STORYTELLING OUT OF SCHOOL: UNDOCUMENTED COLLEGE RESIDENCY, RACE & REACTION

IHELG Monograph
93-7

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University of Houston Law Center/Institute for Higher Education Law and Governance (IHELG)

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I never even knew I was Mexican, I mean really Mexican. I thought I was born in Magnolia or the East End, since that’s all I really remember. Except when my class went on a trip to NASA, I’ve never really left Houston. Except we went to Corpus [Christi] with my grandfather when the Aquarium opened. So I thought all along I was Mexican American, you know, Chicano, until "la IRCA" came along. My mother took me down to the "Migra," and we waited in line with a green bag full of papers, you know, with a twister tie on it like for grass and leaves. That was when I found out I was really Mexican, not Chicano. Born in Mexico. Except to talk to my grandfather and that, I don’t even speak Spanish very well. Now I’m afraid to leave town, cause the "Migra" is, like, really coming down on illegals. Now, it turns out I’m illegal even though I’ve got my drivers’ license and that, even the SAT. If I’m illegal, what about these Mexicans who stand around the corners? I think the law should round them up, not me. I’ve been like a citizen up to now. It was "la IRCA" that made me illegal, but the lawyer said I could become a permanent resident and get a green card. I thought I could vote when I was 18, but now I have to become a citizen first. I’m gonna do it, but I’m not going to tell anybody, cause I want to go to college. I can go to college, can’t I?
It wasn’t until they had the amnesty that I found out I wasn’t born in Texas. We grew up in Laredo, but my parents got divorced and I moved to Houston with my mother and my sisters. She doesn’t speak English, but she wants me to go to school. She cleans offices downtown, like law offices and a bank building. She can’t help me with my homework, but she makes me do it before [I can watch] TV. If I can go to college, it’s because she made me want to go. It’s like for her. But now I found out I’m mojado, but we’re going to get legal papers. [The lawyer] had me bring in my school grades to show that we were in the U.S. before the time. My sisters knew we were mojados, but I didn’t. They said I was pocho, like tourists. But now I can go to college, maybe be a lawyer or doctor. (Interviews with "Manuel H." and "Jose G.", high school valedictorian and salutatorian in Houston, Texas, during 1987 interview.)

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

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

In *Rashomon*, Akira Kurosawa’s brilliant 1950 film, the same event is told in four different ways by four different persons. Moviegoers are drawn into the competing stories, and are left with no clear resolution of which story is the most nearly true.² The law is often like this, with trial lawyers arguing that complex transactions were predatory pricing or just regular business practices,³ or that the failure of the savings and loan industry was due either to vindictive, harassing regulators or massive industry greed.⁴ The best, most successful, and widely admired trial lawyers are often world class raconteurs, able to tell their client’s story in moving and cinematic fashion.⁶ At its core, law is storytelling.

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

Although this story has some of the attributes of legal storytelling affiliated with critical race theory, a genre of legal analysis begun in the 1980’s which has as its aim to develop "outsider narratives" and "counterstory jurisprudence" and to offer critical, alternative versions of stock legal stories,⁸ I do not believe it is truly in this genre. The most practiced writers in this emerging tradition -- Derrick Bell,⁷ Jerome Culp,⁸ Richard Delgado,⁹ Charles Lawrence,¹⁰ Mari Matsuda,¹¹ Patricia Williams,¹² Robert Williams¹³ -- are people of color whose work often blends traditional legal analytic tools with personal narratives, literary criticism, and even fictional stories to make a larger point about law and society. Thus, readers know these writers’ family origins,¹⁴ dreams,¹⁶ experiences,¹⁷ and humiliations,¹⁷ and recognize their fictional characters¹⁸ and folktales.¹⁹

Critical race theory, although in its nascent stages, has gained prominence and attention in legal scholarship.²⁰ In addition to its major figures, it has many lesser-known practitioners, hundreds of articles and a growing number of books,²¹ formal meetings and conferences,²² finding tools and bibliographic categorization,²³ critical opponents,²⁴ all the earmarks of a "movement" or genre. If it were a more profound, synoptic, complex tale, this essay could be situated in this river, within the streams of storytelling/counterstorytelling, structural determinism, and race/sex/class intersections -- critical race theory themes identified by Richard Delgado and Jean Stefancic, the movement’s bibliographers.²⁶ However, it is actually a simple narrative, one that turns on definitions.

The story is "about" undocumented college students, i.e., persons whose legal presence or status in the United States may be unauthorized or undocumented, and who apply to or have been admitted to an institution of higher education. As will be shown, many colleges and universities will not admit undocumented students, or, in some public institutions, do not allow undocumented students to claim in-state residency status. Although the U.S. Supreme Court has not ruled directly on this issue, it has ruled on several dozen residency and domicile cases, including the near-identical issue of charging tuition to undocumented school children in K-12 public schools.²⁶ Dozens of postsecondary residency/alienage cases have appeared on state court dockets, with mixed results.²⁷ In addition, several higher education institutions and systems have acted to accommodate the undocumented, exercising their fourth traditional academic freedom, the right to determine for themselves "who shall attend" their institution.²⁸

This issue occurs during a broad background of rising xenophobia and immigration restrictionism, modern day responses to the story and reality of the United States as a nation of immigrants. Economic downturns have historically led to scapegoating alien workers, said to be
stealing jobs from U.S. workers;\textsuperscript{28} this folktale has been particularly popular in California, where a sluggish economy in the 1990's and a contraction in the country's largest state higher education systems have exacerbated resentment against the state's substantial immigration -- legal and illegal -- of Latinos and Asians.\textsuperscript{30} This story, then, is also about prejudice and retrenchment.

The higher education system in the United States is one of the things we do right. The vast system, with over 3300 collegiate campuses, offers both elite, highly competitive, selective institutions and easily accessible, convenient, inexpensive community colleges or open door institutions.\textsuperscript{31} And it is attractive to students from all over the world, enrolling more than 800,000 international students in 1991,\textsuperscript{32} as well as many others who were foreign-born but have since become permanent residents or citizens. By a wide margin, U.S. colleges serve as receiver schools for more students than those in any country in the world.\textsuperscript{33} In some fields of study, particularly in the sciences and engineering, a substantial percentage of graduate students are foreign born. In 1992, for example, 58% of all engineering PhD's, 32% of all life sciences PhD's, and 43% of all physical sciences doctorates in the United States were awarded to either permanent residents or other non-U.S. citizens.\textsuperscript{34}

Although undocumented students, even if freely admitted into colleges and accorded resident tuition, would be a small number, fierce competition and scarce openings in some of the California institutions have combined to cast their admission as a matter of displacement, both of Anglo students and citizen students of color. Legal permission to enroll and become resident-tuition paying students, earned in a series of cases in the 1980's,\textsuperscript{36} was denied by a 1991 case, \textit{Bradford v. University of California}.\textsuperscript{38} While other states have taken more generous routes, California's admissions and residency policies make a larger difference, inasmuch as the scale of the postsecondary systems (the University of California, the California State University System, and the California Community College System total nearly 150 campuses and 1.5 million students)\textsuperscript{37} and location (nearly 40% of the undocumented population in the U.S. is estimated to reside in the state)\textsuperscript{38} combine to make it the most important venue for the college opportunities of aliens. It is no exaggeration to suggest that as California goes, so goes alien education. New York, in contrast, has reacted more expansively, as have Arizona and Illinois.\textsuperscript{38} As will be seen, Texas, the other major destination for undocumented college students, has an uneven record due to its decentralized higher education systems.\textsuperscript{40}

This story, therefore, is also one of administrative and regulatory law: of residency statutes, agency implementation, and administrator discretion. Above all, however, this story is about 18-22 year olds, whose birthplace was, quite literally, an accident of birth, who have resided in and maintained domicile in the United States virtually all their lives, who have vied successfully in a highly competitive admissions process, and who find themselves precluded from attending colleges into which they have been admitted. Domiciled in and residents of a state, they find themselves barred from establishing higher education residence as a benefit, in contrast to residency as a benefit in virtually all other legal settings.\textsuperscript{41} This Article proceeds as follows. Part II thoroughly investigates the residency system in postsecondary education. Public colleges enroll nearly 80% of all undergraduates, and every state has enacted a tuition scheme to differentiate between residents, who pay lower tuition, and non-residents, who pay substantial tuition differentials.\textsuperscript{42} In many states, this mechanism is used to deny undocumented aliens -- even those who meet all the traditional tests for establishing domiciles -- the opportunity to pay in-state resident tuition. Part II describes basic legal and fiscal operations of residency requirements, with special emphasis upon alienage issues; distinguishes "residence" from "domicile" for alien students; categorizes state governance mechanisms for determining residency and exemptions; and reviews problems with current institutional practices, particularly those concerning undocumented aliens.

