it is the Immigrant *Workers'* Freedom Ride that provides the crucial context for the statement. While "humanity" is distinct from "work" and worthy of respect in and of itself, the quotation and its context suggest the close relationship between contemporary claims for recognition of "humanity" and claims for recognition of "work" in U.S. alienage law and politics. This conceptual ambiguity, or rather the joint occurrences of "humanity" and "work" in contemporary social movements having to do with immigration and alienage,

invokes Hannah Arendt's diagnosis (discussed in Chapter 2) that in the late modern era of positive law and nation-states, the "abstract nakedness of being human" (Arendt 1951: 229) curiously achieves little as a practical matter, despite appearances or hopes to the contrary.

Correspondingly, throughout Benhabib's book, there is pervasive ambiguity as to precisely who may be the relevant "other," whose rights are at issue in any given context. Drawing out the political particularities of the contemporary era, Benhabib notes early in her book that, "The growing normative incongruities between international human rights norms, particularly as they pertain to the 'rights of others'--immigrants, refugees, and asylum seekers-- and assertion of territorial sovereignty are the novel features of this novel [contemporary] landscape" (Benhabib 2004: 7). As noted in Chapter 2, while the terms "refugees" and "asylum seekers" now refer to persons whose paradigmatically political injuries meet certain statutory requirements, illegal aliens are the ultimate category of the remainders. Presumably, by "immigrants" Benhabib means to include both the category that U.S. law designates as "immigrants," legal permanent residents, as well as the illegal aliens, who are nominally beyond the law. As such, the term "immigrant" in Benhabib's text appears to refer at once to the most favored and the least favored categories of non-citizens in liberal democracies.

Ultimately, Benhabib argues "that a cosmopolitan theory of justice cannot be restricted to schemes of just distribution on a global scale, but must also incorporate a vision of just membership on a global scale" (Benhabib 2004: 3). For Benhabib, "a vision of just membership," requires: "recognizing the moral claim of refugees and asylees to first admittance; a regime of porous borders for immigrants; an injunction against denationalization and the loss of citizenship rights; and the vindication of the right of every human being 'to have rights,' that is, to be a legal person, entitled to certain inalienable rights, regardless of the status of their political membership" (3).

The "porous boundaries for immigrants" prong in Benhabib's normative prescriptions above is at once the most crucial and the most difficult to flesh out in detail. Elsewhere, Benhabib notes that "porous borders" entails something like "fairly open borders," where liberal peoples "... coexist within a system of mutual obligations and privileges, an essential component of which is the privilege to immigrate, that is, to enter another's people's territory and become a member of its society peacefully" (93). The problem of permanent alienage is clearly one that Benhabib seeks to foreground. But what remains unclear is how far, or to whom exactly, the "privilege" to immigrate extends. To be clear, I do not mean to suggest that the ambiguity about which kind of non-citizen "other" is the appropriate beneficiary of any one of Benhabib's normative prescriptions necessarily dooms Benhabib's analysis of the contemporary politics of immigration and alienage. Instead, I mean to suggest that this ambiguity is

important to keep in mind when considering the limits and possibilities of the "democratic iterations" of alienage that Benhabib puts front and center in her portrait.

It is to this unique aspect of Benhabib's book that we now turn. Benhabib begins her book with an empirical observation not found in any of the other books analyzed in this chapter. Specifically, Benhabib notes, "We have entered an era when state sovereignty has been frayed and the institutions of national citizenship has been disaggregated or unbundled into diverse elements. New modalities of membership have emerged, with the result that the boundaries of the political community, as defined by the nation-state system, are no longer adequate to regulate membership" (1). From a socio-legal perspective, it is not clear whether this "frayed sovereignty" is new news or rather more of the same. As discussed in Chapter 2, "sovereignty" has always been easy to presume, but hard to pin down in law. Nonetheless, unlike Rawls, Walzer, and Schuck and Smith, Benhabib accepts and indeed ultimately renders productive, or rather "jurisgenerative," the overlapping and nested jurisdictions of modern states as well as the agonistic conflicts that ensue among these jurisdictions.

As a political theorist writing from the perspective of deliberative democracy, Benhabib is committed to the idea that "practices of democratic closure" (17) be justified in speech in such a way that they "can be agreed to by all concerned" (13). This notion of an ideal deliberative forum that provides the site for generating "valid" or "just" rules may seem far-fetched or utopian to many socio-legally inclined readers familiar with the limitations of the "law in action." But Benhabib takes deliberative democratic theory an additional step that gives her political theory-based portrait of alienage a decidedly socio-legal, social constructivist valence. Specifically, Benhabib argues that while "some practices of democratic closure are more justifiable than others, . . . potentially all practices of democratic closure are open to challenge, resignification, and deinstitutionalization"(17).

It is important to note here that Benhabib seeks specifically to locate any defense of closed borders in democracy. As such, closure is clearly and necessarily "democratic closure" for Benhabib. This small but important point distinguishes Benhabib from the other theorists analyzed in this chapter. Furthermore, the contention that contemporary political or socio-legal dilemmas of citizenship and alienage within democracies could be productive rather than destabilizing to the welfare state (Rawls), necessarily subordinating (Walzer), or ascriptive (Schuck and Smith), also distinguishes Benhabib.

How then must we understand the potential productivity of ambiguities of citizenship and alienage? Benhabib notes that in her book, she seeks to "underscore the significance of membership within bounded communities and defend the need for 'democratic attachments' that may not be directed toward existing nation-state structures alone" (3). As such, Benhabib suggests that

supranational and subnational contexts may be sites for important "democratic attachments," and also "democratic iterations," where citizenship and alienage are reconfigured, presumably for the better. For Benhabib, "democratic iterations" refer to "complex processes of public argument, deliberation, and learning through which universalist rights claims are contested and contextualized, invoked and revoked, throughout legal and political institutions as well as in the public sphere of liberal democracies" (19). Additionally, Benhabib notes that she "view[s] democratic iterations as engaging in 'jurisgenerative politics,'" (19), which suggests that for Benhabib, these "democratic iterations" necessarily re-make or re-constitute the law. Rather than viewing "the disaggregation of citizenship and the end of the unitary model with dismay," or thinking of current developments as "indicators of the 'devaluation' of citizenship. . .in so far as one no longer need be a citizen to have access to some coveted social rights," Benhabib urges her readers to consider interpreting new political and socio-legal developments as "indicators of a new sense of global justice and harbingers of new modalities of political agency, heralding perhaps cosmopolitan citizenship" (171).

As noted in the Introduction to this chapter, democratic theorists, from Rousseau onward, exhibit a tendency to presume that the "democratic will," or in this case, "democratic iterations" fully make up "The Law." As such, they tend not to recognize multiple sources and forms of law, as well as important distinctions between "popular sovereign" or "legislative" law-making on the one hand, and administrative or judicial law-making on the other. And they tend not to recognize the institutional dynamics between the various purveyors of law. These factors may contribute to excessive optimism on Behabib's part about "new modalities of political agency, heralding perhaps cosmopolitan citizenship" (171). We will explore these issues further in the U.S. context in the next section of this chapter.

As examples of "democratic iterations," that have already reconstituted "the rights of others" Benhabib points to: 1) the so-called "scarf affair" in France, where the banning of the wearing of headscarves by Muslim girls in French schools has resulted in controversy since 1989; 2) the case of Fereshta Ludin, a teacher of Afghani origin and German citizenship who insisted on being allowed to teach in a German public school with her head covered; and 3) the German Constitutional Court's 1990 ruling against a 1989 law passed by the provincial assembly of Schleswig-Holstein that would have allowed "all foreigners residing in Schleswig-Holstein for at least five years, who possessed a valid permit of residency or who where in no need of one, and who were citizens of Denmark, Ireland, the Netherlands, Norway, Sweden, and Switzerland . . . to vote in local and district elections" (203).

With respect to the so-called "scarf affair" in France, the case the Benhabib analyzes most deeply, Benhabib finds significant, "the intense debate among the

French public about the meaning of wearing the veil, the self-defense of the girls involved and the rearticulation of the meaning of their actions, and the encouragement of other immigrant women to wear the headscarf into the work place" (197). With respect to the case of Fereshta Ludin, Benhabib points to the German Constitutional Court's 2003 ruling that German legislatures must decide the matter. Benhabib notes, "By not leaving the case up to the exclusive jurisdiction of school authorities, and by stressing the necessity for the state to maintain religious and worldview neutrality in the matter, it signaled to democratic lawmakers the importance of respecting the legitimate pluralism of worldviews in a liberal democracy" (200). And with to the 1989 provincial non-citizen voting law, Benhabib finds significant the concession of the German Constitutional Court in 1990 that "the sovereign people, through its representatives, could change the definition of citizenship" (205), the resulting public debate about immigration within Germany, and the eventual awarding of non-citizen voting rights for EU nationals by way of the 1993 Maastricht Treaty. In the first and second cases, the "others" at issue are those who are perhaps "culturally other" or "religiously other," but nominally French or German citizens. In the third case, the relevant non-citizens are all nationals of neighboring European countries. Benhabib does not offer analysis as to how exactly these distinctions may matter. Nor does she indicate how these discussions are necessarily democratic. Indeed, not all debate is necessarily democratic in nature. To say so requires further sociological and normative inquiry into what kinds of actors were mobilized by particular issues.

Nonetheless, given her attention to "iterations" and transformations, Behabib offers the most socio-legally resonant portrait of citizenship and alienage in contemporary liberal democracies among the works analyzed in this chapter. But important questions remain: Is Benhabib too optimistic or too lofty in her understanding of alienage law-making? How might "democratic iterations" vary with respect to the particular "other" whose rights are at issue? The next and final section of this chapter takes a close look at one possible site for "democratic iterations" of alienage in the U.S. context. Specifically, it takes up the possibilities of "democratic iterations" having to do with illegal aliens.

On Illegal Alienage in Modern Administrative States: NY Sanctuary and the Limits and Possibilities of 'Administrative Iterations'

In 1989²⁹, Edward Koch, then Mayor of New York City, issued Executive Order No. 124. It provided:

²⁹ *The New York Times* reported on October 15, 1985 that then Mayor Edward Koch had just written a memo in which "he ordered city employees not to report illegal immigrants living in the city to Federal authorities unless the alien 'appears to be engaged in some kind of criminal

No city officer or employee shall transmit information respecting any alien to federal immigration authorities unless:

- 1) such officer's or employee's agency is required by law to disclose information respecting such alien, or
- 2) such agency has been authorized, in writing signed by such alien, to verify such alien's immigration status, or
- 3) such alien is suspected by such agency of engaging in criminal activity, including an attempt to obtain public assistance benefits through the use of fraudulent documents.³⁰

Further, the Executive Order made it impossible for any individual city employee to take action against an alien unilaterally, even if the employee suspected the alien of criminal activity. The Order required the designation of "one or more officers or employees who shall be responsible for receiving reports from such an agency's line workers on aliens suspected of criminal activity and for determining, on a case by case basis, what action, if any, to take on such reports."³¹ The order thus established an organizational buffer between individual line officers and the federal Immigration and Naturalization Service (INS), thereby suggesting that the decision of whether to communicate with the INS was one which involved a set of factors known fully only to this group and not listed in the text of the order.

In August 1996, President Bill Clinton signed the Welfare Reform Act. Section 434 of the Act, entitled, "Communication between State and Local Government Agencies and the INS," provided in pertinent part:³²

Notwithstanding any other provisions of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.³³

behavior.'" The newspaper reported that "The Mayor said that the policy against reporting illegal aliens had already been in effect within city agencies and that his memorandum was meant to 'reaffirm' that policy." Further, the Mayor's justification for his memo is that aliens who do not access city services pose a danger to their well-being and to the city's well-being. See Kerr (1985). This leads to the preliminary conclusion that although Executive Order 124 officially comes into being in 1989, a similar policy predated 1989. This also leads to the interesting theoretical question of how the policy changed in practice when it became a written policy rather than an unwritten matter of custom.

³⁰ *City of New York v. United States*, 179 F.3d 29 at 31-32.

³¹ *Id.* at 32.

³² Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law No. 104-193, 110 Stat. 2105 (1996).

³³ *City of New York v. United States*, 179 F.3d 29 at 32.

In late September of the same year, Section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act also became law.³⁴ Section 642 provided in pertinent part:

- a) Notwithstanding any other provision of Federal, State or local law, a Federal, State or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.
- b) Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:
 - 1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
 - 2) Maintaining such information.
 - 3) Exchanging such information with any other Federal, State, or local government entity.³⁵

Section 434 contained passive voice language that “no State or local government entity” may be prohibited or restricted from sending information to the INS. This left open the question as to whether the individual officer or rather the committee charged with making decisions about communicating with the INS is the relevant “local government entity.”

In contrast, Section 642(a) posited its subjects more directly and spoke in an active voice of “entities and officials” not being able to prohibit or restrict any other “entities and officials” from exchanging information with the INS. Section 642(b) narrowed further any possible ambiguity about the particular subject to whom this law applied, noting that “no person or agency” can promulgate such restrictions. While Section 434 identified “State or local government entities” as the relevant subjects, Sections 642(a) and 642(b) enlarged the applicability of the law to “officials,” “agencies,” and even “persons.”

³⁴ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

³⁵ *City of New York v. United States*, 179 F.3d 29 at 33.

Eleven days after the signing of the Illegal Immigration Reform and Immigrant Responsibility Act, Mayor Rudolph Giuliani's administration filed a lawsuit in federal district court claiming that Section 434 and Section 642 violated the Tenth Amendment³⁶ of the U.S. Constitution. The Giuliani administration argued that the statutes interfered both with the City's right to control information obtained during the course of its official business and to control its own workforce.³⁷ The new federal law, the City of New York argued, was beyond the scope of even Congress's considerable plenary power in the realm of immigration regulation in so far as it forced the City to participate in a federal regulatory scheme.³⁸

The Court of Appeals for the Second Circuit, like the federal district court that originally heard the case, rejected the City of New York's claim that it had been unconstitutionally conscripted into doing the federal government's work for it. The court also rejected the city's claim that the new federal statutes were beyond the scope of Congressional power.³⁹ The court reasoned that while a statute that directed the executive branch of a state or local government to directly administer a federal program may indeed rise to the level of unconstitutionality, the statutes at hand did not directly compel subfederal jurisdictions to do anything.⁴⁰ The statutes merely prohibited the prohibition of voluntary speech on the part of city officials, the court argued. Further, pointing out (without irony) that insubordinate local officials frustrated desegregation until the federal courts ordered them to comply with *Brown v. Board of Education*, the court rejected the City of New York's claim that the 1996 federal statutes violated the Tenth Amendment. The court invoked the Supremacy Clause of the Constitution to support its holding.

It is perhaps understandable that the Court of Appeals was hesitant to accept New York City's aggressive facial challenge to a legislative act of Congress in a substantive area historically marked by high deference to Congressional prerogative. But most important and interesting for the purpose of this chapter is the language of the Second Circuit's opinion for what it suggests about declarations and statements of law (i.e. positive law) on issues of alienage in the context of cities. The court stated in its opinion:

³⁶ The Tenth Amendment states that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Recent Supreme Court case law, particularly *New York v. United States*, 505 U.S.144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997) have interpreted the Tenth Amendment as prohibiting the conscripting of states (and by extension local government entities) into enforcing a federal regulatory program.

³⁷ *City of New York v. United States*, at 34.

³⁸ *Id.*

³⁹ *Id.* at 35.

⁴⁰ *Id.*

These sections (Sections 434 and 642) do not directly compel states or localities to require or prohibit anything. Rather, they prohibit state and local governmental entities or officials only from directly restricting the *voluntary* exchange of immigration information with the INS [emphasis added].⁴¹

According to the Second Circuit, the federal law only prohibited cities from prohibiting their employees from voluntarily cooperating with the INS. In other words, a city employee could be silent, but that silence could not be commanded through city-level positive law or proffered in the form of a written legal command. The silence could be a matter of individual discretion or preference, but not a matter of city law or policy concerning information about immigration statuses.

This raises a few key questions. Does this silence that cannot be commanded but can nonetheless exist challenge both the sovereignty of the nation-state and its positive law more generally? If this silence is based entirely on individual, official discretion, how can it be a “right” for an alien or the ground of any new, more expansive “political community,” when political community has come to be a matter of positive law? In Benhabib’s terms, can non-mandatory silence be a progressive “democratic iteration?”

The Second Circuit Court suggested further that the City of New York chose to litigate this case in an unfortunately over-combative way and hence did not make some more conservative and therefore stronger constitutional arguments. The court suggested that if the City could show that its Executive Order was integral to the operation of city government generally, then perhaps the court could have been more sympathetic. The court itself offered a suggestion to the City of New York. Specifically, it noted:

Whether these Sections (434 and 642) would survive a constitutional challenge in the context of *generalized confidentiality policies that are necessary to the performance of legitimate municipal functions* and that include federal immigration status is not before us, and we offer no opinion on that question [emphasis added].⁴²

In December of 2002, a 42-year old woman was assaulted in a Queens, New York park. The suspects included five aliens. The Immigration and Naturalization Service provided records to the House Judiciary Committee that alleged that four of the five aliens were undocumented and that all five had been

⁴¹ Id.

⁴² Id. at 37.

arrested before in New York City.⁴³ In February of 2003, John Feinblatt, Criminal Justice Coordinator for the City of New York, found himself testifying before the House of Representatives Subcommittee on Immigration. In a hearing entitled, “New York City’s ‘Sanctuary’ Policy and the Effect of Such Policies on Public Safety, Law Enforcement, and Immigration,” members of Congress pushed Feinblatt on the issue of whether New York City was still following Executive Order 124, despite the 1996 federal statutes and despite its losing its constitutional challenge to the statutes in the Second Circuit in 1999.

Feinblatt assured the House Committee that New York City was in compliance with the 1996 statutes and the 1999 decision. When asked if there existed a text of an executive order that repealed Executive Order 124, Feinblatt stated only that a 2001 city charter authorized the Mayor to promulgate regulations regarding confidentiality, that such confidentiality regulations would be in accordance with federal law, and that the city was currently working on a new executive order.⁴⁴ Feinblatt stressed that federal law imposed no affirmative duty to report on city police officers, that INS agents were stationed in city jails, and that with reference to the December 2002 assault, the police detective on the case had indeed contacted the INS. The Committee Chairman asked in response why no one had called the INS during the course of the suspects’ other arrests. Feinblatt reiterated that police officers bore no affirmative duty to report to the INS and suggested that the INS had failed to respond in the past.⁴⁵

In May 2003, the City of New York established a “don’t ask” policy rather than a “don’t tell about immigration policy.” The “don’t ask” policy, Executive Order 34, prohibited City workers from inquiring about a person’s immigration status.⁴⁶ In September 2003, the City went further and established a “privacy

⁴³ See Transcript of House of Representatives Subcommittee on Immigration, Border Security, and Claims Hearing, February 23, 2003; Available at: <http://commdocs.house.gov/committees/judiciary/hju85287> (Last Accessed November 20, 2009).

⁴⁴ Id.

⁴⁵ Id. The February 2003 hearing transcripts belie an overwhelming concern with prevention of crime in cities, but also a frustrating and persistent lack of certainty as to whether the existence of policies such as Executive Order 124 are themselves crime prevention strategies or crime abetting strategies. Further, there is lack of certainty as to whether undocumented aliens are themselves criminals or more likely victims on account of their status. Interestingly, alien victimhood is represented primarily as a problem of undocumented alien women who are victims of violence within a private sphere they share with men whose status is more legal than their own. This raises the question of whether subfederal jurisdictions opt to separate out undocumented alien victimhood as a matter of official policy or communications with immigrant communities. In other words, it raises the question of whether victimhood can be a particular and protected ground for contact with local governmental officials, as a matter of practice if not of law.

⁴⁶ I have been unable to locate the text of Executive Order 34 in the New York City archives. Executive Order 34 is mentioned and discussed in Mayor Bloomberg’s speech announcing Executive Order 41. See “Mayor Michael R. Bloomberg Signs Executive Order 41 Regarding City

policy,” Executive Order 41.⁴⁷ The order, which is currently on the city's books, is officially named, “City-Wide Privacy Policy and Amendment of Executive Order No. 34 Relating to City Policy Concerning Immigrant Access to City Services.” It first defines as “confidential information” a person’s immigration status, but also sexual orientation, income tax records, and welfare assistance history. It promises that no city employee shall disclose any confidential information unless such a disclosure is “required by law,” or “necessary to achieve the mission of a City agency.” In so far as immigration status is concerned, the exceptions that make possible disclosure of the otherwise confidential information include an officer’s suspicion that the alien has engaged in illegal act other than mere status as an undocumented alien, or the facility that dissemination would have for apprehension of a person suspected of engaging in an illegal act. Finally, in a separate section entitled “Law Enforcement Officers,” the order states that “Law enforcement officers shall not inquire about a person’s immigration status unless investigating illegal activity other than mere status as an undocumented alien,” and that “Police officers and peace officers . . . shall continue to cooperate with federal authorities in investigating and apprehending aliens suspected of criminal activity.”⁴⁸ Further, it attempts to separate out the categories of alien victims and witnesses, noting that it shall be “the policy of the Police Department not to inquire about the immigration status of crime victims, witnesses, or others who call or approach the police seeking assistance.”⁴⁹

Unlike Executive Order 124, New York City’s new “privacy policy,” makes no command to its police officers about the transmission of information to the INS. Indeed, the INS is not mentioned by name at all in the policy. By removing explicit discussion of the INS all the while positing “continued cooperation with federal authorities” in dealing with criminal aliens, Executive Order 41 establishes in theory a broader scope of city police discretion, but not necessarily a broader scope of rights (in positive law) for aliens.

Further, Executive Order has the effect of folding immigration status into other matters of demographic and socioeconomic information. It thus posits that alienage has no primacy unless police officers suspect a crime. But important new questions emerge: Are what is posited in Executive Order 41 “rights” at all, where rights at least to some degree turn on recognition in a public sphere? Is

Services for Immigrants.” Available at: http://www.nyc.gov/html/imm/news/exe_order_41_remarks.shtml (Last Accessed November 21, 2009).

⁴⁷ The City of New York, Office of the Mayor. Executive Order No. 41, September 17, 2003. Available at: http://home2.nyc.gov/html/imm/downloads/pdf/exe_order_41.pdf. (Last accessed November 21, 2009).

⁴⁸ Id.

⁴⁹ Id.

there something oxymoronic about the expansion of “citizenship” through the purported expansion of discretion-based “privacy?”

The language of city informational materials emphasizes that “Mayor Bloomberg’s Executive Order 41 Protects *All* New Yorkers” (emphasis original), and that order makes it more likely that immigrants will access “city services.”⁵⁰ The language of “services” rather than “rights” further suggests that what is at stake at the city level is not the progressive reconstitution of political community but rather the deployment of a particularly administrative and discretionary mode of relations between city officials and illegal aliens in particular. The transformation of New York City’s policy from 1989 to 2003 reveals the ascendancy of this administrative mode of governance. The existence of this administrative mode suggests looking necessarily beyond positive law when confronting questions of alienage, cities, and citizenship.

At the same time, it suggests that scholars should not necessarily expect to find progressive reconstitutions, or “democratic iterations” where disaggregations of citizenship and illegal alienage are jointly at issue. The emergence and transformation of New York City’s “sanctuary policy” suggests rather the importance of “administrative iterations,” or even “administrative non-iterations,” given the importance of municipalities *not* making declarations of law, and therefore *not* encroaching upon the sovereignty of the nation-state.

The next two chapters will formally turn to the sociology of law to examine these questions further. But as a matter of political theory, this chapter has shown that with respect to illegal alienage in particular, the logic of a contemporary “administrative state” may powerfully diverge from the logic of the more familiar “democratic state” or monolithic “sovereign state.” And this chapter has shown that the former, rather than the latter is an essential, if relatively ignored site for grappling with “non-ideal,” yet also urgent contemporary questions of justice and the foreigner.

⁵⁰ Mayor’s office of Immigrant Affairs, “Mayor Bloomberg’s Executive Order 41 Protects All New Yorkers.” Available at: <http://home2.nyc.gov/html/imm/downloads/pdfeo41english.pdf>. (Last accessed November 22, 2009).

CHAPTER 4

"ORDER WITHOUT LAW" REVISITED: ILLEGAL ALIENAGE AND THE SOCIOLOGY OF LAW

Events in a remote corner of the world can illuminate central questions about the organization of social life.

Robert Ellickson

Order without Law: How Neighbors Settle Disputes

To look at the symbolic dimension of social action -- art, religion, ideology, science, law, morality, common sense -- is not to turn away from the existential dilemmas of life for some empyrean realm of de-emotionalized forms; it is to plunge into the midst of them. The essential vocation of interpretive anthropology is not to answer our deepest questions, but to make available to us answers that others, guarding other sheep in other valleys, have given, and thus to include them in the consultable record of what man has said.

Clifford Geertz

The Interpretation of Cultures

Law . . . is not just social engineering. Law is one way of declaring what is morally right and wrong.

"Introduction"

Law in Action: A Socio-legal Reader

Introduction

The three quotations chosen for the epigraph of this chapter, unlike the quotations that comprise the epigraphs of all the previous chapters, have nothing to do with immigration or alienage. This is because this chapter represents a change in register from the political theoretical to the sociological, and therefore, takes a necessary step back from the phenomenon of illegal alienage to paint the contours of a new field. It then situates illegal alienage within that new field.

First, the chapter considers the implications of law itself for broader conceptual debates in the social sciences.¹ Second, the chapter draws out the additional challenges that questions of citizenship, alienage, and ultimately illegal alienage portend for the subfields of sociology of law and socio-legal studies.²

As such, this chapter is not meant to be strictly a literature review documenting extant sociological or socio-legal hypotheses about a particular phenomenon (here, illegal alienage), or alternately, a description and defense of social scientific methods deployed to capture the “essence” of that phenomena. Both of these tasks, namely documenting previous socio-legal work on immigration and alienage and discussing the limits and possibilities of various empirical approaches to these topics, do inform this chapter and thus will be attended to. But to be clear, these tasks do not fully define the scope of this chapter.

In light of the inter-disciplinary aspirations of this dissertation, the chapter’s primary goals are: first, to illuminate central conceptual presumptions in the social sciences generally, and in the sociology of law in particular; then, to show why the phenomenon of illegal alienage rests uncomfortably with these presumptions and thus requires a particular empirical approach. As such, the on-going debate in the social sciences, roughly between “behavioralists” and “non-behavioralists” (or rather “interpretivists”) is a necessary starting point of our discussion. This debate has to do with whether, in fact, “events in a remote corner of the world can illuminate central questions about the organization of social life,” (Ellickson 1991:1) or rather, whether these events are unique instances in the “consultable record of what man has said” (Geertz 1972:30). If, for strong “behavioralists,” the presumption (or article of faith) that there are certain (ostensibly a small number?) of truths about human behavior and social organization, serves as the lens through which the world is necessarily apprehended, for non-behavioralists, this same proposition appears a tall tale, leading to unfortunate obfuscations at best, and fools’ research errands at worse.

While the first quotation in the epigraph above represents a “behavioralist” approach to social science, the second represents an

¹ While this step is something that social scientists who deal with law usually skip, it is integral to the inter-disciplinary mission of this dissertation. Law is only of many phenomena that the modern social sciences take up; therefore, it is important to recognize how certain more general social scientific theories apply or rather do not apply comfortably to law.

² While the phrase “sociology of law” may be technically a subfield of the academic discipline of sociology, I mean to indicate works on law from a variety of social science disciplines, which have in common the fact that they seek to explain the shapes and contents of law through social scientific means. “Socio-legal studies” more commonly refers to works on law that draw inspiration from sociology, as well as from anthropology, political science, economics, and history. I use the terms interchangeably in this chapter and I mean to indicate a broad definition of “sociology of law.”

“interpretivist” approach. The third quotation, neither behavioralist nor interpretivist, introduces law and indicates that law is also a “moral declaration,” whatever else it may also be. This third quotation suggests the particular and additional problems of insisting that events about law in particular in a remote corner of the world can “illuminate central questions about the organization of social life.” Not only are “moral” questions not necessarily “rational,” they also often involve shifting meanings, institutional constraints, and changing conceptions of such important, but hard to define concepts as “citizenship,” “belonging,” and “standing,” each variously affecting the content of “the social,” “sociological” or “socio-legal” at any given point in time. This point has broad implications for the sociology of law and particularly for the sociology of the laws of citizenship and (illegal) alienage.

Furthermore, that law is a “declaration” has all sorts of ramifications having to do more generally with the limits and nuances of language, as discussed in Chapters 1, 2 and 3. And even further, that law, or rather declarations of law, are constitutive of “nation-state sovereignty,” (Chapter 2) suggests that “alienage law in action,” across local jurisdictions is constrained by what the would-be sovereign has already declared (Chapter 3). The most important point here is that these constraints (of language, institutions, and citizenship, for example) are matters wholly distinct from would-be “human nature.” The sociologist of law, this chapter suggests, must resist the temptation to fold law into broader behavioralist hypotheses without considering law’s own particular moral, institutional, or linguistic complexities.

