

CIVILITY, LEGALITY, AND JUSTICE IN AMERICA



Edited by Austin Sarat

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Austin Sarat

Amherst College



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Civility and the Undocumented Alien

Leti Volpp

Introduction

In January 2013, Immigration and Customs Enforcement (ICE) agents knocked on the door of the Phoenix home of Erika Andiola and arrested her mother and brother. Andiola, cofounder of the Arizona DREAM Act Coalition, is a prominent activist for the DREAM Act, a federal bill to grant legal status to undocumented immigrants who were brought to the United States as children.¹ Andiola had been arrested for civil disobedience outside Senator John McCain's Phoenix office, as well as at his office in the U.S. Capitol.

Featured on the June 2012 cover of *Time* magazine, along with Jose Antonio Vargas and other undocumented immigrants under the headline WE ARE AMERICANS – JUST NOT LEGALLY, Andiola was also one of four DREAMers profiled in Davis Guggenheim's film advocating passage of the DREAM Act, *The Dream Is Now*. And Andiola, along with two others, had sued the Senate with the help of Common Cause, challenging

Many thanks to Joseph Bui, Anusheh Farahat, Arden Koehler, and especially Saba Ahmed for research assistance, much gratitude to Richard Perry and the UC Berkeley Framing, Rights and Immigration group for their comments, and profound thanks to Austin Sarat for inviting me to participate in the Civility, Legality, and Justice in America Symposium.

¹ The DREAM (Development, Relief, and Education for Alien Minors) Act was first introduced in the U.S. Senate in 2001, and it would provide conditional permanent residency to immigrants who had arrived in the United States before the age of sixteen, lived in the country continuously for at least five years prior to the bill's enactment, and who graduated from a U.S. high school, among other qualifications. On the completion of two years of military service or college attendance, the condition would be lifted to create legal permanent residency. The noncitizens who would be the beneficiaries of the DREAM Act are known as DREAMers.

the Senate filibuster as unconstitutional, after the DREAM Act was blocked by a filibuster in December 2010.²

Andiola quickly posted a video on YouTube that went viral, with footage of her crying, and with her saying:

Hello, my name is Erika. If I am talking to you right now it is because my mother and brother were just taken by immigration. . . . I need everybody to stop pretending that nothing is wrong, stop pretending that we're all just living normal lives, because we're not. This could happen to any of us anytime.³

In response, the nationally syndicated columnist Ruben Navarrette published a column titled "A DREAMer's Nightmare," asking, "Did you hear about the DREAMer who got a rude awakening?"⁴

As Navarrette describes, most DREAMers are "wise enough" to avoid attention. But, in Navarrette's words, a group of activists "think of themselves as full-fledged Americans who can get away with the kind of in-your-face agitation that has been prevalent since the 1960s . . . their arrogance and radicalism alienates supporters and puts them in jeopardy."⁵ Although the social media response to Andiola's video was so fierce that ICE issued a stay of removal, Navarrette wrote, "Andiola's supporters insist that, if not for her activism she wouldn't have gotten the help she needed to free her family members. That's true. But what they conveniently overlook is that, if not for her activism, she might not have needed it."⁶

Even before the arrest of Andiola's family, Navarrette had complained that DREAMers were acting "like spoiled brats." "I know just what a lot of those so-called DREAMers deserve to get for Christmas: a scolding," he penned in his column. Why? "They don caps and gowns and disrupt committee hearings and occupy the offices of members of Congress. They dare

² Lawrence Downes, "Questions for a Young Immigration-Rights Activist," *New York Times*, April 10, 2013; Fernanda Santos, "After Immigration Arrests, Online Outcry, and Release," *New York Times*, January 11, 2013.

³ Elise Foley, "Erika Andiola, Undocumented Immigrant Activist, Urges ICE to Free Her Detained Family," *Huffington Post*, January 11, 2013, http://www.huffingtonpost.com/2013/01/11/erika-andiola-undocumented-immigrant_n_2456792.html; Stephen Lemons, "DREAM Activist Erika Andiola Says Mom and Brother Taken into Custody by ICE," *Phoenix New Times*, January 11, 2013, http://blogs.phoenixnewtimes.com/bastard/2013/01/dream_activist_erika_andiola_s.php.

⁴ Ruben Navarrette, "A DREAMer's Nightmare," *San Jose Mercury News*, January 15, 2013.

⁵ *Ibid.*

⁶ *Ibid.*

police to arrest them and then act surprised when it happens. They're not realistic, or respectful. They don't ask. They demand."⁷

In criticizing DREAMers for “in-your-face agitation,” “arrogance,” “radicalism,” and the failure to be “respectful,” Navarrette accused Andiola and her cohort of a failure to follow the norms of civility. This chapter will examine the law's stance toward claims of uncivil behavior when these claims are directed toward the alien. Civility can be understood to refer both to the conduct of a citizen and to the borders of civil expression. Political theorists who discuss civility assume as a discursive frame the internal life of a bounded political community, where what is put into question is the civility or incivility of the *citizen*. But what of the *alien*, who lacks the formal status of citizenship? As a noncitizen within the territorial bounds of the polity, the alien is disallowed to take part in the defining political processes that might otherwise channel legitimate political dissent. The alien, unlike the citizen, is not understood as an actor or a robust creator of the political community. How, then, can we understand this relationship between civility and the alien? More particularly, what of the *undocumented alien*, defined as an illegitimate civil subject? Can the undocumented alien's public activity ever be heard within the political boundaries of civility?

Defining Civility

Although civility is commonly reduced merely to niceties of social comportment – “opening doors for women, naughty children misbehaving in public, and suppressing the desire to give others ‘the finger’ in traffic”⁸ – civility in recent decades has also functioned as a *cri de coeur* to address a wide array of serious social problems, including violence, crime, and social protest. One could look, for example, at the collection *Civility and Citizenship*, edited by Edward Banfield, whose book jacket states that:

civility ... and citizenship ... are equally important and essential to maintaining social order. The recent state of social pandemonium

⁷ Ruben Navarrette, “DREAMers Are Pushing Their Luck,” *CNN.com*, December 19, 2012, <http://www.cnn.com/2012/12/19/opinion/navarrette-dreamers>.

⁸ Susan Herbst, *Rude Democracy: Civility and Incivility in American Politics* (Philadelphia, PA: Temple University Press, 2010), 3.

and anarchy in Los Angeles and beyond demonstrates the current relevancy of this argument.⁹

Edward Banfield, along with his student and later colleague, James Q. Wilson, invigorated the movement toward “order maintenance policing” that subsequently underpinned “zero tolerance” policies and “broken windows” theory.¹⁰ For proponents of order maintenance, these norms of civility function to maintain a normative social order and to forestall criminality.

Civility has been put forward not only as the panacea for social ills; its lack has been judged to be responsible for social problems. In the 1990s in the United States the “decline in civility” emerged as an urgent concern.¹¹ Some charged the new civility discourse as a strategic attempt to stifle social dissent. Benjamin DeMott portrayed civility as a scam that seduces, with a vocabulary of “common good, civic trust, communal participation, social capital,” and with mischaracterizing inequity as a problem of tone.¹² Randall Kennedy described the turn to civility, particularly by “liberals and related folk,” as a misplaced inclination, for civility is “deeply at odds with what an invigorated liberalism requires: a willingness to fight loudly” – and even rudely.¹³

In thinking through whether civility is a scam, a misplaced inclination, or a necessary virtue, we must untangle what it means in contemporary U.S. political discourse. To understand civility’s multivalent meaning today requires turning to its history. I tease out from this history five specific dimensions of civility. Even though they overlap in meaning, each concept is also functionally distinct.

The term “civility” can be traced to the Latin term *civilitas*, which is “derived from *civis* (a “citizen”), and therefore [makes] reference to man in

⁹ Edward C. Banfield, ed., *Civility and Citizenship in Liberal Democratic Societies* (Saint Paul, MN: Professors World Peace Academy, 1992).

¹⁰ Bernard E. Harcourt, *Illusion of Order: The False Promise of Broken Windows Policing* (Cambridge, MA: Harvard University Press, 2005), 15.

¹¹ See, for example, Stephen L. Carter, *Civility: Manners, Morals, and the Etiquette of Democracy* (New York: Harper Collins, 1998); Clarence Thomas, “A Return to Civility,” *Tulsa Law Journal* 33 (1997) 7–12.

¹² Benjamin DeMott, “Seduced by Civility: Political Manners and the Crisis of Democratic Values,” *Nation* 263 (1996) 11–19.

¹³ Randall Kennedy, “State of the Debate: The Case Against ‘Civility,’ The American Prospect, Dec. 19, 2001, <http://prospect.org/article/state-debate-case-against-civility/>.

his character as a *citizen*, or member of a state.”¹⁴ The term *civilitas* appeared between the twelfth and fourteenth centuries in northern Italian city-states to designate the legally codified status that constituted the citizen and determined his prerogatives.¹⁵ Much like the Greek concept of *polis* (which gave us *politics*, *policy*, *politeness*, and *police*),¹⁶ *civilitas* defined an individual’s membership in a particular *civitas* (city-state). *Civilitas* described, not the active participation of citizens in the exercise of the sovereignty, but only a passive political membership.¹⁷ I call this conception *civility as citizenship status*.

Over time, a second sense of civility became increasingly important, which related to culture and civilized behavior. Civility came to mean “the state or condition of being civilized”; referred to “culture, refinement”; and indexed “behavior and speech appropriate to civil interaction; politeness, courtesy, consideration.”¹⁸ Here, civility shares ground with its etymological cousin, the city, where one continuously interacts with strangers.¹⁹

Thus, civility began to emerge as the question of appropriate comportment, as examined by sociologists, led by Norbert Elias. In *The Civilizing Process*, Elias famously traced changes in table manners: for example, shifting ideas in Europe from the thirteenth century to the eighteenth about blowing one’s nose (when you blow, turn away so nothing falls on the table; don’t blow your nose into the tablecloth; don’t blow your nose into the same hand you eat with; don’t blow your nose onto your hat or clothes; blow your nose into a handkerchief; don’t make a noise when you blow; don’t stare at what you have blown out; and immediately fold your handkerchief and replace it in your pocket).²⁰ Elias’s work examines these changes in norms in relation to the increasing centralization of power and control of violence

¹⁴ Emanuel Swedenborg, *The Delights of Wisdom Concerning Conjugal Love, after Which Follow the Pleasures of Insanity of Scortatory Love* (1768, reprint: Manchester: R. & W. Dean, 1811), 253.

¹⁵ Paul Magnette: *Citizenship: The History of an Idea* (2005, reprint: London: European Consortium for Political Research Press, 2008), 43–48.

¹⁶ I am indebted to Richard Perry for this point.

¹⁷ Magnette suggests that we might analogize this early notion of “civility” to contemporary “nationality” (*Citizenship*, 48).

¹⁸ “Civility,” *Oxford English Dictionary*, <http://www.oed.com/view/Entry/33581?redirectedFrom=civility#eid> (last visited August 26, 2013; etymology and definitions I and III).

¹⁹ Barbara A. Misztal, *Informality: Social Theory and Contemporary Practice* (London: Routledge, 2000), 74.