With this background, Part III examines how courts have addressed this problem. I trace the development of two judicial themes: undocumented students cannot meet the traditional test for establishing residence inasmuch as their presence is unauthorized, and a second, mutually exclusive theme that these students are entitled to establish their domicile if they meet all the durational and intentional criteria required of all transient students.
Part IV examines the social science of undocumented alien students, including ethnographic studies and extensive case histories. Here, I analyze the judicial themes as separate stories, noting how the telling of the same tale can result in different endings, or "morals" of the stories. I then attempt to use the individual data and research findings to answer the objections of those who would not admit or grant residence benefits to undocumented alien college students. In this new account, aliens are characterized as having positive features who pose no genuine threat to the polity. This narrative draws from the extensive literature on college choice, and concludes in Part V that the higher education enterprise is enriched and strengthened by their admission.

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

II. The Law and Policy of Residency Requirements

Public colleges draw distinctions between resident students and non-residents on the premise that tax-supported, public institutions should be available at lower costs to those taxpayers and their families whose money support the colleges; as a corollary, nonresidents, or nonstate taxpayers, can be expected and required to pay a higher share of the costs. These differences can be quite substantial: in 1990-91, the ratio in Texas was approximately 6 to 1, with non-residents paying six times as much in tuition as did Texas residents. At the University of California-Irvine, undergraduate California residents paid three times the tuition and three times the fees that non-Californians were required to pay in 1993.

Court cases dating back to 1882 have clearly established that states can charge these differentials and can reasonably determine which students are entitled to be classified as residents. In most situations this procedure works well enough, because state institutions spell out the basic residency requirements and students seem to understand the rules. There is an intuitive, appealing symmetry to this arrangement, one that recognizes the important benefit available to those who pay for it, however indirectly. With full realization that a mix of in-state and out-of-state students is a good, officials in most states have made it possible for students to cross borders and to migrate to their public colleges, as long as the higher tuition costs "equalize" the tax burden upon residents. This presumption, too, seems fair, especially in a country with highly decentralized postsecondary state systems. The balance properly favors resident taxpayers yet does not fence out those who wish to change locations and attend schools without having made a tax contribution to that state's coffers. This arrangement also distributes students and acts as an incentive for states to establish strong public postsecondary sectors. It does so by preventing a mass migration to states with lower charges and by engendering loyalties, both political and academic, to state institutions. By means of compacts and state consortia agreements, it can also distribute scarce places in highly specialized and expensive curricula, such as optometry, pharmacy, and veterinary medicine, where not all states offer such programs. The practice of residence, however, lacks the elegance of its theoretical premise. In a surprisingly large number of situations, applicants or students have presented increasingly sophisticated claims to residency, where residency practices (either laws or regulations) had not envisioned such complex claims. In many respects, immigration poses such a challenge.

By employing several approaches, this Part reviews the law, theory, and administration of residency requirements. First, basic operational definitions of the legal and fiscal issues are outlined, including the vexing problems of "domicile" and "residence." It is well established that reasonably drafted regulations can be legally administered. As will be seen, however, even such reasonable practices are fraught with systemic flaws. Second, the governance structures of the states are categorized according to their formality and level of decision-making; this makes it
possible to analyze the various state practices by comparing similarly situated residence requirements. Third, the extensive system of exemptions, exceptions, and waivers will be discussed. It is such a patchwork that one commentator noted the "inconvenience and even injustice, to which such dissimilarity in practices gives rise," and concluded that "this heterogeneity is neither in the interest of the students, of the states, nor of the nation."48 Fourth, problems with institutional practice are discussed: there is considerable administrative discretion at the institutional level in the indices and criteria of residential intent, the burden of persuasion, the evidentiary requirements, and the weight accorded criteria.

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

For persons who have lived in a single state for many years and attend a state institution, it is easy to consider such students as residents; conversely, if a student moves from State A to State B solely for the purpose of attending B state college, it is equally clear that he or she is a nonresident, at least at first. The wide space between these two occurrences, however, is the rub. As a general rule, states will allow a person who "moves" to a state to become reclassified as a resident after a specified period of time. This time period ranges from ninety days (for example, the District of Columbia)60 to twelve months (a period employed by nearly all the states).61 No state with a durational test currently employs a waiting period of more than twelve months, and in several states (for example, New York62 and Tennessee),63 it is possible to become reclassified immediately upon arrival. Absent other exceptions or complications, when the specified time passes, a state with a simple durational requirement (eight states)64 will allow a citizen student to pay the lower tuition as a resident. This is usually an objective standard, with certain proof about continuous presence required for the reclassification. To be sure, this objective standard is subject to measurement problems, as even the seemingly simple standard of X period of days can become complicated: Do holidays away from the state count? Does the "clock" begin when the person moves to the state? When she obtains employment? When she registers to vote? When she buys a house? It is easy to imagine many possible variations on these themes, and an experienced registrar is bound to have heard them all. Immigration makes these rules particularly difficult.

As difficult as this "objective" measurement becomes, forty states have complicated matters by requiring more than mere duration: these states also require that residents establish domicile, by forming the legal intention of making that state their "true, permanent, and fixed abode."65 This is a very complicated requirement, both conceptually and operationally. Instead of merely counting the requisite waiting period (already noted as deceptively complicated), states that employ domicile also require a legal declaration and evidence to prove that residents consider the state their principal establishment. Confusion frequently arises because the terms "residence" and "domicile" are often used interchangeably, or "residence" is measured with language denoting intentionality, which is not required for mere residence.66 In law, "domicile" includes "residence," but has a more specific meaning than does "residence."67 To constitute a domicile, two elements must occur: (1) residence and (2) an intention to make that residence the home and abode. Persons may maintain more than one residence, but only one domicile.68 For example, many students plausibly maintain several residences, some simultaneously (summer state, mother’s and father’s state, the state in which they live and vote). Incidentally, the place where students vote is not necessarily their domicile, as mere residence and brief waiting periods are the requirements to register for voting in local or federal elections.69 As in virtually every other instance, determining residency in the immigration context is even more complicating.

Given the high degree of difficulty in ascertaining student intentions, why do states employ domicile as a determinant of residence? The logic is threefold: to ensure, as strongly as possible,
that students establish and maintain genuine ties to the state; to ensure that students not "forum shop" and pick from several states where they can manufacture or allege contacts; and to make the declaration of residence more meaningful and seriously considered than mere presence requires. Taken individually, these intentions do not always substantially advance the state interests, except through the attendant complexity that discourages (to a limited extent) frivolous claims and thereby protects the states' fiscal resources. This unarticulated premise appears to be a strong driving force behind several residency policies or practices.60

Forty states require the establishment of domicile and a waiting period,61 while an additional two states require domicile with no specified duration period.62 This leaves nine states with pure durational requirements absent intention. Upon closer examination, however, the rationales for the widespread practice of exacting declarations of intention fail to advance any substantial guarantees for establishment of domicile beyond those provided by mere durational requirements. The cost of administering intentions is high, both in dollar terms and in the considerable ill will it exacts. None of the three ostensible reasons for domiciliary requirements truly guarantees loyalty or tax contributions. In fact, none of the three rationales for strict domiciliary requirements assures states that the newly arrived nonresidents have been transformed into genuine residents.63 This is as true for citizens or permanent residents as it is for aliens.

That students establish a legitimate principal home and abode is no guarantee that as graduates they will remain in the state beyond commencement or contribute to the tax system while they are enrolled in school. In all likelihood, students will move wherever employment is available or the quality of life, family considerations, and circumstances allow. To some extent, the second purpose may be met, as students cannot maintain more than one domicile. However, a variety of permutations is possible for students, and more than one legal residence can be maintained, which can give sufficient evidence for students to meet residency requirements in more than one state.64 A greater problem is the possibility that students may have to relinquish residence or domicile in the "home" state to establish sufficient contacts in a new state. This has led, in many instances, to students having no one state in which they can successfully claim a domicile for tuition purposes.65 The third rationale, making declarations more meaningful, is only exhortatory and unlikely to prove efficacious in determining domicile. There is no legal means to ensure that students remain in the state after consuming the postsecondary resources.