In addition, law’s moral and linguistic characteristics also suggest its status as a shared enterprise, based on at least some common understandings, no matter how tenuous or merely procedural (rather than substantive) these shared understandings may be. As such, sociologists of law must also, at the same time, resist any extreme interpretivist impulses, whereby they may be tempted to characterize legal phenomena as wholly unique social events or wholly power laden one-off occurrences, thereby eliding attention to the broader institutional, moral, and linguistic constraints operating implicitly within the “law in action.” The approach advocated here seeks explicitly to avoid both behavioralist and interpretivist approaches in favor of an institutionally-informed, detailed empiricism coupled with on-going political theoretical analysis. Such an approach, I will argue, is particularly suitable for studying the phenomenon at hand, namely illegal alienage, which is neither fully law “on the books” nor law “in action.”

Four parts comprise this chapter. The first part develops further the close reading of Ellickson’s book commenced above. It does so in order to draw out more explicitly certain important, if heretofore relatively unremarked upon, conceptual presumptions in the sociology of law. These issues have to do with behavioralism and its alternatives, as well as with issues of citizenship and non-

citizenship. Admittedly, this chapter more closely analyzes and critiques the behavioralist approach to socio-legal studies than it addresses the interpretivist approach. This greater attention paid to behavioralism is due the greater resonance of behavioralism (and that of its close cousins “efficiency-maximizing rationality,” “rational choice theory,” and “law and economics”) across the social sciences and also within the legal academy.³

The second part of this chapter moves from Ellickson’s book to other classic works in the sociology of law that are also not directly about alienage. It does so in order to show how Ellickson’s thesis of “order without law” has long been a classic trope in the sociology of law, and also, more importantly, to show broadly how the themes of “citizenship” and “second class citizenship” have preoccupied the field of sociology of law, again in important but often implicit ways. This attention to “second class citizenship” in the sociology of law serves to raise questions about the field’s relatively scant attention to issues of alienage.

The third section then moves to the small but important minority of works in the sociology of law that are explicitly about citizenship and (illegal) alienage. It draws out the ways in which the authors of these works have attempted to situate their works as “case studies” of other hypotheses in the sociology of law, and it critically evaluates the limits and possibilities of these various approaches.

The fourth part of the chapter seeks to build and defend a particular theoretical and methodological framework for apprehending the “law in action” of illegal alienage in the U.S. today and thus to set the stage for Chapter 5. This section draws heavily on the work of Michael Lipsky, who coined the term “street-level bureaucrats” (Lipsky 1969; 1980). While Lipsky’s work emerged out of the field of political science more than forty years ago, its focus on “street-level bureaucrats” has particular salience for the sociology of law of contemporary illegal alienage, as I will show. But to be clear, I do not mean to suggest that Lipsky’s text provides a “how-to” with respect to doing a socio-legal study of illegal alienage today. Rather, the close analysis of Lipsky’s texts found in this section is meant to provide a touchstone for “going local” with respect to immigration and alienage law. Ultimately, my approach to illegal alienage owes significantly to all the works analyzed in the third section as well as to Lipsky’s writings on “street-level” bureaucracies.

Taken as a whole, this chapter, like prior chapters, seeks to illuminate how illegal alienage exposes the limits of law, and as such, also challenges extant

³ Lauren Edelman (2004: 182) emphasizes the prominence of law and economics (and also suggest the importance of critique or critical examination of the field) when she writes, “In recent years, the relationship between law and the economy has been front and center in policymaking around the world, in courts, and in law schools, largely as a result of the law and economics (L&E) movement. L&E has been extremely influential in the policy realm, so much so that concepts of law and justice are increasingly *defined* in economic terms and understood through the lens of market efficiency.”

paradigms in disciplines, like sociology of law, that seek to understand law as a matter of "social action." The primary argument of this chapter is that apprehending the "law in action" of illegal alienage requires a cautious refusal of social scientific behavioralism in favor of a historical approach that apprehends law neither as the predictable product of "innate human rationality" nor "social power," but rather as a series of institutionally mediated answers to changing, but recurrent questions of citizenship and government in late modern liberal democracies.

Ellickson's *Order Without Law* and the Temptations of Socio-legal Behavioralism in the "All Citizen" State

In *Order without Law: How Neighbors Settle Disputes*, a book about the everyday municipal governance of a rural northern California county, law and economics scholar Robert Ellickson notes that he intends his book to be, in part, "a gauntlet thrown in [the] direction of sociologists of law." (Ellickson 1991: 8). Ellickson concedes that sociologists of law, "would better be able than law and economics scholars to predict the essentials of what was found in Shasta County, [California]. . . because they [sociologists of law] better understand the importance of informal social controls"(8). But he also contends that these same sociologists of law need to be rescued from the "swamp"(6) in which they labor, where "patterns of human behavior [are seen] as highly variable and contingent on historical circumstance" (7). Ellickson thus sets out at once to challenge sociologists of law and to lead them out of the "swamp" by developing a "theory of norms," which would ostensibly have the power both to predict social outcomes across time and space, and to certify that these social outcomes are efficient.

Given his substantial and overtly theoretical aspirations vis-à-vis the sociology of law in particular, Ellickson's book provides a unique window into important epistemological questions in the sociology of law that any would-be sociologist of law must address. As this chapter will show, many of these epistemological questions implicitly turn on prior questions of citizenship, or more specifically, on the absence of questions of alienage and other variable states of belonging. As such, Ellickson's book is a useful conceptual foil for this chapter on illegal alienage and the sociology of law, precisely because it presents and well-known rendition of "everyday law" where immigrants and immigration are entirely absent.

The setting of Ellickson's book, Shasta County, California, is a rural northern California county. As Ellickson's book has become a paradigmatic study of municipal governance in the field of socio-legal studies, Shasta County has become familiar to many academic readers as a quintessential site of law "in

action," as it deviates from law "on the books." At the same time, Ellickson's book operates on a grander theoretical register in so far as the book is a field test of economist Ronald Coase's famous 1960 "theorem" and also an argument about the (presumed) rationality of "law off the books" in Shasta County as well as (implicitly) most any other place.

The inspiration for Ellickson's "field test," is a 1960 article in the *Journal of Law and Economics*, in which Coase famously argued that when bargaining between two parties is possible, the legal system's imposition of liability for some occurrence on one party rather than the other will make no difference to the ultimate outcome. The two parties, starting from the rights that law bestows upon them, will themselves ultimately arrive at the socially cheapest and most substantively effective possible solution to the problem, Coase reasoned. Paradoxically, Coase's 1960 "theorem" powerfully suggested at once both the relevance and the profound irrelevance of law. More importantly, it fueled the embers of the then nascent deregulatory state, which would presumably realize "efficiency" only if regulations could be stripped away to allow for primordial bargaining between the would-be subjects of regulation.⁴ Or so the story goes.

In the 1980s, Ellickson thus set out for Shasta County, California, to "test" Coase's theorem. In Shasta County, the law on the books designated a portion of the county as "open range" and thus favorable to ranchers, and another portion of the county as "closed range" and thus favorable to farmers. Ellickson ventured to see if "real life" ranchers and farmers who lived in the same community behaved as Coase predicted-- as rational actors who would bargain with each other to achieve the collectively least expensive solutions to a very particular set of dilemmas of law and government in modern America, namely those of straying cattle and trampled crops.

Perhaps unsurprisingly to many readers of this text, Ellickson found that "Shasta county neighbors. . . do not behave as Coase portrays them as behaving in the Farmer-Rancher Parable." (Ellickson 1991: 4). The citizens of Shasta County, Ellickson writes, "in fact are strongly inclined to cooperate, but they achieve cooperative outcomes not by bargaining from legally established entitlements, as the parable supposes, but rather by developing and enforcing adaptive norms of neighborliness that trump formal legal entitlements" (4). But for Ellickson, despite the fact that the Shasta County neighbors do not quite behave as Coase predicted, Ronald Coase and "economic rationality" nonetheless stand vindicated in the end. For Ellickson writes, "Although the route chosen is not the one that the parable anticipates, the end reached is exactly the one that Coase predicted: coordination to mutual advantage without

⁴ On this point, see Minda (1995), noting that the law and economics movement, which was at the core of the deregulatory movements of the 1970s and 1980s, is itself an important "post-modern legal movement" which found its inspiration in Coase's "theorem."

supervision by the state" (4). Given his arguably pre-empirical commitment to an understanding of humans as "rational agents," Ellickson presumes that under most conditions, this unsupervised coordination will be "socially efficient."

However, despite Coase's purported vindication on social cooperation and efficiency fronts, in Ellickson's view, Coase nevertheless made one significant mistake. Ellickson notes, "Coase repeated a blunder that dates back at least to Thomas Hobbes. Coase, like Hobbes, purportedly "adopted the 'legal centralist' view that the state functions as the sole creator of operative rules of entitlement among individuals,"(4).

What, one may justifiably ask, does all this-- the "Coase Theorem," Ellickson's field work in Shasta County, and the ironically parallel presumptions of twentieth-century economist Ronald Coase and seventeenth-century political philosopher Thomas Hobbes-- have to do with the socio-legality of illegal alienage in the contemporary U.S.? To be sure, this chapter is not about whether the "law off-the-books" sociology of (illegal) alienage law is "efficient" or "inefficient," as one may suspect given the engagement with Ellickson's book above. While some scholars may indeed justifiably hone in on Ellickson's arguably functionalist presumptions and claims about the would-be efficiency of the informal norms which govern in Shasta County and elsewhere, my interest in Ellickson's book here is not so much as a matter of empirical sociological debate, but rather as a matter of socio-legal theory and conceptual contrasts. As such, the answer to the question of what the admittedly extended discussion above has to do with the sociology of (illegal) alienage has three parts, each highlighting an important contrast between Ellickson's socio-legal study of municipal governance and the one to follow in this work.

The first and most general reason that Ellickson's work serves as a useful conceptual launching point for this chapter is precisely on account of the difference between his setting and the settings which inform this dissertation. The site of Ellickson's study of work-a-day municipal governance, rural Shasta County, California in the 1980s, is an important contrasting geographic foil to the sites of work-a-day municipal governance to be examined in the subsequent chapter of this work, namely Houston, Texas and San Francisco, California, from the mid-1980s to the present. Juxtaposing Shasta County on the one hand, with Houston and San Francisco on the other, shows in relief the importance of a particular phrase in the socio-legal proposition which emerges from Ellickson's book.

Ellickson argues ultimately that, "to govern their workaday interactions, members of a close-knit group tend to develop informal norms whose content serves to maximize the objective welfare of group members" (283). When Shasta County is juxtaposed with San Francisco and Houston, the term "close-knit" emerges as key differentiating descriptor. To be sure, the latter urban areas are far more populous than Shasta County, but the key distinction is not one of

numbers per se, but rather of variations in nation-state citizenship and alienage or even race and ethnicity. There appear to be no ambiguities of nation-state, or even racial and ethnic belonging in Ellickson's portrait of Shasta County.

In contrast, cities such as San Francisco and Houston have been the primary destinations of immigrants to the U.S. since the late 1960s, making them particular sites for on-going, everyday, local "immigration debates." These debates have only recently made their ways to the agendas of American legal scholars.⁵ But as a matter of U.S. demography if not U.S. law, sociologist Roger Waldinger has argued, for example, that immigration to the United States is "now, as in the past, a quintessentially urban phenomenon" (Waldinger 2001: 1). As he and Jennifer Lee have found through analysis of U.S. Census data and the Current Population Survey, Los Angeles and New York City together are home to approximately 40% of the U.S.'s immigrant population (Waldinger and Lee 2001: 43). Miami, San Francisco, and Chicago together account for an additional 16% (6%, 6% and 4%, respectively), while Boston, Dallas, San Diego, Washington, and Houston account for an additional 11% (2%, 2%, 2%, 2%, and 3%, respectively). As such, we must interrogate what "close-knit" means in the context of studies of "efficient social norms" or "law off the books" such as Ellickson's. We must ask whether "close-knit" groups can exist when there are questions about members' very rights to be present.

Second, and intimately related to the previous point, the discussion of Ellickson's book serves to draw out the tensions between presuming the general application of sociological or even (or especially) socio-legal norms across time and space, and alternately, focusing on the peculiarities of the institutional contexts that delimit the possibilities for "social" and/or "legal" action in particular settings, given some common pronouncements of law. Stated in slightly different terms that are more specific to a work on alienage, an important question that Ellickson's book begs is whether the tendency to ignore the formal law in workaday settings in favor of "efficient norms" can be generalized to persons, as Ellickson strongly suggests, or alternately, whether such a privilege is limited to "citizens," who have no doubts about each other's right to be present in the community. Or rather, in a slight modification of Hannah Arendt's words, no doubts at all about another's "right to have all the same rights." This doubt about the broad applicability of Ellickson's conclusions to sites where citizenship and alienage are in question raises further doubts about the social scientific behavioralism he seeks to vindicate and to recommend to sociologists of law.

To be clear, the goal here is not to critique Ellickson for not conducting a research project on alienage. As Ellickson himself notes, "Because there is no reason to think that a group's norm-making process will give weight to the

⁵ In the field of law, the relatively recent proliferation of city-level anti-immigrant ordinances has brought the issue to the agendas of scholars, as described in Chapter 2.

interests of those outside the group, a legal system properly can decline to pay any respect to how a group customarily treats outsiders" (284). Rather, the goal here is to draw attention to Ellickson's concerns with broad "norm-making processes" rather than with the specific questions that these norms are meant to address.

In other words, with these caveats and distinctions on the table, the objective here is to juxtapose the portrait that Ellickson paints with a (for now) hypothetical portrait of municipal governance that would explicitly take up issues of immigration and citizenship over time. Important new questions thus emerge for those who would conduct field work about the "law in action": Where social action "in the shadow of law" is a primary matter to be studied, how generalizable are the ensuing portraits, given the contested nature of "law" itself, particularly in the case of a phenomenon like illegal alienage, which brings forth all kinds of makeshift and local "solutions?" How might a sociologist of law best account at once for "social action in the shadow of law" and for contestations over or uncertainties about the law itself? How might a sociologist of law resist the behavioralism that pervades the social sciences, given the special linguistic and moral attributes of law? The last two sections of this chapter will flesh out my attempt to address these theoretical challenges of empirically apprehending a quintessentially legal phenomenon such as the oxymoronic law(s) of illegal alienage.

Finally, the third reason that Ellickson's book serves as a useful point of departure for this chapter is that the title of Ellickson's book, *Order Without Law*, turns out to be something of a socio-legal double entendre. As events would have it, this title also usefully describes the law in action of illegal alienage. But it does so in a way that Ellickson's book does not appear to anticipate. Specifically, for Ellickson, "order without law" means that the law is willfully ignored because it is either too complicated or inconvenient, at best, and thus also inefficient, at worst. As such, Ellickson uses his finding of "order without law" --effective contracting without much reference to law, relatively unambiguous though the law may be--to assail those who would suggest that the state must legislate in part because people do not or cannot work things out amongst themselves (280).⁶

But as I shall demonstrate in this and the chapter to follow, "order without law" can mean something else all together, something that has little do with the efficiency of everyday (democratic? charmingly non-elitist?) norms over state

⁶ Ellickson's particular target here appears to be the "liberal" legal scholar Bruce Ackerman. Specifically, Ellickson writes, "Coase's parable has beguiled many analysts into believing that the law must matter when the unrealistic assumption of zero transactions costs is dropped. Bruce Ackerman, for example, regards the existence of transactions costs as serving up a rich opportunity for activist lawmaking to correct market failures" (280).

law, or the presumed gloriousness of pulling back the heavy-hand of the (elitist?) state. Specifically, in the realm of illegal alienage, where, as discussed in Chapters 2 and 3, "nation-state sovereignty" means in practice that only the nation-state can comfortably declare the (oxymoronic) laws of illegal alienage, state and local actors must necessarily navigate around the nation-state elephant in the room by not declaring "law." As such, "the law in action" of illegal alienage, when seen from the vantage point of municipalities, rather than from the vantage point of the nation-state, is also a form of "order without law." But it is "order without law" not because law as declaration of rules is inconvenient and thus willfully ignored, but rather because officially "law" cannot exist without frustrating "nation-state sovereignty." Furthermore, this particular incarnation of "order without law" does not refer to the social norms between undocumented persons, nor even the "legal consciousness" of these persons. Rather, this "order without law" refers to the formal and informal "policy" agreements between local government agencies, local branches of state and federal agencies, and other "service-providing" groups, as the next chapter will discuss and analyze in more detail. But for now, the important point is that the "order without law" of illegal alienage does not have the quality of "democratically virtuous and downright neighborly" people ignoring the law of the Leviathan, to use Ellickson's implicit and explicit imagery. Rather, it has the quality of local officials attempting to govern around the law through other means.

Given this new understanding of "order without law," this chapter seeks to situate illegal alienage within the field of the sociology of law and to lay the foundations for the primarily empirical chapter to follow. At the same time as this chapter reviews extant literature in the sociology of law, it also seeks to raise questions about the extent to which illegal alienage can be a case study of various already existing socio-legal propositions or hypotheses. By showing how the task of understanding illegal alienage empirically requires a "custom built" approach, this chapter seeks also to open up new conceptual possibilities for sociologists of law.

Citizenship, "Second Class" Citizenship, and (Illegal) Alienage in the Sociology of U.S. Law

Although Ellickson's book serves as a useful foil to introduce the major analytical themes of this chapter on account of its explicit epistemological claims as well as its "in the shadow of law" valence, it is important to note that the concept of "order without law" had been an integral part of the sociology of law well before the publication Ellickson's book. In an article published during the field's formative period in the 1960s, Stewart Macaulay reports after "interviewing 68 businessmen and lawyers representing 43 companies and six law firms" primarily in Wisconsin, that businessmen preferred not to use formal

contracts for most of their business transactions (Maccaulay 1963: 141-145). As Maccaulay notes, "Businessmen often prefer to rely on 'a man's word' in a brief letter, a handshake, or 'common honesty and decency"-- even when the transaction involves exposure to serious risks," much to the apparent chagrin of the lawyers familiar with the transactions (145). In explaining the disdain for the formal use of contract law that he observed among businessmen, Maccaulay points to the disciplining functions of reputational norms in a setting where continued profitability depends on delivering reliable products (151-52).

As such, Maccaulay, like Ellickson, paints a portrait of a subculture where law is thought to be perhaps too adversarial and unsportsman-like, and thus politely declined. As one businessman in Maccaulay's study put it, "You can settle any dispute if you keep the lawyers and accountants out of it. They just do not understand the give-and-take needed in business" (Maccaulay 1963: 149). But also like Ellickson's study, what is striking about Maccaulay's study is the extent to which there exist no questions about the citizenship or standing of the parties to the non-legal agreements within the subculture.

In contrast, Patricia Williams, writing in an autobiographical vein as an African American woman trying to rent an apartment in San Francisco, notes that while a white male colleague was comfortable dispensing with the formalities of law during this process, she found comfort and security in the formal legal process, given her position as a member of a historically subordinated racial group (Williams 1991). In other words, for Williams, law provided both standing and rights, despite the general disenchantment with the promises made by law among critical race scholars in the legal academy in the 1980s. Regardless of the specific intellectual genesis of Williams' argument, the important point is that Williams suggests that law indeed matters precisely when "community" or "belonging" remains socially, if not necessarily legally ambiguous.

Admittedly, farmers and ranchers, businessman, and middle class, academic would-be apartment renters in tough real estate markets are not the primary subjects of this dissertation. But the three works discussed above nonetheless usefully demonstrate how the themes of "citizenship" and one of its possible opposites, "second-class citizenship," implicitly pervade the sociology of law. A "gap" between "law on the books" and "law in action," is the major organizing metaphor in the sociology of law, and its salience is on account of two possible meanings. On the one hand, the preference of primarily non-historically-subordinated, close-knit parties for non-legalized interactions can be conceptualized as a gap between "law on the books" and the "law in action," where law is willfully ignored. On the other hand, "the gap" between "law on the books" and "law in action" also connotes the failure of law to improve the standing of historically subordinated groups, despite law's promises of equality.

This latter meaning reveals the sociology of law's deep and abiding concern with "second class citizenship," and its relative inattention to alienage.

With respect to "second class citizenship," in another classic article from the field's formative period, Marc Galanter asks specifically, "Why do 'the haves' appear to always come out ahead?" (Galanter 1975). The answer, Galanter notes, has to do with the structure of the litigation process in an adversarial legal system like that of the U.S., which depends on individuals to mobilize the law and seek redress, primarily by using their personal resources. Law, in such a system, does not end up being as "redistributive (that is, systematically equalizing)" (95) as it may pronounce itself to be because the system of claims adjudication systematically favors "Repeat Players" (paradigmatically, corporations) over One-Shot Player (paradigmatically, individual citizen-plaintiffs). While Repeat Players can envision many cases arising, for example, from a single new civil rights statute, a One-Shot player will justifiably be concerned only with her case. As such, because Repeat Players know that they will be litigating under the same statute multiple times, they have incentives to litigate in such a way as to ensure that the long term judicial precedent involving the statute will be favorable to them (100).⁷ Furthermore, most lawyers specialize in such ways as to cater to the interests of Repeat Players, given both the sizable legal fees that Repeat Players are able to afford, as well as the economies of scale that lawyers who litigate the same kinds of cases throughout their career are able to enjoy (114-118). For these and other reasons, Repeat Players, that is, "the Haves," tend to come out ahead in the U.S. legal system, according to Galanter.

Galanter's important insight about the pervasive need for monetary resources, longevity, and time for successful navigation of the U.S. judicial system has inspired a significant stream of work in the field of sociology of law. Much of this work asks how various kinds of "Have Nots" understand and negotiate a legal system that disfavors them, at least from an institutional perspective. Or stated slightly differently, these works ask why laws, particularly civil rights laws, fail to deliver what they earnestly promise. In this vein, Kristin Bumiller, for example, has argued that the victims of harms that that the Civil Rights Act of 1964 was meant to remedy "reluctantly employ the label of discrimination because they shun the role of the victim, and they fear legal intervention will disrupt the delicate balance of power between themselves and their opponents" (Bumiller 1987: 438). Phoebe Morgan has argued that with

⁷ Catherine Albiston (1999) builds on this point in particular when she argues explicitly that Repeat Players will likely quickly and quietly settle cases where the One-Shot player plaintiff has a very good chance of winning at trial. As such, only cases that are not-so-good for plaintiffs go to trial, resulting in the de facto judicial gutting of potentially transformative social rights legislation like the Family and Medical Leave Act.

respect to sexual harassment litigation, "regardless of the severity of the harassment, or the amount of legal aid available, maternal responsibilities, marital commitments and parental approval can become pivotal considerations," and that this "confirm[s] feminist assertions that relationships-- especially family ones-- often play a central role in the choices that women make" (Morgan 1999: 67). And Lisa Frohmann has argued, "By ascribing stereotypical characteristics of a neighborhood to victims, defendants, and jurors, prosecutors use discordant locales to justify case rejection" (Frohmann 1997: 531). As such, "they construct multiple normative standards of moral character of persons and of places," thereby "inadvertently reproduce race, class, and gender ideologies in legal decision making"(531).

In sum, the "have nots" who are failed by law may be racial minorities, victims of sexual harassment, the poor, or maybe even the middle class. The mechanisms that fail these various "have nots" could range from the setup of the adversarial civil legal system itself (Galanter), to problematic discourses of victimhood (Bumiller), to the necessary contextualization of legal mobilization through the lens of extant social relationships (Morgan), to the cognitive categorization processes endemic to human perception (Frohmann). And the bodies of law that systematically fail the "have nots" can range from employment discrimination law to disability law to criminal law.

The important point here is that the "have nots" at the core of the sociology of law tend to share one thing in common-- U.S. citizenship. Indeed, the paradigmatic "have nots" of the sociology of law are nominally "equal citizens," but are presumably unjustly relegated by very imperfect "law in action" to the status of "second class citizenship."

As such, the sociology of law has been implicitly organized around themes of "full citizenship" and "second class citizenship." However, alienage, the status of non-citizenship, is another possible opposite to citizenship. It is distinct from second class citizenship in so far as alienage is thought to be a more or less justified difference or subordination, while second class citizenship is thought to be profoundly lamentable. Aliens presumably ought not to have all the rights of citizens, even "on the books." Given this presumption, the status of alienage does not easily fit within the category of "have not" that the sociology of law seeks to illuminate. The above discussion has sought to draw out this point in order to set the stage for understanding how extant treatments of alienage, both legal and illegal, challenge the existing contours of the field.

Socio-legal studies of immigration and alienage are relatively less numerous than such studies of other areas of law---particularly criminal law, contract law, and employment discrimination law --again, most likely because the category of alienage frustrates the binary between citizenship and second class citizenship that implicitly animates much of the field. And furthermore, as the next section will discuss, there exists a tension within these studies as to

whether immigration and alienage law ought to be thought of just like other areas of nation-state law, and thus as "case studies" of other socio-legal hypotheses, where more evidence of behavioral would-be regularities can be found, or rather whether immigration and alienage law are legally, and thus also socio-legally distinct phenomena. I address this tension further in the next two sections of this chapter.

Immigration and (Illegal) Alienage in the Sociology of Law

Three scholars, Kitty Calavita, Susan Coutin, and Janet Gilboy have authored the majority of the existing socio-legal studies of immigration and alienage law. Starting from different vantage points within the social sciences, each of these three scholars takes up distinct aspects of immigration and alienage law, which is vast and varied, both in its doctrines and sites. This section reviews and analyzes the works of these scholars. It does so not only to amass and review the "known" empirical facts about U.S. immigration and alienage law "in action" as a conventional sociological literature review might do, but also to identify the ways in which these scholars have or have not presented immigration and alienage law as case studies of other, more general phenomena in the sociology of law. The degree to which scholars set up immigration and alienage law "in action" as case studies of broader hypothesis about law "in action" has important epistemological ramifications, as I will demonstrate.

This section thus lays the foundation for the next section of this chapter and for the following chapter in two important ways. In the next section of this chapter, I construct a socio-legal approach to immigration and alienage law which builds on these important prior works. Also in the next section, I more formally argue that the normative uniqueness of immigration and alienage law, and particularly the fact that illegal alienage exposes the edges or limits of law, together provide important reasons for considering the socio-legal manifestations of illegal alienage as distinctive rather than as grist for the mill of more general theories of modern American law "in action," or even more generally, of "human behavior." My point is that illegal alienage presents a particular challenge to behavioralist understandings of law in the sociology of law and that this challenge must be attended to by a kind of socio-legal empiricism that brackets behavioralism in favor of carefully attending to specific genealogies, rhetorical forms, and institutional contexts of illegal alienage as "law in action."

In first reviewing extant works on immigration and alienage in the sociology of law, this section moves from "legal" to "illegal" alienage, and also at the same time, from relatively more behavioralist framings of immigration and alienage law to relatively more institutional framings, and finally, to

anthropological framings. I begin with discussion of Janet Gilboy's writings on everyday immigration inspections in an airport, and then move to Kitty Calavita's work on the 1986 Immigration Reform and Control Act, a federal statute which prohibits the hiring of illegal alien workers. I also consider Calavita's historical work on the Bracero Program, a federal program lasting from 1942 to 1967 which allowed primarily large landowners in the southwestern United States to hire Mexican contract laborers for large scale agricultural production. Finally, I take up Susan Coutin's scholarship on the legal and social subjectivities of religious sanctuary activists in the 1980s as well as illegal aliens themselves in the 1990s. Again, I closely analyze these three sets of work not only to review known empirical facts about immigration and (illegal) alienage, but also to show in relief the goals, the limits, and possibilities of each of these distinct research approaches to a complex phenomenon.

Of the works discussed in this section, those of Janet Gilboy most directly set up immigration law as a case study or test site for developing broader, behavioralist hypotheses in the sociology of law. Gilboy's works (1991; 1992; 1997) reflect a particular behavioralist reading of immigration law, and Gilboy frames immigration-related phenomena as very much like other "law in action" dilemmas across other areas of law. For example, in her introduction to a study of the immigration inspectors who question arriving foreign passengers at a major U.S. airport, Gilboy situates her study as one that is concerned with "the factors shaping discretionary judgments" (1992: 571), and more specifically, with the question of how such social control decision making may be powerfully influenced not so much by a decision makers' prior cognitive prejudices, but rather by the practical concerns of the organization inside which discretionary decision makers finds themselves" (572-573). As such, Gilboy offers a study of "the nature of categorization in an area rarely examined – immigration primary inspection" (574). She observes that immigration inspectors "frequently wonder whether they have asked enough questions of a traveler they just admitted into the country" (583), and that categories raising the likelihood of secondary inspection included both those who came from certain countries, as we may expect, as well as would-be nannies--young women "typically coming from certain specific European countries, in the early weeks of summer, for a so-called visit of several months with friends of her family who have small children" (590). Gilboy emphasizes that her work shows more broadly how institutional demands matter for cognitive decision making.