²⁰ Norbert Elias, *The Civilizing Process* (1939, reprint: Oxford: Blackwell, 1978).

in the hands of the emergent state. It is within this context that civility norms evolve so as to discourage previously expressed forms of violence and to encourage self-restraint as a means of curtailing aggression among individuals; civility thus emerges as an ongoing process of pacification.²¹ (The knife, for example, was transformed from a weapon to tableware.)

According to Nikolas Rose, the nineteenth century saw European civility take shape as the capacity of the bourgeois-self to exercise restraint on its passions and affections so the self could enter into moral intercourse with others.²² Persons were to be regulated, not by political authorities, but by codes of civility, reason, and orderliness, with conduct civilized through techniques of self-mastery.²³ Civil liberty or freedom thus became inextricably linked to the norm of civility in that persons were “freed” from birth status into the realms of the market and civil society.²⁴ This shift linked the ethical domain of individual conduct to the political domain of liberal policies of governance, inculcating behaviors (punctuality, industry, moderation) appropriate to the new wage-relationship of time-discipline.²⁵ As Rose suggests, this emerging order was also a spatial re-invention; towns were transformed from dangerous and unhygienic aggregations of persons to well-ordered topographies for maintaining morality and public health.²⁶

We can observe here the connection between order maintenance policing and “civility codes” passed in various U.S. cities in the 1990s in order to regiment the so-called quality of life in urban spaces. These codes proscribed specific behaviors, making it a crime to sit or lie on sidewalks or in bus shelters, sleep in public spaces, put one’s possessions on public property for more than a short period of time, drink alcohol in public, engage in public elimination, sell newspapers in public spaces, and pan-handle aggressively.²⁷ As such, they can be understood as a turn backward

²¹ Melanie White, “An Ambivalent Civility,” *Canadian Journal of Sociology* 31 (2006) 445–460.

²² Nikolas Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge: Cambridge University Press, 1999).

²³ Ibid.

²⁴ Ibid.

²⁵ Ross Wolfe, “Civilization,” *Charnel-House*, <http://thecharnelhouse.org/2012/06/03/civilization/#more-4089>. See also E. P. Thompson, “Time, Work-Discipline and Industrial Capitalism,” *Past and Present* 38 (1967): 56–97.

²⁶ Rose, *Powers of Freedom*.

²⁷ Katherine Beckett and Steve Herbert, *Banished: The New Social Control in Urban America* (Oxford: Oxford University Press, 2010), 14.

to the pre-Warren Court era of vagrancy and loitering laws that enforced the moral and racial segmentation of public space. These civility codes were aimed at the homeless, who as “citizens without shelter,” lack the private space in which to “appropriately” regulate the self and whose appearance in public space signifies disorder.²⁸ Here, “civility” – historically, a term used to evaluate interactions in the public square – is now used in the service of the constriction of public space, ceded to commercial interaction. This notion of civility most clearly re-enacts citizenship in the mode of “consumer citizenship,” as suggested by former president George W. Bush when he asked the U.S. citizenry after 9/11 to exercise their patriotic duty by going shopping.²⁹

This conception of civility foregrounds the regulation of bodily comportment, courtesy, and self-control in the service of social order. Thus, this notion of civility can be understood to correlate with restraint, individual responsibility, and self-regulation – all qualities Ruben Navarrette criticizes DREAMers as lacking.³⁰ I am calling this second concept *civility as self-control*.

A third conception of civility, important in political theory, casts civility in relation to civic virtue (the qualities of good citizenship) and to a deliberative political process.³¹ Political theorists think about civility in relation to our treatment of strangers, our treatment of others within a political community. What is in question is respect, mutual recognition, and tolerance, engendered via communication, discourse, and deliberation.³² Some scholars emphasize the idea of a robust and heated discussion; whether

²⁸ Leonard C. Feldman, *Citizens without Shelter: Homelessness, Democracy and Political Exclusion* (Ithaca, NY: Cornell University Press, 2004).

²⁹ Here civility bears a less rosy relationship to the market than appears in Jeremy Waldron’s “Civility and Formality,” Chapter 2 in this volume, where he posits chilly market relations as a model for how we think about civility.

³⁰ Navarrette unfavorably characterizes DREAMers to their parents (who he says have “given more, worked harder and made greater sacrifices”) and writes: “Gee, kids, can we get you anything else? Maybe free massages the next time you stage a sit-in? . . . [I]n a country whose motto has gone from “E Pluribus Unum” to “Gimme, gimme. Where’s mine?” [DREAMers are] not about to be left behind.” Navarrette, “DREAMers Are Pushing Their Luck.”

³¹ For contrasting views on the relationship of civic virtue and civility, see Joan McGregor, “Civility, Civic Virtue, and Citizenship,” in *Civility and Its Discontents: Essays on Civic Virtue, Toleration, and Cultural Fragmentation*, ed. Christine T. Sistare (Lawrence: University of Kansas Press, 2004), 29–42 and Linda C. McClain and James E. Fleming, “Some Questions for Civil Society-Revivalists,” *Chicago-Kent Law Review* 75 (2000) 301–354.

³² See, for example, Herbst, *Rude Democracy*, 19.

one believes that discussion should be well-behaved and rational (as in Habermas's theory of "communicative action") or should make room for rude disagreement, depends on the underlying conception of the public sphere.³³ In either case, such a vision of civility supposes an active and participatory citizenry who are communicating and deliberating, rather than a passive and apathetic public. The focus here is on process, not substantive outcome. As Teresa Bejan and Bryan Garsten similarly put it in this volume, the focus is on manners, not substance.³⁴

It is easy to criticize this concept of civility as containing an inherent contradiction. Its ideal both requires toleration of difference – to be civil is to tolerate others and their difference – and suggests the limits of such toleration, in that offensive difference is cast as uncivil.³⁵ As Wendy Brown tells us, there are similar contradictions inherent to the concept of tolerance.³⁶ Tolerance suggests there is a dominant majority extending its beneficence to a minority community – I choose to tolerate you, or I choose to tolerate what you do (what Herbert Marcuse famously termed "repressive tolerance"³⁷). This tolerance poses both as a universal value and as an impartial practice, concealing the fact that tolerance is always conferred by the dominant, eliding how the recipient of tolerance is placed outside the universal and marked as different, thereby cleansing the tolerant entity of all intolerance.³⁸ Similarly, civility offers itself as a universal value and as an impartial practice, while masking how this self-declared civility aligns itself with the powerful and casts the charge of incivility on the powerless – the powerless whom we

³³ Zizi Papacharissi, "Democracy Online: Civility, Politeness, and the Democratic Potential of Online Political Discussion Groups," *New Media & Society* 6 (2004): 259, 265–6. As Papacharissi describes, Nancy Fraser characterizes Jürgen Habermas's vision of a public sphere where well-behaved and rational actors engage in logical and reasonable discussion as reflecting a public sphere where privileged men practice their skills of governance. See Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy," in *Habermas and the Public Sphere*, ed. C. Calhoun, 109–142 (Cambridge, MA: MIT Press, 1992).

³⁴ Teresa M. Bejan and Bryan Garsten, "The Difficult Work of Liberal Civility," Chapter 1 in this volume.

³⁵ Bejan and Garsten similarly note that civilitarians call those who marginalize and silence other voices "uncivil."

³⁶ Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton, NJ: Princeton University Press, 2006).

³⁷ Herbert Marcuse, "Repressive Tolerance," in *A Critique of Pure Tolerance*, ed. Robert Paul Wolff, Barrington Moore, Jr., and Herbert Marcuse (Boston: Beacon, 1969), 95–137.

³⁸ Brown, *Regulating Aversion*, 7. As an example, we could think here of how the tolerant "mainstream" refuses to tolerate the so-called illiberal minority.

can understand as the disenfranchised making a disruptive demand for inclusion in the public realm.³⁹

We could return here to the words of Ruben Navarrette, charging Erika Andiola with uncivil behavior. Despite the contradictions inherent to this notion of civility, this characterization of civility as the rules of discourse that best facilitate a republican political project, is the focal point of political theory literature on the subject. I call this concept *civility as civic virtue*.

A fourth idea of civility, which bears an ironic relationship to the idea that civility stands for respect and tolerance, links civility's invocation of "being civilized" and "appropriate behavior" to racialization and colonialism. In this sense, civility and its lack are used to police the line between the civilized and the barbaric, the settler and the savage, the normative and the deviant. Civility long functioned as the ideology of the civilizing mission – *la mission civilisatrice* – differentiating not only identities within a society but also societies from one another in a hierarchy of civilizations. As Daniel Coleman suggests, this fourth concept of civility combines the temporal notion of civilization as progress (central to both modernity and the colonial mission) with the moral-ethical concept of a peaceful order fundamental to the modern nation-state.⁴⁰ Thus, cultivated and polite behavior became essential to the production of the modern individual citizen, requiring the disciplining of those subjects considered unfit.⁴¹

In this version of civility, civility distinguishes the civil from the uncivil and gives civil subjects a mandate to manage the life circumstances of those perceived as uncivil.⁴² The inspiration for some of this

³⁹ Linda Zerilli powerfully makes this argument in Chapter 4 of this volume. Melanie White makes a related but different point, that civility as civic virtue contains within it a fundamental ambivalence in that it serves as a technique of pacification, requiring all citizens to attempt to cultivate respect, while at the same time operating as a technique of distinction, expecting citizens to exercise practices that distinguish between civil forms of conduct (listening, etc.) and other forms of conduct (silencing, etc.) This ambivalence enables civility to reflect the organization of power in a society. See White, "Ambivalent Civility," 456–457.

⁴⁰ Daniel Coleman, *White Civility: The Literary Project of English Canada* (Toronto: University of Toronto Press, 2006).

⁴¹ *Ibid.*

⁴² *Ibid.* Coleman argues that English Canadian whiteness has been modeled on a specific form of British civility that is a uniquely settler-colonial project. For other examples of scholars who deploy civility in this sense, see Anindyo Roy, *Civility and Empire: Literature and Culture in British India, 1822–1922* (Abingdon, Oxon: Routledge, 2005): 1 (civility served as an "implicit component in the British colonial project," powerful for its subtle imposition of control and effectuation of exclusion by establishing a normative code of imperial Britishness); Thy Phu, *Picturing Model Citizens: Civility in Asian American Visual Culture* (Philadelphia: Temple

scholarship is Homi Bhabha's invocation of what he calls "sly civility," and his depiction of civility expressed in relation to empire, which actually presumes not democratic representation but despotism as, in John Stuart Mill's words, "the best mode of government for training the people in what is specifically wanting to render them capable of higher civilization."⁴³ (One is reminded here of Mahatma Gandhi's response to the query "What do you think of Western civilization?": "I think it would be a good idea.")

Thus, this fourth concept of civility casts civility not as a neutral or positive political value but as an ideological tool of hierarchical ordering. That civility has enjoyed this valence might make us query how civility might function, as Austin Sarat suggests in this volume, similarly to due process: as an effective constraint on the powerful to encourage us to listen to the marginalized. In these contexts we see civility masquerading as universal value; we could call this conception *civility as civilizing discourse*.