Despite the demonstrable defects of domiciliary requirements, particularly those that also include waiting periods, states and institutions persist in requiring them. In addition, more than lower resident tuition lies in the balance, as many other benefits may accrue to state residents in public or private colleges, such as preferential admissions, scholarship or loan assistance, inclusion in quota programs, eligibility for consortia or exchange programs, and participation in specialized programs negotiated among states in legislative compacts.66 It is these stakes, not merely the tuition differentials (which, in certain instances, can be "equalized" by federal need-based aid formulae) that have contributed to the overall rise in residency litigation.

To complicate matters, there are an extraordinary number of exemptions, exceptions, and waivers to state residency practices.67 The most common areas singled out for special treatment are dependents or minors, marital status, military personnel, and alienage, four areas where nearly all states make some special mention in their practice. States also employ special mention for a wide range of categories, totalling thousands of exceptions to residency requirements. Table 1 summarizes state data on special treatment, but as complicated as these practices are, they significantly understate the exemptions. For those seventeen states with institutional autonomy to devise their own residency requirements, only a flagship system or campus was sampled; the residency requirements in those states vary from institution to institution, and exemptions are no different.

(Insert Table 1 here)

Other groups frequently singled out for special treatment include university employees (seventeen states), financially needy students (sixteen states), and senior citizens (ten states). These exemptions are undoubtedly even more widespread than the data suggest, due to the many
ways employed to treat residency or confer exemption. For example, states may use fiscal riders, revenue bills, or appropriations language to enact exceptions (for one year or several), and these or other quasi-legislative means could not be discovered in a statute search. As one example, Texas uses an appropriations bill each session to limit out-of-state enrollments in public law schools to a certain percentage of their total.68

The most striking feature among these patterns is how few exemptions or special treatment have anything to do with the fundamental concepts of duration or domicile. In some instances, the exceptions are aimed at classes of persons who are mobile (military, migrant workers) or for whom domicile is difficult to determine (aliens, Indians).69 However, the largest class is those for whom residency (or tuition waivers) is a conferred benefit, without reference to duration or intent. Although the data in Table 1 are not arranged to show each state's exemptions (due to the wide number of exceptions), some states are truly spectacular in their legemdomain around strict requirements. Texas, although not the most unusual example, offers more than eighteen categories of exceptions or special treatment to a strict domiciliary requirement with a one year waiting period: from graduate assistants, to recipients of "merit" scholarships, to certain border non-residents.70 In nearly every instance, the benefit is conferred to reward a characteristic or class of persons, such as graduate students (as an employment perquisite), meritorious students (those who receive scholarships), certain fortunate employees, or good neighbors (certain adjoining states).71 Few can really lay claim to exemption on intentional or durational grounds, but all claim statutory preference as an exception carved out over time by the legislature. Ironically, in other respects, the Texas legislature has sought to make state residency even more difficult to achieve, especially for undocumented aliens residing within its borders.72

Some of these exemptions may not pose bad results, but they are, for the most part, unprincipled, except when they ease the evidentiary burden upon groups for whom duration or domicile genuinely poses a particular problem. Graduate students rarely are paid well and provide important instructional or research services to institutions. Paying their tuition seems a modest benefit and one well worth preserving, but using the residency requirement to deem the students "residents" is a curious bookkeeping maneuver, one that undermines the residency determination system. Particularly troubling are the many discretionary means to confer residency upon the advantaged, as in the instance of scholarship recipients or employees of choice industries lured to states by such special treatment as exemptions and (for the companies) tax abatements.73 As weak a system as has been erected to regulate migration of out-of-state students, it is being undermined by the growth of arbitrary and unprincipled exceptions, exemptions, and waivers.

On one hand, it is understandable that exceptions would occur and desirable that some flexibility would be available for the institutions that must administer strict residency requirements; play in the joints is always useful for large organizations, and reasonable accommodations seem a social good. Unfortunately, the extensive and unprincipled exemptions in this area have gone far overboard from their original purpose, and the practices, particularly those found in statutes and regulations, suggest that the basic residency requirements are so outmoded or wrongheaded that only institutionalized circumvention can make the system work.74 This Goldberian scheme is neither rational nor reasonable, and institutional practices, discussed next, only add to the confusion.

A first step in understanding the discretionary practices is an examination of indices and criteria. As has been noted, domiciliary requirements entail subjective as well as objective, measurable evidence. In the purest sense, one who has never left a state and never intends to leave incontestably meets all the presence, duration, and intent criteria; at the other end, someone who has never been in a state and never intends to go there is just as clearly not its domiciliary. Between these two points, however, there is much room for judgment. In most instances, the first level of inquiry is: do the circumstances indicate any presence in the state, and if so, was it of sufficient duration to meet the durational requirement? Some institutions, in anticipation of difficulties in determining this criterion, allow a set "grace period" for counting time. As simple as this appears to be, counting the time periods frequently poses problems: When does the clock
start? When does it stop? Do absences from the state count? If brief ones do not count, what about prolonged ones? A review of admissions practices revealed that nearly half the sampled institutions required that applicants for residence status reside in the state for the appropriate period, counted backwards from the date of application, on the theory that events could change between that time and the time of enrollment; the other states permitted students to run the clock until enrollment, a practice that can substantially shorten the waiting period.76

The measurement of intent is even more complex than the measurement of duration, and the forty states with domiciliary requirements and waiting periods and two states with domiciliary requirements without waiting periods predictably employ a wide range of criteria to determine intent.77 Often, other measures of long-term residence and community ties are used: for example, voter registration is a less stringent form of residence widely used by institutions. In truth, it is a poor proxy, for voting residency periods are by law of short duration, usually ninety days to six months, and rarely are probative of long-term intent.77 People may regularly vote in their domicile, but they need not do so. Conversely, not being registered to vote in a new state is likely to be interpreted as not having established domicile. In any event, the extensive litigation in student voting rights cases suggests the great degree of difficulty in measuring intentionality for meeting voting residency requirements.78 However, every state sampled either allowed or required voter registration as a criterion of domiciliary intent.

The problems of evidence and burden of proof are important, for determining both "objective" facts (for example, how long have students resided) and subjective intent (where is your true, permanent, and fixed abode), but those states that hold students to durational standards appear to exact the same evidentiary requirements as those states where domicile must be proven. Therefore, even where subjective intent is not required, similar proof--including items that measure or count toward intentionality--is exacted.79 This curious finding suggests that even nondomiciliary states are employing domiciliary criteria and evidence, higher standards than the technical requirements of the statutes or regulations.

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

(Insert Table 2 here)

Many states grant wide latitude for the evidence allowed to prove residence, but it is the patterns of the evidence that administrators rely upon to make their determination. For instance, a student holding all the documentation listed in Table 2, but voting in another state, will likely be classified a nonresident; even if the student registered to vote in the new state, many registrars would likely start the clock at the point of reregistration. The burden of proof is always upon the student in classification cases, and courts will likely uphold the state practice unless it includes an irrebuttable presumption (that is, that students, once classified nonresidents, can never become residents)80 or an unconstitutional provision (that states attempt to do what only the federal government can do, namely, regulate immigration).81 Thus, to overcome the burden of proof, students will not only be required to show that they are residents or domiciliaries of the state, but that they are not domiciled or residents elsewhere. These are heavy burdens to overcome, and although the requirements for duration are less stringent than those for domicile, the evidence deemed necessary for one is no less than that required for the other.

The weight accorded the evidence does not substantially differ between determinations of residence or domicile. In both instances, states rely upon similar records (the portfolio of evidence) and accord the evidence the greatest weight when the records show uninterrupted presence as well as abandonment of domicile elsewhere. As noted earlier, even durational requirement determinations have elements of intentionality, and "taking into account the whole picture" inevitably considers intentions. The care with which materials are scrutinized can depend on a
range of elements, including political or legal considerations. For example, even in those institutions that enjoy considerable autonomy in residency matters, admissions numbers and policies can subtly affect whether or not institutional strict scrutiny is applied to residency petitions: when enrollments are down or when substantial tuition increases occur, it may prove efficacious for institutions to be more lenient in borderline residency cases rather than risk losing students.\textsuperscript{82} If a school has differential admissions practices for transfer students—requiring higher GPA’s for transfer admissions than those required for enrolled students—such flexibility may actually be a way to improve the quality of students. Of course, such practices cannot be articulated as formal institutional policy, lest state auditors investigate or students begin to expect easier reclassification in the future. There are also occasions where institutions reinterpret state legislation or regulations, as in one state, where a virtually unenforceable provision of dubious constitutionality was ignored by the state institutions in an unspoken compact.\textsuperscript{83} This has also happened in states where the existing practice has been struck down by a court decision. A study found a number of states whose practices regarding alien students had not been brought into conformity with a United States Supreme Court postsecondary residency decision, several years after the requirements had been found unconstitutional.\textsuperscript{84} Nonetheless, many institutional officers were aware of the court case and had been advised by legal counsel to ignore the requirements and abide by the Court’s decision.\textsuperscript{85} The fluctuations of enrollments, institutional priorities, and legal criteria all contribute to the accordion-like tightening and releasing of the evidence, burdens of proof, standards, and weights in residency determination. Like the multiple exemptions found in nearly all states, the wide swings evident in the administration of residency suggest the deterioration of the system into one that does not always protect either the institutional interest or the students’ rights. As troubling as the system is for citizens simply moving to a new state, even more complex is the calculus for aliens, particularly undocumented aliens.
III. Courts, Colleges, and Undocumented Aliens