For our purposes here, it is important to note that Gilboy is less concerned about the immigration context of these decisions than that they are organizationally constrained. In other words, in arguing against the theory that decision-makers' prior cognitive prejudices determine outcomes, Gilboy argues instead that organizational context determines outcomes. Gilboy's arguments

deemphasize the particular normative commitments and constraints of immigration law as a distinct body of law and state prerogative.

In two subsequent articles, Gilboy (1992; 1997) puts the peculiarities of immigration law somewhat more squarely front and center in so far as she considers immigration as part of administrative law and the administrative state. But nonetheless, Gilboy's main goal is to discuss the possible forces that may be acting on legal actors in general, not to focus on the peculiarities of immigration law in action. In expanding upon the dilemmas posed by the arrival of would-be nannies from Europe to work in the homes of well-connected, upper middle class Americans, Gilboy frames the phenomenon as a matter of "casework," where "politicians may contact government officials to obtain information or nudge or challenge an agency" (274). But as Gilboy is interested ultimately in the effect of casework on immigration officials' behavior, she argues that nanny cases demonstrate that "in the inspection setting, awareness of casework intervention gets built into this background knowledge, and the likely organizational fates and implications of different types of cases provide a 'tentative frame' in which cases are initially viewed by front-line staff" (Gilboy 1992: 277).

Insofar as Gilboy situates this phenomenon in the broader context of administrative governance, she makes an important point about the INS as an agency. She writes, "Casework intervention has a ripple effect beyond the point of agency contact. . . The anticipatory behavior [of front line officials] enlarges accommodation to outside interests. . . The agency's [INS's] vulnerability to pressures from political sources arises in part from the meager assistance it receives from other traditional centers of support" (309). She continues, "It [The INS] has, for instance, no natural constituency, that is, no dependable reservoir of strong political support for the resources it needs for its enforcement objectives" (309). These points suggest that the INS presents an outlier case of "administrative law in action" in the U.S. in so far as it has no particularly vocal citizen constituency, short of anti-immigration groups, whose politics are decidedly at odds with the part of the agency's mandate that involves assuring justice in immigration. While this is a relatively minor point in Gilboy's text, it illustrates the always present need to acknowledge the differences between particular areas of law in so far as each area of law reflects distinct normative political commitments and differently animated subjects, in the multiple sense of the word. While sociologists of law tend to deemphasize these particular aspects of law, such aspects nonetheless matter for adequately contextualizing any "behavior" or "social action" in the shadow of law.

Finally, in a 1997 article, Gilboy takes up the legal requirement that airlines screen foreign travelers prior to allowing them to travel to the U.S. as well as the requirement that these airlines remove all inadmissible travelers at the airlines' cost (Gilboy 1997: 505). She frames this study as one of "the effects of third-party liability systems on government agencies," (596), and she notes that

such studies conventionally focus on the effects of such requirements on the private third parties themselves. Once again, Gilboy's main interest is in the behavior of the government officials, and not in the normative peculiarities brought forth by immigration law, nor in the ways in which-immigration-law-related practices affect the broader legal and political culture. As such, she writes, "The study suggests that officials' behavior is shaped not by direct pressures from the industry, but more indirectly by the specific agency constraints that establish practical work concerns and conditions that increase the dependence of inspectors on the cooperation and goodwill of airline personnel" (507). To illustrate her point, Gilboy painstakingly documents the ways in which inspectors assiduously attempt to avoid detaining inadmissible aliens overnight and therefore often accelerate inspections so that inadmissible passengers are able to return on the flights of the airlines that originally brought them to the U.S. (512-517). Again, my intention here is not to criticize Gilboy for the specifics of her socio-legal studies, but rather to show how in the context of her particular sociological approach, immigration law is unproblematically situated as a "case study" of official decision-making without much consideration of the ramifications of conceiving of immigration law, arguably a normatively distinct area of law, as an ostensibly generalizable case study.

While some sociological and socio-legal frameworks set up immigration and alienage law as more or less like other areas of law, other frameworks delve into the normative and practical uniqueness of these fields. And some reflect a tension between these two possibilities. Like Janet Gilboy, Kitty Calavita, for example, frames her studies of U.S. immigration law primarily as a matter of sociology. But in contrast to Gilboy, Calavita suggests that her findings are more squarely about immigration law than about law in general or the cognitive practices of legal actors. In a 1990 article, Calavita reports that among 103 employers in Southern California counties, violations of the Immigration Reform and Control Act of 1986 (IRCA) were widespread. She argues that employers continued to employ undocumented workers despite a new legal threat of fines because in the course of the passing of IRCA, "legislative and implementation processes produced a low-risk crime, indicating the shape the law took from the beginning ensured that its effect would be primarily symbolic and that violations would be widespread" (Calavita 1990: 1041). Further, Calavita notes that against then prevalent socio-legal explanations of white-collar crime which often emphasized cost/ benefit analysis in explaining illegal activity, employer sanctions revealed a situation in which "the law making process ensured that employer violations would entail very little risk" (1065). And finally she writes that:

An inherent contradiction underlies immigration policymaking – a contradiction that is grounded in the economic role played by

immigrant labor versus the political backlash against this cheap labor supply. The resulting dilemma for immigration policymakers in the early 1980s was that they were pressed on the one hand by a public demand for employer sanctions and on the other hand by the impossibility of passing such a law over the objections of employers. An employer sanctions law that satisfied employers by making it easy for them to “comply” was the solution to this dilemma. By de facto redefining compliance as conformity with the paperwork component of the law, Congress constructed a law that made employers virtually immune to the “knowing hire” clause and simultaneously guaranteed widespread violations (1065).

Thus, Calavita presents employer sanctions as a “case study” of white collar crime. In doing so, she argues that the extant socio-legal theory of white collar crime (of which employers’ violations of immigration law is an example) must be revised to take account of such instances where “the symbolic nature of the law and subsequent violations of the law are dialectically linked” (1041). But at the same time, Calavita appears also to point to the fact that this kind of symbolic lawmaking happens particularly and especially in immigration law. To be clear, this tension, between the generality and specificity of empirical observations about immigration law, does nothing to detract from the value of Calavita’s empirical documentation of employers’ reactions to the 1986 employer sanctions statute. Rather, my point here is that Calavita appears less willing than Gilboy to de-emphasize the possible normative and institutional distinctiveness of immigration and alienage law in the interest of ultimately verifying or modifying broader sociological and socio-legal hypotheses.

This tension, between rendering immigration and alienage law as more or less like any other body of law, or alternately, as something of an anomaly, is something that all socio-legal scholars who take up immigration and alienage law “in action” must consider and address in the context of designing and presenting their particular studies. The payoff for thinking about immigration and alienage law as distinct, rather than as grist for any mill of socio-legal behavior, is that acknowledging such a distinction illuminates peculiar normative complexities of immigration and alienage, which may in turn powerfully structure the social action that comprises “immigration and alienage law in action” in particular ways. An approach that marries sociology of law and political theory is better suited, I will argue below, to realize the significance of various kinds of social actions (and especially inactions), without implicitly or explicitly settling upon overbroad and perhaps also over-determined causal explanations.

In a subsequent work, Calavita historicizes immigration and alienage law “in action” in a way that serves as an important example for this dissertation. In

her book, *Inside the State: The Bracero Program, Immigration, and the INS*, Calavita argues that, "The Bracero Program was born and raised on administrative powers, not just the power of the INS but of all government agencies that participated in Bracero operations" (1992: 1). As such, Calavita points to an important attribute of immigration law-making, namely its dependence on administrative discretion and administrative actions rather than only legislative or judicial declarations. Calavita extends this insight to argue further that "neither the Althusserian structuralist rendering nor the more straightforward instrumentalist account of the state's role in designing and implementing the Bracero Program are entirely supported by the historical record" (3).

Thus, Calavita again presents an empirically rich account of some aspect immigration law "in action," (here, the Bracero Program), and then, in addition, argues that her empirical account requires reformulation of particular extant sociological hypotheses, namely structuralist and instrumentalist theories of states situated in the field of sociology. For Calavita, ultimately, "INS policies were not simply a response to the demands of the capitalist class -- in this case growers -- but were first and foremost the product of the bureaucracy's own institutional needs" (4). And she concludes further, "The data uncovered in this study reveal a 'state' that is fragmented across institutional lines, at least in the short term and close up; . . . and that sets policies less according to some grand plan to rescue the political economy than in response to immediate institutional needs" (9).

While Calavita's conclusions above are likely credible to most if not all scholars who study immigration and alienage law, the extent to which any of these propositions is surprising or unexpected arguably varies considerably with respect to a particular scholar's disciplinary starting point. More specifically, for those scholars whose primary expertise may be in the detailed study of U.S. immigration and alienage law, a portrait of a "state that is fragmented across institutional lines" is unlikely to be surprising. Indeed, "U.S. Immigration Law" as "law on the books" is comprised of, among other things: constitutional law as promulgated by the federal courts and the U.S. Supreme Court; a massive federal statute, written by Congress in 1952 and amended in various places numerous times since then; decisions of the Board of Immigration Appeals and the federal courts interpreting the statute; and nearly innumerable regulations promulgated by various administrative agencies (e.g. Department of Homeland Security; Department of Labor) that are charged with executing some aspect of immigration law. In short, massive amounts of text on the pages of numerous books (or more modernly, on a seemingly endless hyperlinked string of ".gov" websites) makes up "immigration law on the books." And this body of text itself reveals a "fragmented state that sets policies less according to some grand plan . . . than in response to immediate institutional needs."

Furthermore, “the state” that “makes” immigration law is now, as it turns out, even more fragmented than Calavita posits. Calavita focuses only on the federal government and characterizes it as “fragmented” with respect to immigration law and policy-making. In 1992, when she published her book, this was undoubtedly a sensible point of focus and an equally sensible finding or conclusion. But the flurry of recent activity by state and local governments to regulate the rights of non-citizens (most commonly, to deny rights to illegal aliens), as discussed in Chapter 2, reveals that the state is “fragmented” both horizontally (resulting from the separation of federal powers) and vertically (resulting from newly resurrected “immigration federalism”). New questions thus arise about the extent to which the components of the vertically fragmented immigration state necessarily act with regard to institutional self-interest. In other words, while institutional self-regard may be a plausible explanation for the actions of co-equal parts of the federal administrative bureaucracy, it is not so compelling an explanation, even at first pass, for the actions of less politically insulated states and local governments, trying to decide, from a much blanker slate, what the rights of non-citizens within their jurisdictions ought to be.

This discussion thus also illustrates a point about the limits of purely sociological approaches to immigration law “in action,” no matter how carefully empirical and how historical such approaches may be. Insisting on purely sociological, causal explanations for the extant shapes of immigration law leads to the same traps that Calavita identifies in other, more structuralist and also more instrumentalist sociological work – namely, excessive abstraction and an over determined narrative. As the third quotation in the epigraph at the beginning of this chapter reminds us, law has at least two simultaneous lives. To be sure, law is a sociologically important exercise of state power, which is always different “in action” than it may be “on the books. But viewing law in this sociological way does nothing to diminish the fact that law is also a declaration or expression (however imperfect or fraught) of some set of moral commitments. Attention to these moral commitments requires a sociologist of law to refrain from constructing a binary between “the sociological” and the “jurisprudential or political theoretical.” While sociologists of law correctly claim that they study law “as it is” rather than what law “ought to be,” which they happily leave to their more jurisprudentially inclined colleagues, my point here is that the moral valences of particular bodies of law cannot be ignored even for the project of understanding law “as it is.” As a practical matter, sociologists of immigration law should be open to viewing their data in multiple lights at once – perhaps as both the result of self-interested machinations of bureaucracies or of a capitalist class, and as attempts to reconcile universal normative commitments of equal personhood with the intuition that nation-state citizenship likely ought to have some meaning.

In sum, immigration and alienage law in particular turn a great deal on moral and political commitments, and thus not entirely or even substantially on sociological facts, “market rationality,” bureaucratic self-regard, or even capitalist dominance. As such, I adopt a socio-legal approach that is both attentive to the activities and inactivities of bureaucracies, as Calavita’s work recommends, but also seeks to delve into the political theoretical commitments and conflicts that various “social facts” of immigration law “in action” belie. The final section of this chapter lays out further my particular socio-legal approach, which builds on Calavita’s exemplary socio-legal institutional work as well as the work of political scientist Michael Lipsky.

But first, to complete this section of this chapter, which has focused on the relatively small body of extant works about immigration and alienage law that are situated within the subfields of sociology of law or socio-legal studies, it is necessary to discuss the anthropological works of Susan Coutin. In her book, *The Culture of Protest: Religious Activism and the U.S. Sanctuary Movement* Coutin, like Gilboy, is concerned with the actions of individuals in response to certain laws. But unlike Gilboy, who is concerned with cognitive decision making of (immigration) law enforcers, Coutin does not regard the actions of her subjects and informants to be evidence of human behavior or cognitive processes, per se. Rather, given her anthropological starting point, Coutin is concerned with the shared “culture of protest within the U.S. sanctuary movement, a grass-roots religious-based network whose aid to undocumented Central Americans had unleashed the state’s power of surveillance” (Coutin 1993: 2). For Coutin, the church-based “sanctuary” movement for undocumented Central Americans which formed during the early 1980s presented, a case study, or rather, in her terms, “a uniquely unmuddled window on the ways that individuals produce culture and on the political nature of such processes,” and also “material for analyzing how people manipulated cultural concepts and practices” (3). She concludes, ultimately, that “sanctuary workers reproduced both the movement and wider culture by acting on their understanding of reality in ways that reauthorized that understanding” (225). For example:

Sanctuary workers assessed immigrants’ asylum claims, aided those immigrants judged to be refugees, and publicized the accounts of persecution and flight on which participants’ interpretations of the law were based. Sanctuary workers defined this partial substitute for the U.S. immigration system as civil *initiative* rather than civil disobedience, contending that because the U.S. government had failed to fulfill its legal obligations, citizens were obliged to do so. . . By acting on their understanding of the law, sanctuary workers challenged the government to either tacitly accept their legal notions or to indict movement members and thus

give them the opportunity to prove their claims in court. When the government *did* indict and convict sanctuary workers, defendants used the trial to publicize the movement, question the validity of verdicts, and defy the deterrence that was supposed to result from being subjects of a government investigation (224).

In sum, Coutin focuses her attention on the way in which sanctuary workers “simultaneously challenged the exclusivity of the government’s authority over immigration matters and placed themselves in a position of power vis-à-vis Central Americans” (228). Power and resistance, she shows, following Michel Foucault, are often cut from the same basic cloth (227).

To be sure, Coutin’s is a “case study” of close relationships between power, resistance, and “culture.” But because of the ethnographic nature of her study, Coutin pays close attention to the relationships between actors in particular places — specifically, San Francisco East Bay, California and Tucson, Arizona — as well as to the unfolding of events in time in these places. As such, Coutin’s text reads not as a behavioralist case study that describes something that could happen in any place and in many legal contexts, but rather as a historicized, contextualized analysis of the “culture” of immigration-related “law-breaking” in response to the U.S.’s role in civil wars in Central America. For the purpose of this dissertation, Coutin’s tracing of the origins of the “sanctuary movement” are particularly important. Coutin shows how “sanctuary” policies of the early 1980s had their origins in a religious context. Specifically, she notes that All Saints, a Protestant Church in Tucson, Arizona was widely regarded as the origin of the sanctuary movement. Church members cited a seventy-five year history of ministering to the Indians, among the most oppressed peoples of the time, and thus a sense that the church had always challenged the status quo. At its peak, the “sanctuary movement” was comprised of 300 congregations nation-wide that provided refuge for those fleeing violence in Central American countries (9). The term “sanctuary” also came to be used by city governments in the 1980s, but with a much more general, secular, and administrative rather than moral valence, as we will see in the next chapter.

In a subsequent book, Coutin turns her attention from U.S. citizen church leaders and members who worked on behalf of illegal aliens, to the non-citizens themselves. Specifically, in *Legalizing Moves: Salvadorian Immigrants’ Struggle for U.S. Residency*, Coutin takes up “immigrants’ legal consciousness” in the mid to late 1990s. Her study of “legal consciousness,” she argues, comprises “an ethnography of legal process rather than a particular group of people” (23). After describing and analyzing the understandings, actions, and purported emotions of the immigrants during the course of unauthorized migration, contact

with community organizations in the U.S. seeking to help them, and adjudication in the formal U.S. legal system, Coutin concludes:

The relationship between law and immigration makes immigrants' agency quite complex. Within deportation hearings, certain forms of agency are privileged. For example, both asylum applicants who express a difference that occasions persecution and suspension applicants who "progress" and demonstrate "deservingness" can be recognized and legitimized. In contrast, agency of an illegitimate sort is attributed to immigrants who accept public assistance, attempt to "fix" their papers, or operate unlicensed businesses. Because the structures that contribute to these "illegitimate" practices cannot be deemed agentive, individuals' explanations for submitting fraudulent applications, living without insurance, or working under the table appear to be excuses for their own immorality. These ideas of legitimate and illegitimate agency, both of which attribute actions to character, do not take individuals' social positioning into account and therefore cannot describe how immigrants shape policy. To acknowledge the embeddedness of agency, I do not equate agency with autonomy, as does legal liberalism. . . but rather with maneuvering within a particular set of conditions. People maneuver by going into hiding when they are targeted by death squads, applying for papers when they are undocumented, and so forth. Such actions and inactions have multiple consequences and can reproduce as well as challenge structures of power. Nonetheless, when taken collectively, maneuvering can be a potent political force (173).

This lengthy quotation from Coutin's texts is important for two reasons. First, I wish to acknowledge Coutin's point that unauthorized immigrants demonstrate considerable and often courageous agency in all the decisions they make in the face of the law, and also her point that presenting non-citizens' perspectives is an integral part of understanding immigration and alienage law "in action." However, because my specific research interests are in the limits and transformations of state power in the face of illegal alienage, or rather, in the possible self-consciousness of the state about its own limits vis-à-vis illegal alienage, I do not directly interview unauthorized migrants or address their lived experiences in this work. Instead, I illuminate the historical development and transformation of certain city-level policies concerning alienage through archival research and observation, and I interview the "street level bureaucrats" who shed light on the reasons behind these transformations. No doubt these

transformations affected the ways in which many non-citizens thought about law, citizenship, and identity. But delineating these changes in non-citizen subjectivity is admittedly beyond the scope of this work and necessarily in the service of a different kind of research question than the one that I pursue.

Second, and in a more theoretical register, I wish to draw attention to Coutin's presumptions, and also those of most other socio-legal scholars, that: 1) legal liberalism necessarily equates agency with autonomy; 2) that legal liberalism is thus blind to "maneuvering within a set of conditions;" and 3) that working without papers is always deemed illegitimate and thus immoral. While these propositions may be correct on a broad, first pass level, I wish to suggest that these claims over-simplify the socio-legal realities of the U.S. laws of immigration, both "in action" and "on the books." In particular, as the subsequent two chapters will show, the positive moral and political value of work, even unauthorized work, in U.S. law and liberal democracy casts doubt on the claims that immigrant agency in working is always already illegitimate, and that liberalism necessarily equates agency with autonomy. Further, that working is an activity that renders a person part of a "labor market," whereby the treatment of one worker could adversely affect the wages and working conditions of other workers means that U.S. courts must and do grapple with the possibly symbiotic relationships between unauthorized workers and authorized workers. This suggests that "maneuvering within a set of conditions" (e.g. working and also demanding certain legally mandated working conditions even when one's presence is unauthorized) may be a morally and legally favored activity in U.S. liberal democracy. I will attempt to draw out the political theoretical implications of this point in Chapters 5 and 6. For now, it is sufficient to note simply that the machinery of "legal liberalism" vis-à-vis illegal alienage is more complicated than Coutin's text suggests, especially when a magnifying glass is taken to contemporary law "on the books" and "in action" and to the normative commitments or intuitions that undergird the law, if always imperfectly.

This section has reviewed major works about immigration and alienage law. It has demonstrated the considerable range of specific topics (e.g. the decision-making processes of immigration enforcement officials at airports; federal administrative practice surrounding foreign contract labor; and the subjective experience of migrants) that any socio-legal scholar may take up. Furthermore, it has analyzed the various presumptions inherent in relatively more behaviorist (Gilboy), institutional (Calavita) and anthropological (Coutin) approaches.

As discussed above, my chosen approach is most similar to Calavita's historical and institutional approach. But also as discussed above, I take inspiration from anthropologists of law such as Coutin in so far as I seek to situate my study of law, on and off the books, within particular, recognizable

places. These places, or jurisdictions, serve as important units of analysis that contain the circulation of various laws and policies. By situating my study in particular places, I am able to show the interaction between different kinds of actors, rather than focus on one kind of actor or one kind of dispute.⁸ The next section of this chapter discusses further the analytical payoff of and foundations for a local, “street-level” approach to U.S. immigration and alienage law.

Order without Law Revisited: Illegal Alienage and Street Level Bureaucracies

Like Robert Ellickson’s work on “order without law,” which provided a launching off point for this chapter, Michael Lipsky’s work on “street-level bureaucracies” is not directly about alienage. It too appears to presume primarily an “all-citizen” state of sorts, where dilemmas of non-citizenship are scarcely on the radar.⁹ But as with Ellickson’s book, Lipsky’s writings on “street-level bureaucracies” provide an important touchstone for thinking about how a contemporary sociological study of state practices surrounding (illegal) alienage may best proceed.

In a 1969 paper, an early incarnation of his thesis, Lipsky posits that, “In recent years, political scientists have been particularly concerned with finding viable means of measuring the impact of government on people.” He continues, “One of the most important and least studied areas relating to this concern is the problematic ‘place’ in the political system where government meets people.” (Lipsky 1969: i). Furthermore, Lipsky remarks that “recent American urban conflict has focused attention on bureaucratic structures providing services to the poor. Police departments, school systems, and welfare service organizations have increasingly been the objects of public concern” (1).

Lipsky’s motivating questions appear to have been two-fold. On one hand, the discipline of political science was seeking, at the time, to “measure the impact of government on people” and Lipsky appears to address his work to that mandate. But even more importantly, Lipsky points to his “street-level

⁸ Sally Falk Moore (2005: 3) notes in the introduction to a volume entitled, *Law and Anthropology: A Reader*, “Today, anthropological fieldwork remains ideally the classical one of quite specific observation, inquiry, and interpretation, carried out either at a particular site or at multiple sites. The goal is to try to understand what is going on, and what it means to the actors, and to the collectivities in which they are embedded.”

⁹ There is one small exception to this point. “Immigration” appears in Lipsky’s book, where he discusses the role of street level bureaucrats in determining what is “normal.” In giving examples of such situations, he notes, “An early set of immigration regulations designed to exclude people with mental disorders permitted erratic or “hotheaded” behavior if exhibited by Italians, for whom this was regarded as a cultural characteristic (and therefore normal), but regarded such behavior as grounds for excluding northern Europeans, for whom this was designated an abnormal characteristic” (Lipsky 1980: 113). This appears more a matter of “ethnicity” and its social construction than of alienage, per se.

bureaucracies," as possible places which may be systematically causing, or at least exacerbating, feelings of dissatisfaction or abandonment among minorities and the urban poor in the socially volatile mid to late 1960s. Crucially, for Lipsky, these "men and women who, in the face-to-face encounters with citizens 'represent' government to the people"(1) for the most part do not intentionally exhibit hostile animus. Rather, these street-level bureaucrats "develop mechanisms to cope with . . . problems" such as "lack of organizational and personal resources, physical and psychological threat, and conflicting and ambiguous role expectations" (1). Furthermore, "because of certain characteristic behavior patterns, they [street-level bureaucrats] may be incapable of responding to pressure from client groups. . . and [may] exacerbate the very conflicts they otherwise declare interest in ameliorating" (1). And to make matters even worse, the "clients" of street-level bureaucrats are overwhelmingly low-income citizens and racial minorities, because "poor people and minority group members command fewer personal resources than more favored individuals, and thus are more dependent upon governmental bureaucratic structures for fair treatment or provision of basic services" (3). Thus, in this early article, Lipsky paints an important, if bleak, picture of organizationally and structurally constrained street-level bureaucracies who are unwittingly at the core of the urban protest of the period.

In a book published in 1980, entitled *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services*, Lipsky modifies and expands this argument. In light of the passage of a decade of American political life, Lipsky observes the increasing importance of street-level bureaucrats, even if the urban riots of the 1960s had ceased:

In the 1960s and the early 1970s the modal governmental response to social problems was to commission a corps of street-level bureaucrats to attend to them. Are poor people deprived of equal access to the courts? Provide them with lawyers. Equal access to health care? Establish neighborhood clinics. Educational opportunity? Develop preschool enrichment programs. It is far easier and less disruptive to develop employment for street-level bureaucrats than to reduce income inequalities (1980: 7).

Furthermore, he makes explicit the role of street-level as agents of social control (11.) But most importantly, for our purposes here, Lipsky identifies "street-level bureaucrats" as "policy-makers." As he notes:

Street level bureaucrats make policy in two related respects. They exercise wide discretion in decisions about citizens with whom they interact. Then, when taken in concert, their individual actions

add up to agency behavior. . . The policy-making roles of street-level bureaucrats are built upon two interrelated facets of their position: relatively high degrees of discretion and relative autonomy from organizational authority (13).

While Lipsky identifies “street-level bureaucrats” as policy-makers, he takes care not to forget the existence of law “on the books” all together. But he also suggests the possibility of increased de facto “street-level” discretion when law “on the books” is particularly cumbersome. Specifically, he notes:

This is not to say that street-level workers are unrestrained by rules, regulations, and directives from above. On the contrary, the major dimensions of public policy are shaped by policy elites and political and administrative officials. . . [But] rules may actually be an impediment to supervision. They may be so voluminous and contradictory that they can only be enforced or invoked selectively (14).

Two points of synthesis are helpful at this juncture. First, it is important to note the differences between Ellickson’s “order without law,” and the “order without law” that Lipsky implicitly puts forth. At a very broad level, Ellickson’s site of analysis is rural America, where “street-level bureaucrats” are scarcely to be found, while Lipsky’s site is urban America, which, in his portrait from the 1960s and 1970s, is teeming with “street-level bureaucrats.” But more importantly, Lipsky’s “order without law” is a matter of administrative discretion by bureaucrats in the face of law, rather than “rational” contracting between non-state actors, on which Ellickson focuses. Crucially, Lipsky makes a distinction between “law” and “policy” which most socio-legally inclined scholars today elide. Specifically, “policy” is presumably not law because it often does not come from an identifiable sovereign and is not necessarily written. A great deal of day to day government in modern urban American, Lipsky suggests, is a matter of “order through policy,” itself another form of “order without law.” And it is organizationally and institutionally mediated through and through.

Second, Lipsky’s writings suggest that street level bureaucrats heavily determine “law in action,” which might best be characterized as not law, but rather “policy.” But Lipsky appears to presume that most if not all relevant street-level bureaucrats will be local government officials (e.g. police, teachers, lower state court judges). As such, Lipsky is relatively blind to the nested jurisdictions that make up a federal state, and to turf wars between these various jurisdictions. Furthermore, Lipsky also does not discuss the roles that non-governmental organizations may have in doing at least some of the work of

“street-level bureaucracies.” Illegal alienage, seen through the lens of the “street-level” appears to implicate in particular these two variations on the theme, as we will see in the next chapter.

In sum, my particular socio-legal approach to illegal alienage takes a significant cue from Lipsky in so far as I ask how “street level bureaucracies” in two municipalities have constructed and governed illegal alienage from 1985 to the present. Like Calavita, my focus is on the relationships between parts of the multi-fragmented “state” and thus on the relationships between organizations that make up “the state,” rather than on the organizationally constrained cognitive processes of individuals. Like Coutin, I situate my study in particular places, namely Houston, Texas and San Francisco, California and pay attention to relationships between actors in these places. But in addition to imposing these socio-legal frames onto my analysis of empirical facts, I seek at the same time to keep in mind important political theoretical questions about illegal alienage and corresponding dilemmas of law and government in modern America, as the next chapter will demonstrate.

CHAPTER 5

ILLEGAL ALIENAGE, "SANCTUARY," AND "DAY LABOR" IN TWO AMERICAN MUNICIPALITIES, 1985-2010

The desk over there where one of the Immigrants' Rights Commissioners is sitting today is the desk where Mr. Harvey Milk once used to sit.

David Campos, Supervisor, City and County of San Francisco, marking the beginning of the Human Rights Commission/ Immigrant Rights Commission Joint Public Hearing on Impacts of Federal Immigration Enforcement Policy on San Francisco Communities Legislative Chamber, City Hall, San Francisco, CA, April 13, 2009

The Houston Area Justice and Equality in the Workplace Program has worked to improve the working conditions of some of the most valuable --no, sorry, the most vulnerable. . . the most vulnerable workers.