Finally, we can see that civility operates as a discursive tactic, selectively invoked for purposes of silencing speech and repressing activity considered rude, disruptive, intolerable, and intolerant. While Susan Herbst suggests that this enables us to see civility as a tool in the arsenal of politics, allowing us to escape an unproductive debate as to whether civility is "good" or "bad," it also seems true that, as Bernard Harcourt argues, the "ability to brand a particular discourse as uncivil is itself a political accomplishment that reflects a certain position of privilege."⁴⁴ Here, as Harcourt writes, those who call for civility have the *luxury* of civility in that they already represent more dominant or mainstream political voices. In other words, the call for civility serves those who already possess political power, those at greater ease to be civil or to "perform civility," while excluding those considered uncivil.⁴⁵

University Press, 2012) (civility is central to the formation of Asian America, lying at the heart of the model minority figure associating quiescent conduct with discipline, chastising the unruly and demanding radical); and Joy James, "Campaigns against 'Blackness': Criminality, Incivility, and Election to Executive Office," *Critical Sociology* 36 (2009) 25–44 (criminality and incivility are constructed as forms of "blackness" designated for discipline).

⁴³ Homi K. Bhabha, *The Location of Culture* (New York: Routledge, 1994): 96. Bhabha is citing to John Stuart Mill, "On Liberty," in *Utilitarianism, Liberty, and Representative Government*, H.B. Acton (ed.) (London: J.M. Dent & Sons, 1972): 382–383.

⁴⁴ Herbst, *Rude Democracy*, 6–9; Bernard F. Harcourt, "The Politics of Incivility," *Arizona Law Review* 54 (2012) 345–373, 348.

⁴⁵ Harcourt, "Politics of Incivility."

Civility and Citizenship

If civility, then, can variously imbricate citizenship status, self-control, civic virtue, and a civilizing mission, and can function as a discursive tactic, what might these facts mean for the alien, the stranger, the noncitizen? Before examining the relationship between citizenship and its contrary, the alien, we must also think about what is meant by the concept of citizenship, which itself implicates several distinct discourses, some conceptually related to different conceptions of civility. Linda Bosniak's untangling of citizenship discourses provides us with a useful template,⁴⁶ although, as I discuss, its exclusive focus on citizenship in relation to the state should be supplemented by considering citizenship in relation to the market, to civil society, and even to the private sphere.⁴⁷

The first vision of citizenship is *citizenship as formal legal status*. This references formal juridical membership in a defined political community. The notion of *citizenship as formal legal status* is analogous to what I have called *civility as citizenship status* in considering political membership against the figure who lacks it: the status noncitizen.

The second idea of citizenship is *citizenship as rights*, which signifies the rights necessary to achieve full and equal membership in society. As famously described by T. H. Marshall, this approach historically tracks efforts to gain the enjoyment of rights in Western capitalist democracies.⁴⁸ Marshall suggested that the rights that citizenship protects have followed a particular order in these societies: civil, then political, and finally, social rights.⁴⁹

In the United States, this vision of citizenship as rights is premised on a liberal notion of rights, whereby every individual is presumptively entitled to

⁴⁶ Linda Bosniak, "Citizenship Denationalized," *Indiana Journal of Global Legal Studies* 7 (2000) 447–509.

⁴⁷ See Margaret R. Somers, *Genealogies of Citizenship: Markets, Statelessness, and the Right to Have Rights* (Cambridge: Cambridge University Press, 2008). See also Amanda Root, *Market Citizenship: Experiments in Democracy and Globalization* (London: Sage, 2007) for a description of "market citizenship." We could also think of the terms "fiscal citizenship," "neoliberal citizenship," and "consumer citizenship."

⁴⁸ T. H. Marshall, *Class, Citizenship, and Social Development* (Garden City, NY: Doubleday, 1964).

⁴⁹ *Ibid.* For an explanation of why social citizenship has such limited salience in the United States, see Nancy Fraser and Linda Gordon, "Contract vs. Charity: Why Is There No Social Citizenship in the United States?" *Socialist Review* 22 (1992) 45–68.

be treated by the state as a respected, responsible, and participating member. We can understand this as an aspirational vision as opposed to a realized one. We can relate the idea of *citizenship as rights* to my proposal of *civility as self-control* in that various groups throughout history have only been considered recipients of rights when they are considered capable of rational market-based interaction and have internalized modes of self-regulation.⁵⁰ Relatedly, *civility as a civilizing discourse* only extended citizenship rights to those recognized as citizens, rather than as subjects of state power.

The third notion is *citizenship as political activity*, positing political engagement in the community as the basis for citizenship, as exemplified both by republican theories that played a key role in the founding of American democracy, as well as by a recent renaissance of civic republicanism. Against monarchism and feudalism, classic civil republicanism maintained that the protection of the common good was the goal of society; that citizens had to be virtuous, through subordinating their private ends to this public good; that to be virtuous, citizens had to exercise their own political will and be active in political life; and that they were entitled to equality under a representative, democratic system of laws.

At the founding of the republic, ownership of property was considered a fundamental prerequisite to the making of the good citizen, tying the citizen's fate to that of the larger polity, giving the citizen a stake in the controversies of the day but also providing a shield against corruption. This led to all colonies but one mandating property ownership as a qualification to vote, since those without property were considered to "have no wills of their own."⁵¹ This underscores the relationship of citizenship to the market, as structuring access to citizenship in the state.⁵² One could also think here of

⁵⁰ See Fraser and Gordon, "Contract vs. Charity"; Ann Laura Stoler, ed., *Haunted by Empire: Geographies of Intimacy in North American History* (Durham, NC: Duke University Press, 2006); Katherine Franke, "Becoming a Citizen: Reconstruction Era Regulation of African American Marriages," *Yale Journal of Law and the Humanities* 11 (1999) 251–309.

⁵¹ Robert J. Steinfeld, "Property and Suffrage in the Early American Republic," *Stanford Law Review* 41 (1989) 335–376. For a return of the idea of property qualifications for voting, see Robert C. Ellickson, "Cities and Homeowners Associations," *University of Pennsylvania Law Review* 130 (1982) 1519–1580; Frank Michelman, "Universal Resident Suffrage: A Liberal Defense," *University of Pennsylvania Law Review* 130 (1982) 1581–1588.

⁵² See Colin Crouch, Klaus Eder, and Damian Tambini, eds., *Citizenship, Markets, and the State* (New York: Oxford University Press, 2001), 8: "In the historical rise of citizenship rights against arbitrary aristocratic authority, the freedom afforded by property and markets played a major role in the emergence of citizenship. The *Bürger* is both a citizen and a bourgeois."

the link between the term “property” and of civility’s synonym “propriety,” reminding us that private policing via nuisance regulation functions like public order maintenance policing to enforce codes of civility.⁵³

This then is the citizen conception of robust participation, of the citizen who acts. Yet here we must make an additional move, from the “citizen who acts” to the idea of “acts of citizenship.” As Engin Isin and Greg Nielsen tell us, making this shift stretches us beyond the dominant liberal paradigm of status, rights, obligation, and order considered only in relation to actors who are already produced as citizens. Shifting from the “citizen who acts” to “acts of citizenship” redirects the focus from doer to deed; this allows us to examine acts whereby subjects constitute themselves as those to whom the right to have rights is due, allowing citizenship to be an incipient project.⁵⁴ We could think of this as citizenship as a verb – the practice of citizenship, the performance of citizenship, or citizenship as engagement. My *civility as civic virtue* is clearly related to *citizenship as political activity*.

The final discourse of citizenship is *citizenship as identity*, or citizenship as solidarity, which refers to people’s collective experience of themselves, in terms of their belonging to a particular community as expressed on the terrain of culture. This version of citizenship concerns the citizen’s affective ties of identification and solidarity. I intend my *civility as civilizing discourse* to correspond with Bosniak’s *citizenship as identity*, as both of these conceptualizations focus on questions of who belongs as a member, as a citizen, or as presumptively engaged in civility or not, although Bosniak’s focus is on the citizen who imagines fellow members to be included in a network of kinship or membership.⁵⁵ In thinking about the identitarian notions of citizenship – or in thinking of *civility as civilizing* – I find it essential to focus on those who are excluded from membership or are thrust outside the community of citizenship or civility. My emphasis here is how those who clearly enjoy citizenship perceive those excluded. This would include those who are considered to be insufficiently self-regulating in the context of civil society or the free market because of their identities. Considered to lack both *civility as self-control* and *citizenship as identity*, they are seen as the

⁵³ See D. Asher Ghertner, “Nuisance Talk and the Propriety of Property: Middle Class Discourses of a Slum-Free Delhi,” *Antipode* 44 (2012) 1161–1187.

⁵⁴ Engin F. Isin and Greg M. Nielsen, “Introduction,” in *Acts of Citizenship*, ed. Engin F. Isin and Greg M. Nielsen (London: Zed Books, 2008), 1–12, 2.

⁵⁵ See Leti Volpp, “The Citizen and the Terrorist,” *UCLA Law Review* 49 (2002) 1575–1600.

antithesis of the self-reliant, independent *homo economicus* underlying the ideal model of the worthy citizen.⁵⁶ They inevitably fail the test of worthiness as “human capital.”⁵⁷

In examining these citizenship discourses, it seems that traveling from the first discourse to the fourth, the citizen-subject has an increasingly agentic self. One might differentiate the discourses through understanding only the first two, citizenship as formal legal status and citizenship as rights, as sites where the citizen functions as the passive recipient of rights. But one could argue that to be a naturalized citizen requires the action of the consenting subject.⁵⁸ One could also see the activity of the undocumented in pressing for legalization (along with his or her subsequent citizenship status) as an “act of citizenship.” One could also argue that citizenship as rights only became realizable for certain citizens after their successful pursuit of those rights. Nonetheless, conventional discussions of citizenship certainly focus less on the citizen’s own activity in self-constituting citizenship as formal legal status and citizenship as rights than in descriptions of the robust citizenship of civic participation.

This third discourse, citizenship as political activity, requires the citizen to function as an active subject, and the fourth discourse, citizenship as identity, invokes the citizen’s sense of subjectivity. In my past writing, I have suggested that racialization cuts against the promise of each of these discourses, with formal *de jure* racial restrictions on citizenship as formal legal status and citizenship as rights a strong current of American historical practice. Forms of discrimination more elusive and more difficult to identify still haunt the modes of citizenship that require the citizen to function as an active subject or that concern the citizen’s sense of subjectivity. Even when particular groups are perceived as legitimate recipients of formal rights,

⁵⁶ This could include the homeless person of Feldman’s *Citizens without Shelter*, or the refugee; see Aihwa Ong, *Buddha Is Hiding: Refugees, Citizenship, the New America* (Berkeley: University of California Press, 2003).

⁵⁷ Gary S. Becker, *Human Capital: A Theoretical and Empirical Analysis, with Special Reference to Education* (1964, reprint: Chicago: University of Chicago Press, 1993).

⁵⁸ This is why it is more than a bit ironic that Peter Schuck and Rogers Smith, in seeking to revise American forms of citizenship acquisition from an ascriptive model to a consent-based one, do not choose to discard both ascriptive forms of acquisition by birth (*jus soli* and *jus sanguinis*) in favor of citizenship through naturalization. They would retain *jus sanguinis* (but what could be more accidental than the “choice” of your parents?) as well as *jus soli* for children of U.S. citizens and legal permanent residents. See Peter H. Schuck and Rogers M. Smith, *Citizenship without Consent: Illegal Aliens in the American Polity* (New Haven, CT: Yale University Press, 1985).

their political activity can cause discomfort, and unsettle the mainstream “e pluribus unum” understanding, when their identity is not considered constitutive of the American nation.⁵⁹

Citizenship and the Alien

We can now come back to the discourses of citizenship in relation to the alien. Most political theorists who discuss citizenship focus on its universalist commitments and its inclusionary aspect – “citizenship in this internal sense is understood to stand for a universalist ethic – of the inclusion and incorporation of ‘everyone.’”⁶⁰ In so doing, these theorists rely on the presumption of a bounded political community. But what if we focus on how the borders of the political community are constituted?⁶¹ This requires our consideration of the place of the alien in discussions of citizenship.