_Plyler v. Doe_ stands at the apex of immigrants' rights in the United States, particularly the rights of undocumented aliens. The legislation that prompted the case also symbolizes the meanspiritedness directed against undocumented aliens: in this instance, the ability of alien children to attend Texas public elementary and secondary schools without being required to pay tuition. It is not surprising that such repressive anti-Mexican legislation would have originated in Texas, as it is the jurisdiction widely regarded to have "a legacy of hate engendered by the Texas Revolution and the Mexican American War." According to historians, this history of conflict has "generated distrust and dislike between Anglos and Texas Mexicans. Most important, it shaped Anglo attitudes towards Mexicans by (a) justifying the inferior status to which they were relegated, (b) legitimizing the stereotype of Mexicans as 'eternal enemies' of the state, and (c) encouraging their denigration. Additionally this legacy undergirded the historical attitude of Anglo disparagement of Mexican culture and the Spanish language."

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

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

The State also argued that it had enacted the legislation in order to protect itself from a putative influx of undocumented aliens. The court acknowledged the concerns of the state due to any increase in the undocumented population, but found the creation of the statute was not tailored to meet the stated objective: "Charging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration." Immigration and naturalization policy has always been within the exclusive powers of federal government. A state may act to create legislation affecting aliens only if it is delegated to the states, mirrors federal policy, and furthers a legitimate state goal. However, the court found no perceivable educational policy or any state interests that would justify denying undocumented children an education.

Finally, the state maintained that undocumented children were singled out because their unlawful presence rendered them less likely to remain in the United States and therefore to be able to use the free public education they received in order to contribute to the social and political goals of the United States community. This circular assumption about undocumented children is difficult to quantify, and the court distinguished the subclass of undocumented aliens who have lived in the United States as a family and for all practical purposes permanently from the subclass of aliens who enter the country alone and whose intent is to earn money and stay temporarily. For those who remain with the intent of making the United States their home "[i]t is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime."
As in many equal protection cases, an important issue in Doe v. Plyler was the level of scrutiny to be accorded the Texas statute\textsuperscript{106} that denied state funds to school districts enrolling children who were not "citizens of the United States or legally admitted aliens"\textsuperscript{107}. Undocumented alien children. Undocumented aliens, prior to Plyler, had won constitutional protection in fourth,\textsuperscript{108} fifth,\textsuperscript{109} and sixth\textsuperscript{110} amendment cases, as well as in a range of civil litigation.\textsuperscript{111} However, the Supreme Court had never been faced with the question of whether undocumented aliens could seek fourteenth amendment equal protection.\textsuperscript{112} The Supreme Court had earlier held that undocumented aliens are "persons,"\textsuperscript{113} and that undocumented persons are protected by the due process provisions of the fourteenth amendment.\textsuperscript{114} However, the State of Texas argued that because undocumented children were not "within its jurisdiction,"\textsuperscript{115} they were not entitled to equal protection. Justice Brennan rejected this line of reasoning, drawing upon the legislative history of the fourteenth amendment\textsuperscript{116} and concluding that there "is simply no support for [the] suggestion that 'due process' is somehow of greater stature that 'equal protection' and therefore available to a larger class of persons."\textsuperscript{117}

Once he had determined that undocumented aliens were entitled to equal protection, Brennan decided upon the extent of scrutiny to be applied in the case. He discarded strict scrutiny, noting that undocumented aliens were neither a "suspect class"\textsuperscript{118} nor was education a "fundamental right."\textsuperscript{119} He also rejected the minimal scrutiny inherent in a two-tiered standard.\textsuperscript{120} Instead, he chose the "intermediate' scrutiny" standard of Craig v. Boren,\textsuperscript{121} and found that the statute did not advance "some substantial state interests."\textsuperscript{122} Therefore, he affirmed United States District Court and Court of Appeals judgments invalidating the statute.\textsuperscript{123}

He reached this conclusion by stretching the suspect classification and the fundamental right and, although he did not reach the claim of federal preemption,\textsuperscript{124} he did draw a crucial distinction between what states and the federal government may do in legislating treatment of aliens.\textsuperscript{125} In stretching the "suspect" classification, Brennan analyzed from legitimacy classifications\textsuperscript{126} that undocumented children were not responsible for their own citizenship status and to treat them as Texas law envisioned would "not comport with fundamental conceptions of justice."\textsuperscript{127} However, he was more emphatically concerned with education and elaborating the nature of the putative right. While he reaffirmed Rodriguez in finding public education not to be a fundamental right,\textsuperscript{128} he recited a litany of cases holding education to have "a fundamental role in maintaining the fabric of our society."\textsuperscript{129} Moreover, he felt that "illiteracy is an enduring disability,"\textsuperscript{130} one that would plague the individual and society. This weighting enabled him to rebut the State's assertions, which the Burger dissent had found persuasive, that the policy was legislatively related to protecting the fiscal economy of the State.\textsuperscript{131}

The nature of the right (education) seems to have more thoroughly persuaded the Court in Plyler than it had in Rodriguez.\textsuperscript{132} Additionally, while the Court has upheld state statutes governing alien employment\textsuperscript{133} and unemployment benefits,\textsuperscript{134} these narrow areas mirrored federal classifications and congressional action governing immigration.\textsuperscript{135} In DeCanas,\textsuperscript{136} the Supreme Court had held that if Congress had addressed an immigration issue and delegated aspects of its administration to states, the states could enact their own legislation to regulate the area. In public education, however, Brennan wrote, "we perceive no national policy that supports the State in denying these children an elementary education."\textsuperscript{137}

The framework employed by the majority, couched as it was in moral tones, seems to be the very type of "legislating" Justice Rehnquist feared in Craig v. Boren, the earliest use of heightened scrutiny.\textsuperscript{138} However, the Court could have, in its own terms, found undocumented alienage of children to be suspect or, more satisfactorily, provided criteria for measuring the "enduring disability,"\textsuperscript{139} so that legislatures could fashion more acceptable ends-means formulations in such instances. Heightened scrutiny could have arisen from two different directions, one suggested by Judge Seals in the original trial court In re Alien Children's Education Litigation,\textsuperscript{140} apparently not considered by the Court, but envisioned in the Rodriguez case,\textsuperscript{141} and a second, an outgrowth of race, national origin, and alienage cases in which stricter scrutiny
has been employed.\textsuperscript{142}

Judge Seals applied "strict judicial scrutiny" in his District Court opinion,\textsuperscript{143} "when the absolute deprivation [of education] is the result of complete inability to pay for the desired benefit."\textsuperscript{144} Such a standard would have required the State show a "compelling governmental interest."\textsuperscript{146} In contrast to the \textit{Rodriguez} fact pattern that provided a minimum education for all Texas school children but did not constitute "an absolute deprivation,"\textsuperscript{146} the charges to undocumented aliens were substantial,\textsuperscript{147} and the District Court had found "the effect of the new statute is to exclude undocumented children from the Texas public schools."\textsuperscript{148} Therefore, one of the missing "fundamental right" ingredients in \textit{Rodriguez} was concededly present in \textit{Plyler}.