Reporter from the Telemundo Television Network, serving as Event Emcee and reading opening remarks marking the commencement of the Eighth Annual Signing Ceremony for the Houston Area Justice and Equality in the Workplace Program 2nd Floor Meeting Area, Consulate of Mexico, Houston, TX, November 4, 2009

Introduction

The two quotations that together form the epigraph for this chapter are ultimately sentences about illegal alienage, though they may not appear to be on first glance. They were spoken in two American municipalities, months apart, in 2009. Neither is a grand statement of law or policy. Neither is a statement of any great practical importance. Instead, both statements are fleeting, relatively ritualistic moments at the public or semi-public events that provided the context, and even more importantly the podiums and the microphones for such statements to be heard.

Yet, at the same time, at a deeper level, these quotations are important windows revealing recent manifestations of two different approaches to trying to “solve” or even merely to manage the “street-level” dilemmas of law and government brought into being by illegal alienage. At its core, this chapter illuminates how these two very different moments came to be, and what they may together reveal about broader dilemmas of law and government in contemporary America.

Exactly how, one may ask, are these two seemingly insignificant instances so importantly and so revealingly different? In San Francisco, on April 13, 2009, hundreds of people, many of them members of the local public, came to tell of their own very current dilemmas of immigration, citizenship, and status (or lack thereof) in an event that would likely make even the most cynical political theorist believe again, at least for a few minutes, in the possibilities of robust deliberative democratic practices. There, David Campos, a member of the City’s Board of Supervisors, congratulated San Francisco on being the most prominent center of a social movement organized around achieving gay rights. “Look how far we have come on LGBT rights!” Campos said emphatically. Many people sitting near me in wooden pews in the ornate assembly hall looked confused however, as if they had come by innocent mistake to the wrong hearing in the wrong room in City Hall.

Campos continued, “We are very proud of the fact that San Francisco sent the message that every human being, regardless of sexual orientation, is equal. Now, the U.S. Attorney has targeted our immigrant population. . . Sanctuary was put in place to make our city safe. Yet we have moved away from that. It is not popular to protect the undocumented, but no human being is illegal!” The crowd applauded enthusiastically, and many people seemed relieved that they were in the correct room after all.

As we shall see in this chapter, San Francisco’s “sanctuary” ordinance was not quite originally put into place “in order to make the city safe,” despite the fact that this justification of public safety has enjoyed resonance for a significant period of time since the mid 1980s. But putting aside, for just a moment, various complex questions of origins and transformations, Campos’s statement was striking and confusing mainly for the parallel it quickly drew between gay rights and immigrants’ rights. Illegal alienage too, Campos suggested, is an unfortunate incarnation of second class citizenship, nothing more, and yet also nothing less.

A public event of the kind that took place in the San Francisco City Hall on April 13, 2009 did not occur in Houston, Texas, in or around 2009. Such an event is also not likely to occur in Houston, at least for the foreseeable future. In Houston, the most organized display of “street-level” bureaucratic action-taking on illegal alienage took place in a place jurisdictionally, if not geographically, far away from Houston’s City Hall. On the second floor of the local Mexican

Consulate, the heads of Houston area branch offices of federal agencies such as the Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Labor Wage and Hour Division as well as relatively high-level representatives from the local El Salvadorian, Honduran, Columbian, and Guatemalan consulates, gathered for a brief “signing ceremony” to commemorate the eighth year of the existence of the Justice and Equality in the Workplace program, a program with the stated objectives of:

conduct[ing] an educational campaign aimed at employers and employees living in the Greater Houston Area to inform them about their rights and responsibilities in the workplace; identify[ing] unlawful employment practices and employment discrimination against Latinos/Hispanic workers; and provid[ing] referrals and case by case resolution of issues affecting Latino/Hispanic immigrant workers, regardless of their immigration status.¹

The audience of about fifty people, comprised mainly of conservatively suited administrative agency officials and foreign diplomats, sat in rows of folding chairs and looked around the room, nodding and smiling as they recognized acquaintances but then turning quickly back to Blackberries adeptly held and continuously manipulated with single hands. Some looked up as the young Telemundo reporter charged with emceeing the event stumbled over the words “valuable” and “vulnerable” in his introduction; others paid no attention at all.² The reporter introduced each agency head, and he or she spoke for about two minutes each, reviewing how glad his or her group was to be part of such an unprecedented network, or how many investigations had been initiated and approximately how much money had been recovered in 2008 on behalf of aggrieved Latino/ Hispanic workers in the Houston area.

While a subsequent section of this chapter will delve further into the origins and limits of the Justice and Equality in the Workplace Program, this

¹ Program; Justice and Equality in the Workplace Signing Ceremony; Wednesday, November 4 2009.

² The question of whether “valuable” or “vulnerable” best fits the sentence is interesting as a practical matter of how illegal alien workers ought best to be characterized for the purpose of getting the attention of a room full of administrative officials in contemporary America. But on a more theoretical level, the slip between “valuable” and “vulnerable” is even more interesting in so far as it raises the hypothetical question of how illegal alien workers ought best to appeal to the state -- as “valuable” in an economic sense, or as already injured or likely to be injured in a physical and political sense. Critical theorists would probably point to the pitfalls of both of these kinds of appeals. See Brown (1995). That said, the answer to this question is likely much more empirical and much more dependent on the particular contexts of a particular body of law than political theorists are likely to recognize.

Introduction seeks only to highlight the differences between this thoroughly administrative reckoning with illegal alienage in Houston, Texas and the paradigmatically political one in San Francisco, California. To be sure, not all responses to illegal alienage in Houston can be deemed “purely administrative,” and not all such responses in San Francisco can be deemed “purely political” ones. Rather, the key point is that Houston and San Francisco present two differently accented narratives of “street-level” contention with illegal alienage over the last twenty-five years. While “illegal alienage” was not even mentioned at the Houston event, it was front and center at the San Francisco event. While at the Houston event, speakers stressed the need only to enforce existing federal laws in the name of *all* workers, at the San Francisco event, law, and especially federal law, was regarded fully as an impediment to justice. While “work” was everywhere at the Houston event, it was scarcely in circulation at the San Francisco event, which turned primarily on “personhood” and “human rights.”

The task of this chapter is to explain precisely how these two divergent trajectories came to be, and to draw out what each reveals about the limits and possibilities of various kinds of speech and action by street-level bureaucrats in a nation-state that is profoundly uncertain about what to do in the face of illegal alienage.³ The primary argument of this chapter is that immigrant “labor” or “work”--rather than immigrant personhood as allegedly protected by immigrant “sanctuary”-- has been *both* the socio-legal phenomenon and the normative ground upon which street-level bureaucrats have most successfully expanded the “rights in action” or belonging of illegal aliens within their jurisdictions. The four-pronged comparison--that is, comparison of two different kinds of illegal alienage-related issues within two different jurisdictions-- shows how “work” or “labor” has been the more enduring ground for street-level bureaucratic action on behalf of illegal aliens, despite different political climates in the two jurisdictions. The four-pronged comparison allows for contextualizing “sanctuary” and labor rights’ responses in each place with respect to each other, and not only with respect to such responses in other jurisdictions, as a more conventional approach may suggest. And because the comparison is intra-jurisdictional vis-à-vis illegal alienage, the comparison allows specifically for on-going political theoretical as well as socio-legal analysis.

With respect to illegal alienage, intra-jurisdictional comparisons are also preferable to inter-jurisdictional comparisons precisely because there is so little “law on the books” of the local governance of illegal alienage to provide a

³ To be clear, the goal of this chapter is not to endorse one trajectory as more or less “liberal,” more or less democratic, more or less progressive, or even more or less worthy of admiration than the other. Nor is the goal to make a claim about what street-level bureaucrats definitively do in the face of illegal alienage, in all places in America, on account of the “inherent natures” of either street-level bureaucracies and/or illegal alienage, and/or human social interaction. Chapter 4 analyzed the dangers of such an approach, particularly for studying illegal alienage.

starting point for socio-legal research design, either explicitly or implicitly. The socio-legal management of illegal alienage is in large part unwritten and thus quintessentially local. The research design employed in this chapter recognizes this important point.

In addition to showing the contrasts between bureaucratic action around immigrant “sanctuary” and labor, this chapter also shows how “immigrant sanctuary,” particularly in San Francisco, where it has been most extensively pursued, uniquely reveals the shortcomings of consequentialist, “community safety” justifications for immigrants’ rights. To the extent that “immigrant sanctuary” has been justified in terms of crime prevention across a population, rather than on the basis of the actions or contributions of immigrants, immigrant “sanctuary” has been on unstable ground, despite its lofty language. This chapter shows how employing this essentially future-looking, consequentialist justification for immigrant “sanctuary,” --- meant to incentivize illegal aliens to call police when witnessing crimes--- backfired on the San Francisco street-level bureaucrats who once defended immigrant “sanctuary” in this particular way. While perhaps more politically sellable in the short term than a non-consequentialist argument that illegal alienage should simply not matter for local governance, the “community safety” justification contained within it the serious risk that a single violent crime by an illegal alien would unravel the public justification for such a policy. This is exactly what happened in San Francisco, as this chapter will show.

Related to this point, and also with particular reference to San Francisco’s long “sanctuary debate,” this chapter shows also how certain street-level officials and bureaucrats have insisted on developing written laws of sanctuary, how they have struggled to write these laws over time in ways that maximize unwritten official discretion, and how they have subsequently underemphasized the discretion contained in these written laws when called upon to defend some pro-immigrant policies. By showing how the writing of law is itself a *process*, and by showing the significant official discretion embedded into the written law, this chapter illustrates how the binary between “law and action” and “law on the books,” breaks down, especially where illegal alienage is concerned.

Four sections comprise this chapter. The first section discusses the initial motivating research question and research methods which undergird the fieldwork presented in this chapter. It shows how the approach taken in this chapter refuses the binary between “law on the books” and “law in action” as well as that between “political theory” and “sociology of law.”

The second section provides background legal and demographic information about California and Texas. It demonstrates how these two states together form an important set of jurisdictions for comparative socio-legal study of illegal alienage in the U.S. The second section then moves from the state level to the municipal level to delve into background demographic information about

San Francisco and Houston. Furthermore, the second section also briefly reviews the specifically legal issues surrounding “sanctuary” and “day labor” in the U.S. today. “Sanctuary” and “day labor” serve as empirical anchors for this socio-legal chapter precisely because they are the names given to the most salient “street-level” dilemmas brought into being by illegal alienage over the last twenty-five years. These dilemmas have to do with the normative and administrative commitments of local police departments vis-à-vis “immigrant communities,” broadly defined, and also with the participation of purportedly illegal aliens in local labor markets, primarily for manual, relatively unskilled labor. But as the second section will also show, attribution of the terms “sanctuary” and “day labor” situates illegal alienage within both the particular histories and prior legal valences of these words, and it also powerfully delimits the ways in which illegal alienage has been understood and reckoned with at the “street-level,” both as matters of politics and of administration.

After the second section sets the overarching substantive context, the third and fourth sections of this chapter turn formally to San Francisco and Houston to draw detailed portraits of the origins and ongoing fates of “sanctuary” and “day labor” in these places between 1985 and 2010. And as noted above, unlike previous writings on sanctuary and day labor in contemporary American cities, these sections take up “sanctuary” and “day labor” together rather than as isolated or unrelated phenomena. Most scholars write either about “immigrant labor rights and/or day labor” or about “sanctuary” ordinances, perhaps because they presume that the phenomena are sociologically, legally, and normatively distinct.⁴ I opt rather to focus on the relationship between these two phenomena over time in particular places. I do so because, as subsequent sections show, both implicate local police departments, which exercise substantial discretion under U.S. law. More importantly, both have become deeply associated with illegal alienage in U.S. municipalities between 1985 and the present. As such, I consider “sanctuary” and “day labor” together because, viewed from the platforms of both sociology of law and of political theory, they are at once sufficiently alike and revealingly different. They are alike in so far as they have become the *lingua franca* for speaking of the local dilemmas of law and government brought forth by illegal alienage over the course of the last twenty-five years. They are different because they each implicate different normative concerns for liberal democracies, ranging from the unjustness of the positive laws of the nation-state, to the safety of local “populations,” to the rights and

⁴ Shannon Gleeson’s (2009) book chapter entitled, “Organizing for Immigrant Labor Rights: Latino Immigrants in San Jose and Houston,” and Rose Cuison Villazor’s (2010) law review article entitled, “Sanctuary Cities and Local Citizenship” are good examples of works from sociology and from law respectively that take the approach of focusing either on immigrant labor issues or immigrant sanctuary, but not both. The next section will consider the main arguments of both these works in greater detail.

normative political implications associated with doing mainly manual labor, as subsequent sections will demonstrate in more detail.

The section on San Francisco, which comes first, is significantly longer than the section on Houston because San Francisco has been the site of a public debate about immigrant “sanctuary” in a way that Houston has not, and because the section on San Francisco uses the many changes in San Francisco’s “sanctuary” law to draw out theoretical points. The section on Houston will analyze the contrast between approaches to “sanctuary” in San Francisco and Houston and build on the theoretical discussion commenced in the prior section on San Francisco. Furthermore, the discussion of day labor regulation in San Francisco is significantly shorter than the discussion of “sanctuary” in San Francisco, again, because day labor regulation has not been as controversial as “sanctuary” in San Francisco. However, the relative lack of controversy about day labor regulation in San Francisco will itself be explored.

Socio-legal Methodology

The chapter seeks also to demonstrate the advantages of a kind of sociology of law that walks toward, rather than away from the political theoretical questions that lurk throughout its subject matter, particularly when this subject matter has to do with immigration and alienage in modern liberal democratic nation-states. The method of this chapter, particularly in the third and fourth sections, is to present and analyze information from hundreds of documents, gathered from newspaper archives and agency files, over fifty hours of ethnographic observations at public hearings and other events between January 2006 and September 2010, and fifteen semi-structured interviews, lasting anywhere from one to three hours, with street level bureaucrats representing both governmental and non-governmental organizations in San Francisco and Houston.

While a sociologist may refer to the methods employed here as a suitably “triangulated” approach to gathering sociological data, such an approach also approximates that which political scientist and socio-legal scholar Julie Novkov (2008: 1) has recently termed “legal archeology.”⁵ “Legal archeology” Novkov has written, “[is] a mode of analysis that recognizes the value of historical institutionalism and of substantive work done under the banner of American political development, but that is generated more organically from within the study of law” (1). “[L]egal archaeology,” she continues, “focuses on the production of legal discourse as the starting point for analysis while attending to the institutional boundaries and conditions that contribute to this production” (1). The approach taken in this chapter seeks to do this, among other things. It

⁵ See Novkov, Julie (2008). "Legal Archaeology" Available at: http://works.bepress.com/julie_novkov/2 (Last Accessed September 20, 2010).

seeks to reconstruct events over the course of time, and it seeks to illuminate the perspectives of different kinds of officials on these events.

The research question that motivated this inquiry was: "How has illegal alienage been managed as a matter of local governance, in two U.S. municipalities, between 1985 and the present?" A broad research question was necessary precisely because no prior socio-legal study had considered the multiple ways that illegal alienage made it to the radars of street-level bureaucrats over time within particular jurisdictions, and I was not certain exactly what I would discover. Therefore, I chose to limit my inquiry by time (1985 to the present) and space (within Houston and San Francisco), and cast a wide net, particularly in my archival research.

Furthermore, the definition of "street-level bureaucrat" I used was broader than that of Lipsky (1980). While Lipsky defined teachers, police, and lower court state judges as "street level bureaucrats" my working definition of the term included elected city officials, city administrators, police officials, federal agency officials resident in local branch offices, state agency officials resident in local branch offices, local consular officials, and non-profit agency employees. The kinds of street-level bureaucrats whose activities I was interested in were more "elite" than the teachers and front-line policemen who occupied the bulk of Lipsky's attention. The street-level bureaucrats in my study were primarily managers of their respective local bureaucracies. They had the duties to set goals for the local offices of their particular organizations. The federal agency officials especially navigated the intersection of federal law and local conditions. They reported to "Headquarters" at the same time that they tried to inform "Headquarters" about conditions specific to their regions. The street-level bureaucrats in my study were accustomed to networking with other street-level bureaucrats from other organizations; therefore, they were not the "rank and file," but rather more "elite" bureaucrats. I needed a broader definition of "street-level bureaucrat" than Lipsky precisely because the phenomenon in which I was interested, illegal alienage, was sufficiently controversial to require responses from bureaucratic management. Furthermore, as noted in Chapter 4, Lipsky's study said little about overlapping federal, state, and local jurisdictions. Given that illegal alienage is a quintessentially federal designation, observing variation with respect to the phenomenon across levels of jurisdiction was essential.

Because I was interested in the transformation of "law" and "policy" over time, I began with archival research. I used ProQuest databases in the main public libraries in each jurisdiction to gather articles in local daily newspapers containing the terms "sanctuary," "day labor," or "illegal alien or undocumented worker or unauthorized immigrant" in the text. I confirmed the accuracy of my ProQuest searches by conducting identical searches of Houston and San Francisco Newspapers in the LexisNexis Academic Database at the UC Berkeley

Library. Given the high degree of correlation in my results in these two separate electronic databases, I was satisfied that I had assembled a relatively accurate archive. And given that I had searched also for “illegal alien or undocumented worker or unauthorized immigrant,” I was satisfied that I was not missing another kind of local regulation beyond “sanctuary” and “day labor.”

I used an Excel spreadsheet to catalog each article, with date and a brief summary of events and some verbatim quotations from officials interviewed for the articles. Because I was interested in the unfolding of events over time, I organized the spreadsheet primarily by date, and by category (i.e. “sanctuary,” “day labor,” or “both.” I noted down agencies and individuals whose names recurred within the articles, and I contacted them by email and telephone to schedule interviews. As I began to conduct interviews, I also asked officials I interviewed if they could recommend other people to interview.

In the mean time, I also visited day labor sites within the two jurisdictions, in order to get a sense of how organized the site appeared, and to discern which, if any, organization I should contact for more information about the sites. While San Francisco’s site was heavily organized, I could detect no sense of official organization among the day laborers who I continued to see on various street corners in Houston. I expected this lack of official organization in Houston in light of the newspaper articles I had gathered about the waxing and waning of day labor organization in Houston over the last ten years.

From 2006- 2010, I attended meetings of the Immigrants Rights Commission in San Francisco, which were open to members of the public by statute, occurred roughly once every two months, and lasted about two hours. I sat in the public gallery, and took handwritten notes while the meeting took place. I typed up my notes upon returning home. Usually, I was among five to ten members of the public. Other observers, I learned, came from local public interest law organizations and local ethnic newspapers. Twice, I met other UC Berkeley graduate student researchers interested in some aspect of immigration politics in San Francisco. I found the Immigrants Rights Commission meetings helpful for understanding how many kinds of officials – from the Mayor, to the Chief of Police, to the Board of Supervisors – took an active interest in the issue of “Immigrants Rights” in San Francisco. The Commission’s meeting were often discussions about the vagueness of these recent initiatives by these higher level city officials. I was struck by how little power the Commission had, and how frustrated the Commissioners, often prominent businesspeople from San Francisco’s immigrant communities, were with respect to “lack of change” and the “merely advisory role of the Commission.” In addition to routine Immigrants Rights Commission Meetings, I attended major public events such as the Immigrants Rights Summit, which took place in San Francisco’s Main City Hall Chamber and attracted hundreds of people.

In Houston, there was no Immigrants Rights Commission with regular public meetings and no large scale Immigrants Rights Summit. I made inquiries about such meetings in Houston's City Hall and was told that such meetings did not exist in Houston. The only event I went to in Houston took place at the Mexican Consulate, as discussed above. I was specifically invited to this event at the Mexican Consulate by two federal officials I had previously interviewed.

Across both jurisdictions, the officials I contacted for interviews were responsive immediately or not at all, despite my numerous attempts to reach them. I conducted thirteen out of fifteen interviews in person, at the offices of the officials, and two by telephone. All but one of my fifteen interviews were with officials charged with protecting labor rights in some fashion.⁶ Five city and police officials whom I contacted regarding sanctuary policy did not return my calls, suggesting the controversial nature of city sanctuary by 2006 in both cities, and the perceived dangers of speaking "off the record" about the issue. Therefore, most of my information about sanctuary comes from detailed newspaper coverage of the issue.

When given permission, I tape recorded interviews and submitted them for professional transcription. When I was not able to tape record interviews, I took handwritten notes during the interview and transcribed them immediately upon returning home. During my first two interviews, I found that I presumed that the official I was interviewing knew as much as I did about the historical controversies surrounding illegal alienage in that jurisdiction. I asked overly specific questions which presumed familiarity with events that took place before the officials had even arrived in that jurisdiction. Learning from these early mistakes, I began to ask more open-ended questions about the mission of the official's organization, what a regular day in the office would be like, and how high levels of immigration challenged the organization to develop new or different strategies. I found that these more open-ended questions allowed me to assess to what extent the organization considered illegal alienage as an issue to be addressed, rather than simply presuming that illegal alienage was important to the organization. I entered my transcripts from interviews into the qualitative analysis software ATLAS. I inserted codes to refer to particular segments of responses in order to facilitate the juxtaposition of responses to similar questions over interviews.

This chapter focuses solely on the histories of "sanctuary" and "day labor" within the municipalities, which is the most important initial narrative that emerges from the data collected for this dissertation. The interviews in particular, however, contained more data than can be presented here.

⁶ The exception was an interview I conducted with a public health analyst in San Francisco, who spoke mainly of her organization's key role in developing "San Francisco Municipal ID Cards" as part of something "a sanctuary city ought to do." Interview; Public Health Analyst; Department of Public Health; San Francisco; October 2006.

Subsequent writings will likely consider more closely (and with the benefit of additional research) the relationships between local branch offices of federal agencies and “Headquarters,” as well as the specific kinds of partnerships between governmental and non-governmental organizations, both vis-à-vis illegal alienage.

The Jurisdictional Sites and the Controversies: The Common Immigration Conundrums and the Uncommon State Regulatory Frameworks of the “Twin Poles of the West”

In July of 2009, the *Economist* magazine put an editorial cartoon on its cover. Entitled “America’s future,” the cover displays cartoons of a confident, muscle-laden cowboy and a cowering, excessively thin surfer who looks as if he has had better days. “America’s recent history,” the text of the corresponding editorial inside the magazine begins, “has been a relentless tilt to the West—of people, ideas, commerce and even political power. California and Texas, the nation’s two biggest states, are the twin poles of the West, but very different ones.”⁷ The editorial asks and answers how California and Texas are so importantly different:

For most of the 20th century the home of Silicon Valley and Hollywood has been the brainier, sexier, and trendier of the two: its suburbs and freeways, its fads and foibles, its marvelous miscegenation have spread around the world. Texas, once part of the Confederacy, has trailed behind: its cliché has been a conservative Christian in cowboy boots, much like a recent president. But twins can change places. Is that happening now?

That is indeed happening now, the editorial suggests. For unlike California, where “high taxes, coupled with intrusive regulation of business and greenery taken to silly extremes have gradually strangled what was once America’s most dynamic state economy” (13), Texas is purportedly doing “just fine, thanks y’all.” Texas, the right-of-center *Economist* praises, “offers a different model, based on small government. It has no state capital-gains or income tax, and a business-friendly and immigrant tolerant attitude” (13). And, as if that was not enough, the editorial adds, “Old conservative stereotypes are being questioned: two leading contenders to be Houston’s next mayor are a black man

⁷ “America’s future.” *Economist*. July 11, 2009: 13.

and a white lesbian. Texas also gets on better with Mexico than California does” (13).

But in the end, the magazine’s readers are warned from choosing a definitive favorite. “The truth is,” the editorial diplomatically concludes, “that both states could learn from each other. Texas still lacks California’s great universities and lags in terms of culture. California could adopt not just Texas’s leaner state, but also its more bipartisan approach to politics and its more welcoming attitude towards Mexico” (13).

An editorial in the *Economist* can bear the weight of only so much close analysis. Nonetheless, one cannot help but wonder what the editorialists mean exactly when they praise Texas’s ability to “get on better with Mexico” and to sport a “more welcoming attitude toward Mexico.” On the one hand, such an impression may be simply the unconscious result of viewing one too many happy photos of the famously chummy relationship between a recent President of Mexico, Vicente Fox and the most famous Texan of the 2000s, George W. Bush, both fortuitously fond of horses and ranches, at least for photos. On the other hand, the attribution suggests something deeper. Perhaps what the editorialists meant to say was that “small government” Texas is more “welcoming” of paradigmatically Mexican illegal alien labor because Texas does little to regulate labor markets, and laborers must simply bear the risks of entry. Important distinctions--between labor in the abstract, the persons who labor, and the numerous nations from which these people often come--are likely lost on the editorialists. For now, the point is that it is simply not clear what all the statements in the *Economist’s* editorial exactly mean. But the comparison the editorial sets up is very instructive indeed--even or especially for a comparative study of the law and politics of illegal alienage over the course of the last twenty-five years.

For in addition to being the most populous states in the country and the divergent “twin poles of the West,” California and Texas are also the U.S. states that are home to the greatest and second greatest number of unauthorized immigrants. According to a widely cited report published by the Pew Research Center in 2009, there were somewhere between 11,400,000 and 12,400,000 unauthorized immigrants in the United States in 2008.⁸ Of these unauthorized immigrants in the U.S. in 2008, approximately 2,700,000 (22.69%) lived in California, while 1,450,000 (12.18%) lived in Texas. California and Texas were followed by Florida (8.82%), New York (7.77%), New Jersey (4.62%), Arizona

⁸ See Passel, Jeffrey S. and D’Vera Cohen (2009). “A Portrait of Unauthorized Immigrants in the U.S.” Available at <http://pewhispanic.org/files/reports/107.pdf>, last accessed September 20, 2010. The report notes that its numbers are Pew Hispanic Center estimates based on March 2008 Current Population Survey data collected by the U.S. Census Bureau.

(4.20%), Illinois (3.99%), North Carolina (2.94%) and Virginia (2.52%). The Pew Research Report notes also that while California is still the state of residence of the largest number of undocumented migrants, California's share of the total U.S. population of undocumented migrants has declined considerably, from 42% in 1990 to 22.69% in 2008. During the same period, Texas's share of the U.S. population of undocumented migrants has remained stable at approximately 12%.⁹

To be sure, characterizations of U.S. states as "blue" or "red," following television news organizations' collective color scheme for signifying whether a particular state's Electoral College votes go in their entirety to the Democrat or Republican candidate during the high drama evenings of U.S. Presidential elections, no doubt obscure the complexities of political party affiliations and preferences within states. Nonetheless, on a macro level, state labor law and administrative frameworks in California and Texas may be characterized as "blue" and "red" respectively, so long as "blue" is meant to signify a proclivity toward some worker-oriented labor market regulations, associated these days with Democrats, while "red" is meant to signify an aversion toward these very regulations, associated today with Republicans.

Put in the more precise language of state administrative law "on the books," California has notably strong and active state agencies charged with enforcing California's labor and employment law. The Division of Labor Standards Enforcement (DLSE) in the California Department of Industrial Relations has district offices in Bakersfield, El Centro, Fresno, Long Beach, Los Angeles, Oakland, Redding, Sacramento, Salinas, San Bernardino, San Diego, San Francisco, San Jose, Santa Ana, Santa Barbara, Santa Rosa, Stockton, and Van Nuys.¹⁰ Any California worker who wishes: 1) to file a wage claim with the state labor commissioner if he feels that his employer has violated stage wage laws; 2) to file a workplace health and safety complain with Cal/OSHA, the agency charged with enforcing California's particular workplace health and safety laws; and/or 3) to report an employer for retaliating against him on account of his mobilization of his California labor rights can do so by going to the local DLSE district office closest to the location where he performed the work.

And by "any" California worker, the California Department of Industrial Relations means explicitly to include undocumented workers. A special document¹¹ entitled "Undocumented Worker Rights," and easily found on the Department's website notes:

⁹ See *id.*

¹⁰ See <http://www.dir.ca.gov/dlse/DistrictOffices.htm> (Last accessed September 20, 2010).

¹¹ This section and this chapter pay special attention to documents of law, their relative availability to the public, what they say, and what they do not say. This attention to documents is in line with Novkov's (2008) discussion of doing "legal archeology," described in the previous section. The role of documents, their structure, and their relationship to larger collections of

Because of confusion about the rights of undocumented workers employed in California resulting from a recent U.S. Supreme Court decision [ostensibly *Hoffman Plastics v. NLRB*, to be discussed in Chapter 6 of this work, though the case is not named in the document itself], the Department of Industrial Relations is providing the following clarification of its enforcement practices: **All California workers are entitled to workplace protection** (emphasis original).¹²

The document continues in part:

All California workers -- whether or not they are legally authorized to work in the United States -- are protected by state laws regulating wages and working conditions. . .