Aliens are denied the first type of citizenship, citizenship as formal legal status; an alien is defined as a person who is not a citizen.⁶² But the fact that citizenship is divisible into different discourses helps us see that noncitizens – who are defined through their lack of the formal status of citizenship – may yet be understood to enjoy certain other forms of citizenship. What of citizenship as rights? Aliens do enjoy some rights in the U.S. context, given a constitutional framework that protects *persons*. The

⁵⁹ I am thinking here of Asian Americans. See Leti Volpp, “Obnoxious to Their Very Nature: Asian Americans and Constitutional Citizenship,” *Citizenship Studies* 5 (2001) 57–72. There is also discomfort associated with the idea that, say, Muslim Americans can represent the United States citizenry as a matter of identity (witness the persistent attempt to “discredit” President Obama by figuring him as Muslim rather than Christian).

⁶⁰ Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton, NJ: Princeton University Press, 2006), 2.

⁶¹ *Ibid.* For important work examining how political communities are created in the first instance, see Jacqueline Stevens, *States without Nations: Citizenship for Mortals* (New York: Columbia University Press, 2010); Jacqueline Stevens, *Reproducing the State* (Princeton, NJ: Princeton University Press, 1999); Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Cambridge, MA: Harvard University Press, 2009); Bosniak, *Citizen and the Alien*. For a symposium examining Bosniak’s and Shachar’s books, see Leti Volpp, ed., “Denaturalizing Citizenship: A Symposium on Linda Bosniak’s *The Citizen and the Alien* and Ayelet Shachar’s *The Birthright Lottery*,” *Issues in Legal Scholarship* 9 (2011).

⁶² Aliens encompass a number of different statuses, primary among them legal permanent residents who have the ability to permanently reside in the United States, so long as they do not do something that renders them removable; nonimmigrants, who are in the United States for a temporary period of time and for a specific purpose (for example, as a tourist, a worker, a student); and undocumented aliens.

rights noncitizens can enjoy in the United States is governed by the legacy of a 1886 Supreme Court case, *Yick Wo v. Hopkins*, in which the Supreme Court held that all persons within the territorial jurisdiction of the United States – including aliens – were “persons” for the purpose of protection under the Fourteenth Amendment. This has meant that in many realms, aliens are entitled to be treated as any other person, regardless of their citizenship status. Thus, aliens, including undocumented aliens, enjoy the protections of the Fourth, Fifth, Sixth, and Eighth Amendments of the Constitution in criminal proceedings. They enjoy expressive and associational rights (with a particular exception).⁶³ They have the right to make contracts, own property, marry, and attend public school, and are accorded protection under most protective labor and employment legislation.⁶⁴

Thus, personhood – and not citizenship – may instantiate the “right to have [some] rights.”⁶⁵ The fact that aliens enjoy this kind of “territorial personhood” is considered to reflect the idea that they can enjoy the “soft inside” of the nation-state (somewhat) insulated from the “hard outside” of border regulation.⁶⁶ Of course, the hard outside always follows the alien, in terms of his or her continued vulnerability to deportation. We might thus argue, paraphrasing Bosniak, that aliens enjoy many substantive citizenship rights even in the absence of formal citizenship status, but the scope

⁶³ Note here, the exception that the Supreme Court in *Reno v. American-Arab Anti-Discrimination Committee* (1999) held that “an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation.” A nearby footnote states: “Our holding generally deprives deportable aliens of the defense of selective prosecution” (suggesting that this would also be the case for legal permanent residents). This is not a blanket bar on all First Amendment claims in removal hearings but indicates that a First Amendment claim underlying a claim of selective prosecution (as in this case, where the noncitizens argued that they were being selectively targeted because of their membership in the Popular Front for the Liberation of Palestine, which violated their First Amendment rights to free speech and free association) would not succeed.

⁶⁴ Linda Bosniak, “Membership, Equality, and the Difference That Alienage Makes,” *New York University Law Review* 69 (1994) 1047–1149. An exception here is backpay under the National Labor Relations Act. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

⁶⁵ See Bosniak, *Citizen and the Alien*, 117. This is obviously a reference to Hannah Arendt, *The Origins of Totalitarianism* (1951, reprint: New York, Harcourt, Brace Jovanovich, 1968). The idea of citizenship as the “right to have rights” subsequently appears in Supreme Court cases addressing the involuntary expatriation of U.S. citizens, see for example, *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Chief Justice Warren, dissenting).

⁶⁶ Bosniak, *Citizen and the Alien*.

of rights they enjoy is simultaneously constrained by virtue of citizenship's commitment to national exclusivity and closure.⁶⁷

Yet the rights aliens enjoy as persons do not generally extend to political rights, which are almost exclusively reserved for U.S. citizens. As Daniel Kanstroom suggests, polity participation is "prototypically accomplished by voting, the practice most directly linked to political legitimacy in a democracy."⁶⁸ Voting is almost "universally denied to non-citizens in the United States" and, in fact, unlawful voting constitutes both a ground for immigration removal of the noncitizen as well as the possibility of criminal charges. The constitutional right to run for federal elective offices and the right not to be discriminatorily denied the vote are also expressly limited to citizens.⁶⁹ Employment considered to concern "public functions" (such as the occupations of schoolteacher, police officer, probation officer) may also be legally restricted to citizens.

Historically, the franchise was not always so restricted. Alien suffrage, which began in the late 1700s and ended in the 1920s, was open to legal residents who had declared their intent to naturalize. At that point in time, the ability to naturalize was racially restricted (as of 1790, to "free white persons," and then, as of 1870, additionally to "persons of African nativity or descent"). This meant that the franchise was similarly racially qualified. The franchise was also restricted to men – the case *Minor v. Happersett* (1875) explained that the citizenship of (white) women did not mean that they had the right to vote, serving as another illustration of the partible nature of citizenship. Here, citizenship signifying membership in the national polity was not coextensive with all rights of citizenship.⁷⁰ That the franchise was open to European immigrant men who had declared their intent to naturalize reflected the fact that the polity saw these men as "Americans in waiting," eligible to participate in the project of settlement of the Western frontier through receiving homesteader land grants, and capable of functioning as full members of the American

⁶⁷ *Ibid.*, 100.

⁶⁸ Daniel Kanstroom, "'Alien' Litigation as Polity-Participation: The Positive Power of a 'Voteless class of Litigants,'" *William & Mary Bill of Rights Journal* 21 (2012): 399–461, 404.

⁶⁹ *Ibid.* at 405–406.

⁷⁰ On the complicated history of the intersection of racial and gendered bars to the formal status of citizenship, see Leti Volpp, "Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage," *UCLA Law Review* 53 (2005) 405–483.

polity. This franchise was additionally a strategy to encourage European immigration.⁷¹

There have been various recent efforts, with mixed success, to expand the suffrage to noncitizens at the local level in the United States.⁷² Noncitizens can vote in Chicago school board elections (as they could in New York City from 1970 to 2003) and in several municipalities in Maryland.⁷³ We could note here the question of local versus national membership and whether aliens' lack of national citizenship should preclude participation as a local citizen. (The recent development of city identity cards by various municipalities suggests disagreement with that view.) We could also acknowledge the normative question of whether noncitizens *should* have the right to vote; as some have suggested, the presence of large numbers of noncitizens who cannot participate in governance raises questions of democratic legitimacy.

But political participation is not limited to voting. One could also think about the broad categories of protest and public claims making, which could encompass particular activities such as writing to a government official, signing a petition for a political cause, volunteering for a political candidate, donating money to a campaign or an organization, attending a protest demonstration, participation in voter registration, encouraging others to take political action, and filing litigation.⁷⁴ If we view these broad categories of activity as, in addition to voting, constituting the practice of citizenship, then the participation of noncitizens in these activities suggests

⁷¹ Jamin R. Raskin, "Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage," *University of Pennsylvania Law Review* 141 (1993) 1391–1470.

⁷² For background on the failed attempt to allow noncitizen parents to vote in local school elections, see Tara Kini, "Sharing the Vote: Noncitizen Voting Rights in Local School Board Elections," *California Law Review* 93 (2005): 271–321.

⁷³ Ron Hayduk, *Democracy for All: Restoring Immigrant Voting Rights in the United States* (New York: Routledge, 2006).

⁷⁴ On immigrant political activity outside formal political participation, see Dina Okamoto and Kim Ebert, "Beyond the Ballot: Immigrant Collective Action in Gateways and New Destinations in the United States," *Social Problems* 57 (2010) 529–558; Kim Ebert and Dina G. Okamoto, "Social Citizenship, Integration and Collective Action: Immigrant Civic Engagement in the United States," *Social Forces* 91 (2013) 1267–1292 (describing all forms but participation in voter registration and litigation); Kathy Abrams, "Performative Citizenship and Political Claims-Making in Arizona's Immigrant Justice Movement," paper presented at the Law and Society Association Annual Meeting, Boston, MA, May 2013 (describing the participation of undocumented immigrants in voter registration and get out the vote efforts); Kanstroom, "Alien' Litigation" (on litigation).

that citizenship as political activity does not require citizenship as formal legal status. In this sense, these “acts of citizenship” are not the product of citizenship but actually may be understood to produce citizenship.⁷⁵

Clearly, the political activity of aliens seems both enabled (these “broad categories”) and constrained (the illegality of voting). Given this situation of ambivalence, we might ask whether noncitizens’ political activity is thus channeled toward more confrontational directions (such as protest) and away from formal legal processes (voting) – a channeling that renders the political activity of noncitizens more likely to be experienced as uncivil. We might also ask whether the political activity of noncitizens, even when engaged in what would be normally considered formal and appropriate legal processes for expressing and influencing political opinion (e.g., campaign donation), is *perceived* as uncivil because there is an implicit contradiction between the activity and the identity of the actor. Here we might think of Asian American campaign finance scandals of the 1990s and the perception of the inappropriateness of “foreign” influence on American elections.⁷⁶ This history might suggest that when an activity that, when engaged in by a citizen, would be perceived as a positive display of robust citizenship is experienced as inappropriate, discourteous, and wrong when engaged in by a noncitizen, it is because the identity of the actor is believed to be misaligned with the act.⁷⁷

This brings us to the identitarian dimension of citizenship. It is often taken as given that the alien stands outside the bonds of kinship and solidarity that construct the U.S. nation. The imagined community of nationhood has a universalist and inclusionary dimension, the collective cohering of “we the people.” Yet this is also taken to be a necessarily bounded community, constructed through the exclusion of those who are considered outside its edges. The alien is outside those edges, even when

⁷⁵ Peter Nyers, “No One Is Illegal between City and Nation,” in Engin F. Isin and Greg M. Nielsen, eds., *Acts of Citizenship*, 160–181, 163 (“acts of citizenship, therefore, produce citizens and their others”).

⁷⁶ See Volpp, “Obnoxious to Their Very Nature.”