Another way in which the Supreme Court could have employed strict scrutiny was to hold undocumented alien children as a "suspect class." Brennan categorized these classifications as reflecting "deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective," and requiring furtherance of a "compelling governmental interest."\textsuperscript{148} The record seems replete with such animus towards undocumented aliens in Texas.\textsuperscript{160} He held, however, that undocumented entry is "the product of voluntary action"\textsuperscript{161} and therefore "not irrelevant to any proper legislative goal."\textsuperscript{162} This reasoning, while arguably applicable to the parents, is repudiated by Brennan himself on the same page as being inapplicable to undocumented children.\textsuperscript{163} The children’s surreptitious entries were not effected voluntarily by the children; in traditional domicile terms, children’s domiciles are those of their parents.\textsuperscript{164} He failed, therefore, to provide an internally consistent or satisfying reason for not holding the children to be members of a suspect class. He also could have reviewed the classification in light of the Court’s previous national-origin and alienage cases,\textsuperscript{166} which, read together, provide a considerable record of the "deep-seated prejudice" so manifestly evident in Texas’ and other States’ treatment of undocumented aliens. The Court acknowledged the scrutiny due aliens in two other cases the same term, with which \textit{Plyler} would have been consistent.\textsuperscript{166}

Although undocumented college students were not at issue, \textit{Toll v. Moreno}\textsuperscript{167} was the first postsecondary education case construing a state statute affecting non-immigrants, aliens with permission to remain only temporarily in the United States.\textsuperscript{168} Read with \textit{Toll v. Moreno} for its preemption value, \textit{Plyer v. Doe} will eventually be tested for its vitality in a postsecondary setting. Justice Brennan also wrote the majority opinion in \textit{Toll}. After reviewing the confusing history of the case,\textsuperscript{168} he held that Maryland’s policy towards G-4 aliens and their dependents constituted a violation of the Supremacy Clause,\textsuperscript{160} and therefore did not reach the questions of due process or equal protection, which had been considered by the District Court\textsuperscript{161} and Appeals Court.\textsuperscript{162} By denying domiciled G-4 aliens the opportunity to pay reduced in-state tuition, the University of Maryland violated the Supremacy Clause.\textsuperscript{163} The opinion follows a simple logic: the Federal Government is preeminent in matters of immigration policy and states may not enact alienage classifications, except in limited cases of political and government functions.

The decision was predictable in that the University had lost at every turn, and on each issue. The District Court had held in 1976 that the original policy was a violation of due process and constituted an irrebuttable assumption.\textsuperscript{164} The United States Supreme Court had held in 1978 that G-4 visa holders could be United States domiciliaries,\textsuperscript{166} certified a question to the Maryland Court of Appeals to determine whether G-4 aliens and dependents could be Maryland domiciliaries.\textsuperscript{166} The Maryland Court determined that they were capable of acquiring domicile,\textsuperscript{167} rendering erroneous the University’s previous reliance upon non-establishment of domicile. Before the Court rendered its opinion, the University’s Board of Regents issued a "Reaffirmation of In-State Policy"\textsuperscript{168} that, its characterization notwithstanding, constituted a substantial retreat from its previous position.\textsuperscript{169} The Supreme Court, noting that the University’s action had "fundamentally altered" the domicile issue, remanded the case to the District Court.\textsuperscript{170}

At the District Court, the University lost once again. The court reaffirmed that even though the University’s "paramount consideration" was no longer domicile, the previous policy had denied due process to G-4 aliens.\textsuperscript{171} Moreover, the revised policy was also found to be defective on fourteenth amendment equal protection and supremacy clause grounds.\textsuperscript{172} In the Court’s view,
the "revised" policy concerning alienage could not survive strict scrutiny\textsuperscript{173} and, further, it impermissibly encroached upon federal immigration prerogatives.\textsuperscript{174} The Appeals Court affirmed,\textsuperscript{175} making both the policies invalid: the original practice on due process and irrebuttable presumption grounds concerning the establishment of domicile, and the revised practice on equal protection for alienage and preemption grounds. While Justice Brennan’s opinion only reached the issue of the supremacy clause,\textsuperscript{176} his opinion in \textit{Pluyer v. Doe}, decided upon equal protection grounds with less-than-strict scrutiny for undocumented aliens,\textsuperscript{177} suggests that he also would have found the revised policy invalid on equal protection grounds\textsuperscript{178} and would have affirmed the District Court and Appeals Court.

Brennan reviewed \textit{Takahashi},\textsuperscript{179} \textit{Graham},\textsuperscript{180} and \textit{DeCanas},\textsuperscript{181} reading them for the principle that "state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress."\textsuperscript{182} He found both that Congress had allowed G-4 visa holders to establish domicile in the United States,\textsuperscript{183} and also had conferred tax exemptions upon G-4 aliens "as an inducement for these [international] organizations to locate significant operations in the United States."\textsuperscript{184} Therefore, Brennan reasoned, it was clearly the congressional intent that G-4 visa holders not bear the "additional burdens" Maryland sought to impose: "The State may not recoup indirectly from respondents’ parents the taxes that the Federal Government has expressly barred the state from collecting."\textsuperscript{185}

On the merits of the case, Brennan mustered a 7-2 vote, with Justice O’Connor concurring in the result. Blackmun’s concurring opinion was aimed at rebutting the dissent by Justice Rehnquist, in which he argued at length that G-4 aliens should not be strictly scrutinized, as they were an advantaged group, not the disadvantaged aliens envisioned as requiring protection in \textit{Graham v. Richardson}.\textsuperscript{186} Additionally, Rehnquist found the majority’s preemption analysis flawed: "First, the Federal Government has not barred the States from collecting taxes from many, if not most, G-4 visa holders. Second, as to those G-4 nonimmigrants who are immune from state income taxes by treaty, Maryland’s tuition policy cannot fairly be said to conflict with those treaties in a manner requiring its preemption."\textsuperscript{187}

The dissent is not helpful in clarifying the problems glossed over in the majority opinions. First, it is not disadvantage per se that provokes the need for strictly scrutinizing alienage statutes, but rather aliens’ concede powerlessness in political disputes.\textsuperscript{188} However wealthy or advantaged World Bank employees may be—and these plaintiffs surely could not invoke the same moral claims as did undocumented alien children\textsuperscript{189}—the University’s additional charges for non-residents clearly constituted a burdensome extra cost which the University was ultimately required to refund.\textsuperscript{190} Moreover, in attempting to suggest that the Maryland tuition policy was not in conflict with the State’s tax exemption,\textsuperscript{191} Rehnquist was simply wrong. Not only did the University concede openly that the surcharges were calculated in an attempt at "granting a higher subsidy" and "achieving equalization,"\textsuperscript{192} both tax terms, but in their brief the University noted that the non-resident tuition differential was "roughly equivalent to the amount of state income tax [a G-4 alien] is spared by [the state] treasury each year."\textsuperscript{193} What Rehnquist might have queried was the extent to which public universities may appropriately regulate their admissions policies concerning residence, particularly policies concerning foreign nationals, following \textit{Toll}. A significant number of states have residency requirements that functionally resemble Maryland’s practice, and not all have granted G-4 alienage tax exemptions. Given the complexity of administration in foreign student affairs, it is likely that many administrators in public and private universities frequently do not understand their legal responsibilities to foreign nationals who apply for admission, in-state tuition, or state financial assistance.\textsuperscript{184} Therefore, the majority’s broad language ("we cannot conclude that Congress ever contemplated that a State, in the operation of a university, might impose discriminating tuition charges and fees solely on account of the federal immigration classification")\textsuperscript{196} is unhelpful to guide admissions officers in drafting acceptable guidelines. For example, how can a state university "track" relevant federal immigration statutes in admissions and financial aid, so as to meet the requirements of \textit{DeCanas v. Bica}? How may states regulate tuition
charges for other similarly-situated nonimmigrants who are not G-4 aliens? Read with Plyler v. Doe, Toll raises several important questions concerning the “residency clock” for undocumented adults: does the proper determination for establishing domicile begin when they enter the country? When they apply for a formal status? When they receive formal, adjusted status? What happens if the state has no common law on alien residency? While Toll may have resolved the narrow issue of domiciled G-4 aliens in states that grant tax exemptions, it is clear its significance lies beyond this narrow setting.

Leticia “A” and Undocumented College Students in California’s Public Institutions: Plyler Goes to College

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

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

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

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

As the court has also done in Plyler, Judge Kawauchi stretched education to be more than a minimal interest requiring a mere rational relationship. He cited evidence of the “importance of [public] higher education in California,” and applied heightened scrutiny for “determining whether there is a ‘substantial’ state interest served by the classification.” He found no interest.

Rather, unlike the Attorney General’s Opinion which did not even attempt to mount a constitutional justification for its result, Judge Kawauchi showed a sophisticated grasp of immigration law relative to student residency issues: he discerned that not all undocumented aliens
are similarly situated; as an example, one of the plaintiffs was in the process of becoming a permanent resident, even during the trial.\textsuperscript{216} In truth, several of the undocumented students became eligible to apply for permanent resident status and were not subject to deportation.\textsuperscript{216}

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

The policies underlying the immigration laws and regulations are vastly different from those relating to residency for student fee purposes. The two systems are totally unrelated for purposes of administration, enforcement and legal analysis. The use of unrelated policies, statutes, regulations or case law from one system to govern portions of the other is irrational. The incorporation of policies governing adjustment of status of undocumented aliens into regulations and administration of a system for determining residence for student fee purposes is neither logical nor rational.\textsuperscript{217}

Under this reasoning, it would be "a difficult legislative task"\textsuperscript{218} for a state to track federal immigration law for purposes of student residency requirements, without violating principles of equal protection or preemption.