The California Department of Industrial Relations -- which enforces the state's labor and workplace safety and health laws -- will not question workers about their immigration status. The department will:

Process all wage claims without regard to a worker's immigration status

Hold hearings to recover unpaid wages and represent workers without regard to the worker's immigration status

Investigate retaliation complaints and file court actions to collect back pay owed to any worker who was the victim of retaliation for having complained about wages or workplace safety and health, without regard to the worker's immigration status

Vigorously enforce the state's employment laws to protect **all** California workers.¹³

documents is also at center of Vissman's (2008) book. Vissman's insight, that the documents that "contain" law do more than merely reflect law, but rather determine what law is and can be, informs this entire chapter and this section in particular.

¹² See <http://www.dir.ca.gov/QAundoc.html> (Last accessed September 20, 2010).

¹³ See id.

In addition to unambiguously declaring the applicability of California employment law to undocumented workers who perform work in California, the California Division of Labor Standards Enforcement also provides, pursuant to state law, relatively long periods of time before statutes of limitations render impossible the seeking of redress under state law. Specifically, the agency specifies that: a claim based on an oral agreement must be filed within two years from the date the claim arose; that a claim based on a written agreement be filed within four years from the date that the claim arose; and, most importantly, that a claim for minimum wage, unpaid overtime, and other statutory rights must be filed within three years from the date the claim arose.¹⁴ Crucially, workers may file claims either by mail or in person at any of the numerous district offices around the state.¹⁵ The form that a claimant must fill out and mail is available in English, Spanish, Vietnamese, and Korean, and requires only the claimant's signature. The claimant must simply certify that all that he has written on the form is true to the best of his knowledge.

Filed claims are automatically assigned to a Deputy Labor Commissioner, who either dismisses the claim for lack of cause or summons employers for a conference and/or a formal hearing.¹⁶ In sum, the state-based apparatus for aggrieved workers, even undocumented workers, to bring claims under California administrative law is extensive, both as a matter of law "on the books" and as a matter of staffing by designated street-level bureaucrats. Lawyers who represent undocumented workers in employment-related claims, as well as federal administrative officials based in California are keenly aware of the friendliness of California's labor and employment laws and bureaucracy to undocumented workers, as the next section of this chapter will discuss further.

For now, the contrast between California's labor and employment law infrastructure and that of Texas is foremost. In contrast to California with its multiple "walk-in service" district offices, Texas has only one office of the Texas Workforce Commission, the state's labor and employment law enforcement agency. The office is located in Austin. Among its numerous responsibilities, the Commission is charged with enforcing Texas's "Payday Law," under which Texas workers may bring claims for unpaid wages or overtime.¹⁷ More importantly, the Texas Workforce Commission has produced no document analogous to the California Department of Industrial Relations' unambiguous announcement about the applicability of its laws to undocumented workers, though technically, they do apply to such workers. And further, the statute of

¹⁴ See <http://www.dir.ca.gov/dlse/HowToFileWageClaim.htm> (Last accessed September 21, 2010).

¹⁵ See *id.*

¹⁶ See <http://www.dir.ca.gov/dlse/Policies.htm> (Last accessed September 21, 2010).

¹⁷ See Texas Labor Code, Title 2, Chapter 61.

limitations for all Texas wage claims under the Texas Payday Law is 6 months from the date the unpaid wages were due to be paid. This is markedly more punishing than the two to four year California statutes of limitations on wage claims noted above. Federal administrative officials at branch offices in Texas are keenly aware of the Texas Payday Law's relatively ungenerous statute of limitations and lack of bureaucratic personnel to enforce even the state's relatively thin labor and employment laws, as the third section of this chapter will discuss further.

Finally, the form that aggrieved Texas workers must fill out in order to initiate a claim under the Texas Payday law has some important, particularly claims-discouraging characteristics, especially from the perspective of undocumented workers.¹⁸ Specifically, the cover sheet to the Wage Claim form states, among other things, that:

YOU SHOULD KNOW THAT A WAGE CLAIM CANNOT BE ACCEPTED IF:

Your wage claim is **without the signatures of both you and the witness.**

You acted as an **"independent contractor"** and not as an **"employee"** of the business (emphasis original).¹⁹

And in less prominent text, the form states, "Note: Social Security Number is optional, but failing to include it will delay processing of your claim."²⁰

While all three of these aspects of the Texas Workforce Commission Wage Claim form are facially neutral, advocates for undocumented workers in Texas complain that these aspects of the form result in a disparate negative impact on undocumented workers. The relevant "witness" must be either a Texas Workforce Commission Representative or a Notary Public. Even more importantly, the question of whether a particular worker is an "independent contractor" or an "employee" is a complex question of law disguised as a relatively uncomplicated question of fact. Only the quotation marks around the words "independent contractor" and "employee" suggest the legal valences of the terms. The Texas case law distinguishing an "independent contractor" from "employee" holds that as long as the employer determines the physical conditions of the work performed, provides tools, and or/ determines the time at

¹⁸ Those who advocate for the rights of undocumented in Houston have pointed to these particular characteristics of the form.

¹⁹ See <http://www.twc.state.tx.us/ui/lablaw/ll1.pdf> (Last Accessed December 13, 2010).

²⁰ See id.

which the work is performer, a worker is an “employee” rather than an “independent contractor.” However, without this information, an undocumented worker could easily conclude that he was an “independent contractor” rather than an “employee.” And finally, the reference to social security numbers, which undocumented workers generally lack, suggests that the claim is likely to be ineffective unless a valid social security number is provided. We will return to the socio-legal complexities brought forth by the combination of illegal alienage and social security numbers at the beginning of Chapter 6. For now, the objective has been to draw out the differences between the labor and employment law and administrative environments found in California and Texas.

The everyday laws of illegal alienage in San Francisco and Houston thus emerge within these distinctly different state regulatory contexts (c.f. Gleeson 2009).²¹ Having just described these varying contexts, it is important also to lay

²¹ In a book chapter entitled, “Organizing for Immigrant Labor Rights: Latino Immigrants in San Jose and Houston,” Shannon Gleeson (2009) presents data from “interviews conducted in San Jose and Houston with key immigrant labor unions, community organizations, and labor standards enforcement agencies” (107). Although my study and Gleeson’s study are both partly situated in Houston, my epistemological approach departs significantly from Gleeson’s as do my interpretations of what I observed in my sites and in the archival materials I consult. The differences are worth drawing out in so far as they usefully illustrate the different foci of different disciplinary approaches to the phenomena of illegal alienage. Gleeson’s study is relatively more behavioralist in tenor than my own. Specifically, she asks, “Given increasing levels of Latino migration, how do low-wage Latino workers, especially those who are undocumented immigrants, ensure and advocate for their labor rights both individually and collectively? When do local governments get involved in advocating for migrants rights, and what forms do these coalitions take?” Though likely not at all surprising to legal scholars familiar with federalism in the U.S. or socio-legal scholars who study organizations, if maybe a surprise to some sociologists and political scientists, she concludes, “Despite overarching federal policies and distinct state policy contexts, I find that local innovation and institutions also matter” (109).

It is important to note one thing in particular about Gleeson’s argument. Her major concern, or rather her “dependent variable,” in sociological parlance, appears to be “amount of activism around basic labor rights.” She identifies more “activism” of a certain kind in Houston than she does in San Jose. Gleeson is not concerned with changes in the “laws” of illegal alienage over time, as I am in this chapter. Rather, she is interested mainly in drawing out sociological propositions about presence or absence of certain forms of “labor activism” in two places at a moment in time.

And ultimately, Gleeson appears to be concerned about health of labor unions rather than about illegal alienage, per se. She concludes, “As Nelson Lichtenstein emphasized, the decline of the union movement has occurred because greater access to ‘rights conscious employment law’ has become more attractive, and in many ways less cumbersome, than a union contract. Substituting this ‘rights-based model’ for one based on the ‘collective advancement of mutual interests,’ overlooks the rights-based model’s limited enforcement capabilities, dependence on professional and government expertise, and an inability to attack structural crises at their core.”

out the varying demographic compositions of San Francisco and Houston, though with a caveat. While those relatively unfamiliar with the complexities of U.S. federalism may be tempted to interpret demographic facts about places as necessarily highly correlated with the existence or absence of certain laws or policies, the intent here is not to draw or even to suggest a direct correlation, given the complexities of both federalism and law in the U.S. The unique vesting of considerable law-making and law enforcement discretion in local police departments in the U.S., the commonplace jockeying for control between relatively more political and relatively more administrative branches of local governments, and the often unwritten nature of local policies toward immigrants all render problematic any attempt to read too much about law into the tea leaves of purely demographic information.

Nevertheless, the demographic similarities and differences between San Francisco and Houston can shed some additional, if now intentionally tempered, contextual light on the historically-informed narratives about the everyday laws of illegal alienage to follow in the next two sections. To be clear, San Francisco and Houston were selected for this study on account of their positions as major cities in California and Texas, housing well-established political, administrative, and non-governmental entities of local, state, and federal stripes within their borders. The presence of these multiple political and administrative entities is more important, from a legally informed socio-legal perspective on the spectral phenomenon of illegal alienage, than demographic near identicalness. Furthermore, while Los Angeles too is a major city in California with these multiple kinds of actors within its boundaries, its sheer size makes it difficult to compare with any U.S. city other than New York City, no matter how cautiously and tentatively.

The most important demographic characteristics of San Francisco and Houston are summarized in the following table, which draws on the U.S. Census's final numbers for 2000 as well as its 2006 updated estimates.

Socio-legal scholars too have long been suspicious of 'rights-based' employment law and have spent many decades pointing the shortcomings of "rights" in general, as discussed in Chapter 4. But while it is beyond the scope of the analysis here to disprove Gleeson's suggestion above that rights-based law is primarily to blame for the decline of unionism in the U.S., I do wish to emphasize that illegal alienage's intersection with the "rights-based model" of (employment) law is more complicated sociologically and normatively than Gleeson accounts for. In particular, "professional and governmental expertise" may actually trend toward more "rights" for illegal aliens, than union contracts would, as the next two sections will show.

TABLE 1: COMPARATIVE DEMOGRAPHIC INFORMATION	San Francisco	Houston
Population, 2006 estimate	744,041	2,144,491
Population, 2000	776,733	1,953,631
Land Area, 2000 (square miles)	46	579
Persons per square mile, 2000	16,636	3,372
Households, 2000	329,700	717,945
Persons per household	2.30	2.67
Median household income, \$ 1999	55,221	36,616
Homeownership rate, percent 2000	35.00	45.80
Persons below poverty, percent 1999	11.30	19.20
Foreign born persons, percent 2000	36.80	26.40
White persons, percent 2000	49.70	49.30
Black persons, percent 2000	7.80	25.30
Asian persons, percent, 2000	30.80	5.30
Persons of Hispanic or Latino origin, percent 2000	14.10	37.40
Language other than English spoken at home, pct age 5+, 2000	45.70	41.30
High school graduates, percent of persons age 25+, 2000	81.20	70.40
Bachelor's degree or higher, percent of persons age 25+, 2000	45.00	27.00

Source: US Census Bureau²²

Particularly notable is San Francisco's only 46 square miles size, compared to Houston's sprawling 579 square miles. Further and related to this point, despite San Franciscans having a considerably higher median income than Houstonians, the rate of homeownership in San Francisco is considerably lower. Nonetheless, the poverty rate is significantly lower in San Francisco. San Francisco has a higher percentage of foreign born persons, though Houston has a higher percentage of Latino or Hispanic origin residents. Also notable are the nearly identical percentages of white persons in San Francisco and Houston, and closeness between the percentages of African Americans in Houston and the percentage of Asians in San Francisco, and vice versa. While 75% percent of the unauthorized migrants in the U.S. are estimated to be of Hispanic or Latino origin, 11% are estimated to be of Asian origin. Only 4% are estimated to be of

²²See <http://quickfacts.census.gov/qfd/states> (Last Accessed September 22, 2010).

Caribbean origin, and only 2% are estimated to be of Middle Eastern origin.²³ Again, given the difficulties inherent in counting unauthorized immigrants at all, it is no surprise that city by city estimates of the undocumented population do not exist. Furthermore, it is not possible even to guess whether San Francisco or Houston has a greater percentage of undocumented immigrant residents based on the racial or other characteristics followed by the U.S. Census Department. The difficulty of making anything other than state-level estimates of the dispersion of the undocumented population in the U.S. highlights the extent to which the politics of illegal alienage are often driven as much by uncertainty and the corresponding specter of “unlawfulness,” “lawlessness,” or by “lack of governability” rather than by confirmed demographic facts.

Having thus analyzed the state-level legal frameworks of California and Texas, as well as the demographic characteristics of San Francisco and Houston, it is necessary now to move to the key topical controversies having specifically to do with illegal alienage that have occurred within both of these places, namely those surrounding “sanctuary” and “day labor.” The second and third sections of this chapter present not only a comparison of illegal alienage in two distinct jurisdictions, but also a comparison of the refracting of illegal alienage in each place through the distinct prisms of “sanctuary” and “day labor.” The remaining paragraphs of this section will provide pre-histories of these terms, or rather, some glimpses of the meanings of the terms in Anglo-American law prior to the relatively recent advent of illegal alienage. While most, if not all scholars interested in the contemporary politics and laws of immigration and alienage in the U.S. pay no attention to these pre-histories, they are important in so far as they show how illegal alienage both invokes and pushes the boundaries of already existing legal terms and concepts, and also tends to fully occupy or delimit these terms in contemporary discourse.

The term “sanctuary,” as historian Karl Shoemaker (2001) has argued, has a long and storied legal history, revealing within its course important shifts in western conceptions of law and punishment. Spanning “from the close of the Roman Empire and the emergence of the barbarian tribes at the dawn of the early medieval period until the onset of territorial nation-states in the early modern era,” (2-3) “sanctuary” referred to the practice whereby a wrongdoer who fled to a church, monastery, or some ecclesiastical residences would be protected from removal from that place (3). The wrongdoer would be spared capital or corporal punishment, in most cases (3). After seeking sanctuary, a wrongdoer would have to perform ritual penance of some sort, admit his wrongdoing, or participate in mediation of a kind with the victim, overseen by a

²³ See Passel, Jeffrey S. and D’Vera Cohen (2009). “A Portrait of Unauthorized Immigrants in the U.S.” Available at <http://pewhispanic.org/files/reports/107.pdf> (Last Accessed September 20, 2010).

clergyman (3). Though the particular practices of medieval sanctuary varied, one thing was central to its invocation: that a wrong had been most definitely committed. This attribute reveals a curious gulf between historical uses of the term in the western legal tradition and its most recent incarnation in U.S. immigration law and politics. As Shoemaker has written:

[I]t may seem that traces of sanctuary remain in our world. For one thing, many modern states continue to afford asylum to refugees suffering from oppression on political, ethnic, or religious grounds. In recent decades, moreover, and largely in response to perceived deficiencies in state sponsored asylum, certain community and religious groups have sought to shelter refugees in church buildings. And in so far as the significance of sanctuary is thought to reside in the mitigation or abrogation of persecution, perhaps these modern practices retain the most important aspect of medieval sanctuary. But, in part, what makes sanctuary so central to medieval understandings of law, wrongdoing, and punishment and so foreign to our own, is that the claim of sanctuary was explicitly conditioned on the commission of a wrong. Unlike modern asylum practices, which almost uniformly deny protection to those having committed non-political crimes, medieval sanctuary sheltered precisely those who had broken the law (4).

“Sanctuary,” Shoemaker proceeds to argue, was ultimately a way in which medieval communities “confronted wrongdoing” (4). Because punishment had not yet been conceived of in medieval times as either an offense against a properly constituted sovereign or as a method of deterring future wrongdoing by the wrongdoer and/or his fellow citizens, medieval punishment had rather only to provide a means whereby the rightful order of things could be restored (9), and a wrongdoer’s belonging to the community reaffirmed (10).

For our purposes, the most striking aspect of the long history of the term “sanctuary” is, as Shoemaker himself points out, the historical necessity of unambiguous wrongdoing for “sanctuary” to have any salience whatsoever. In contrast, “immigrant sanctuary” or “immigration-related sanctuary” has little to do with bad acts other than migrating without official permission. Therefore, “immigrant sanctuary” has more to do with the perceived injustice of positive laws of immigration and asylum than with individual transgressions. Indeed, as contemporary supporters of “immigrant sanctuary” laws and policies are keen to point out, “sanctuary” is not for “criminals.”

And as we shall see in the next section of this chapter, “sanctuary” has undergone a further macro-level transformation in the last twenty-five years in American law. Specifically, if “sanctuary” began in its 1980s form as a church-

based or at least church-identified response to perceived moral and political failures in the U.S.'s asylum laws and policies, it later migrated from churches to city halls. And it has morphed from a gesture of extraordinariness or emergency designed to support a persecuted few, to a necessary policy to protect the everyday safety of the *entire* community.

For now, it is necessary only to understand the terms of contemporary legal discussions surrounding the term "sanctuary." Law review articles and notes today mainly debate whether the "sanctuary ordinances" of municipalities, some of which proclaim that local authorities will not cooperate with federal immigration enforcement agencies to varying degrees, are preempted by federal immigration law (see e.g. Carro 1989; Kobach 2006). Other articles and notes bracket the ins and outs of the admittedly byzantine and arguably also ultimately unsatisfying²⁴ doctrine of federal preemption in favor of arguments about, for example: what a proper "public policy" response to sanctuary ordinances would require (Bilke 2009)²⁵; or how recent developments in information technology and data sharing across law enforcement authorities threatens to render effectively useless most sanctuary ordinances (Sullivan 2009).

Rose Cuison Villazor (2010) has offered one of the most theoretically informed recent treatments of sanctuary ordinances, and in particular, of San Francisco's sanctuary ordinance. In an article entitled, "'Sanctuary Cities' and Local Citizenship" Villazor sets out "to understand how San Francisco's [sanctuary] ordinance may be viewed to have constructed a type of local citizenship for undocumented immigrants and residents within its jurisdiction" (579-580). Employing Linda Bosniak's four-pronged definition of citizenship--as legal status, rights, public engagement, and identity--Villazor argues that drawing out how sanctuary ordinances animate new forms of "local citizenship" is "the first step in examining the broader implications of sanctuary laws on national citizenship" (590).

To be sure, San Francisco's sanctuary ordinance may be creating some form of "local citizenship" in so far as it modifies legal subjects' understandings of their "statuses, rights, capacities for public engagement, and/ or identities." But seen in other lights, to render "sanctuary ordinances" as constructing "local citizenships," which then have some destabilizing effect on "national

²⁴ Some may consider preemption arguments ultimately unsatisfying because, as discussed in Chapter 3, they do not speak in terms of the justice or injustice of a particular law, but rather of whether it is pronounced by the appropriate sovereign.

²⁵ According to one author, local governments should not be involved in immigration enforcement, from a "public policy perspective," because local governments are, as of now, "critically unequipped and inappropriately funded to effectively manage it" (Bilke 2009: 167, 193). Like most arguments that turn entirely on "public policy," the argument gives little indication of whether and on what grounds a particular state action would be just or unjust. Rather, the focus is on "effectiveness" and the necessary funding to achieve "effectiveness."

citizenship,” may be giving “sanctuary ordinances” too much of a starring role in an over determined narrative. In other words, perhaps the language of citizenship is a red herring, and sanctuary ordinances are important not for the “local citizenship” that they may or may not make possible, but rather as a repository for the changing normative commitments of street level bureaucrats vis-à-vis first refugees, and later, illegal aliens.

As such, when illegal alienage, rather than citizenship, preemption, or public policy is appropriately the lens through which sanctuary is apprehended, “immigrant sanctuary” is best considered in juxtaposition to the other local pressure point exposed by illegal alienage during the last twenty-five years -- the regulation (or non-regulation) of day labor solicitation. With “day labor” too there exists an important history that pre-dates the relatively recent advent of illegal alienage as a lightning rod of American law and politics.

Veteran journalist Dick Reeves (2010) has aptly noted in a recent book describing his experiences as a day laborer that “the father of labor agencies in the Western world was probably one of the employers who hired workers at the agora (the marketplace) in ancient Athens, where job seekers ‘shaped up,’ or formed lines for viewing and selection” (177). As we saw during our close reading of Michael Walzer’s *Spheres of Justice* in Chapter 3, the immigrants to ancient Athens who did much the same work as slaves, seem a bit like the day laborers, or rather more specifically for Walzer, the “guest workers” of today.

But as Reeves takes pains to remind his readers, the almost exclusive contemporary association of “day labor” with “immigration” or “non-citizens” in the U.S. is a relatively recent phenomenon. Between 800,000 and 2 million workers, primarily men, report each day to labor halls run by companies, some of them even publically traded, with names like “Labor Ready” and “Labor-4-U.” The companies send workers out to worksites for short-term tasks and then pay a share of the proceeds to the workers (4). Like firms providing temporary clerical workers to offices, private day labor halls generally require applicants to show two forms of government-issued identification, “to weed out bad apples and paperless aliens,” (35). Private day labor halls, notes Reeves, are generally for people who for one reason or another -- physical or mental disabilities, homelessness, drug or alcohol addictions, or temperament, for example -- are unable to hold down forty-hour a week jobs (5). This kind of private day labor contracting, in use in the U.S. since at least the early 20th century, has generally escaped the attention of academics and governments. And to the small extent that sociologists have shown interest in day labor at all, the most thorough of their studies, complains Reeves, focus on “casual laborers who are undocumented immigrants, the kind of workers who stand on street corners or outside home improvement stores, who negotiate wages while standing at the windows of pickup trucks -- and who face dangers and deceptions no citizen would endure” (4).

A study published in 2006, with funding from the Ford and Rockefeller Foundations, entitled, perhaps over inclusively, *On the Corner: Day Labor in the United States*, presents the most comprehensive survey of the “street corner” variety of day laborers to date.²⁶ The study contained information gleaned from interviewing 2,660 mostly Latino workers in 139 cities who waited on street corners and outside hardware stores for work opportunities. It concluded that, “On any given day, approximately 117,600 workers are either looking for day labor jobs or working as day laborers... Median earnings during peak periods (good months) are \$1,400 while in slow periods (bad months) median monthly earnings fall to just \$500.” 117,600 workers is admittedly significantly less than the 800,000 to 2 million hiring hall day laborers. But the Ford-Rockefeller study also concluded that 75% of street corner day laborers were unauthorized to work in the United States.

“Street corner” day labor is thus a small, but in great part unauthorized workforce. With the indoor for-profit hiring hall system firmly in place in U.S. cities well before the advent of the Immigration Reform and Control Act of 1986, street corner day labor represents a public display of predominately immigrant, likely unauthorized workers. “Street corner” day labor, which cannot be folded into previously existing, more formalized day labor markets, is ultimately left to be addressed by the local municipality, the authority under whose jurisdiction the street corner falls. Street corner day labor thus implicates the state in a way that the majority of day labor in America does not. And the work that most street corner day laborers seek -- construction work, landscaping, painting, and drywall installation²⁷ -- are tasks that offer visible home-based services to private homeowners rather than more specialized, labor-intensive business which may have historically patronized hiring halls as part of their own “behind factory walls” production processes.

In municipalities, street corner day labor solicitation has invoked primarily three courses of action: anti-solicitation ordinances; city-funded or supported indoor spaces for day laborers to congregate; or no regulation at all (Kettles 2009: 140). Legal commentators opine on the extent to which day labor solicitation is protected commercial speech (see e.g. Kornzweig 2000: 499), and they debate whether shelters, or rather open, unregulated street corners better vindicate the rights of day laborers at lowest cost to communities (see e.g. Kettles 2009). Regardless of what course these commentators ultimately recommend, they tend to ignore the origins, transformations, political theoretical, and socio-

²⁶ See “On the Corner: Day Labor in the United States;” http://www.sscnet.ucla.edu/issr/csup/uploaded_files/Natl_DayLabor-On_the_Corner1.pdf (Last accessed December 13, 2010).

²⁷ See id.

legal implications of the laws and regulations attempting to address this phenomenon. The next two sections seek to illuminate these implications.

Sanctuary and Day Labor in San Francisco

On December 27, 1985, then San Francisco Mayor Diane Feinstein signed a resolution that declared San Francisco a “sanctuary.” Twenty-five years later, on August 31, 2010, at a meeting of the Immigrants Rights Council held in a mid-size hearing room in San Francisco’s City Hall, approximately ten Immigrants Rights Commissioners discussed the idea of publishing a “Fact Sheet about Immigrants and San Francisco.” The Commissioners, generally prominent, politically-inclined members of various immigrant communities, outnumbered the audience in the hearing room.

“A Fact Sheet is a very good idea. We should lay out the facts of immigrants rights and sanctuary in San Francisco” opined one Commissioner. “But are we still a ‘sanctuary city?’”

Another Commissioner answered, “The Mayor may have changed that.”

“We’re either a ‘sanctuary city’ or not!” another Commissioner exclaimed, exasperatedly. No one said anything for about twenty awkward seconds.

“We should act like a sanctuary city. I see that as our job,” the Chairman of the Commission offered, conciliatorily.

And yet, the Chairman’s well-meaning invitation to a kind of “politics as if”²⁸ on behalf of San Francisco’s immigrants did little to dispel the confusion in the room. Even if San Francisco was no longer officially a ‘sanctuary city,’ it was also not clear what it would mean for the Commissioners to “act as if San Francisco were a sanctuary city.” And therein was the conundrum.

After some silence, another Commissioner offered a different possibility for a “Fact Sheet about Immigrants and San Francisco.” “We could use the Fact Sheet to correct misperceptions about the economic impact of our immigrant communities,” he said.

The Commissioner sitting next to him agreed with this new suggestion for an easier “Fact Sheet.” “It is very important to represent the positive economic benefits that our immigrants bring,” he offered.

The Chairman announced that the idea of a “Fact Sheet” about the economic contributions of immigrants, rather than one about the local “laws”

²⁸ The phrase is taken from Honig (2001). Honig writes that one of the things that foreigners do for democracy is engage in a politics “as if” they were citizens, thereby expanding the possibilities of democracies. The Chairman encouraged the other Commissioners to act “as if” San Francisco were a sanctuary, but that failed to be instructive. The point here is that a “politics as if” vis-à-vis “sanctuary” may be harder to achieve than meets the eye, given the factors (e.g. policing, turf wars among agencies in a federal state, the complexities of the word ‘sanctuary’) at play. While foreigners may be able to sometimes act “as if” they are citizens, per Honig, the issue is much more complicated for these particular street-level bureaucrats.

and/ or “facts” of immigrants’ rights, as everyone had originally presumed, was an excellent new idea. The Committee would “calendar a hearing” to solicit testimony on the “net economic value of immigrants to San Francisco.”

This section of the chapter takes up the elephant in the hearing room described above. It primarily considers immigrant “sanctuary” in San Francisco. Specifically, it analyzes the transformation of immigrant “sanctuary,” in San Francisco, from an earnest declaration in 1985, to a profound ambiguity, discursively abandoned in favor of dollars and cents at the Immigrants Rights Commission meeting described above. It will show the extent to which immigrant “sanctuary” in San Francisco exposes the paradoxes of a “sanctuary,” which sounds sometimes like a moral stance against illegal alienage, but is grounded ultimately in a consequentialist understanding of law and in the governing of populations. Further, it shows the extent to which illegal alienage and immigrant “sanctuary” together uniquely expose to the public: the risk and benefit calculations on which the policing and governing of populations necessarily depends; the pervasive “gaps” between immigration “law on the books” and the “law in action” that federal authorities are willing and/or able to bring into being; and to the possibilities of “unwritten laws” among contemporary street-level bureaucrats.

This section also shows also how the most long term and perhaps most unambiguous consequence of immigrant “sanctuary” for “immigrants’ rights” in San Francisco has not been in the achievement of definitive propositional statements of specifically pro-immigrant laws, or in the creation of a “safe space” in San Francisco qua “human rights “ or “personhood,” but rather in the establishment of ongoing relationships between police officials and local immigrants’ rights advocacy elites which have served to undergird the relatively successful “management” of day labor solicitation in San Francisco. This presents an important contrast to the history of day labor solicitation and “management” in Houston, as the subsequent section will show.

Given the many publicly played-out transformations of San Francisco’s “sanctuary” status, and the comparative lack of public discussion over the issue day labor solicitation in San Francisco, the majority of this section will be devoted to the issue of “sanctuary,” and specifically, to the struggle to write definitively the laws of immigrant “sanctuary” in San Francisco. The end of this section will discuss the necessarily related issue of how day labor has remained relatively less controversial than “sanctuary” in San Francisco.