⁷⁷ One could think here of the hostility directed toward Japanese farmers on the West Coast of the United States, which precipitated the passage of Alien Land Laws, when the Japanese were in fact the “yeoman farmers” lauded by Thomas Jefferson as the ideal citizen. The Japanese farmers, of course, were immigrants incapable of the formal status of citizen as citizens ineligible to naturalize under the racially restrictive laws. See Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton, NJ: Princeton University Press, 2004).

he or she lives inside the United States. The citizen and the alien are in fact oppositional terms; placing them together evokes a dissonance, an inappropriateness. That aliens are not considered citizens as a matter of identity is evident in the observation that there are persons whose experience can be labeled “alien citizenship.” These are persons who enjoy the formal status of citizenship but lack citizenship as a matter of identity. It is alien citizenship that arguably enabled the incarceration of some 80,000 U.S. citizens of Japanese ancestry in internment camps for the duration of the war.⁷⁸

Today, the most sharply oppositional relationship to the citizen seems borne by the so-called illegal alien, whose very territorial presence is considered a violation of the law, a law legislated by the citizenry, “we the people.”⁷⁹ The citizen fancies himself the property owner of the U.S. nation-state, in which the illegal alien is trespassing; the offense of the illegality is thus experienced as a personal affront to the citizen via a conflation of home and homeland (“You are trespassing on my property”). The affront is also experienced as personal because the presence of the illegal alien is experienced as a diminution of the worth of citizenship, in a kind of zero-sum equation.

The illegal alien is viewed as having committed an original sin that can only be expiated through “self-deportation,” facilitated by state-level measures such as Arizona’s SB 1070 or Alabama’s HB 56, designed to create “attrition through enforcement.” In the American imagination, this original sin is not just illegal presence; it also concerns the nature of the illegal alien’s first contact with the United States. This is conceptualized as the trespass, an unlawful entry, as the illegal alien is conflated with the border crosser. This perception remains, regardless of statistics that indicate that perhaps 45 percent of persons who are undocumented are in fact visa overstayers, in other words, noncitizens who entered lawfully on temporary visas but then never left or otherwise violated the terms of their

⁷⁸ Ngai, *Impossible Subjects*. In the exclusion order, the U.S. government in instructing all persons of Japanese ancestry to report, chose to identify the relevant population as both “aliens and nonaliens,” suggesting the extreme reluctance to acknowledge a citizenship that was about to be nullified through the experience of internment. Internment was fueled by the fact that the Asian was the quintessential alien, excluded from immigration (*ibid.*).

⁷⁹ On the construction of the “illegal alien,” see Nicholas P. De Genova, “Migrant ‘Illegality’ and Deportability in Everyday Life,” *Annual Review of Anthropology* 31 (2002): 419–447; Ngai, *Impossible Subjects*.

visas (e.g., working while on a tourist visa).⁸⁰ Correlating with the presumption that the illegal alien is a border crosser is the notion that the illegal alien is racialized as Mexican, in a hierarchical position of inferiority to the American citizen.⁸¹

Yet is it possible for undocumented immigrants to be considered American – as DREAMers have asserted – in other words, for undocumented immigrants to enjoy citizenship as identity in the eyes of their fellow citizens? Because of the guarantee of *Plyler v. Doe* (1982) allowing access to K–12 education regardless of immigration status, undocumented children are “full members of school society,” allowing them to form a robust attachment to the United States and a perception of themselves as Americans.⁸² But is that perception shared by U.S. citizens? To the extent that it is, can that citizenship as identity, correlated with undocumented youth’s performance of citizenship, help constitute the conditions for their receipt of citizenship as formal legal status through a legalization program? Or is this considered too strange a brew, a confusion among citizenships, which renders the attempt of the noncitizen to act like a citizen, when he or she is not one, uncivil?

Civility and the Alien

Having now addressed conceptions of civility, the relation of civility to citizenship, and the situation of the alien in relation to citizenship, we can return to the questions with which we began. What, then, might be the relationship between civility and the alien? In particular, what of the

⁸⁰ See Pew Hispanic Center, *Modes of Entry for the Unauthorized Migrant Population* (May 2006), <http://pewhispanic.org/files/factsheets/19.pdf>. Visa overstayers emerged as a sudden population of concern after September 11.

⁸¹ For a history of how this racialization came to be, see Leti Volpp, “Impossible Subjects: Illegal Aliens and Alien Citizens” (reviewing Mae Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America*), *Michigan Law Review* 103 (2005): 1595.

⁸² Hinda Seif, “Unapologetic and Unafraid: Immigrant Youth Come Out from the Shadows,” *New Directions for Child and Adolescent Development* (2011): 59–75, 66. The turbulent transition from the belonging undocumented children can experience as K-12 students to their lives in adult roles that require legal status is well described in Roberto G. Gonzales, “Learning to be Illegal: Undocumented Youth and Shifting Legal Contexts in the Transition to Adulthood,” *American Sociological Review* 76 (2011) 602–619. See also Leisy Janet Abrego, “‘I Can’t Go to College Because I Don’t Have Papers’: Incorporation Patterns of Latino Undocumented Youth,” *Latino Studies* 4 (2006) 212–231.

undocumented alien? Can the undocumented alien's political activity be considered within the bounds of civility? To explore these questions, let us turn to the political activity of immigrants over the past several years as the backdrop to a particular case, that of the "DREAM 9."

In 2006, hundreds of thousands of immigrants and their allies protested through demonstrations against proposed federal legislation that would have criminalized unlawful presence, making life in the United States without valid legal documentation a crime rather than the civil offense it currently is.⁸³ The bill also would have criminalized anyone who assisted undocumented immigrants. More than 250 massive marches were held, culminating in simultaneous marches on May 1 that drew an estimated 3.5 to 5 million people, making these, in the eyes of some observers, the most significant events of political activism in the United States since the 1960s.⁸⁴ As noted by Cristina Beltrán, while supporters saw the demonstrations as an attempt to claim and express membership ("today we march, tomorrow we vote"), anti-immigrant forces saw the marches as "the actions of an illegitimate mob shamelessly demanding rights and benefits that were not theirs to have."⁸⁵

The protests were considered remarkable in their focus on and animation by people without citizenship in the political system they challenged.⁸⁶ And not only were these people without citizenship; the protests concerned undocumented immigrants, who are "viewed as situated not only outside the nation-state, but outside of law entirely."⁸⁷ Yet these noncitizens made themselves visible through publicly articulating particular claims. Some scholars assess the most successful framing of the movement as centered on "American values" of family and work: "immigrants are members

⁸³ Currently, a few immigration offenses, such as illegal entry, reentry, and the manufacture of false documents, are criminal offenses; all other violations of the immigration law, including unlawful presence, are considered civil offenses.

⁸⁴ Amalia Pallares and Nilda Flores-Gonzalez, eds., *¡Marcha! Latino Chicago and the Immigrants Rights Movement* (Urbana: University of Illinois Press, 2010); Kim Voss and Irene Bloemraad, eds., *Rallying for Immigrant Rights: The Fight for Inclusion in 21st Century America* (Berkeley: University of California Press, 2011).

⁸⁵ Cristina Beltrán, "Going Public: Hannah Arendt, Immigrant Action, and the Space of Appearance," *Political Theory* 37 (2009): 595–622. See also Cristina Beltrán, *The Trouble with Unity: Latino Politics and the Creation of Identity* (Oxford: Oxford University Press, 2010).

⁸⁶ Irene Bloemraad, Kim Voss, and Taeku Lee, "The Protests of 2006: What Were They, How Do We Understand Them, Where Do We Go?" in *Rallying for Immigrant Rights*, 3–43, 8.

⁸⁷ Muneer I. Ahmad, "Developing Citizenship," *Issues in Legal Scholarship* 9 (2011) 1–21.

of families and hard workers who do not deserve to be seen or treated like deportable criminals.”⁸⁸ Others, including Beltrán, Amalia Pallares, and Lisa Cacho, caution that we need to think carefully about how claims about family and hard work relate to the politics of worthiness and deservingness, and how this is a politics that is always normatively patrolled.⁸⁹ Beltrán further argues that such claims register as part of an established narrative that accepts immigrants as belonging to the polity only under the condition that they assimilate, contribute, and express their patriotism, and that such an assessment of the 2006 marches actually undervalues their political character. In particular, she asserts that we must see what was democratically distinctive and politically consequential about noncitizens laying claim to the public realm: an *inaugural performance of the political* and an *expression of citizenship*. This would not be the *prelude* to citizenship (“today we march, tomorrow we vote”) but, she says, “events in which noncitizens experienced a richer and more expressive instance of citizenship than the vast majority of their legally sanctioned counterparts.”⁹⁰

This scholarly assessment frames the next series of events. Between 2006 and 2010, advocates hoping for comprehensive immigration reform resisted the separation of the legalization of DREAMers from the legalization of other undocumented immigrants, because of concerns that this would lead to legalization only of DREAMers.⁹¹ Youth activism took place

⁸⁸ Bloemraad, Voss, and Lee, “Protests of 2006,” 5. To be clear, these scholars are making an empirical claim as to what frames successfully resonated, not a normative claim.

⁸⁹ Amalia Pallares, “Symbolizing Family, Reconstructing Worthiness,” paper presented at the Law and Society Association Annual Meeting, Boston, MA, June 2013; Lisa Marie Cacho, *Social Death: Racialized Rightlessness and the Criminalization of the Unprotected* (New York: New York University Press, 2012). Particular signs displayed during the marches, such as “I’m a Worker, Not a Criminal” and “We Are Not Terrorists,” explicitly differentiate the bearer of the sign from another class of beings who are demarcated as harmful, denigrated, and presumptively worthy of devaluation: criminals and terrorists. Of course, we know that these signs are an attempt to speak against particular perceptions – that to be undocumented is to engage in a criminal act – or that terrorists have entered or overstayed in the United States because of the failure of our immigration system to adequately police itself in its failure to secure the borders against “illegal aliens.” At the same time, there is an implicit racialized other who is being disavowed through the rejection of the “criminal” and the “terrorist.” For another criticism of these two signs, see Nicholas De Genova, “The Queer Politics of Migration: Reflections on ‘Illegality’ and Incorrigeability,” *Studies in Social Justice* 4 (2010) 101–126.

⁹⁰ Beltrán, “Going Public,” 598.