In a traditional equal protection vein, the United States Supreme Court had, in \textit{Plyler}, prohibited the very same governmental attempt to charge a form of non-resident tuition to undocumented children: "A state may not however, accomplish what would otherwise be prohibited by the Equal Protection Clause, merely by defining a disfavored group as non-resident. And illegal entry into the country would not, under traditional criteria, bar a person from obtaining domicile within a State."\textsuperscript{219} \textit{Toll v. Moreno}, decided within two weeks of \textit{Plyler}, held that states may not deny aliens the ability to establish domicile unless federal law precludes establishing such domicile, as when aliens are admitted to the United States on temporary visas and are required to retain domicile in their country of origin.\textsuperscript{220}

\textit{Plyler, Toll, and Leticia "A"} appeared to erode the ability of states to employ federal immigration criteria irrefutably to their postsecondary residency determinations. However, in an unusual resuscitation of the issue in California, a University of California, Los Angeles employee refused to administer the residency policy, claiming it was encouraging illegal immigration.\textsuperscript{221} He quit and filed a taxpayer suit in California state court, asserting that the Attorney General's opinion overruled in \textit{Leticia "A"} was correct and that the Education Code residency provision struck down by \textit{Leticia "A"} should be considered valid.\textsuperscript{222} To do so would restore the state provision that had occasioned \textit{Leticia} and would make it impossible for undocumented students to be considered California "residents" for tuition purposes.

By this time, state higher education officials had become converts to Judge Kawaichi's ruling. The state and the universities had not appealed his 1985 ruling, and had since come to believe that the alien students deserved to be considered as residents, provided they met all the other tests for in-state status.\textsuperscript{223} Several undocumented students in state institutions did quite well in school, and the floodgates had not loosened: in a public postsecondary education system of several hundred thousand students, University of California and California State University officials estimated fewer than 1000 students in the two systems were undocumented when admitted; fewer than half of one percent of the total enrollment was undocumented.\textsuperscript{224} One study of San Diego, the city closest to the border, estimated that only 80-90 of the 35,000 students in the San Diego campus of California State University were undocumented, and only one student in the new CSU-San Marcos campus was out of status.\textsuperscript{226} The open door community college system estimated that fewer than 1% of their 1.5 million students were undocumented.\textsuperscript{226}

Even so, on May 30, 1990 the Los Angeles County Superior Court ruled against UCLA and the State, in \textit{Bradford v. Regents of the University of California}.\textsuperscript{227} The Court ruled that the original Education Code provisions (pre-\textit{Leticia "A"}) were constitutional and that the state was required to charge the aliens tuition, as they did not have the legal capacity to establish domicile, as required by the Code.\textsuperscript{228}
At this point, the state attempted a new tactic, seeking to dismiss the action or to have it transferred to Alameda County, where Judge Kawauchi sat, in effect, to consolidate it with *Leticia "A".* Judge David Yaffe denied the motions to dismiss and to transfer the case; he scolded the university for its tactics:

You have this action pending in this court. You litigate it through to a decision against you, and then, at that point, you claim that the court should yield its jurisdiction because there's another action that is still pending, in essence, up in Alameda County. . . . It doesn't seem to me that there is any sound rule of judicial policy that would permit a litigant to do that.\(^{230}\)

At this point, the University was in for a penny, in for a pound. They had brought in outside counsel to assist, and filed a writ of mandate in an attempt to reverse Judge Yaffe's original ruling that found for Bradford and the subsequent denial of the motion to dismiss or transfer.\(^{231}\) The California Supreme Court then directed an alternative writ.\(^{232}\) The Court of Appeal upheld the trial judge's opinion, finding that he had not abused his discretion in refusing to transfer and consolidate *Bradford* with *Leticia "A"* in Alameda County, that the original sec. 68062(h) properly excluded undocumented students from becoming in-state residents for tuition purposes, and that the statute was constitutional.\(^{233}\)

In the meantime, Judge Kawauchi was petitioned by the original *Leticia "A"* plaintiffs to reconsider his decision and order, in light of the competing *Bradford* Superior Court decision.\(^{234}\) He issued a modified holding, retaining jurisdiction and affirming his original decision—which struck down Sec. 68062(h).\(^{235}\) Here, the 1985 decision of the California State University defendants not to appeal their loss in *Leticia "A"* frustrated their ability to advance the argument that *Leticia "A"* was as binding upon the CSU system as *Bradford* was upon the University of California system.\(^{236}\) With the change of heart, the undocumented plaintiffs also found themselves mousetrapped: having won so convincingly earlier, there had been no appeal taken by the State. The institutions came to see the issue as one where they could accommodate the wishes of the original undocumented plaintiffs.\(^{237}\) However, with the ostensibly-competing decisions, the state institutions did not wish to be whipsawed on this issue, especially when they were being criticized for management practices and were bracing for financial cutbacks.\(^{238}\)

The issue was addressed by a collateral taxpayer case, *American Association of Women (AAW) v. California State University,* brought by the Federation for American Immigration Reform (FAIR), an immigration restrictionist group, to force the state's hand. In *AAW,* Judge Robert O'Brien of the Los Angeles County Superior Court considered the discrepancies between *Leticia "A",* as modified, and *Bradford,* and decided there were no conflicts.\(^{239}\) He held that Judge Kawauchi's "clarification" constituted a substantive shift in the holding: "Unlike the original injunction the *Leticia "A"* clarification no longer requires CSU automatically to treat undocumented students the same as U.S. citizens. Thus, although the trial court does not specifically follow the law established by *Bradford,* it has tempered its original holding so that it in effect gives credence to *Bradford,* as well as the process required by Section 68062(h)."\(^{240}\)

By finessing this issue and creating a distinction without a difference, the court found that the modified *Leticia "A"* was *res judicata,* completely tried and determined on its merits and that there was no "substantial identity of parties or those who are in privity with a party."\(^{241}\) He held that *Bradford* was "the only relevant California appellate court decision, [and] controls this case on the legal issues involved."\(^{242}\) Finally, he ordered the CSU system to "cease, desist, and refrain from, directly or indirectly, by any means whatsoever, violating Education Code sections 68050 and 68062(h) or from treating undocumented aliens as residents, for purposes of tuition, without first establishing them as such in accordance with Education Code section 68062(h)."\(^{243}\)

The University of California considers itself bound by *Bradford,* while the California State University System has appealed *Leticia "A",* as modified, in order to have an Appeal Court resolution of the conflict.\(^{244}\) Thus, by Summer, 1994, undocumented students are eligible to establish residency in the CSU, but not in the UC or in the 110 public California Community College campuses.
This case is a quintessential residency dispute, as the residency determinations turn on fact patterns of intent. Bradford and AAW hold that the undocumented cannot establish the requisite intent, while Leticia "A" holds that they are not prevented from establishing residence. Judge Kavauchi's holdings, in Leticia "A" and its clarification, are clearly the more correct of the two competing versions, both because Bradford and AAW misrepresented the elements of domicile and residence, and because neither carefully distinguished among the forms of undocumented alienage, including those who are able to establish domicile in the state.

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

This error then enabled the Bradford court to misapply California law concerning residency, where, in Cabral v. State Board of Control, a California Appeal Court had earlier held that undocumented aliens are state "residents" for purposes of establishing standing for state benefits. The Bradford court held that Cabral was not controlling, because it "arose under a statute which contain[ed] no definition of the term 'resident.'" However, the court misapplied the Toll test for interpreting Education Code 68062(h), by acting as if federal law controlled for one purpose (i.e., finding that Congressional language was "unremarkable" but controlling) but state law controlled for another (i.e., the existence of a state residence statute distinguished what would have otherwise been a controlling construction of state domicile).