This modern genealogy of “sanctuary” begins in the 1980s. On December 7, 1985, a San Francisco newspaper reported that five supervisors “will propose making San Francisco a ‘city of sanctuary’ for the city’s 60,000 to

80,000 Salvadoran and Guatemalan refugees.”²⁹ Arthur Shanks, then Deputy INS District Director in San Francisco brushed the news off, noting, “It is a waste of time and effort,” and that the resolution is unlikely to “jeopardize the immigration agency’s relationship with the San Francisco police, who as a matter of general practice contact INS officials when they believe someone suspected of a crime might also be in the country illegally.”³⁰ Then Deputy City Attorney Burk Delventhal appeared to be of the same mind, noting that while the city could declare itself a ‘city of refuge,’ it cannot prohibit its employees, individual police officers, from “exercising their rights under state and federal law to assist the INS.”³¹

On December 27, 1985, Mayor Diane Feinstein signed “a resolution that declare[d] San Francisco a sanctuary for Salvadoran and Guatemalan refugees.”³² Though the resolution was widely considered “largely symbolic,” Feinstein additionally noted in a written statement that “the measure does not grant immunity from the country’s immigration laws.”³³ The earliest “sanctuary” policy in San Francisco was thus focused on Salvadoran and Guatemalan refugees, and it provided only that city workers themselves would not assist federal immigration officials “in locating and deporting refugees from El Salvador and Guatemala.”³⁴

In effect, the 1985 resolution sought only to distinguish and differentiate parts of the “state” in a complex federal state with nested jurisdictions, rather than create a place beyond the reach of U.S. federal law, as the term “sanctuary” may imply. Specifically, San Francisco sought to distinguish its officials from the federal officials then charged exclusively with enforcing immigration laws. And it sought to declare only that San Francisco employees would not be commanded to do the work of the INS. It said little else.

In July of 1989, during a raid at a Mission District nightclub, INS agents were reportedly assisted by San Francisco police in detaining everyone in the club and then arresting two dozen “illegal aliens.”³⁵ Reportage of the July 1989 event spoke of “illegal aliens” rather than the “refugees” who were unambiguously the subjects of the 1985 “sanctuary” resolution.³⁶ As David

²⁹ Smith, Reginald. “Move to Aid Central American Refugees: Supervisors on S.F. as ‘Sanctuary’” *San Francisco Chronicle*. December 7, 1985: 2.

³⁰ Id.

³¹ Id.

³² “Resolution Calling S.F. a Sanctuary is Signed.” *San Francisco Chronicle*. December 28, 1985: 5

³³ Id.

³⁴ Smith, Reginald. “S.F. ‘Sanctuary’ Plan Faces First Test Today.” *San Francisco Chronicle*. December 18, 1985: 4.

³⁵ Bodovitz, Kathy. “S.F. Billed Aimed at Police: Plan to Legislate Sanctuary.” *San Francisco Chronicle*. September 29, 1989: A33.

³⁶ Id.

Rodriguez of the Central American Refugee Center then explained to the *San Francisco Chronicle*, nearly 125,000 Central American refugees now lived as “illegal aliens in the Bay Area, with more arriving everyday.”³⁷ Further, William Tamayo of the Asian Law Caucus “estimated that thousands of Asians, many of them Filipinos who fled the Marcos regime in the early 1980s, are living illegally in San Francisco.”³⁸

If the 1985 policy had as its beneficiaries specifically those who would have been granted political asylum, but for controversial U.S. treatment of those who fled the violence of U.S. backed regimes in those countries, discourse surrounding the 1989 modification of the 1985 policy presented a significant change. By 1989, “refugees,” born in states of emergencies, had grown into mere “illegal aliens,” and these “illegal aliens” could hail from Central American or Asian countries.

Most importantly, signifying the shift from the language of international emergency, to the language of domestic social movements aimed at getting rid of instances of “second class citizenship,” Supervisor Jim Gonzalez, co-author of the measure, stated, “In essence, this is a civil rights ordinance. . . Just because of the color of your skin, the way you speak, the accent you have, your civil rights are not suspended.”³⁹ The 1985 declaration, it now seemed, was “only a statement of city policy, with no legal binding.”⁴⁰ What was needed now, proponents of the ordinance presumed, was written, positive law, binding police officers to act in certain ways vis-à-vis illegal alienage that could be announced in advance to local (immigrant) communities.

Again, the INS Deputy District Director in San Francisco gave the distinct impression of not being particularly phased by the City’s aspirations, suggesting that the police requested the help of the INS, particularly with respect to the “war on drugs,” far more frequently than the INS requested the help of the police.⁴¹ Nonetheless, in 1989, as a result of Gonzalez’s proposal, San Francisco sought to become a sanctuary city, by “law,” rather than only by “policy.” San Francisco provided in relevant part in its Municipal Code, that:

No department, agency, commission, officer, or employee of the City and County of San Francisco shall use any City funds or resources to assist in the enforcement of federal immigration law or to gather or disseminate information regarding the immigration status of individuals in the City and County of San Francisco unless

³⁷ Id.

³⁸ Id.

³⁹ Id.

⁴⁰ Id.

⁴¹ Id.

such assistance is required by federal or state statute, regulation, or court decision.⁴²

Most importantly, the formulation of the ordinance above spoke only of the enforcement of “federal immigration law.” By positing that no city funds or employees would be involved in enforcing federal immigration law, the ordinance relied upon a conceptual separation between “federal immigration law” and presumably all other kinds of law. The ordinance stated merely that City resources would not be used for the exclusive enforcement of federal immigration law. It said nothing about whether federal immigration law would or would not be used as a tool or instrument to achieve particular ends of criminal law, or rather criminal justice policy.

In August 1992, citing overcrowding in the city’s jails, then newly elected mayor Frank Jordan placed a proposition on the ballot for voter approval for that coming November that would have amended the city’s sanctuary ordinance to exclude illegal aliens convicted of felony crimes. “San Francisco shall always be a sanctuary for oppressed people, but not ever a sanctuary for convicted felons,” Jordan stated. At the same time, however, Jordan also admitted that he had no particular evidence that illegal aliens were specifically to blame for crowding in the city’s jails.⁴³ Members of the City’s Board of Supervisors quickly accused Jordan of political pandering, designed to please right-of-center and conservative voters while scapegoating immigrants.⁴⁴

In light of the looming ballot proposition, Supervisor Jim Gonzalez, the primary sponsor of the 1989 statute, offered a “clarification” of the law containing language similar to that of Jordan’s proposal. An additional paragraph was added to the “sanctuary ordinance, as it appeared in the San Francisco Municipal Code. The additional paragraph, purportedly a “mere clarification” of apparently already existing “policy,” provided in pertinent part:

Nothing in this Chapter shall prohibit, or be construed as prohibiting, a law enforcement officer from identifying and reporting any person pursuant to state or federal law or regulation who is in custody after being booked for the alleged commission of

⁴² San Francisco, California, Administrative Code § 12H.2 (1989).

⁴³ Herscher, Elaine. “Mayor Jordan Puts Panhandling, Sanctuary Measures on Ballot” *San Francisco Chronicle*. August 6, 1992: A19.

⁴⁴ Herscher, Elaine. “Board Opposes 2 Ballot Measures Sponsored by Jordan.” *San Francisco Chronicle*. August 12, 1992: A17.

a felony and is suspected of violating the civil provisions of immigration laws. In addition, nothing in this Chapter shall preclude any City and County department, any City and County department, agency, commission, officer, or employee from (a) reporting information to the INS regarding an individual who has been booked at any county facility, and who has previously been convicted of a felony; (b) cooperating with an INS request for information regarding an individual who has been convicted of a felony; or (c) reporting information as required by federal or state statute.⁴⁵

The “clarification” above posited only that a law enforcement officer may exercise his individual discretion in order to report to the INS any person charged with a felony and suspected of being an illegal alien. Such discretion to report extended more broadly to all city employees (e.g. social workers, city hospital employees) when a would-be illegal alien had already been convicted of a felony. As measured as the 1992 amendment may appear, it nonetheless initiated new formulations of “law” and of “sanctuary” in writing. Specifically, while the 1989 statute spoke only of the enforcement of “federal immigration law,” the 1992 statute, by introducing the term “felony,” explicitly admitted the co-existence of two distinct bodies of law – local criminal law and federal immigration law. And it suggested a hierarchy among them. Specifically, where alleged or convicted felons were concerned, immigration law could be used to facilitate punishment, but ultimately at the discretion of individual officers.

Taken together, the 1989 statute and its 1992 amendment reveal both the limited scope of the immigrant “sanctuary” ordinance, as a matter of written law, as well as the formal vesting of discretion to report felony suspects to the INS in individual police officers. In other words, both attempts to write the law(s) of San Francisco immigrant “sanctuary” preserved a great deal of necessarily unwritten official discretion in the guise of individual enforcement officers. The first stated only that city officials would not enforce immigration law exclusively. The second stated that law enforcement officials are not barred from reporting felony suspects to the INS, but not that they will necessarily do so. The portrait of individual police officers making ultimate decisions about whether or not to report felony suspects to federal immigration authorities neglected the complexities of the organizational practices of police departments.

While both the 1989 ordinance and the 1992 amendment to the ordinance received a significant amount of public attention on account of their origins as local legislative efforts, a 1995 San Francisco Police Department General Order,

⁴⁵ San Francisco, California, Administrative Code § 12H.2 (1989).

arguably a more important recitation of the actual working contours of immigrant “sanctuary” in San Francisco received little public attention at the time of its promulgation, likely on account of its generation within the administrative and organizational realm of internal police department rule-making. On December 13, 1995, the San Francisco Police Department announced General Order 5.15, which attempted to spell out the practical effects of “immigrant sanctuary” for police officers. Specifically, the text of the General Order stated, “Members shall not enforce immigration laws or assist the INS in the enforcement of immigration laws.” Again, like the 1989 ordinance, this portion of General Order 5.15 spoke only of the non-enforcement of “pure” immigration law.

The second part of the Order deviated, however, in a significant, if not initially noticeable way from the 1992 amendment. General Order 5.15 went further than the 1992 amendment in seeking to declare what San Francisco police officers, as directly identified subjects, should and should not do. The 1992 amendment began with a negative sentence construction, and made the text itself the focus of the proposition, stating, “Nothing in this Chapter shall preclude. . . a law enforcement officer from identifying and reporting information to the INS.” In contrast, General Order 5.15, made the “Members [of the San Francisco Police Department]” the subjects of its proposition.

Specifically, General Order 5.15 stated, “Members shall not enforce immigration laws or assist in the enforcement of immigration laws” (General Order 5.15 §2, “Assisting the INS”). Nonetheless, despite directly addressing and identifying “Members,” General Order 5.15 failed to overcome a now familiar practical ambiguity. As a matter of “law on the books” or as here, as a matter of “policy on the books,” General Order 5.15 gave little indication, in this section, as to what it would mean for members to enforce or assist the INS in enforcing only or purely “immigration law” rather than using immigration law as a means to enforce local “criminal justice policy.”

A subsequent section of General Order 5.15 attempted to declare more specifically, for the first time, the practical implications of the statement that “members shall not enforce or assist in the enforcement of immigration laws.” It stated:

A member shall not inquire into an individual’s immigration status or release or threaten to release information to the INS regarding an individual’s identity or immigration status except:

- a. When a person has been arrested for . . . offenses involving controlled substances. . . and there is reason to believe that the person may not be a citizen of the United States. Such a belief cannot be based solely upon a person’s inability to speak English or his/her “foreign” appearance.

- b. When a person is in custody after being booked for the alleged commission of a felony and is suspected of violating the civil provisions of the immigration laws.
- c. When a person has been booked at any county jail facility and has previously been convicted of a felony and has previously been convicted of a felony committed in violation of the laws of the State of California which is still considered a felony under state law; or when the INS makes a request for information about a person and the person has previously been convicted of a felony committed in violation of the laws of the State of California which is still considered a felony under state law.

General Order 5.15 attempted to spell out when in fact a police department "Member" could enforce immigration law. But the written statement contained in General Order 5.15 did not quite require that Members make an issue of the potentially unlawful immigration status of anyone -- felons and non-felons alike. In other words, by stating that a Member "shall not inquire" into an individual's immigration status unless certain conditions were met, the Order did not require the Member to look into an individual's immigration status even if these very conditions were met. It simply stated that a Member would not look into immigration status unless the conditions were met. As such, while possibly antithetical even to the consequentialist "public safety" or "crime control" justifications for "sanctuary," which traded on the terms of eliciting the cooperation of the "good unlawful immigrant" in the service of ridding the immigrant and citizen populations of the "criminal unlawful immigrant," General Order 5.15 ultimately preserved official, street-level bureaucratic discretion as to speaking about immigration status, even in the face of felonious violations of the local criminal law.

Beginning in the mid-1990s, San Francisco officials began to give the impression, as they had in the 1980s, of the existence of a broad, simple, and moral (as opposed to consequentially justified) sanctuary "law" with few nuances or discretionary aspects. From approximately the mid-1990s to the mid-2000s, there was little public attention paid to the specific contours of San Francisco's sanctuary ordinances and General Order. In 2006, in response to proposed federal laws that would criminalize living as an undocumented person within the United States as well as immigration raids in the city, Mayor Gavin Newsom declared simply, "This is a city of refuge. San Francisco stands in strong

opposition of the rhetoric coming out of Washington, D.C.”⁴⁶ A spokesperson for the San Francisco District Attorney’s Office added, “We are a sanctuary city, a city of refuge, and we always will be.”⁴⁷

In April of 2008, San Francisco officials unveiled a an \$83,000 television and radio advertising campaign designed to educate San Francisco’s immigrants of the “fact” that San Francisco’s officials would neither ask nor tell about immigration statuses to federal officials.⁴⁸ This simplified, categorical sounding rendition of the sanctuary policy appeared to have as its intended audience disapproving federal authorities as well as illegal aliens living or working in the city. In response to San Francisco’s advertising campaign, Mark Kirkorian, executive director of the Center for Immigration Studies, a restrictionist group stated, “San Francisco is clearly going a step beyond most places in boasting about and advertising this. Most cities kind of almost apologize to their voters when they complain about it.” Though Kirkorian likely intended only to chastise San Francisco officials for their “pro-immigrant” sentiments, his comment nevertheless highlighted an important and unique aspect of “immigrant sanctuary” in San Francisco. In San Francisco, unlike in most other American cities, and indeed, unlike in Houston as we shall see in the next section, city officials attempted to make “immigrant sanctuary” part of the written law of the community, rather than confining “sanctuary” to the realm of unwritten administrative governance or “necessary practice,” if not “law.” More specifically, in attempting to make “sanctuary” the written law of the city, San Francisco officials put forth propositional statements about “sanctuary” which at times sounded in the tone of moral, categorical reasoning, but which ultimately preserved a great deal of official discretion and were grounded in the consequentialist logic of risk and reward vis-à-vis populations and crime.

In late June of 2008, the foundations of “immigrant sanctuary” began to bear significant new tension. On June, 29, 2008, the *San Francisco Chronicle* published an investigative report entitled, “City’s shield of migrants probed; Feds say drug lords ‘gaming the system.’”⁴⁹ The article stated, “San Francisco juvenile probation officials – citing the city’s sanctuary status – are protecting Honduran youths caught dealing crack cocaine from possible federal deportation and have given some offenders a city-paid flight home with carte blanche to return.”⁵⁰ Juvenile probation officials, it seemed, had recommended that

⁴⁶ Fulbright, Leslie. “San Francisco: Line Drawn on Immigration Legislation.” *San Francisco Chronicle*. April 8, 2006: B3.

⁴⁷ Id.

⁴⁸ Vega, Cecilia M. “City Making Clear Illegals Can Obtain Services Here.” *San Francisco Chronicle*. April 3, 2008: B1.

⁴⁹ Van Derbeken, Jaxon. “City’s Shield of Migrants Probed; Feds Say Drug Lords ‘Gaming the System.’” *San Francisco Chronicle*. June 29, 2008: A1.

⁵⁰ Id.

Juvenile Court judges and commissioners approve city-funded flights for Honduran youth offenders so that these offenders could be reunited with their families rather than go through formal deportation.⁵¹ Federal immigration authorities had discovered the practice by chance at the Houston International Airport when they stumbled onto a San Francisco juvenile probation officer attempting to put several illegal alien youths on a plane from Houston to Honduras.

When questioned about the practice, William Sifferman, the chief of San Francisco's Juvenile Probation Department said that his position was that his office had no obligation to report illegal alien minors to the federal government, even if they had committed crimes. "We are not obligated to," he said. "We are abiding by the sanctuary ordinance."⁵²

As a technical matter, as discussed above, the words of the sanctuary ordinance never required Siffermann's office to report illegal alien youth who had committed felonies to the federal government. Siffermann was correct in stating that his office was not obligated to report. But contra Siffermann's second sentence, the sanctuary ordinance did not prevent his office from reporting. Siffermann elided the considerable street-level discretion that rested with his office, even, or especially, pursuant to the written "sanctuary law." Unable or unwilling to make a moral argument about the injustice or even the complexities of unauthorized immigration status for handling felonies committed by illegal alien youths, Siffermann overstated the scope and effect of the city's written "sanctuary law," suggesting that the written sanctuary law tied his hands.

By July 3, 2008, Mayor Gavin Newsom of San Francisco had "conceded that the city was wrong to shield young immigrants convicted of felonies from possible deportation."⁵³ In particular, he stated, "Adults who commit felonies are already turned over to the federal authorities for deportation. There has been a lack of clarity, however, on our policy toward juveniles who commit felonies . . . I have directed my administration to work in cooperation with the federal government on all felony cases."⁵⁴ Again, even though the "sanctuary law" did not mandate that youth committing felonies *not* be turned over to federal authorities, the "law" was seen as an expression of some categorical moral reasoning behind the existence of the practice. But ironically, because the "sanctuary law" was in large part justified by its consequences for crime "management," rather than by any categorical position on illegal alienage, the San Francisco "sanctuary law" had already begun to unravel.

⁵¹ Id.

⁵² Id.

⁵³ Van Derbeken, Jaxon. "SF Mayor Reverses Policy on Illegals; Update: Sanctuary City." *San Francisco Chronicle*. July 3, 2008: A1.

⁵⁴ Id.

With the “sanctuary law” thus on already shaky ground, the newspaper reporter who “broke” the stories of the transportation of Honduran youth made another discovery. On June 22, 2008, then twenty-one year old Edwin Ramos, a suspected member of a gang, allegedly shot and killed Tony Bologna, 48, and his sons, ages 20 and 16. The Bologna family was returning from a family picnic when Ramos allegedly shot and killed them in their car when the Bolognas blocked Ramos from making a left turn onto a street. Ramos, a native of El Salvador who did not possess lawful immigration status, had been found guilty of two felonies while he was a juvenile. City juvenile justice officials did not investigate or report Ramos’s immigration status. Furthermore, even federal immigration authorities passed up the opportunity to take Ramos into immigration custody after Ramos was arrested in San Francisco on a gun charge, well after he had turned eighteen and only three months before the killings.⁵⁵

The information about Ramos’s history with San Francisco law enforcement predictably provided grounds for the indignant editorial statement that “San Francisco’s ‘sanctuary city’ policy--as was implemented recently --put the welfare of juvenile gang-bangers and drug dealers, who are also illegal immigrants, before the safety of law-abiding residents who are victimized by gangs and thugs.”⁵⁶ But on a deeper level, the history of Ramos’s brushes with law enforcement also provided a rare window onto the considerable street-level bureaucratic discretion about what to do with information about an individual’s unlawful immigration status. While the city juvenile corrections officials may have implicitly, if not explicitly, relied on particular categorical normative positions vis-à-vis the intersection of illegal alienage and youth, the actions of the federal immigration authorities strongly suggested a risk-benefit calculation, whereby the *adult* Ramos was simply not deemed a high priority for immediate custody and deportation, given the limited resources of the agency.

The tragic murder of the Bolognas thus set up a scenario for a critical examination of the presumptive responsibilities inherent in consequentialist, street-level bureaucratic reckoning with illegal alienage. But while federal immigration authorities made (and lost) the most naked risk-benefit bet in the case of Edwin Ramos, San Francisco officials were the ones who found themselves as defendants in a lawsuit brought in United States federal court. The INS officials who had failed to take Ramos into custody after learning about him after he had reached eighteen enjoyed the considerable discretion that came

⁵⁵ Van Derbeken, Jaxon. “Slaying Suspect Once Found S.F. Sanctuary.” *San Francisco Chronicle*. July 20, 2008: A1.

⁵⁶ Saunders, Debra J. “Sanctuary Policy Makes City Less Safe.” *San Francisco Chronicle*. July 22, 2008: B7.

with being federal officials dealing with immigration. San Francisco officials, in contrast, had to answer for their “sanctuary law/ policy.”

Anthony’s Bologna’s widow and two surviving children brought suit in the U.S. District Court for the Northern District of California against the City and County of San Francisco, San Francisco’s Mayor, Chief of Police, and Chief of Juvenile Probation, alleging, that:

it was reasonably foreseeable to defendants that Ramos would shoot Anthony, Michael, and Matthew Bologna, and that defendants could have prevented these deaths because if they had complied with state law and reported Ramos to federal immigration officials, Ramos would have been deported to El Salvador.⁵⁷

As a matter of “law on the books,” the Bologna family brought five claims against the San Francisco defendants: a common law tort claim of negligence; a common law tort claim of negligent infliction of emotional distress; violation of the California Constitution; violation of federal rights under 42 U.S.C. § 1983 (Violations of Equal Protection and Due Process Clauses of the 14th Amendment); and violation of the federal Racketeer and Influenced and Corrupt Organizations Act (“RICO”).⁵⁸ The federal district court judge remanded the plaintiffs’ common law and state statutory claims to a California lower court. She adjudicated and ultimately dismissed only the plaintiff’s fourth and fifth causes of action, the plaintiff’s claims deriving from federal law.

The Bologna plaintiffs asserted as a matter of Equal Protection that: 1) San Francisco’s sanctuary policies required city officials to treat violations of federal immigration law by citizens different from violations of federal immigration law by aliens; and 2) San Francisco’s non-reporting policy discriminated against city residents who are, or are likely to appear Latino, because members of the criminal gang to which Edwin Ramos allegedly belonged are more likely to attack Latinos who are not members of the gang that they are likely to attack residents of other racial groups.⁵⁹

The court dismissed the plaintiff’s first Equal Protection claim for want of standing. The Bologna plaintiffs charged, in essence, that San Francisco officials would have had no problem reporting to federal immigration authorities U.S. citizens in San Francisco who transported, smuggled, or harbored illegal aliens, at the same time that these city officials would likely not report the illegal aliens

⁵⁷ *Bologna v. San Francisco*, 2009 U.S. Dist. LEXIS 6998, 4 (2009).

⁵⁸ *Id.* at 4-5. To state a claim under 42 U.S.C. § 1983, a plaintiff must allege: 1) that a right secured by the U.S. Constitution or laws of the United States was violated; and 2) that the violation was committed by a person acting under the color of state law. See, e.g., *West v. Atkins*, 487 U.S. 42, 28 (1988).

⁵⁹ *Id.* at 10-15.

themselves. The plaintiffs complained that San Francisco officials' humanitarian charity vis-à-vis sanctuary was unequally and unjustly reserved for non-citizens. Here, plaintiffs accused San Francisco of not being categorical enough in its disdain for federal immigration law. The court rejected this argument noting, "Plaintiffs have no standing to pursue the claims of U.S. citizens whose immigration crimes have been reported to ICE. Neither plaintiff, nor the decedents were 'U.S. citizens whose immigration crimes have been reported to ICE,' and plaintiffs' injury – the lost of Anthony, Michael and Matthew Bologna – is certainly not 'fairly traceable' to the failure to report U.S. citizens to ICE."⁶⁰

The court also dismissed the plaintiff's second Equal Protection challenge. The Bolognas alleged that because members of Edwin Ramos's gang are more likely to attack individuals who are or appear to be Latino, San Francisco's "sanctuary" policy had an unjustifiable disparate impact on those who are or appear to be Latino. The court dismissed this claim for want of intentional discrimination on the part of city officials. In other words, the court accepted the argument of the San Francisco Defendants that they did not refrain from reporting Ramos's immigration status for the pernicious purpose of harming residents who appeared to be Latino.⁶¹

The court also dismissed the plaintiffs' Due Process Clause and RICO claims. With respect to the Due Process Clause, the court rejected the plaintiffs' argument that by allegedly instructing San Francisco police officers not to report Ramos to federal immigration authorities, San Francisco officials created a danger and then deliberately subjected the plaintiffs to this known danger. Such an argument about a "state-created danger" proved unconvincing for the court because "there is no authority for the proposition that the state-created danger doctrine can apply when the population of the city – or a subset [of that population]. . . - is placed at risk."⁶² The danger, the court noted, must be "specific to an individual or group of individuals."⁶³ Finally, the court dismissed the Bolognas' RICO claims on the grounds that the Bolognas had provided no evidence that San Francisco's Mayor, Police Chief, or Chief of Police of Juvenile Probation had gained any personal financial benefit from the practice of not reporting juvenile offenders to federal immigration authorities.⁶⁴

For the purposes of the socio-legal analysis of this chapter, what is most important about the *Bologna* case is not the final outcome of its federal statutory

⁶⁰ Id. at 12-13.

⁶¹ Id. at 13-14.

⁶² Id. at 16.

⁶³ Id. at 17.

⁶⁴ For a RICO claim, a plaintiff must show "conduct of an enterprise through a pattern of racketeering activity causing injury to plaintiff's business or property." When an immigration offense is the possible "racketeering activity," the plaintiffs must show that the defendants committed the immigration offense for the purpose of financial gain. Id. at 19.

and constitutional adjudication, but rather what the case reveals about the intersection of post-hoc judicial review with the laws and policies of “immigrant sanctuary” in San Francisco. In a footnote, which appears to have been something of an ineffectual nod to the plaintiffs, the *Bologna* court stated:

The Court notes that the sanctuary policy, as set forth in Administrative Code 12H, expressly permits law enforcement officers to comply with state and federal laws that require reporting any person ‘who is in custody after being booked for the alleged commission of a felony and is suspected of violating the civil provisions of the immigration laws’ to immigration officials. Plaintiffs allege, however, that San Francisco had an “unwritten but enforced policy that prohibited and discouraged” San Francisco employees from reporting undocumented immigrants to ICE” (14-15).

The *Bologna* court said nothing more about the possible “unwritten laws” of immigrant “sanctuary” in San Francisco. In broaching the subject but doing little more than that, the court revealed that it was not prepared and/or not willing to conduct any further analysis into the ramifications of the existence of an “unwritten law” of “sanctuary” in San Francisco; the court presumed that the “laws” to be judicially reviewed were necessarily written laws.⁶⁵

On one hand, the very possibility that important aspects of the practice of immigrant “sanctuary” in San Francisco may have been in large part “unwritten” is ironic, given the extensive efforts over the course of almost twenty-five years to make immigrant “sanctuary” into the “law” of San Francisco *precisely* by committing it to text. But on a more fundamental level, the inability or unwillingness of San Francisco officials to write fully the “laws” of immigrant “sanctuary” reveals the significant role played by police department elites -- street-level bureaucratic managers-- in crafting the contours of a highly discretionary “sanctuary,” normatively grounded in the arguably attenuated goal of crime prevention across a population, rather than in necessarily reducing the exclusionary burden of illegal alienage for individuals, qua their “personhood.”

While the outcome of the federal court *Bologna* litigation was an unambiguous victory for the San Francisco defendants, the consequentialist normative ground on which “sanctuary” ultimately rested in San Francisco had already irreversibly cracked when Edwin Ramos allegedly murdered the

⁶⁵ A more conventional legal analysis may venture into the question of whether the district court “erred” in not considering the “unwritten law.” But that is not my interest here. Instead, for now, I am concerned only with how the concept of “unwritten law” appears in the court’s decision, and how the court does or does not engage with the phenomenon.

Bolognas.⁶⁶ “Sanctuary” it seemed, did not achieve the attenuated goal of making the city necessarily “safer.”

After the Bologna murders, the City’s Board of Supervisors nonetheless attempted to preserve a normative distinction between unauthorized youth and unauthorized adults. Specifically, the Board of Supervisors voted in October 2009 to require that undocumented youth be convicted of felonies, rather than merely booked on felony charges, before San Francisco juvenile justice officials could report them to federal immigration authorities.⁶⁷ The Mayor vetoed the Board’s ordinance, citing concerns that such a carve-out for youth would violate federal law. The Board overrode the veto. The Mayor, however, has thus far refused to enforce the law, claiming that doing so would violate federal law.⁶⁸ The question of whether this would in fact be the case remains open, especially since the San Francisco “sanctuary” law technically neither prescribes or proscribes much of anything specific, as this section has shown. But the most revealing and important aspect of the renewed debate about San Francisco’s “sanctuary” law/ policy is the newly exposed division between elite local government officials (the Board of Supervisors) and the precise street level bureaucrats charged with implementing the Board’s laws. Specifically, after the Board’s vote to require that undocumented youth picked up on felony charges be reported only after they are convicted, Gabriel Calvillo, president of the San Francisco Deputy Probation Officer’s Association stated that the city’s sixty juvenile probation officers will instead be reporting likely undocumented youths to federal immigration authorities as soon as they are booked on felony charges. Calvillo explained unabashedly, “I think that keeps all our officers safe and free from violation of federal law.”⁶⁹

The recent public attention brought to immigrant “sanctuary” has thus made the most “on the ground” of street-level bureaucrats fearful of ending up in the cross fires of increasingly high stakes and increasingly highly scrutinized immigration politics and governance. On a deeper level, the long and detailed story of immigrant “sanctuary” in San Francisco reveals that a good deal of the practice, “in action,” appears to have remained unwritten. And while the proponents of sanctuary insisted on its expression in written, propositional form, presuming perhaps that written law would yield more “rights” or be more “official” than unwritten practice, the writing of immigrant “sanctuary” in San

⁶⁶ The common law tort claims, which in essence put forth the argument that the City was “negligent” in having a “sanctuary” policy, remain to be adjudicated in California court.