⁹¹ See Walter J. Nicholls, *The DREAMers: How the Undocumented Youth Movement Transformed the Immigrant Rights Debate* (Stanford: Stanford University Press, 2013); Hinda Seif, “‘Wise Up!’ Undocumented (Im)migrant Youth, Latino Legislators, and the Struggle for Higher Education Access,” *Latino Studies* 2 (2004) 210–230.

primarily around individual deportation cases and the question of access of undocumented students to higher education.⁹² Then, in 2010, something happened that radically reshaped this movement. The Chicago-based Immigrant Youth Justice League declared March 15–21 “National Coming Out of the Shadows Week.” Taking guidance from Harvey Milk (“Brothers and Sisters, you must come out!”), the DREAM Activist website provided “Coming Out of the Shadows – A How-To Guide”:

Congratulations! You have decided to come out of the shadows about your undocumented status. Perhaps you have finally decided to tell your friends why you haven’t signed up for your drivers’ ed. class or why you still don’t drive to school. Maybe, you will come out to your guidance counselor, who has asked you repeatedly to turn in your college application, but you were too afraid to tell him/her that you don’t have a social security number and that you still don’t know how you will pay for college without financial aid. Please remember you are not alone. You are part of a large community of courageous undocumented youth who have decided to come out of the shadows about our immigration status. We live every day in fear and we are tired of it. We want to be able to talk about our lives and our stories without fearing persecution or deportation. We are not free to travel, go to school, work, live, but we refuse to be helpless. In the same way the LGBTQ community has historically come out, undocumented youth, some of whom are also part of the LGBTQ community, have decided to speak openly about their status . . . Sharing your stories will allow us, as a movement of undocumented youth, to grow, as we continue to learn to accept ourselves. By being more open we will begin replacing fear with courage and, ultimately, be united in our demands for change. . . . Whatever you decide to do . . . Be Creative and Be Brave!⁹³

In understanding this coming out of the shadows campaign, it is important to note the prominence of queer undocumented youth as leaders in the DREAMer movement. Many refer to themselves as “undocuqueer.”⁹⁴

⁹² Pallares, “Symbolizing Family.”

⁹³ See DREAM Activist: Undocumented Students Action & Resource Network, “National Coming Out of the Shadows Week,” <https://www.facebook.com/notes/dreamactivistorg/national-coming-out-of-the-shadows-week-march-15th-to-the-21st/374226820188/>.

⁹⁴ On the prominence of queer undocumented youth in the movement, see Veronica Terriquez, “Out of the Shadows and Out of the Closet: Queer Youth Leadership in the Immigrant Rights Movement,” unpublished manuscript; Rose Cuison Villazor, “Coming Out of the Undocumented Closet,” *North Carolina Law Review* 92 (2013): 1–74; Cristina Beltrán, “Undocumented,

In the words of two of these activists, “We knew the way to formal equality for undocumented immigrants was to use our stories as our weapon, to ‘come out’ as undocumented, just as we had come out as gay, lesbian, or transgender.”⁹⁵

Coming out constructs oneself as a political agent, transfiguring the DREAMer from “‘the liminal space of non-recognition’ into both public consciousness and a more tangible, functional sort of membership status.”⁹⁶ Coming out of “the shadows” disrupts the “regime of enforced invisibility,”⁹⁷ in which undocumented immigrants generally live, making the statement, “See me: I am here.” This is reminiscent of Muneer Ahmad’s description of representing Omar Khadr, a prisoner on Guantánamo:

Only later did I come to understand that by claiming rights, we were demanding recognition: raising one’s hand, not waiting to be called on before answering, “I am here.” [This] . . . is an insistence upon Omar’s legibility in the world. . . . to insist upon his place in the community.⁹⁸

As Ahmad points out, the ability of the rights claimant to gain attention requires “a baseline of consent of the community that the claimant belongs to it.”⁹⁹ In the case of Guantánamo, because the community did not admit the prisoners’ political membership, the rights-based claims made by hundreds of lawyers in that “rights-starved” environment were only partially successful in changing material conditions, even while they importantly mounted resistance to the unbridled exercise of state violence.¹⁰⁰ In the case of DREAMers, by coming out, as “undocumented and unafraid,”

Unafraid, and Unapologetic: DREAM Activists, Immigrant Politics, and the Queering of Democracy,” in *From Voice to Influence: Youth, New Media, and Political Participation*, eds. Danielle Allen and Jennifer Light (forthcoming).

⁹⁵ Prerna Lal and Tania Unzueta, “How Queer Undocumented Youth Built the Immigrant Rights Movement,” *HuffPost Gay Voices*, March 28, 2013, http://www.huffingtonpost.com/prerna-lal/how-queer-undocumented_b_2973670.html/.

⁹⁶ Daniel Kanstroom, “‘Alien’ Litigation,” 428. The phrase “liminal space of non-recognition” is René Galindo’s. See René Galindo, “Embodying the Gap between National Inclusion and Exclusion: The ‘Testimonios’ of Three Undocumented Students at a 2007 Congressional Hearing,” *Harvard Latino Law Review* 14 (2011) 377–395, 382.

⁹⁷ Kanstroom, 428.

⁹⁸ Muneer I. Ahmad, “Resisting Guantánamo: Rights at the Brink of Dehumanization,” *Northwestern University Law Review* 103 (2009) 1683, 1747–1764, 1747.

⁹⁹ *Ibid.*, 1749.

¹⁰⁰ *Ibid.*, 1752.

they have launched a deep challenge to the presumption that they have no right to belong and no legitimate claim on the political community. While both groups share a status as noncitizens without legal presence in the United States, in contrast to prisoners on Guantánamo, DREAMers have a stronger claim to membership in the political community, for a number of obvious reasons.¹⁰¹ They are “inside,” not “outside,” national borders, in the “black hole” of Guantánamo. They are presumptively innocent (in the words of *Plyler v. Doe*, they are “innocent children” and not culpable in creating their status as undocumented immigrants, compared with their presumptively guilty parents) in contrast to the presumptively guilty prisoners on Guantánamo. And they grew up in the United States and are perceived as American, in contrast to the faceless foreign “terrorists” on Guantánamo.¹⁰²

In April 2010 the Arizona legislature passed and its governor signed SB 1070, an unprecedented set of sweeping new laws designed to make life in Arizona intolerable in order to encourage undocumented immigrants to engage in self-deportation. At the same time, youth organizations began advocating for a strategy to push through the DREAM Act separately from comprehensive immigration reform. Protests by DREAMers escalated. In May 2010 a group of four undocumented youth sat in Senator John McCain’s office and were arrested and detained, risking their deportation. Activists staged sit-ins and hunger strikes, blocked traffic, and held rallies and marches.¹⁰³ Some politicians and advocates began pushing for legalization specifically of DREAMers via a particular framing that emphasized their worthiness, both as innocent victims “cleansed” of their illegality, since they were undocumented through no fault of their own, and as embodying exemplary human capital, capable of aiding the United States both in military

¹⁰¹ For the fascinating – and strange – D.C. Circuit opinion analogizing Uighurs on Guantánamo to immigrants, saying that releasing them via a writ of habeas corpus into the United States would violate immigration law as they had not followed appropriate legal admission procedure and were barred by various removal grounds, see *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009).

¹⁰² This comparison of prisoners on Guantánamo and undocumented immigrants raises the question whether charges of incivility should be understood differently when they are directed at those clearly outside the political body versus those who are within, along a spectrum of belonging that could range from those with no claim on citizenship whatsoever to those with full citizenship (for example, Civil Rights protestors).

¹⁰³ Arely M. Zimmerman, “A Dream Detained: Undocumented Latino Youth and the DREAM Movement,” *NACLA Report on the Americas*, November–December 2011, 14.

readiness and in increasing its ranks of the highly educated.¹⁰⁴ In December 2010 the DREAM Act, after passing the House, failed to achieve cloture in the U.S. Senate by only five votes. Despondent and frustrated, many youth activists critiqued the dominant framing of their struggle, which was premised on their unique deservingness, and began articulating narratives that did not foreground belonging as a reward for their human capital or singular worth.¹⁰⁵ In June 2011, Pulitzer Prize-winning journalist Jose Antonio Vargas came out as undocumented in an article in the *New York Times* magazine and created the “Define American” project (Vargas himself defines “American” as “hardworking and loyal”). Undocumented youth activists began rearticulating their identity as “unashamed” and “unapologetic,” as well as “undocumented and unafraid.” In September 2011, undocumented members of the National Immigrant Youth Alliance launched a new tactic, getting themselves arrested in order to infiltrate immigrant detention centers, so they could help detainees on the inside push for prosecutorial discretion to be exercised on their behalf.¹⁰⁶

In June 2012, President Obama announced he was using his executive authority to grant deferred action to childhood arrivals (DACA) – essentially granting two years of legal presence (not legal status) to qualified DREAMers, creating the new notion of noncitizens as not undocumented, but “DACAdmented.” To date, more than half a million applicants have applied for DACA, with 72 percent approved, 1 percent denied, and the remaining applications under review.¹⁰⁷ Many observers noted that the creation of DACA coincided with the re-election campaign of President Obama, amid criticisms of “Obama the Deporter” for the record rate of deportations (upward of 400,000 annually) during his administration. The Latino vote was considered pivotal to President Obama’s re-election, and,

¹⁰⁴ The term “cleanse” is Walter Nicholls’s. See Walter J. Nicholls, “From Political Opportunities to Niche-Openings: The Dilemmas of Mobilizing for Immigrant Rights in Inhospitable Environments,” *Theory and Society* 43 (2014) 23–49, 30.

¹⁰⁵ Pallares, “Symbolizing Family.”

¹⁰⁶ Michael May, “Los Infiltradores,” *The American Prospect*, June 21, 2013. A radio version of this story also appeared on *This American Life*, under the heading “The One Thing You’re Not Supposed to Do.” In June 2011, the head of ICE, John Morton, had issued a memo directing field offices to use prosecutorial discretion to release those immigrants from detention who were a low priority for removal. The Morton Memo was only weakly implemented, resulting in NIYA’s action.

¹⁰⁷ Audrey Singer and Nicole Prchal Svajlenka, “Immigration Facts: Deferred Action for Childhood Arrivals (DACA),” *Brookings Report*, August 14, 2013, <http://www.brookings.edu/research/reports/2013/08/14-daca-immigration-singer>.

suddenly, postelection, comprehensive immigration reform, including a legalization program, also called a “pathway to citizenship,” for those currently undocumented seemed an urgent bipartisan goal.

In June 2013, the U.S. Senate passed the most monumental overhaul of immigration law in decades, which, among other provisions, would legalize DREAMers and other undocumented immigrants through creating Registered Provisional Immigration Status. Meanwhile, the House of Representatives began to take up immigration reform through piecemeal proposals, a strategy designed to preclude the inclusion of legalization within comprehensive legislation. As the White House tried to pressure the House to pass broad immigration legislation in fall 2013, it also had to persuade skeptical Republicans that it was vigorously enforcing immigration law.¹⁰⁸ Within this context, young undocumented immigrants escalated their protests, creating an awkward dilemma for a White House that wanted to appear tough on immigration law violations without wanting to lose sympathy by arresting DREAMers.¹⁰⁹

Amid escalating acts of civil disobedience – blocking a bus taking immigrants out of a Phoenix federal immigration detention center, blocking a street outside a federal immigration facility in New York City – nine DREAM activists took the most dramatic step yet. They attempted to enter the borders of the United States.¹¹⁰ Three of the DREAM 9 – who actually potentially qualified for DACA – left the United States to take part in this action, risking the possibility that they would never be allowed to return. The other six had either been deported or left the United States on their own accord. Approaching the United States from Nogales, Mexico, the nine approached the border, with supporters on the U.S. side screaming, “Bring them home!” as 10,000 viewers from around the world tuned in to a Ustream live feed.¹¹¹ All nine requested both humanitarian parole (an

¹⁰⁸ Julia Preston, “Young Immigrants Protest Deportations,” *New York Times*, August 22, 2013.