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

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

That federal law does not preclude the undocumented from establishing domicile is clear from careful readings of Plyer and Martinez, as well as the INA provisions. Even Toll v. Moreno, on the issue of non-immigrants, appears to rule out such arbitrary residency requirements: "we cannot conclude that Congress ever contemplated that a State, in the operation of a university, might impose discriminating tuition charges and fees solely on account of the federal immigration classification." As a final piece to this puzzle, the treatment of legalization benefits also suggests that federal law does not preclude aliens from establishing domicile under state laws that incorporate the INA. The Bradford Appeal Court attempts to trump the Leticia "A" analysis by arguing that even the generous amnesty to legalize the undocumented status of some aliens under the Immunization Reform and Control Act (IRCA) did not contemplate generosity toward the undocumented:

Federal law, too, discriminates against undocumented aliens in the most basic way: it forbids their entry into the country and authorizes their arrest and deportation. Even undocumented aliens given preferred status under federal law--those authorized under the Immigration Reform and Control Act of 1986 to become lawful temporary residents and thereafter permanent residents--are disqualified for five years from most federal programs of financial assistance to the needy. If federal financial assistance may be withheld from newly legalized aliens who, under the 1986 amnesty law, ‘are to be welcomed as full and productive members of our nation,’ surely the state is not constitutionally required to subsidize the university education of other aliens who have never legalized their status.

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

This Part, like Gaul, is divided in three, and reviews the social science literature on residency determinations, research on alien students, and alien benefit studies. These areas pose unusual research problems, as studying undocumented students presents unusual ethical and social science limitations.274 Even the most obvious questions -- including how many undocumented aliens there are in the United States -- are mixed social science/political questions.276 There has been a longstanding history of overestimating the number of aliens for political purposes and "law enforcement" expediencies, while questionable research findings gain receptive public audiences and even traffic as authoritative "evidence" for judges in immigration cases.278 Therefore, great care must be accorded any social science research that is used to buttress an immigration case or to establish the effect of undocumented immigration upon U.S. labor markets, public benefits, or social services.

Indeed, it is virtually impossible to tell the tale of undocumented communities in the U.S. through traditional social science, as even the best social science labors in the shadow of historical U.S. attitudes towards "foreigners," often, ironically, attitudes held by persons descended from groups once themselves reviled as "dangerous elements" or "foreign influences."276 The preeminent political historian Richard Hofstadter characterized these nativist manifestations and scapegoating of unpopular groups in his book, The Paranoid Style in American Politics and Other Essays:

The recurrence of the paranoid style over a long span of time...suggests that a mentality disposed to see the world in the paranoid's way may always be present in some considerable minority of the population. But the fact that movements employing the paranoid style are not constant but come in successive episodic waves suggests that the paranoid disposition is mobilized into action chiefly by social conflicts that involve ultimate schemes of values and that bring fundamental fears and hatreds, rather than negotiable interests, into political action...[This] paranoid tendency is aroused by a confrontation of opposed interests which are (or are felt to be) totally irreconcilable, and thus by nature not susceptible to the normal political processes of bargain and compromise.278

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

[If] surges of anti-Mexican nativism are viewed as a cyclical phenomenon -- something that seems to happen at least once in a generation -- it could be argued that the U.S. is now overdue for another such nativist spasm. The point is that the attitudes, perceptions, fears and prejudices that underlie such movements do not go away once the immediate stimulus of an economic recession or international reverse of some kind passes. They remain latent in the body politic, waiting to be tapped and manipulated by politicians and special interest groups that have no reservations about: appealing to the baser instincts of their constituents. Indeed, we may be entering a period in which such appeals to nativism are increasingly respectable, because they can be cloaked in an aura of protecting our basic: values as a society, the hard-won living standards of the middle class, or even the national security.278

Cornelius, writing a decade ago, may have been anticipating the cynical manipulation of the war on drugs to justify the shameful treatment of unaccompanied refugee minors in dreadful, Dickensian conditions in INS detention facilities in Texas and California;290 appeals to national security in the interdiction at sea of Haitian boat people desperately fleeing poverty and political
oppression in their country; or legislative proposals to make asylum claims more difficult to advance and easier to deny, in the wake of the first domestic terrorist attack on U.S. soil, alleged to have been perpetrated by Islamic aliens. In this vein, the manipulation of social science data for advancing anti-immigrant arguments has reached fever pitch in the case made against the undocumented in the United States. This discourse, as I will note in the last section of Part IV, has dire consequences for the issue of undocumented college students.

The area of college residency determinations is in need of fresh insights, as no ethnographic study and few administrative law studies have emerged to shed light on the important role administrators play in interpreting residency rules and making residency determinations. The gap is considerable, because redefinition and reinterpretation occur between the enactment of statutes or promulgation of regulations and the institutional determination of a student’s residency status. One knowledgeable scholar of residency practices has noted, "most classification officers would be likely to stress that the difficulties of making either or decisions in individual cases should not be underestimated." One scholar who has begun to examine the administrative law of residency determinations is Richard Padilla, who has written a doctoral dissertation and undertaken two studies on the discretionary aspects of residency. In a 1989 study, Padilla asked registrars and residency officials in a state (where all institutions were required to employ the same criteria and procedures) to review twelve "cases" of student transcripts, applications, and residency information. Using a very carefully controlled interview protocol, he could not get all the administrators to agree unanimously on any of the cases, save one where all would have denied residency status; in five of the twelve cases, no majority could conclusively agree on whether to deny or grant residency. Most tellingly, they split 5-4 on the case of a student who had been granted political asylum in the United States. In the case facts, the student had been in the state for six months as an applicant for asylum, and eight months more after he had received formal asylum status: under the state’s law, he was clearly entitled to be treated as a resident student. In two other immigration-related hypotheticals, facts were given for undocumented students: one was brought surreptitiously into the country as a child while the other had been in student status on a F-1 visa but had left school several years before in violation of the terms of his visa. He had lived and worked in the state for six years since leaving school and owned a home in the state. When polled on these hypothetical cases, two officials voted nonresident for the former, and seven would request more information, while for the latter, seven voted non-resident and two would have sought additional information. In neither case did any official agree to grant residency status to the undocumented students, even though the state law concerning undocumented college students is vague enough to permit the granting of residency. Virtually all the registrars considered the undocumented students to be "foreign students," even though in the first case, the facts would likely not permit the applicant to obtain "residency" in his former "home" country.

These cases point to another complexity, that of the variegations of "foreign students," ranging from the more traditional F-visa holder to other immigrant and non-immigrant visa categories. In Texas, the state where Padilla conducted his studies, the state specifies the possibility of obtaining residency for foreign students who hold visas with A-1 or A-2 (diplomatic), G-1, G-2, G-3, G-4 (treaty organization), K (fiances or fiancées), and OP-1 (qualified immigrants from underrepresented countries) classifications, as well as those who have been classified as refugees, asylees, parolees, conditional permanent residents, or temporary residents (i.e., undergoing amnesty under the Immigration Reform and Control Act). In addition, there is a special provision for aliens who are part of NATO forces and a reciprocity agreement for Mexican nationals who reside in Mexican border states to attend Texas colleges in border counties and to pay in-state tuition. Moreover, these provisions are not unique to Texas; a 1986 study of residency exemptions found more than seventy different alienage provisions in the fifty states and the District of Columbia. As an additional twist, public institutions in fifteen states each devise their own residency criteria, including alienage requirements. Thus, Eastern Michigan University treats A-visa holders (diplomats) one way for residency determination dozen miles away, the University of
Michigan does the opposite.\textsuperscript{293}

Moreover, it is not always clear who is undocumented and who may be eligible for a more permanent category or adjustment of status. \textit{Leticia "A"} and her colleagues eventually adjusted to become permanent residents.\textsuperscript{294} The Immigration and Nationality Act is chock-full of safe havens, exceptions, loopholes, and interstices that may render yesterday's undocumented alien today's permanent resident or citizen.\textsuperscript{295} These categories and opportunities exist quite apart from any legislative or executive amnesty provisions that are enacted for groups who would otherwise be subject to deportation or who could not successfully negotiate residency.\textsuperscript{296} Chinese students in the U.S. may have a gift from heaven given them, in the form of the Chinese Student Protection Act.\textsuperscript{297} To paraphrase Tolstoy, not all the undocumented are alike, and each may be unique in a different way. Of course, the length of time in the U.S. is an important criterion of eligibility for a number of these reclassifications, and many undocumented aliens may have "inchoate permission" to remain in this country, virtually forever.\textsuperscript{298}

In order to measure change in residency practices that had been triggered by the IRCA amnesty legislation and other immigration statutes and regulations, Padilla re-administered his case study portfolios in 1991 to registrars at the same nine Texas public colleges he had surveyed earlier; his respondents included five of the same respondents and three new respondents.\textsuperscript{299} One was unable to participate. His findings further revealed the confusion and imprecision inherent in making discretionary judgments on complex evidence and unclear categories.