⁶⁷ Knight, Heather. “Probation Officers Side with Mayor.” *San Francisco Chronicle*. October 22, 2009: D1.

⁶⁸ “Chief Takes Sides on Sanctuary Law.” *San Francisco Chronicle*. October 27, 2009: A15.

⁶⁹ Knight, Heather. “Probation Officers Side with Mayor.” *San Francisco Chronicle*. October 22, 2009: D1.

Francisco could do little to transcend the limits of the consequentialist foundations on which immigrant “sanctuary” ultimately came to rest.

The ambiguous legacy of immigrant “sanctuary” in San Francisco presents a contrast to the story of day labor regulation, which has remained relatively less controversial. Even if on-going connections between police department elites and those advocating on behalf of unauthorized immigrants have not been able to prevent the retrenchment of immigrant “sanctuary” in the last two years, such connections have proven extremely useful in the resolution of the question of what to do about immigrant day labor in San Francisco. As the long time Director of the San Francisco Day Labor Program, an employee of the non-profit Latino civil rights organization La Raza Centro Legal, noted in an interview, “We have never been retaliated against in San Francisco because of our on-going relationship with the local police.”⁷⁰

The San Francisco Day Labor Program was formed by the city in the early 1990s, with an official hiring site located in a public park in San Francisco. In 2000, La Raza Centro Legal took the program over (“adopted the program” in the words of the Director), and in 2004, the Program moved from the park two miles away to a natural urban congregation point at the intersection of two main streets in San Francisco’s busy Mission District.⁷¹ The building currently housing the San Francisco Day Labor Program is a small and without much decoration; male day laborers often wait outside the building for manual labor work such as helping people move, yard work, and unskilled construction tasks. But the central room in the building provides chairs, and sometimes, aluminum trays of food such as rice and beans from neighborhood restaurants, are left on the large card table in the corner of the room. A La Raza Centro Legal staff member sits in a small office adjacent to the waiting room. Each time an employer wants to hire a laborer, an employer must read and complete a form which explains his obligations to pay and provide a safe workspace for the workers. The form also requires that the employer write down all his contact information. Laborers are dispatched in a queue by way of a list, based in part on the workers’ own ordering. That employers must engage with a visible street-level bureaucracy (even one contracted by the city to run the Day Labor Program) gives the San Francisco Day Labor Program an aura of hiring hall formality.

The Director explained further, “There has never been an anti-solicitation ordinance in San Francisco because day laborers in San Francisco have always been organized by our group.” By “organized,” the Director elaborated that she meant that day laborers are represented by her group and provided with guidelines for “self-governance.”⁷² When pushed to elaborate further on the

⁷⁰ Telephone Interview with former Director of San Francisco Day Labor Program; September 20, 2010.

⁷¹ Id.

⁷² Id.

exact nature of her group's "good relations" with police, she suggested that because the police trust her group to maintain order among day laborers, her group is able to fend off disputes between the police and day laborers. She continued to emphasize that the police know that the "day laborers in San Francisco are organized by us," suggesting that she saw her group's role as in part promoting "order without law" among day laborers.⁷³

City funding for the program has remained about \$100,000 per year, paid to La Raza, she reports. Admittedly, things have not been all smooth sailing. In 2003, after workers complained about some incidents of harassment by police officers, then Mayor Willie Brown's Office threatened to cut off funding for the Day Labor Program for "biting the hand that feeds it." However, La Raza and the City were able to settle the dispute, and funding has continued. The expensive San Francisco real estate market prevents the Day Labor Program from moving into a larger building, but the small building at the intersection of two thoroughfares in the populated Mission District is a great improvement from the days of being blocks away in a park.⁷⁴

Except the ongoing recognition that her group enjoys with police elites and city officials as a kind of supervisor of day laborers, the state and local labor and employment law infrastructures are the most valuable day-to-day resources, the Director reports. The San Francisco Day Labor Program employs a team of four to five full-time staff attorneys, who are "constantly filing claims on behalf of day laborers with a San Francisco Minimum Wage Office as well as a State Labor Commissioner." The city's Minimum Wage Office is very useful for getting unpaid wages, the most common harm suffered by day laborers. And the State Labor Commissioner is friendly to the claims of day laborers, especially as these laborers generally have experienced and highly trained La Raza staff attorneys to represent them at hearings. The city and state administrative law infrastructure makes the mobilization of any federal labor or employment law unnecessary.⁷⁵

A federal official, the Deputy Director of the San Francisco Field Office of the Equal Employment Opportunity Commission (EEOC) echoed this point about the relative dearth of causes of action in federal labor and employment law vis-à-vis immigrant workers in California. He noted that for most, if not all, labor and employment matters, state law is far more friendly than federal law to aggrieved plaintiffs, immigrant and non-immigrant alike. While federal labor and employment agencies "keep their doors open" to illegal aliens, the "on the books" tools that these agencies have to help illegal alien workers are "not the

⁷³ Id.

⁷⁴ Id.

⁷⁵ Id.

best game in town,” especially in California, according to the EEOC Deputy Director.⁷⁶

Ultimately, this section on the manifestations of illegal alienage in San Francisco between 1985 and 2010 has demonstrated two major things. First and foremost, it has analyzed the multiple socio-legal iterations of San Francisco’s prominent “sanctuary” law/ policy, the normative presumptions at the heart of these various iterations, and the behind the scenes roles played by various street-level bureaucracies in shaping possibilities for the law/ policy. Secondly, it has shown how local governance of “illegal presence” vis-à-vis sanctuary, is markedly divergent from the local governance of possibly “unauthorized work” in the same jurisdiction. To be sure, this is due in part to the friendliness of California labor and employment laws to unauthorized workers. But the mobilization of this law in San Francisco has depended in large part upon the activities of a non-profit Latino civil rights organization with strong links to city government, and more than one staff attorney. At an even deeper level, the activity of “work” brings to illegal alienage a kind of legal and normative standing that the mere “personhood” or “humanity” does not, as a socio-legal matter. The next section further analyzes this point with reference to the socio-legal history of governing (around) illegal alienage in Houston, Texas.

Sanctuary and Day Labor in Houston

On February 27, 2003, the Subcommittee on Immigration, Border Security, and Claims of the Committee on the Judiciary of the U.S. House of Representatives held a hearing in Washington D.C. The hearing was entitled “New York City’s Sanctuary Police and the Effect of Such Policies on Public Safety, Law Enforcement, and Immigration.”⁷⁷ Despite the hearing’s advertised focus on New York City, Houston Police Officer John Nickell testified at the hearing. Specifically, he complained to the Congressional panel that his work had been hindered by Houston’s “so-called ‘sanctuary law,’” under which, “the police department does not always honor warrants taken out by the INS, forbids officers to ask the nationality of suspects, and does not have a link to the INS to check the criminal status of noncitizen criminal suspects.”⁷⁸ Nickell also told the Congressional subcommittee that he had filed a legal challenge to the Houston Police Department’s policies.⁷⁹

⁷⁶ Interview; Deputy Director; Equal Employment Opportunity Commission; San Francisco Field Office; October 22, 2006.

⁷⁷ This hearing comes up at the beginning of Chapter 3 as well.

⁷⁸ “New York, Houston grilled about ‘sanctuary’ policies.” *Houston Chronicle*. February 28, 2003: A12.

⁷⁹ *Id.*

And so began the public discussion of immigrant “sanctuary” in Houston, with a whimper (or rather a whine) about administrative practice, rather than with a legislative bang. In contrast to San Francisco, there was no public discussion of immigrant “sanctuary” in Houston until 2003, eighteen years after San Francisco passed its first “sanctuary” ordinance. And when the discussion began, no one seemed to know quite whom to believe. Officer John Nickell, it turned out, worked in the Traffic and Accident Division of the Houston Police Department. And he was in Washington on his own time, complaining about his employer, even though the president of the Houston Police Officers’ Union stated that few, if any, other members thought this was an important issue or problem.⁸⁰

But Officer Nickell’s “going to Washington” spurred Houston journalists to start doing a kind of research they had not done before. On March 3, 2003, the *Houston Chronicle* reported that, “Although Houston police officials said the city does not have a sanctuary ordinance protecting illegal immigrants from federal intervention – despite an officer’s nationally publicized complaints to the contrary – officers have been bound to a hands-off policy for nearly 11 years.”⁸¹ Specifically, a police department “policy” in place since June of 1992 stipulated that “Houston Police Officers may contact the INS only if an illegal alien is arrested on a criminal charge more serious than a Class C misdemeanor.”⁸² For the first time, Houston Police Department officials spoke about their “policy.” Spokesman Robert Hurst stated, “We are in the business of investigating crimes – not enforcement of immigration laws.”⁸³ While there appeared to be no official, published text of the “policy,” the policy did state the now familiar point that “undocumented alien status is not, in itself, a matter for local police action.”⁸⁴

As in San Francisco, it was only a matter of a short time (here, a mere five days) before the local press alleged a connection between a single illegal alien and a violent crime, thereby easily casting doubt on the consequentialist “effectiveness” of immigrant “sanctuary.” One of the accused killers of three Houston women, twenty-five year old Walter Sorto, was allegedly ticketed by Houston police officers for traffic violations. But Houston Police Officers, the story suggested, were “hamstrung,” or rather “barred by city rules from asking about [his] immigration status or reporting [him] to federal authorities.”⁸⁵ In response, the Houston Police Department failed to articulate either a non-

⁸⁰ Id.

⁸¹ O’Hare, Peggy. “HPD Policy on Aliens is Hands-Off.” *Houston Chronicle*. March 3, 2003: A15.

⁸² Id.

⁸³ Id.

⁸⁴ Id.

⁸⁵ O’Hare, Peggy. “Sanctuary Policy Irks Some in HPD; Accused Killer Helped by Hands-Off Proviso.” *Houston Chronicle*. March 8, 2003: A31.

consequentialist, categorical critique of illegal alienage (an admittedly unlikely path for a contemporary urban police department) or even a strong consequentialist defense, focusing on the proposition that such a policy is more likely to promote “net reduction in crime,” over time. Instead, the Houston Police Department was wooden in its response, stating only that “The Houston Police Department policy has been in effect since 1992. It is our belief that our policy is in compliance with the law.”⁸⁶

Houston’s “sanctuary policy,” a quintessentially administrative one, remained unchanged in the short term. But the fully administrative origin of the policy meant that police department elites bore the burden of defending the policy against two distinct onslaughts -- first, from the rank-and-file of the police department, and second, from democratically elected City Council Members. The paragraphs above have analyzed the first challenge.

As for the second challenge, in December 2005, Houston City Council Member Mark Ellis proposed to overturn Houston’s “sanctuary policy.” Ellis himself acknowledged that Houston was not “officially” a “sanctuary city,” conceding, “Houston has never passed a resolution at City Hall designating the city as a sanctuary city.”⁸⁷ But this formality of nomenclature did not matter, he argued, because “[The general order] creates an appearance of a sanctuary city.”⁸⁸ Although Ellis’s proposal did not pass, the controversy continued unabated. And more importantly, sticking to whatever one may call the policy that Houston had in place since 1992 was beginning to prove more and more of a political juggernaut, as the normative justifications for such a policy were difficult to articulate in the face of both democratic opposition from citizens, and reportage of violent crimes committed by a few unauthorized persons who came to stand for all such persons.

Those seeking to defend the policy opted to focus on the semantic error of characterizing as a “sanctuary city” rather than on the normative foundations for the policy. City Council Member Gordon Quan, one of the most vocal defenders of the policy, ironically highlighted the non-legislative origins of the sanctuary in an attempt to defend the practice:

The characterization of Houston as a “sanctuary city” . . . was wrong. Houston has never--by ordinance, resolution, or executive order – forbade its employees from cooperating with federal officials charged with immigration enforcement.

At every raid of a drop house, you will see Houston Police Department Officers. Unlike Dallas, San Antonio, and Austin, that

⁸⁶ Id.

⁸⁷ Freemantle, Tony. “Stricter Policy on Undocumented Immigrants Asked.” *Houston Chronicle*. December 7, 2005: B4.

⁸⁸ Id.

passed resolutions declaring their cities to be “safety zones” for immigrants, Houston has not ever entertained such a resolution, let alone a declaration of sanctuary.

In a time of rising crime and overcrowded jails, the city would be foolish to spend precious HPD resources on the work of immigration authorities. The increase of day laborers on street corners may be attributed to our booming economy and the city’s actual reduction in funding for day labor sites.

President Bush is correct to urge a comprehensive reform of our nation’s immigration laws in order to balance the needs of security with the labor market.⁸⁹

Quan’s statement is striking on one level for its focus on the administrative nature of Houston’s policy--lamentably neither a “sanctuary policy” nor a “safety zone,” he suggests. On another level, Quan’s statement is striking also because it explicitly links day labor and “sanctuary” in a way that most discussions of either topic do not. Any greater visibility of day laborers, Quan suggests, has not to do with the alleged “sanctuary” policy in place, but rather with economic prosperity and with a reduction in funding for day labor sites. Subsequent paragraphs in this section will soon take up the question of how the controversy surrounding “sanctuary” in Houston affected day labor regulation in the city; these paragraphs will show how the relationship between day labor regulation and “sanctuary” in Houston has been markedly different than in San Francisco.

But first, it is necessary to return to the issue of the fate of Houston’s 1992 policy on policing and illegal alienage. In September 2006, Houston Police Officer Rodney Johnson was shot in the head during a traffic stop. The alleged shooter was Juan Leonardo Quintero, an unauthorized immigrant with a criminal record. Houston Mayor Bill White, once a staunch defender of the 1992 policy, changed course in response to the murder of Officer Johnson.⁹⁰ By late 2006, Houston Police Officers were “required to check the warrant status of everyone who is ticketed, arrested, or jailed--if they failed to show proper ID—according to a memo from the police chief.”⁹¹ In addition, Immigration and Customs Enforcement (ICE) agents “were given full access to city jails and the

⁸⁹ “Letters” *Houston Chronicle*. June 14, 2006.

⁹⁰ Carroll, Susan. “Is Houston a Sanctuary for Illegal Immigrants?” *Houston Chronicle*. December 23, 2007: A1.

⁹¹ *Id.*

information collected by the HPD.”⁹² The local ICE office confirmed that it had begun to work closely with the Houston Police Department.

Despite the complete reversal of Houston’s admittedly relatively tepid “sanctuary” policy under Mayor Bill White, White has continued to be labeled as a “Sanctuary Mayor.” In the run-up to the 2010 Texas Gubernatorial Election, incumbent Governor Rick Perry’s campaign used the “sanctuary” label to discredit White, Perry’s major opponent in the election. A *Houston Chronicle* editorialist pointed to the ironic differences, vis-à-vis immigrant “sanctuary,” between Houston and Texas as a whole. Houston, by May 2010, she argued “seems to do more to aid enforcement of federal immigration law than the state of Texas.”⁹³ In opposing Arizona’s controversial 2010 state immigration law, SB 1070, Perry stated, “in a news release that was issued with little fanfare” that:

Some aspects of the law turn law enforcement officers into immigration officials by requiring them to determine immigration status during any lawful contact with a suspected alien, taking them away from their existing law enforcement duties, which are critical to keeping citizens safe.⁹⁴

The editorialist pointed out that such a normative statement is strikingly similar to statements that Bill White and others once put forth in what turned out to be failed attempts to defend Houston’s “sanctuary” policy.⁹⁵

But for our purposes here, the return to “public safety” in attempting to explain how what is allegedly essential for the goose (city) is not good for the gander (state) only highlights the indeterminacy and instability of consequentialist, crime prevention justifications for any law or policy related to illegal alienage. Both San Francisco’s relatively strong, legislatively grounded immigrant “sanctuary” law, and Houston’s relatively weak, administratively derived “sanctuary” policy have suffered similar fates over the last twenty-five years. While San Francisco has not witnessed quite the reversal of “sanctuary” that Houston has, San Francisco’s “law” too is mired in paralyzing ambiguity as a practical matter, as discussed above.

But like San Francisco, Houston has been the site of a distinct and untold narrative about the relationship between immigrant “sanctuary,” and the regulation of day labor within the jurisdiction. While there exist important similarities between the waning of “sanctuary” in San Francisco and Houston over the last ten years in particular, there is also marked divergence in the extent to which this waning of “sanctuary” has bled into the city’s support for day labor

⁹² Id.

⁹³ Falkenberg, Lisa. “SanctuaryCity” Label Resurfaces.” *Houston Chronicle*. May 13, 2010: B1.

⁹⁴ Id.

⁹⁵ Id.

sites and centers. In San Francisco, the controversy surrounding “sanctuary” remained relatively distinct from the issue of day labor regulation, and the relatively good relationships between immigrants’ rights activists and police department personnel contributed to the staying power of the San Francisco Day Labor Center. In contrast, in Houston, city funding for a day labor site fell prey to the political controversy surrounding “sanctuary.” But, as we shall see, this galvanized a federal street-level bureaucracy in Houston in a unique way.

In 1985 and 1986, increasing numbers of refugees arrived in Houston from Central America, according to the Director of the first organized day labor center in Houston. Men started to stand on street corners on the perimeters of the city’s many suburban-style neighborhoods, hoping to find work doing yard work or other household tasks. The men lacked a place to use the restroom, homeowners began to complain, and a few instances of police harassment occurred. In 1989, the relatively newly formed CARECEN Central American Refugee Center in Houston started informally representing these workers in discussions with city officials. In 1993, the City of Houston agreed to give CARECEN approximately \$25,000 and a building to start and run a Day Labor Center. But soon after, the city took the building away, in order to develop it for a for-profit purpose. For ten years, CARECEN set up various day labor centers, but had difficulty finding landlords willing to rent commercial space. The CARECEN organization closed its center in 2003.⁹⁶

The City of Houston then contracted with Neighborhood Centers, Inc., an old, prominent, and non-ethnically-affiliated social services organization in Houston, to run a day labor program, according to the Director of Programs at Neighborhood Centers, Inc. The city agreed to provide \$100,000 per year. But as a Neighborhood Centers executive noted in a personal interview in 2009, the local politics of illegal alienage suddenly made continued funding from the city unlikely:

Around 2006 and 2007, immigration and lots of furor around quote “illegal immigrants” became a real hot issue nationwide. And so folks who had been working really strongly with us became a little skittish about what that association might mean. You know, like maybe we need to be really careful about how we’re involved with illegal immigrants or undocumented workers. We had some visits from the Minutemen who came from Arizona and parked across the street and took pictures of our guys.

So it was uncomfortable for a lot of people. At one point the city said, “Too controversial of an issue. We can’t continue to fund it.” The mayor, however, was a strong supporter. He couldn’t promise

⁹⁶ Interview; Executive Director, CARECEN Houston; July 9, 2009.

city money to it, but he raised some private money on his own time to help the center after the city money went away. But that wasn't sustainable either. So after about three years of operation we said, "Look, we can't raise the money. Nobody really wants to fund it. The donors that we had--either the ones that the mayor got or some that came through Catholic charities--are remaining anonymous."⁹⁷

Meanwhile, according to a mid-level public affairs official at the Houston District Office of the EEOC who agreed to a personal interview in 2009, local field offices of federal labor and employment agencies such as the Equal Employment Opportunity Commission (EEOC) were increasingly receiving telephone calls from local Central and South American consular officials about what to do when day laborers were not paid. Recognizing both the absence of viable Texas law causes of action for such cases and the relative lack of strong day labor advocacy in Houston, officials from the EEOC, the U.S. Department of Labor's Wage and Hour Division, and the Mexican Consulate, spurred on by the Secretary of the local chapter of the AFL-CIO, decided to try something new. In 2000, using EEOC funds earmarked for "publicity," the group commissioned a billboard on top of the Mexican consulate (noting that the Mexican Consulate was not technically not on U.S. soil), with a number for a "hotline" at the Mexican consulate. Aggrieved workers of any nationality could report their troubles to a staff member at the Mexican consulate, who would then relay the information to the appropriate federal agency.⁹⁸

The EEOC official suggested that at first, there was some concern in the Houston EEOC District Office that EEOC Headquarters in D.C. would disapprove of the Justice and Equality in the Workplace (JEW) Program, as it came to be known, particularly as the EEOC was not likely to be the most effective agency in dealing with the violations. But "we decided our attitude was going to be 'Ask for forgiveness instead of permission,'" the official reflected. Far from being scolded, the EEOC Houston District Office won favor with "Headquarters" on account of its innovative program, designed to protect "all workers."⁹⁹ Similarly, the Houston Office of the Department of Labor Wage and Hour Division, which received most of referrals from the JEW hotline, increased annual dollar values of recovered wages under the Fair Labor Standards Act on account of the program, according to the Houston Area Director of the Wage and Hour Division.¹⁰⁰

⁹⁷ Interview; Program Director, Neighborhood Centers, Inc.; Houston; July 10, 2009.

⁹⁸ Interview; Public Information Officer; Equal Employment Opportunity Commission; Houston; July 8, 2009.

⁹⁹ Id.

¹⁰⁰ Telephone Interview; Director; Department of Labor Wage and Hour Office; Houston; September 22, 2009.

Nonetheless, other members of Justice and Equality in the Workplace Program have reported some grievances about the program, as it has become institutionalized over nearly a decade. Specifically, the two primary community organizers of the Houston Interfaith Worker Justice Center noted in a 2009 interview that the intake staff member at the Mexican Consulate often fails to communicate by email with all members of the coalition when a complaint comes into the hotline, as originally mandated. Sometimes, the phone just rings and rings, they assert. Complaints involving employers who are not large enough to be covered under the Fair Labor Standards Act, they surmise, are falling through the cracks without any follow up. And worse, sometimes aggrieved workers are probably just giving up.¹⁰¹ Even the EEOC official noted that the phone line should “probably go directly to the Interfaith Worker Justice Center,” ostensibly because the community organizers at the Center resort to formal law when they must, but rely in the main on “non-legal” tactics such as stern letters and frequent visits to the worksites of unscrupulous employers. But such a change in the location of the JEWOP phone line would be impossible, the EEOC official suggested, on account of the now institutionalized structure of the program. Put simply, the Mexican Consulate would never give up the phone line.¹⁰²

To be sure, when one looks closely into the details, the JEWOP Program has not been a magical solution to all alienage-related labor and employment law violations in Houston. Nonetheless, for the purposes of this chapter, the staying power of JEWOP Program in Houston, like that of the San Francisco Day Labor Program, illuminates a primary argument of this dissertation – namely that where “illegal alienage in action” (as opposed to “illegal alienage on the books” or in scholars’ imaginations) is concerned, the more viable ground for recognition and rights for illegal aliens rests in “work” or “labor” rather than in abstract notions of “immigrant personhood” or “sanctuary.” Indeed, as the last two sections of this chapter have demonstrated, over the last twenty-five years, immigrant “sanctuary” has exposed the limitations of abstract consequentialist reasoning about crime vis-a-vis subfederal alienage laws and policies in two different jurisdictions. More broadly, illegal alienage and immigrant “sanctuary” in San Francisco and Houston have also shed a light onto the “unwritten laws” of various street-level bureaucracies, which often rely on “policy” rather than “law” to engender their own conceptions of “order.” The concluding chapter which follows suggests possible new ways of understanding the political theoretical and legal implications of this chapter’s socio-legal findings about work, illegal alienage, and possible “unwritten laws” thereof in contemporary America.

¹⁰¹ Interview; Lead Organizers; Interfaith Worker Justice Center; Houston; July 21, 2009.

¹⁰² Interview; Public Information Officer; Equal Employment Opportunity Commission; Houston; July 8, 2009.

CHAPTER 6

CONCLUSION: WORK, JUSTICE, AND THE FOREIGNER

The dignity of work and of personal achievement, and the contempt for aristocratic idleness, have since Colonial times been an important part of American civic self-identification. The opportunity to work and to be paid an earned reward for one's labor was a social right, because it was a primary source of public respect. It was seen as such, however, not only because it was a defiant cultural and moral departure from a corrupt European past, but also because paid labor separated the free man from the slave.

Judith N. Shklar
American Citizenship: The Quest for Inclusion (1991)

"[T]he right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth Amendment] to secure. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words . . . The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality."

Traux v. Raich, U.S. Supreme Court, (1915)

"[I]n the classic case of identity theft, intent is generally not difficult to prove. For example, where a defendant has used another person's identification information to get access to that person's bank account, the Government can prove knowledge with little difficulty. The same is true when the defendant has gone through someone else's trash to find discarded credit card and bank statements, or pretends to be from the victim's bank and requests personal identifying information. Indeed, the examples of identity theft in the legislative history (dumpster diving, computer hacking, and the like) are all examples of the types of classic identity theft where intent should be relatively

easy to prove, and there will be no practical enforcement problem. For another thing, to the extent that Congress may have been concerned about criminalizing the conduct of a broader class of individuals, the concerns about practical enforceability are insufficient to outweigh the clarity of the text.

Flores-Figueora v. United States, U.S. Supreme Court, (2009)

In December 14, 1914, the Governor of Arizona signed a law which sounds in a strikingly contemporary tone. As “[a]n act to protect citizens of the United States in their employment against noncitizens of the United States, in Arizona, and to provide penalties and punishment for the violation thereof,” the law stipulated that:

Any company, corporation, partnership, association or individual who is, or may hereafter become an employer of more than five (5) workers at any one time, in the State of Arizona, regardless of kind or class of work, or sex of workers, shall employ not less than eighty (80) percent qualified electors or native-born citizens of the United States or some subdivision thereof.

Those “unscrupulous” employers who disobeyed this law would be treated to “a fine of not less than one hundred dollars, and imprisoned for not less than thirty days.”¹

Mike Raich, an Austrian citizen living in Arizona at the time, worked as a cook in the restaurant of William Traux Sr. in the City of Bisbee, Arizona. Traux employed nine people. Of those nine employees, seven were non-citizens, resulting in 77% non-citizen workers. Upon passage of the December 1914 law, Traux informed Raich that he could no longer work in the restaurant, “solely by reason of [the law’s] requirements and because of the fear that penalties would be incurred in case of its violation.”² In response, Raich brought a legal case against Traux and the Attorney General of Arizona in U.S. District Court for the District of Arizona, seeking a declaration that the Arizona law was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

The resulting U.S. Supreme Court case, *Traux v. Raich*, gave the Court occasion to proclaim, as excerpted in the second quotation of this chapter’s epigraph, that “the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth Amendment] to secure” and that “[t]he

¹ *Traux v. Raich*, 239 U.S. 33, 35.

² *Id.* at 36.

assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode.” As it turned out, it mattered that Raich was a cook in a private restaurant rather than, say, a probation officer. The Court would subsequently retreat from its strong statement about “the right to work for a living” being essential to a non-citizen’s “personal freedom,” when a non-citizen happened to want to work in a profession that somehow seemed essential to constituting the state.³ For those non-citizens, “the very essence of personal freedom and opportunity” had simply to be in some other job.

Also, it appears to have mattered that Mike Raich had been lawfully admitted, even in 1915. In 1915, illegal alienage was not the legal and political lightning rod it is today precisely because the country’s borders were relatively open then. As noted in prior chapters, before the advent of the first comprehensive immigration restriction law in 1924, “illegal aliens” in the U.S. meant mainly a relatively small number Chinese, other Asians, and various kinds of other undesirable persons (“paupers,” “criminals,” “anarchists”) who managed somehow to defy the then relatively newly formed Border Patrol. (Ngai 2004: 3). Nonetheless, *Traux v. Raich* makes an explicit link between “lawful admittance” and “right” or “privilege” to work.⁴ In making this link, the Court seems ahead of its time, in a manner of speaking.

But perhaps even more strikingly, the strong statement of the importance of a non-citizen’s “right/ privilege to work” in *Traux* sounds very much like an excerpt from a book by liberal political theorist Judith Shklar, published in 1991. Perhaps this similarity is due to the possibility that images of slavery were at the backs of the minds of the members of the *Traux* Court in 1915, with slavery part of the then relatively recent American past. And such images were at the forefront of Shklar’s mind. Still, regardless of the possibility that both the *Traux* Court and Judith Shklar may have been thinking about slavery, the juxtaposition of the language of *Traux* with the words of a leading American political theorist of the late twentieth-century is instructive for what it suggests about the central place of “work” in both citizenship and (legal?) alienage in America.