¹⁰⁹ *Ibid.*

¹¹⁰ This was followed in September 2013 by thirty-six others, known as the DREAM 30, who crossed the border at the Laredo port of entry and requested political asylum. See Jonathan Blitzer, “Dreamers at the Border,” *New Yorker*, October 3, 2013. After one was removed after failing to pass a credible fear screening, her attorney suggested the officials used her to deter others from attempting to cross. See Esther Yu-Hsi Lee, “Did Federal Immigration Officials Deport a Low-Priority Activist to Deter Future Civil Disobedience Protests?” *Think Progress*, October 31, 2013.

¹¹¹ Aura Bogado, “Undocumented Activists Take a Giant Risk to Return Home,” *Colorlines*, July 23, 2013.

administrative grant to allow the noncitizen inside the United States without legal admission) and asylum, and were placed in immigration detention, where they then staged a hunger strike. The DREAM 9 action was a tactical escalation to draw attention to the Obama administration's unprecedented rate of deportations and refusal to issue a moratorium on deportations, even while he called for comprehensive immigration reform. "This is a way to say we have done everything and now we are putting our bodies on the line," said Cirstina Jimenez, managing director of United We Dream.¹¹²

The actions of the DREAM 9 created a rare visible split among supporters of immigration reform. Some advocates and lawmakers praised the DREAM 9 for their "bold civil disobedience in the tradition of the civil rights era." Others called their tactics "reckless" and a distraction from the fight in Washington, "counterproductive" and "defiant."¹¹³ The split among advocates and lawmakers was echoed by dissent among lawyers. While the DREAM 9's attorney argued, "These are not deportees . . . They are persons who find themselves outside the United States but belong here," David Leopold, the former president of the American Immigration Lawyers Association said, "Once you depart the U.S., all bets are off. To suggest that anyone should be able to walk out of the U.S. and turn around and knock on the door and come back in, I don't know anybody who thinks that we ought to have an open border."¹¹⁴ Others quickly condemned Leopold for speaking publicly about the DREAM 9's legal case without being privy to its specifics. All nine passed a credible fear screening, a prescreening mechanism evaluating whether there exists a significant possibility that an applicant could establish the statutory requirements for asylum in a future

¹¹² "Dreamers' Switch to Civil Disobedience to Help Cause," *UPI.com*, August 26, 2013, http://www.upi.com/Top_News/US/2013/08/26/Dreamers-switch-to-civil-disobedience-to-help-cause/UPI-95551377544151/.

¹¹³ Representative Luis Gutierrez said the "provocative" nature of the acts undermined his efforts to win support for comprehensive immigration reform. See Elizabeth Llorente, "Leading Pro-Immigrant Congressman Severs Ties with DREAMer Groups," *Fox News Latino*, November 5, 2013, <http://latino.foxnews.com/latino/politics/2013/11/05/rep-luis-gutierrez-cuts-ties-with-two-advocacy-groups-says-are-undermining/>.

¹¹⁴ Julia Preston and Rebekah Zemansky, "Demonstration at Arizona Border Divides Supporters of Immigration Overhaul," *New York Times*, August 4, 2013, <http://www.nytimes.com/2013/08/05/us/demonstration-at-arizona-border-divides-supporters-of-immigration-overhaul.html/>. See also David Leopold, "The DREAM 9's Misguided Protest," *Fox News Latino*, August 9, 2013, <http://latino.foxnews.com/latino/opinion/2013/08/09/david-leopold-dream-s-misguided-protest/#ixzz2dfw3yPj>.

hearing,¹¹⁵ and have been released from detention into the United States, pending their removal proceedings.

Unsurprisingly, the actions of the DREAM 9 were met with condemnation by critics of immigration reform. One observer lamented what he called “the obnoxious arrogance” of DREAMers engaged in “leftist street theater,” and posted a petition urging expediting immigration hearings to deport “a group of foreign political activists known as the DREAM 9,” complaining that this is “a group of illegal alien activists; citizens of Mexico who are attempting to influence United States policy on immigration reform” with a “history of civil disobedience and raucous activism towards their goals, which include ending deportation. These activists are foreign nationals, not United States citizens; yet they have occupied politician’s offices, held rallies, protested outside U.S. immigration offices and more in an attempt to affect U.S. laws.”¹¹⁶

In response, Mohammad Abdollahi, a leader of the National Immigrant Youth Alliance, which organized the DREAM 9 protest, described the action thus: “It was purely civil disobedience.” Noting that three of the nine had traveled to Mexico to accompany the other six as they tried to return to the United States, he said, “We wanted everybody to be treated the same.”¹¹⁷ Yet civil disobedience, a political protest over an unjust law or policy, is committed by violating law conscientiously and openly, with acceptance of punishment. Were the DREAM 9 engaging in civil disobedience in seeking to enter the United States? They did not violate any law in asking for humanitarian parole or asylum, but followed specified legal channels for being granted sovereign permission to be inside the United States.

¹¹⁵ This means they showed a “significant possibility” that they could establish in a hearing before an Immigration Judge that they have been persecuted or have a well-founded fear of persecution on account of their race, religion, nationality, membership in a particular social group, or political opinion, or that they would be subject to torture, if returned to Mexico. See Lory Rosenberg, “Let’s Get Clear about Credible Fear” (August 9, 2013), <http://blogs.ilw.com/entry.php?7415-Let-s-Get-Clear-About-Credible-Fear>.

¹¹⁶ Lee Stranahan, “Deport the Dream 9” (August 19 2013), <http://leestranahan.com/deport-the-dream-9-lizabeth-mateo-tweets/>. The petition goes on: Their “most audacious act of open defiance” is a “publicity stunt” to “openly mock” the country’s immigration policies. “Their activism shows that they have no respect for United States sovereignty, the rule of law, or the thousands of people who legitimately seek asylum from regimes around the globe that persecute and torture their own citizens.”

¹¹⁷ Preston and Zemansky, “Demonstration.” On the DREAM 9 blurring the line between those inside and those outside, as well as the line between DACA beneficiaies and their undocumented parents, see Stephen Lee, “Growing Up Outside the Law,” *Harvard Law Review* 128 (forthcoming 2015).

We can understand civil disobedience as a “firebreak between legal protest and rebellion, while simultaneously providing a safety valve through which the profoundly disaffected can vent dissent.”¹¹⁸ This was not an act of civil disobedience in that sense. Yet arguably the DREAM 9 – like any other undocumented person out of the closet – is engaging in civil disobedience through the mere performance of public existence. The DREAM 9 are making a moral claim to belonging against the presumption of their unbelonging, and given that this unbelonging is understood to be produced through their violation of the law, a violation that renders their being in the United States a civil violation, the DREAM 9 action turns into one that *is* experienced as lawbreaking. Fox commentator Laura Ingraham, for example, criticized the DREAM 9 for flouting and disrespecting “our laws.” She continued, “When I go into someone else’s home, I try to follow their rules. So when you come into our home and make it your home, then you’ve got to follow the rules.”

We see interesting slippage here in Ingraham’s statement, around whose home this is, when she says “you come into our home and make it your home.”¹¹⁹ This slippage captures the complicated claim of the DREAMer – “Bring Them Home!” – who, as an undocumented immigrant who grew up in the United States, is without the formal status of citizenship but at the same time experiences the identitarian dimension of citizenship: “I Am American.”¹²⁰ Witness the *Time* magazine cover: WE ARE AMERICANS – JUST NOT LEGALLY. The DREAMer is perceived to be outside the boundary of the demos (“these foreign nationals”) and as a rude challenge coming from within the demos (“these young people pushing their luck”). Let us return to the statement of Mohammad Abdollahi, “It was purely civil disobedience.” Civil disobedience is understood as the province of the citizen, seeking change from within, as opposed to the work of the outside agitator. Thus, Abdollahi was implicitly arguing that the DREAM 9, as engaging in civil disobedience, are members of the demos with the right as well as the moral authority to try to change the law.

¹¹⁸ Matthew R. Hall, “Guilty but Civilly Disobedient: Reconciling Civil Disobedience and the Rule of Law,” *Cardozo Law Review* 28 (2007): 2083–2132, 2083. On immigration and civil disobedience see Allegra Inceod, “When the Law Demands Disobedience: Re-envisioning immigration law,” unpublished manuscript on file with the author.

¹¹⁹ Solange Uwimana, “Laura Ingraham’s Hypocrisy over DREAM 9 Immigration Protest,” *Media Matters for Amer* August 9, 2013, <http://mediamatters.org/blog/2013/08/09/lavra-ingrahams-hypocrisy-over-dream-9-immigrant/195>.

¹²⁰ See, for example, Jose Antonio Vargas’s project, Define American.

Abdollahi also clarified the group's demand: "We wanted everybody to be treated the same."¹²¹ This claim suggests that the DREAMer outside, standing at the gates, on the outside of the hard border, should be treated like the DREAMer inside, who enjoys territorial presence in the soft inside. See also the statement of the DREAM 9's attorney: "They are persons who find themselves outside the United States but belong here."¹²² Contrary to attorney David Leopold then, the salient fact is not whether the noncitizen is "inside" or "outside"; what this protest sought to challenge was not the moral significance of borders altogether. Instead, implicitly, at issue was whether the life experience of someone inside the United States, someone who has developed ties, equities, and stakes in the country and made contributions to the country, could be understood to translate into the moral imperative to legalize him or her. Thus, these are persons who "belong here."

Conventionally, the argument on behalf of noncitizens facing removal goes: this person who has these stakes and made these contributions deserves to stay; they should not be deported. The DREAM 9, in choosing to bring into this moral argument those *outside* the United States, add they should not be *excluded*. I don't see the DREAM 9 making the argument Leopold suggests they are, which is that anyone outside has the right to come in; borders have no more significance. Instead, the DREAM 9 are strategically trying to encompass within the ambit of public concern those who would be eligible for a legalization program, or would have been if they were still inside the country, if such ever passes. This is not about an open border, but about recognizing noncitizens with particular life histories within the United States.

The DREAMer, having grown up in the United States, is conceptualized like the adverse possessor who can magically turn in property law from trespasser to property owner, whose roots into the soil are now so deep that it would be unjust to rip them out. As Ayelet Shachar suggests, the existence of already established, real, and genuine ties, reflecting that one has taken root, can be the basis for earning an entitlement, in this case, "earned citizenship."¹²³ Joseph Carens analogously argues that the passage of time over

¹²¹ Preston and Zemansky, "Demonstration."

¹²² *Ibid.*

¹²³ Ayelet Shachar, "Earned Citizenship: Property Lessons for Immigration Reform," *Yale Journal of Law and the Humanities* 23 (2011): 110–158. For a discussion of how earned citizenship

a particular formative period in the life cycle (he invokes the ages of six to sixteen or eight to eighteen) creates a moral basis for amnesty.¹²⁴ This vision once appeared in U.S. immigration law in the form of a statute of limitations on the deportation of those who had lived in the United States for one year, initiated in 1891. This was extended to five years and then abolished, never to be seen again.¹²⁵

There is a possessory interest in the state that DREAMers claim – that they belong to this nation-state, that this nation-state is theirs. The distaste many students of property law express for the unexpected doctrine of adverse possession is mimicked in the reaction to the DREAMers in that many think that one simply cannot turn from a trespasser to an owner. One has to follow formal channels of legality; we have a rule of law (get in the back of the line – don't jump the queue). Of course, this distaste and longing for the good old days of historical legality betrays amnesia about the origins of property ownership in the United States as well as about settler colonialism and historical patterns of immigration.¹²⁶ Historical practice and what is taken as its legacy often do not correlate.

That grants of citizenship, for those not lucky enough to enjoy that status through birth, bear a relationship to the market are evident both in the idea of “earned citizenship” and the monetization of the undocumented. Earned citizenship functions as an exchange for past labor performed, in addition to an array of additional requirements, namely, the payment of a fine, payment of back taxes, performance of English literacy and civics knowledge, and the passing of criminal and security background checks, in order to show that, in contradistinction to the idea of “amnesty,” the state is not granting immigrants “something for nothing.”¹²⁷ Here, citizenship

requires the noncitizen to perform “citizenlike qualities,” see Muneer Ahmad, “Personhood in Citizenship’s Shadow,” *Constitution in 2020*, <http://www.constitution2020.org/node/101>.

¹²⁴ Joseph H. Carens, “The Case for Amnesty,” *Boston Review* (2009), <http://www.bostonreview.net/forum/case-amnesty-joseph-carens/>.

¹²⁵ See Ngai, *Impossible Subjects*.

¹²⁶ See Mae M. Ngai, “How Grandma Got Legal,” *L.A. Times*, May 16, 2006.

¹²⁷ See, for example, President Obama’s statement on earned citizenship:

We have to deal with the 11 million individuals who are here illegally. We all agree that these men and women should have to earn their way to citizenship. But for comprehensive immigration reform to work, it must be clear from the outset that there is a pathway to citizenship. We’ve got to lay out a path – a process that includes passing a background check, paying taxes, paying a penalty, learning English, and then going to the back of the line, behind all the folks who are trying to come here legally. That’s only fair.

appears like Lockean labor theory, a property right that arises, in part, because of labor mixed in with the (U.S.) land. Even when some suggest that undocumented immigrants should earn citizenship as a reward for, or in exchange for, their labor mixed in with the soil, the perception of their illegality easily turns them from legitimate future owners of the property of U.S. citizenship to undeserving trespassers engaging in a kind of theft.

Conceptualizing undocumented immigrants primarily in relation to their labor allows their monetization in discussions of their “use-value,” specifically as economic producers of labor that U.S. citizens do not want to do.¹²⁸ These workers are “the hardworking and humble folks who cut your lawn, clean your house or care for your kids,” in contrast to the DREAMers who, in the words of Ruben Navarrette, are “drunk on entitlement.”¹²⁹ Undocumented immigrants are also monetized as contributors who add more to the U.S. economy than they take out (or the reverse). One finds economic calculations of what current immigration policy costs (\$23,000 per deportation) in contrast to the potential economic benefits of legalizing immigrants, with, for example, David Guggenheim’s two-minute film of these calculations, as performed on a blackboard by the UC Berkeley student Terrence Park, president of the UC Berkeley Math Club, who happens to be undocumented.¹³⁰

That monetization of the undocumented provides only a limited frame is well expressed by Lawrence Downes, public editor of the *New York Times*, in his reading of President Obama’s second inaugural address. In that address President Obama “stressed the great American ‘we,’” but, rather than connect this thought to immigrants and their descendants, he merely stated:

Our journey is not complete until we find a better way to welcome the striving, hopeful immigrants who still see America as a land of

President Barack Obama, “Earned Citizenship” (January 29, 2013), <http://www.whitehouse.gov/issues/immigration/earned-citizenship>.

On ideas of amnesty, see Linda Bosniak, “Amnesty in Immigration: Forgetting, Forgiving, Freedom,” *Critical Review of International Social and Political Philosophy* 16 (2013): 344–365; Linda Bosniak, “Arguing for Amnesty,” *Law, Culture and the Humanities* 9 (2012): 432–442.

¹²⁸ Shannon Gleeson, “An Evaluation of the Economic Argument in Favor of Immigrant Rights,” unpublished manuscript on file with the author. For a critique of framing undocumented immigrants as *homo economicus*, see Beltrán, “Going Public” (arguing there are limits to non-citizens using labor as a basis for claiming standing, because race can undermine the relationship between work and civic standing).

¹²⁹ Navarrette, “DREAMers Are Pushing Their Luck.”

¹³⁰ “Terrence’s Chalkboard Talk,” <http://www.youtube.com/watch?v=eeDdBenkbXg>.

opportunity, until bright young students and engineers are enlisted in our workforce rather than expelled from our country.¹³¹

As Downes puts it, this “cold, utilitarian argument for immigration” linking DREAMers with engineers, foregrounding two groups of immigrants with exemplary human capital, suggests “We need to legalize *them* to help our economy.”¹³² Luckily, writes Downes, Obama’s speech was supplemented with a very different vision of immigrants and the national character by the inaugural poet Richard Blanco, who in his poem “One Today” suggests that immigrants are part of the “us.” As Downes points out, Blanco himself happens to be an engineer (“a civil engineer by day, poet by night”). Downes asks, “What if you’re an unauthorized immigrant who doesn’t want to be an engineer?” Perhaps Mr. Blanco will inspire more youthful poets than engineers. “Will that be bad for our economy? Won’t those young people add to the country as well? Aren’t they, too, ‘we the people’?”¹³³

Perhaps there is a place for the undocumented poet, despite his or her lack of human capital, in “we the people” – perhaps he or she is understood to contribute value to the shared good through art and imagination. But what is the relationship between “we the people” and the undocumented political actor? What of the undocumented political actor who is characterized as an “in-your-face,” outside agitator?

Conclusion

While citizenship as formal legal status is usually considered a precondition for citizenship as political activity, the DREAMers present a vision of undocumented noncitizens engaging in acts of citizenship. And in an inverse relationship of the conventional story, these acts of citizenship may help produce their citizenship as formal legal status, through creating pressure for a “pathway to citizenship.” Their political activity is variously experienced as “American protest movement tactics” or as rude and disrespectful, tacking along different visions of civility (the civility of active discourse versus the civility of respectful manners). Recall the various dimensions of civility. Arguably, the origin of civility, its emergence from *civilitas*, haunts the possibility of any noncitizen, and particularly the undocumented

¹³¹ Lawrence Downes, “Turning ‘Them’ into ‘Us,’” *New York Times*, January 22, 2013.

¹³² *Ibid.*

¹³³ *Ibid.*

noncitizen, to have his or her actions experienced as civil. As formal status noncitizens, they can be perceived to stand outside the demos, so that any political claim they make on the state will be perceived as uncivil.

Their political claims-making may be considered uncivil for other reasons, as well. Their behavior and speech may not display an understanding of appropriate manners in that they are insufficiently pacified and self-regulated; their presence and making political claims are perceived as the product of a sovereign that has failed to do its job in not deporting them already. By coming out, the undocumented immigrant is challenging the idea of the self that is supposed to be controlled, as he or she is not supposed to exist; he or she is, in the words of Mae Ngai, an “impossible subject.”¹³⁴ He or she is supposed to control him- or herself by remaining in what Susan Bibler Coutin calls “spaces of non-existence”¹³⁵; he or she instead has come out and become a political subject.

Civility as civic virtue asks for tolerance of and respect for the foreigner, the stranger. But the noncitizen *is* the foreigner, the stranger, who is supposed to be the recipient of civil tolerance and respect. Here we have the DREAMer in the role of the politically active citizen, and not in the role of the grateful and passive recipient. The DREAMer’s robust civic participation can strain even the liberal tolerance of supporters who worry he or she is asking too much, has gone too far. In turning to more confrontational and less civil tactics, some worry that DREAMers risk being perceived as something other than dutiful, loyal, hardworking, patriotic human capital.¹³⁶ But these concerns betray a fundamental sense that the appropriate position is one of passive gratitude rather than robust activity, correlating with differing

¹³⁴ Ngai, *Impossible Subjects*.

¹³⁵ Susan Bibler Coutin, “Borderlands, Illegality and the Spaces of Non-Existence,” in *Globalization and Governmentalities*, eds. Richard Warren Perry and Bill Maurer (Minneapolis: University of Minnesota Press, 2003), 171–202.

¹³⁶ Many undocumented youth are challenging these conventional framings of themselves; see Beltrán, “Undocumented, Unafraid, and Unapologetic,” describing the more complex relationship to political membership many undocumented youth have developed, as indicating how their political activity has “queered democracy.” It also bears emphasizing that undocumented youth have publicly objected to the narratives that elevate them as more worthy than or different from other undocumented immigrant. As one example, some are refusing to refer to themselves any longer as DREAMers, rather than as undocumented. See, for example, Tania Unzueta, “How I Stopped Believing in CIR and Learned to Love Piecemeal Legislation” (December 14, 2012), <http://www.ijjl.org/how-i-stopped-believing-in-cir-and-learned-to-love-piecemeal-legislation/> (stating “p.s. I am not a new or aspiring American, I am not a dreamer, I am undocumented, unafraid, and unapologetic”).

senses as to whether the noncitizen can appropriately demand political change. Tactics of the sort used by the DREAM 9 both invite and challenge the charge of incivility.

Civility is a civilizing discourse, used, as Linda Zerilli tells us in this volume, against the disenfranchised seeking to create fundamental change in moral conscience and political consensus. Here, noncitizens are told, you need to learn our rules. This is our house. You are not an invited guest; you are a trespasser. If we let you stay, you need to learn how to behave. Pundits such as the patronizing Ruben Navarrette say, “You’re going to get a scolding,” engaging in civility as a subordinating discursive tactic. It is easy to say, don’t act up, stay quiet, and hope for the best. But, in fact, it is the noncitizens who have been quiet who have in the past few years been most easily deported, as opposed to those who have demanded the public serve as a witness.

Cristina Beltrán, following Bonnie Honig, suggests that we understand the 2006 immigrants’ rights marches as partaking in democracy as a form of performative politics in which power is not received by grateful subjects but, rather, is “taken, redistributed, reenacted, and recirculated” by way of popular political action.¹³⁷ This notion of immigrants “taking,” say Honig and Beltrán, can have a positive dimension. “The practice of taking rights and privileges rather than waiting for them to be granted by a sovereign power is,” says Honig, “a quintessentially democratic practice . . . We have here a story of illegitimate demands made by people with no standing to make them, a story of people so far outside the circle of who ‘counts’ that they cannot make claims within the existing frames of claim making.”¹³⁸

Here, those who “do not count” make a claim to be counted, interrupting the “established speaking order which elevates citizenship to holding a near monopoly of speech acts.”¹³⁹ New political actors pushing beyond existing frames of claim making will always be met with charges of incivility. DREAMers, coming out from the space of nonexistence into visibility and performing the most active citizen participation imaginable, should be

¹³⁷ Beltrán, “Going Public,” 598.

¹³⁸ Bonnie Honig, *Democracy and the Foreigner* (Princeton, NJ: Princeton University Press, 2001), 99, 101.

¹³⁹ Peter Nyers, “No One Is Illegal,” 164. Nyers, like Honig, relies on Rancière and his discussion of how we understand the political and who “counts”; see Jacques Rancière, *Disagreement: Politics and Philosophy*, trans. Julie Rose (Minneapolis: University of Minnesota Press, 1999).

understood as engaging in a form of resistance that has enabled new visions of the possible. They remind us that civility, like citizenship, has both an inclusive and an exclusive function, in creating a space within, as well as an outside. And they tell us that while civility is sometimes vaunted for its importance in stitching the fabric between those within the political community, its most salient characteristic may be how it can be used to push others outside.