Likely familiar by now to readers of this dissertation, illegal alienage complicates such tidy unities. The third quotation in this chapter’s epigraph, decidedly far less lofty and soaring in tone than the first two, is also a statement about work, though it may not appear to be on first or even second glance. The third quotation exists because in 2006, Ignacio Flores-Figueora, a citizen of Mexico, gave his U. S. employer counterfeit Social Security and alien registration cards. The cards reflected Flores-Figueora’s real name, but they included

³ See, e.g. *Cabell v. Chavez –Solido*, 454 U.S. 432 (1982) (holding that California could prohibit lawfully admitted non-citizens from working as probation officers).

⁴ The Court is not quite sure if a lawfully admitted non-citizen’s getting work is a “right” or rather a “privilege.” It uses both words in the passage above.

random numbers.⁵ Or so Flores-Figueora thought at the time. But as luck, or rather as remarkable un-luck would have it, the numbers on both cards were numbers lawfully assigned to other people. ⁶

Flores-Figueora's employer reported the lack of match between name and number to Immigration and Custom's Enforcement (ICE). The United States then charged Flores-Figueora with: 1) entering the United States without inspection; 2) misusing immigration documents; and 3) aggravated identity theft.⁷ The U.S. Supreme Court case to emerge from this seemingly unremarkable episode of an illegal alien presenting counterfeit social security and alien registration cards to an employer in order to work in the U.S. turned on the third charge, aggravated identity theft. By 2006, Congress had passed a federal criminal statute imposing "a mandatory consecutive 2-year prison term upon individuals convicted of certain other crimes, *if, during (or in relation to) the commission of those other crimes, the offender "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person."*⁸ *Flores-Figueroa v. United States* was ultimately a case about whether "the provision requires that a defendant also know that that the *something* he has unlawfully transferred is, for example, a real ID belonging to another person rather than say, a fake ID (i.e. a group of numbers that does not correspond to any real Social Security number.)"⁹

A person not trained in U.S. law may, very logically and sensibly, suppose that the discussion in the text of the resulting opinion would be in large part about whether an individual who engaged in identity theft in order to work is as culpable and deserving of imprisonment as an individual who engaged in identity theft in order to steal money. But the words "work" or "labor" do not appear in the text of the Court's opinion. Instead, the Court focuses its analysis on the use of adverbs "as a matter of ordinary English grammar."¹⁰ "Knowingly," the Court ultimately decides, extends to the prepositional phrase "of another person." By considering carefully what it means to say, for example, that "Someone knowingly ate a sandwich with cheese" (The Court inquires, "Does the person know both that he was eating a sandwich and that his sandwich contained cheese? Or does the person only know that he was eating a sandwich?"), the Court comes to an uncharacteristically unanimous holding. It holds that in order to send Flores-Figueroa away to jail for an extra two years,

⁵ *Flores-Figueora v. United States*, 173 L. Ed. 2d 853, 857 (2009).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 857 (emphasis in original text of Court opinion).

⁹ *Id.* at 856.

¹⁰ *Id.* at 857.

the Government would have to prove that he knew that the numbers on his fake IDs belonged to other people.¹¹

“Ordinary English usage” rather than a serious engagement with *why* Mr. Flores-Figueroa did what he did thus kept Mr. Flores-Figueroa out of jail. The only hint that the Court was even aware of the difficult normative questions brought into being by the undocumented work of illegal aliens is the contrast drawn between the “classic cases of identity theft” and what Mr. Flores-Figueroa did. The last sentence of the passage excerpted in the epigraph suggests, but does not name illegal alienage. Specifically, it states, “For another thing, to the extent that Congress may have been concerned about criminalizing the conduct of a broader class of individuals, the concerns about practical enforceability are insufficient to outweigh the clarity of the text.” “A broader class of individuals” is the closest the Court was able to come to naming illegal alien workers. And with reference to this “broader class of individuals,” Congress is not going to be able to point to woefully to “losing control of the borders” or some such to convince the Court ignore the ordinary “work” of adverbs. Or so the U.S. Supreme Court recently decided.

As part of the conclusions of dissertation, *Flores-Figueroa v. United States* poignantly illustrates what appears to be a deep difficulty in understanding the normative significance of work done by foreigners in the United States without authorization. To be sure, other important U.S. Supreme Court decisions have had illegal alien workers as protagonists. For example, in 1984, in *Sure-Tan v. National Labor Relations Board (NLRB)* the Court held that an employer who fired illegal aliens in its workforce and additionally reported them to the INS had engaged in unfair labor practices, per the National Labor Relations Act.¹² And in 2002, the Court held in *Hoffman Plastic Compounds v. National Labor Relations Board* that federal immigration policy, after the Immigration Reform and Control Act of 1986, prevented the NLRB from awarding “backpay” to an undocumented alien who has never been authorized to work in the U.S.¹³ But both *Sure-Tan* and *Hoffman Plastics* turned on something more than the work of undocumented workers. Both these cases involved organizing to form a union and the question of whether the goals of the National Labor Relations Act would be better realized by providing remedies to undocumented workers or not. *Flores-Figueroa*, in contrast, involved a man who appears to have wanted just to work.

Recent scholarship in law and in political theory also reflects anxious concern about the relationships between (illegal) aliens and work. Linda Bosniak, for example, worries in the final chapter of her book on citizenship and alienage in U.S. law that, “what many theorists characterize as the achievement

¹¹Id. at 858, 861.

¹² *Sure Tan v. NLRB*, 467 U.S. 883 (1984).

¹³ *Hoffman Plastics v. NLRB*, 535 U.S. 137 (2002).

of emancipatory citizenship for some women through participation in paid work often depends on the labor of citizenshipless others,” (Bonsiak 2006: 102) and that, “a rising number of women who perform . . . commodified household labor are (and have been for some time) immigrants” (109). Bosniak thus suggests that the gains which U.S. citizen women have made in the U.S. labor market have come in part through the commodification of the labor of immigrant women, who do necessary “care work” in U.S. middle class households in exchange for wages. For Bosniak, that immigrant women do a greater share of household work in America casts a cloud on the achievements of feminism over the last fifty years. Immigrant women may have relieved American women of household chores. But these chores are still being done primarily by women, and women without the standing conferred by citizenship at that.

In a more unambiguously normative tenor, Cristina Beltran 2009: 616) has written in a recent edition of the journal *Political Theory* that:

[T]he labor of the undocumented is characterized not as a marker of value but as a threat to polity. . . the capacity to work hard and earn confers little to no civic standing on raced subjects. Instead, the undocumented occupy a subject position defined by their willingness to engage in punishing, tedious, and dangerous labor. Moreover, deploying this discourse of labor often results in proimmigrant forces offering incoherent arguments regarding justice and the value of the undocumented while failing to address central questions of equality and power.

Perhaps adopting too quickly and too literally Hannah Arendt’s apparent disdain for “work” and “labor” and her apparent valoration of political “action,”¹⁴ Beltran has also written:

Arendt’s account of labor shows us how the logic of interchangeability, use, and disposability continues to impact how we think politically about subjects defined by their labor. If I am correct and undocumented subjectivity is excessively defined by labor, then the marchers of 2006 were fighting an uphill battle against a logic that treated them as subjects of little worth or individuation. The depiction of the undocumented as subjects whose value lies in their willingness to pick crops, clean houses, mow lawns, care for children, cook food, etc. produced subjects

¹⁴ In *The Human Condition* (1958), Arendt posits that three activities—“labor, work, and action”—are the three fundamental forms of activity comprising the human condition. Throughout the text, Arendt expresses a strong preference for “action,” where she argues the plurality of human beings is most evident.

who value lies not in their distinctiveness but rather, in their collective existence as an always available mass. Individuality, intellect, judgment, reason, and insight remain invisible, as the discourse of labor tends to overshadow acts of freedom performed in the political realm (614).

This concluding chapter argues that such statements are antithetical to the normatively inflected socio-legal realities of illegal alienage in the U.S. today. While legal scholars and political theorists may chose to lament and/or ignore the connections between contemporary illegal alienage and work or labor, such connections are undeniably present, ought to be reckoned with, and indeed provide comparatively more grounds for “institutional recognition” of illegal aliens than such grounds as “personhood” or “political action.”

Taken as a whole, this dissertation has shown how modern law is not a unitary declaration of a sovereign, but rather the result of the actions or inactions of conflicting sets of bureaucratic actors. And law is increasingly expressed as bureaucratic policies in a federal administrative state. Each chapter advanced this argument in a particular way by looking at U.S. law through the prism of illegal alienage. Specifically, Chapter 2 showed how “ethical territoriality” and “the social” have each been grounds for the rights of illegal aliens. Chapter 3 turned to Anglo-American political theory and argued that even if citizenship and rights are disaggregated in modern liberal democracies, rights for illegal aliens are unlikely to be officially declared via democratic processes as political theorists may hope. The chapter showed instead that these “rights” will likely take the form of administrative silences. Chapter 4 turned to the sociology of law to show how a “street-level bureaucratic” approach to illegal alienage is needed. Chapter 5 argued that “work” or “labor” provided administrative officials in two very different jurisdictions with the most unambiguous grounds for organizing inclusive “policies” on behalf of illegal aliens.

While the dissertation has been in large part about the failure of positive law, vis-à-vis the oxymoronic phenomenon of illegal alienage, the figure of “work” has also appeared in each chapter. Chapter 2 showed that the rights of illegal aliens in the U.S. have been grounded in “the future productivity of a territorial workforce,” as opposed to both the “sovereignty” of the nation-state or even “ethical territoriality.” Chapter 3 further developed an argument begun in Chapter 2, namely that illegal alienage is a problem for the positive law of nation-states in part because the actions (mainly the “work” of illegal aliens) defies positive law at the same time as it is normatively worthy of respect. With reference to the writings of Benhabib in particular, Chapter 3 also presented socio-legal analysis of the limitations of “personhood” as a singular ground for rights. The “*Immigrant Workers’ Freedom Right*,” we saw, provided the context for declaring that “No human being is illegal.”

Chapter 4 turned formally to the sociology of law; it drew attention to the daily “work” of street-level bureaucrats charged with managing the everyday manifestations of illegal alienage. It argued for a reassessment of illegal alienage from the vantage point of the everyday tasks of street level bureaucracies. And finally, Chapter 5 demonstrated most explicitly the normative and institutional staying power of “work” or “labor” rather than “personhood” as a ground for rights for illegal aliens “in action.” “Work” has thus normatively and empirically transcended the positive laws that create illegal alienage.

But well before Linda Bosniak or Cristina Beltran started to express concern about a link between non-citizens and work in western liberal democracies, Michael Walzer did so. Such a concern was at the heart of Walzer’s critical discussion of “metics” or “guest workers,” as we saw in Chapter 3. In addition to proposing to do away with “guest workers” in liberal democracies, Walzer made another, less often cited proposal. In a subsequent section in *Spheres of Justice* entitled, “Dirty Work,” Walzer proposed:

What is required, then, is a kind of domestic *corvee*, not only in households – though it is especially important there – but also in communes, factories, offices, and schools. . . . There would probably be less dirt to clean up if everyone knew in advance of making it that he couldn’t leave the cleaning to someone else. But some people – patients in a hospital, for example – can’t help but leave it to someone else, and certain sorts of cleaning are best organized on a large scale. Work of this sort might be done as part of a national service program . . . Perhaps the work should be done by the young, not because they will enjoy it, but because it isn’t without educational value. Perhaps each citizen should be allowed to choose when in the course of his life he will take his turn. But it is certainly appropriate that the cleaning of city streets, say, or of national parks should be the (part-time) work of the citizens.

Walzer could hardly be clearer about his view that “dirty work” must be done by citizens. He has written further:

In principle, there is no such thing as intrinsically degrading work; degradation is a cultural phenomenon. It is probably true in practice, however, that a set of activities having to do with dirt, waste, and garbage has been the object of disdain and avoidance in just about every human society. . . . Hence the question, in a society of equals, who will do the dirty work? has some special force. And

the answer is that, at least in some partial and symbolic sense, we all will have to do it.

For Walzer, all “dirty work” must be done by citizens because *in practice if not in principle*, some jobs have negative social meaning. To evaluate this proposal, we must ask a question similar to the one we asked in Chapter 3 about Walzer’s views on guest workers. Is Walzer unnecessarily presuming: 1) that people are defined by the “dirty work” they may do; and (2) that such work is necessarily subordinating? Could it be possible that doing “dirty” work, or indeed work of *any* kind, confers a certain kind of dignity or standing to non-citizens, contra Bosniak, Beltran, and Walzer? Could it even be possible that doing “dirty work” ought even to confer some kind of legalization, if we citizens were able to transcend our collective discomfort with the topic?

Judith Shklar provides an explicit counterpoint to Michael Walzer which allows us to refine our questions a bit. Shklar has written:

In the wake of the Jacksonian assertion of democratic beliefs America was left, not an egalitarian, but a republican ethos, which saw the independence of the working and earning many constantly threatened by the idle, aristocratic few at one end of the spectrum, and by slavery at the other. Both were anomalies in a republic that was based on the premise that independent citizens acted in a republic economy in which each had an equal opportunity to get ahead by his own efforts and could earn his bread without fear or favor. This vision of economic independence, of self-directed “earning” as the ethical basis of democratic citizenship took the place of an outmoded notion of public virtue, and it has retained its powerful appeal. We are citizens only if we “earn” (Shklar 1991: 66-67).

For Shklar, unlike for Walzer, it appears to matter not what kind of job a person may do. Standing emerges simply from earning. Indeed, for Shklar, “earning” has replaced “public virtue” as the way of gaining respect in the “republic.” Admittedly, Shklar is scarcely concerned with non-citizens, much less with illegal aliens.

Indeed, Gerald Neuman (1992: 1283) has critiqued Shklar for suggesting that the *right* to work might be limited to citizens. Neuman has noted, “Though it may be somewhat daring that the right to work is distinctively American, still I am less troubled by this claim than by the effort to make the right to work an attribute of *citizenship*.”

But perhaps both “rights” and “citizenship” are red herrings. What about the socio-legal phenomenon of work itself, which exists in spite of the positive law

prohibiting it? What might such “work” do, standing alone? Seen from the socio-legal vantage point that this dissertation has constructed, the critical imposition of non-citizenship onto Shklar’s argument yields a slightly different set of questions than Neuman identified. Instead of simply insisting that non-citizens should be allowed to work, we must ask: What about variations on the statement “We are citizens only if we “earn””? Specifically, what happens if one earns, but is a non-citizen? And of course, what happens if one earns--indeed, if one’s very reason for being here, in the U.S., “illegally”---is to *earn*?

Framed in this way, this dissertation’s socio-legal and political theoretical travels have opened up an important set of new avenues for exploration: Ought “legalization of illegal aliens” proceed on the basis of having done “work?” How could such a proposal be implemented without adversely affecting those undocumented persons, likely in large part women, children and the elderly, who have not engaged in paid wage labor during their time in the United States? Ought “legalization of illegal aliens” proceed precisely on the basis of the performance of socially necessary, if devalued “dirty work?” How should U.S. lawmakers understand those who may want to have “merely economic” relationships with the state whereby they seek to work legally in the U.S. but return to homes in other countries with frequency? Is such an arrangement necessarily illiberal or subordinating, especially if once being such a worker or laborer in no ways forestalls the possibility of future citizenship? How would such an arrangement challenge presumptions about the value or worth of U.S. citizenship? Should immigration priorities be weighted toward unskilled labor rather than skilled labor?

This concluding chapter can only frame these questions and seek to provide an explanation for why such questions need to be asked. Nonetheless, this dissertation has sought, at its core, to show that our engagements with questions of “justice and the foreigner” ought instead to be engagements with questions of “work, justice, and the foreigner.” Far from being exploitative, subordinating, or illiberal, such a move recognizes that whatever else “illegal alienage” may do to U.S. law and legal institutions, it reminds us all – citizens and foreigner alike-- of our interdependencies.

REFERENCES

- Aleinikoff, T. Alexander (1986). "Symposium on Law and Community: Theories of Loss of Citizenship." 84 *Michigan Law Review* 1471.
- Aleinikoff, T. Alexander (2002). *Semblances of Sovereignty: The Constitution, the State, and American Citizenship*. Cambridge: Harvard University Press.
- Albiston, Catherine (1999). "The Rule of Law and the Litigation Process: The Paradox of Losing by Winning." 33 *Law and Society Review* 869.
- Bumiller, Kristin (198). "Victims in the Shadow of the Law." 12 *Signs* 421.
- Anderson, Benedict (1983). *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. London: Verso.
- Anker, Deborah E. (1994). *The Law of Asylum in the United States*. Washington, D.C. : American Immigration Foundation.
- Arendt, Hannah (1951). *The Origins of Totalitarianism*. New York: Harcourt.
- Arendt, Hannah (1998(1958). *The Human Condition*. Chicago: University of Chicago Press.
- Beiner, Ronald (2003). *Liberalism, Nationalism, and Citizenship: Essays on the Problem of Political Community*. Vancouver: University of British Columbia Press.
- Beltran, Cristina (2009). "Going Public: Hannah Arendt, Immigrant Action and the Space of Appearance," 37 *Political Theory* 595-622.
- Benhabib, Seyla (2004). *The Rights of Others: Aliens, Residents, and Citizens*. Cambridge: Cambridge University Press.
- Bilke, Corrie (2009). "Divided We Stand United We Fall: A Public Policy Analysis of Sanctuary Cities' Role in the Immigration Debate." 42 *Indiana Law Review* 165.
- Bloemraad, Irene (2006). *Becoming a Citizen : Incorporating Immigrants and Refugees in the United States and Canada*. Berkeley : University of California Press.

- Bosniak, Linda (2006). *The Citizen and the Alien: Dilemmas of Contemporary Membership*. Princeton: Princeton University Press.
- Bosniak, Linda (2007). "Being Here: Ethical Territoriality and the Rights of Immigrants." 8 *Theoretical Inquiries in Law* 389.
- Bourdieu, Pierre (1991). *Language and Symbolic Power*. Cambridge: Harvard University Press.
- Brown, Wendy (1995). *States of Injury : Power and Freedom in Late Modernity*. Princeton: Princeton University Press.
- Calavita, Kitty (1990). "Employer Sanctions Violations: Toward a Dialectical Model of White Collar Crime." 24 *Law and Society Review* 1041.
- Calavita, Kitty (1992). *Inside the State : The Bracero Program, Immigration, and the I.N.S.* New York: Routledge.
- Canovan, Margaret (1998). "Introduction." *The Human Condition*. Chicago: University of Chicago Press.
- Carens, Joseph H. (1995). "Aliens and Citizens: The Case for Open Borders." *Theorizing Citizenship*, Ronald Beiner, ed. Buffalo: State University of New York Press.
- Carens, Joseph H. (2005). "On Belonging: What We Owe to People Who Stay." *Boston Review* (Summer).
- Carro, Jorge L. (1989). "Municipal and State Sanctuary Declarations: Innocuous Symbolism or Improper Dictates?" 16 *Pepperdine Law Review*, 297.
- Chin, Gabriel (2008). "Unexplainable on Grounds of Race: Doubts about *Yick Wo*." 2008 *University of Illinois Law Review* 1359.
- Cohen, Elizabeth F. (2007) "Carved from the Inside Out." In *Debating Immigration*, Carol Swain, ed. New York: Cambridge University Press.
- Constable, Marianne (1993). "Sovereignty and Governmentality in Modern American Immigration Law" 13 *Studies in Law, Politics, and Society* 249.

Constable, Marianne (1994). *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law, and Knowledge*. Chicago: University of Chicago Press.

Constable, Marianne (2005). *Just Silences: The Limits and Possibilities of Modern Law*. Princeton: Princeton University Press.

Coutin, Susan B. (1993). *The Culture of Protest: Religious Activism and the U.S. Sanctuary Movement*. Boulder: Westview Press.

Coutin, Susan Bibler (2000). *Legalizing Moves : Salvadoran Immigrants' Struggle for U.S. Residency* Ann Arbor : University of Michigan Press.

Coutin, Susan (2007). *Nations of Emigrants: Shifting Boundaries of Citizenship in El Salvador and the United States*. Ithaca. Cornell University Press.

Derrida, Jacques (1986). "Declarations of Independence." 15 *New Political Science*: 7.

Edelman, Lauren B. (1992). "Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law." 97 *American Journal of Sociology* 1531-1576.

Edelman, Lauren B. (2004). "Rivers of Law and Contested Terrain: A Law and Society Approach to Economic Rationality." 38 *Law and Society Review* 181.

Edelman, Lauren B., Christopher Uggen and Howard S. Erlanger (1999). "The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth." 105 *American Journal of Sociology* 406-454.

Ellickson, Robert C. (1991). *Order Without Law: How Neighbors Settle Disputes* Cambridge : Harvard University Press.

Falk Moore, Sally (2005). "Introduction" in *Law and Anthropology: A Reader*. Sally Falk Moore, ed. Malden: Blackwell Publishing.

Frohman, Lisa (1997). "Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking." 31 *Law and Society Review* 531.

Galanter, Marc (1975). "Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change." 9 *Law and Society Review* 95.

Geertz, Clifford (1973). *The Interpretation of Cultures : Selected Essays*. New York: Basic Books.

Gilboy, Janet (1991). "Deciding Who Gets In: Decisionmaking by Immigration Inspectors." 25 *Law and Society Review* 571.

Gilboy, Janet (1992). "Penetrability of Administrative Systems: Political 'Casework' and Immigration Inspections." 26 *Law and Society Review* 273.

Gilboy, Janet (1997). "Implications of 'Third-Party' Involvement in Enforcement: The INS, Illegal Travelers, and International Airlines." 31 *Law and Society Review* 505.

Habermas, Jurgen (1996) *Between Facts and Norms : Contributions to a Discourse Theory of Law and Democracy*. Translated by William Rehg. Cambridge: MIT Press.

Hinsley, F.H. *Sovereignty* (1966). New York: Basic Books.

Honig, Bonnie (1993). *Political Theory and the Displacement of Politics*. Ithaca: Cornell University Press.

Honig, Bonnie (2001). *Democracy and the Foreigner*. Princeton: Princeton University Press.

Kerr, Peter (1985). "Koch Memo Directs City Workers Not to Report Illegal Aliens to U.S." *The New York Times*. October, 18.

Kobach, Kris (2005). "The Quintessential Force Multiplier: the Inherent Authority of Local Police to Make Immigration Arrests. 69 *Albany Law Review* 179.

Krasner, Stephen D. (1999). *Sovereignty: Organized Hypocrisy*. Princeton: Princeton University Press.

Legomsky, Stephen H. (2002). *Immigration and Refugee Law and Policy*. New York: Foundation Press.

Legomsky, Stephen H. and Cristina M. Rodriguez (2009). *Immigration and Refugee Law and Policy, Fifth Edition*. New York: Foundation Press.

Lipsky, Michael (1969). "Toward a Theory of Street-Level Bureacracy." *Institute for Research on Poverty Discussion Papers*. University of Wisconsin.

- Lipsky, Michael (1980). *Street Level Bureaucracy: Dilemmas of the Individual in Public Services*. New York: Russell Sage Foundation.
- Macklin, Audrey (2007). "Who is the Citizen's Other? Considering the Heft of Citizenship." 8 *Theoretical Inquiries in Law* 333.
- Macaulay, Stewart (1963) Non-Contractual Relations in Business: A Preliminary Study. 28 *American Sociological Review* 55.
- Macaulay, Stewart, Lawrence Friedman, and Elizabeth Mertz, eds. (2007). *Law in Action: A Socio-Legal Reader*. New York: Foundation Press.
- Macedo, Stephen (2007). "The Moral Dilemma of U.S. Immigration Policy: Open Borders vs. Social Justice?" In *Debating Immigration*, Carol Swain, ed. New York: Cambridge University Press.
- Maine, Henry Sumner (1877). *Ancient Law*. New York: H. Holt and Company.
- Marshall, T.H. (1950). *Citizenship and Social Class and Other Essays*. Cambridge: Cambridge University Press.
- McKinley, Jesse (2006). "Immigrant Protection Rules Draw Fire." *The New York Times*. November 12.
- Minda, Gary (1995). *Postmodern Legal Movements: Law and Jurisprudence at Century's End*. New York: New York University Press.
- Motomura, Hiroshi (2006). *Citizens in Waiting: The Lost Story of Immigration and Citizenship in the United States*. New York: Oxford University Press.
- Neuman, Gerald (1987). "Book Review: Back to Dread Scott?" 24 *San Diego Law Review* 485.
- Neuman, Gerald (1996). *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law*. Princeton: Princeton University Press.
- Ngai, Mae (2004). *Impossible Subjects: Illegal Aliens and the Making of Modern America*. Princeton: Princeton University Press.
- Nunberg, Geoffrey (2006). "Aliens: 'Fresh Air' commentary, April 11, 2006." Available at: <http://www-csli.stanford.edu/~nunberg/aliens.html>.

Nyers, Peter (2003). "Abject Cosmopolitanism: the Politics of Protection in the Anti-Deportation Movement." 24 *Third World Quarterly* 1069-93.

Ong, Aihwa (2003). *Buddha is Hiding: Refugees, Citizenship, the New America* Berkeley : University of California Press.

Pevnick, Ryan (2009). "Social Trust and the Ethics of Immigration Policy." 17 *Journal of Political Philosophy* 146-67.

Pitkin, Hanna F. (1998). *The Attack of the Blob: Hannah Arendt's Concept of the Social*. Chicago: University of Chicago Press.

Rawls, John (1971). *A Theory of Justice*. Cambridge: Harvard University Press.

Reeves, Dick (2010). *Catching Out: The Secret Work of Day Laborers*. New York: Simon and Schuster.

Rodriguez, Cristina (2008). The Significance of the Local in Immigration Regulation. 106 *Michigan Law Review* 567

Salyer, Lucy (1995). *Laws Harsh as Tigers: Chinese Immigration and the Shaping of Modern Immigration Law*. Chapel Hill: University of North Carolina Press.

Sassen, Saskia (1996). *Losing Control?: Sovereignty in an Age of Globalization* New York : Columbia University Press.

Scheffler, Samuel (2001). *Boundaries and Allegiances : Problems of Justice and Responsibility in Liberal Thought*. New York: Oxford University Press.

Schuck, Peter H. and Rogers M. Smith (1985). *Citizenship Without Consent: Illegal Aliens in the American Polity*. New Haven: Yale University Press.

Shachar, Ayelet (2009). *The Birthright Lottery: Citizenship and Global Identity*. Cambridge: Harvard University Press.

Shklar, Judith N. (1991). *American Citizenship : The Quest for Inclusion*. Cambridge: Harvard University Press.

Shoemaker, Karl (2001). *Sanctuary Law : Changing Conceptions of Wrongdoing and Punishment in Medieval European law*. Unpublished Dissertation. University of California at Berkeley.

- Smith, Rogers M. (1997). *Civic Ideals: Conflicting Visions of Citizenship in U.S. History*. New Haven: Yale University Press.
- Song, Sarah (2009). "Democracy and Noncitizen Voting Rights," 13 *Citizenship Studies* 607.
- Song, Sarah (2009). "What Does it Mean to be an American?" *Daedalus* (Spring 2009) 31.
- Sullivan, Laura (2009). "Enforcing Nonenforcement: Countering the Threat Posed to Sanctuary Laws by the Inclusion of Immigration Records in the National Crime Database." 97 *California Law Review* 567.
- Villazor, Rose Cuison (2010). "'Sanctuary Cities' and Local Citizenship." 37 *Fordham Urban Law Journal* 573.
- Vismann, Cornelia (2008). *Files : Law and Media Technology*. Geoffrey Winthrop-Young, trans. Stanford: Stanford University Press.
- Waldinger, Roger (2001). "Strangers at the Gates." In *Strangers at the Gates: New Immigrants in Urban America*, Roger Waldinger, ed. Berkeley: University of California Press.
- Waldinger, Roger and Jennifer Lee (2001). "New Immigrants in Urban America." In *Strangers at the Gates: New Immigrants in Urban America*, Roger Waldinger, ed. Berkeley: University of California Press.
- Waldron, Jeremy (2000). "Arendt's Constitutional Politics." In *The Cambridge Companion to Hannah Arendt*. Dana Villa, ed. Cambridge: Cambridge University Press.
- Walzer, Michael (1983). *Spheres of Justice: A Defense of Pluralism and Equality*. New York: Basic Books.
- Williams, Patricia (1991). *The Alchemy of Race and Rights*. Cambridge: Harvard University Press.
- Wishnie, Michael (2001). "Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism" 76 *New York University Law Review* 494.

Zolberg, Aristide (2006). *A Nation by Design: Immigration Policy in the Fashioning of America*. Cambridge: Harvard University Press.