Four of the five original respondents reversed course concerning the parolee applicant in the follow-up study, but there was still no consensus on whether or not he would be eligible for resident status.\textsuperscript{300} This was all the more surprising in that the Texas Attorney General’s office had since issued an opinion on this issue, indicating that a student with these facts clearly was eligible for residency reclassification.\textsuperscript{301} In the two hypothetical cases involving undocumented students, one brought to the country as a child by his parents and another who violated the terms of his original student status, the respondents again overwhelmingly indicated they would not reclassify them as residents.\textsuperscript{302} Indeed, in extramural remarks, two respondents emphatically indicated that they would report the latter student to the Immigration and Naturalization Service, despite no obligation to do so, and that they would not admit him even as a non-resident, international student. Padilla also again found substantial disagreement among the respondents on the issue of when resident "clocks" began to toll. He concluded: "there can be little doubt that immigration status has a direct impact on the practice of residency determination for tuition purposes. The complex circumstances of students are made even harder to understand and interpret when viewed through the two hazy windows of immigration and the residency laws, rules, and regulations. Consequently, similarly situated students receive inconsistent residency classifications."\textsuperscript{303} These are important findings, as the inconsistencies in administering postsecondary residency appear as "ludicrously ineffectual" as the Texas efforts had been in controlling undocumented alien children's immigration in \textit{Plpyler}.\textsuperscript{304} AAW, so badly reasoned, also flies in the face of this practicality test: it, like \textit{Bradford}, ignores the administrative aspects of establishing domicile.\textsuperscript{306}

Undocumented Immigrant Students and Higher Education:

A Houston Case Study

Large-scale immigration is not of recent vintage in the United States, a country that has reconstituted itself over time by various waves of immigration. Particularly in the Southwestern United States, where history is a mixture of the conquest of native peoples, Spanish colonization, Mexican land grants, U.S. treaties, and Anglo frontier annexation, undocumented immigration is a bewildering nexus of law and practice. In large urban areas of the Southwest, particularly San Diego, Los Angeles, and Houston, the 1980's growth of undocumented populations has exacerbated the complex social structure of racial and ethnic relations.

In Houston, the country's fourth largest city, with over 3.3 million persons by 1990, there
has always been a substantial Latino -- particularly Mexican origin -- population, the growth of which outstripped even the city’s phenomenal growth during the 1970’s. The Latino population doubled from 1970 to 1980, and increased another 66.5% by 1990; during the same periods, the total Houston population grew by 46.5% and 13.6%. By 1993, the Houston area was approximately 28% Latino, 27% African American, 5% Asian, and 40% Anglo. Of course, the area’s public schools were even more heavily enrolled with students of color: in 1992-93, fewer than 15% of the nearly 200,000 student Houston Independent School District were white. Even the suburban districts, where Anglos had fled, have become predominantly minority. The poor economy in Mexico and, especially, civil wars in Central America forced many undocumented Latinos to come to Houston, which during the 1970’s and early 1980’s enjoyed a booming economy. This undocumented immigrant flow did not slow even during Houston’s economic downturn, from 1983-1990.

Although earlier undocumented migrant labor streams had always included intact families, it was predominantly a seasonal flow of adults; a father (or, less often, a mother) would set out ahead of the rest of the family, sending for the other spouse and children only after a new residence and employment had been secured. Demographer Nestor Rodriguez has noted,

Unlike earlier undocumented immigration patterns that included large numbers of seasonal migrants, the post-1960’s undocumented Latino immigration of Mexicans, Central Americans, and Caribbean Islanders, included large numbers of families, i.e., families with school-age children. Several factors are related to this development of greater undocumented, family migration. These factors include changes in the international labor system between the U.S. and Mexico in which the reproduction of (migrant) labor took place primarily in the sending communities, changes in the destruction of migrant labor (from rural to urban settings), and a growing involvement of Latino women (many with children) in international labor migration to the United States.

While bracero-like [i.e., seasonal farm labor] undocumented migration tended to be heavily male, seasonal and rural-bound, much of the undocumented migration in the 1960’s and afterwards headed toward urban centers. To an extent, agricultural mechanization displaced migrant labor, but urban labor markets also acted on their own to help redirect undocumented-migrant streams into U.S. cities and towns. The institutional social infrastructure in urban areas presented greater opportunities for family survival than did the meager settings of rural employment. For immigrant women, city jobs such as domestic work presented greater opportunities for social, if not economic survival. It is safe to hypothesize that the new urban destinations of undocumented Latino migrants, i.e., destinations like Los Angeles, Chicago, and Houston, presented favorable resources (social, economic and cultural) at sufficient ... levels to relocate migrant families into the United States. The supportive social actions of established Latino residents (e.g., Mexican Americans) also helped in this transition...

Undocumented Latino neighborhood growth became a basis for undocumented Latino community development. Many ethnic enterprises and activities arose from the residential areas of undocumented immigrants and helped form a community institutional infrastructure. This social formation was critical for the incorporation of undocumented immigrants as a social category into U.S. society. Here relations with the dominant society were no
longer necessarily mediated through established Latino residents but
directly in face-to-face encounters with dominant group members.
The undocumented had a home base in the United States, which
helped their incorporation into U.S. society. With this new
community homeland came a sense of social citizenship with ideas
of legal entitlements that extended to children in the educational
sector.  

As these families migrated, their children -- both those born in the home country and those
citizen children born in the U.S. -- attended public schools, adding to enrollments of receiver school
districts.  Texas responded by enacting a 1979 statute requiring undocumented children to
pay for public schools, the practice found by the U.S. Supreme Court to be unconstitutional in
Plyer v. Doe.  Thus, with grudging acceptance by Texas schools, and additional litigation to
test the scope of Plyer v. Doe in Texas, the number of undocumented students has increased,
with the inevitable result that some of these children have completed college-preparatory curricula
and have aspired to attend college. As Rodriguez summarized, "To an extent, the efforts to help
undocumented Latino students gain entry into colleges and universities [represent] the rising
expectation of Latino educational success beyond the primary and secondary-grade levels."

In 1991, Professor Rodriguez undertook a study of 80 Houston undocumented Latino
aliens, all of whom had either experienced a preliminary contact with a higher education institution
or had discussed college plans with education counselors. His bilingual research team conducted
extensive oral interviews with the respondents, who averaged 21.1 years of age, ranging from 16
to 46 years. Ninety percent were 26 or younger, while slightly more than half were women (42 to
38). Almost half (39) were from Central America, five were South Americans, while 36 were
Mexican. Their average time in the United States was 4.2 years, meaning on average that they
would not qualify for the IRCA legalization amnesty, which in most instances required
undocumented aliens to have resided continuously in the United States since January 1, 1982.
Their family structure showed an enormous resilience in the face of the long distances involved:
although six resided in a sanctuary shelter and more than half (39 of the 70 with a parent alive)
lived apart from their parents, 31 of the 70 with a parent alive lived with both their father and
mother.

Like many first generation immigrants, these parents generally have high hopes for their
children. Not well educated themselves, they want better for their sons and daughters. The
education for the parents was average for Central Americans, but extraordinarily low by U.S.
standards: a median of 5 years for fathers and 6.0 for mothers. However, progress had begun
for these families. Despite the low education levels for their parents, the sons and daughters had
improved their educational levels; half those with older siblings indicated that their brother or sister
had completed high school, and 20% reported that he or she had gone on to a college or
community college. Whatever else these data reveal, they constitute a remarkable case study of
intergenerational improvement in schooling. The older students had, in most instances, legalized
their status by earlier arrival than their younger siblings, or adjusted status by other formal means
(e.g., marrying a U.S. citizen or permanent resident, serving in the armed forces).

There were other influences for them to consider college as an alternative. Among these
included high school citizen friends who had college plans or had attended college, local college
recruitment efforts aimed at area high schools, special minority efforts targeted at high schools
with substantial Latino and black enrollments, and the usual array of college-going inducements
such as SAT workshops, college fairs, and public service announcements.

However, all were aware that their legal status either precluded them from attending
college or rendered them ineligible for residency benefits or financial aid programs. Unlike Manuel
and Jose, the respondents quoted in the introductory part of this article, these students knew they
were undocumented. Almost a quarter indicated that a high school counselor or teacher who knew
of their legal status had alerted them to the problems they would encounter in attending college; all
the others learned of their problem when they contacted a college official. Upon learning that
they had a problem, more than half the students had attempted other alternatives, or "forum shopping": they tried other colleges, counselors, or programs. Even those who did not try alternatives indicated that they had not done so either because they believed they did not have any real choices or that their persisting might lead the INS to discover their status. After Plyler v. Doe, public schools were perceived by undocumented communities as safe havens or sanctuaries, where the students’ immigration status did not matter.

The undocumented students had a variety of formal and informal interactions with area colleges. All had had some formal or informal contact or evinced some interest in college; this was a precondition of their being interviewed. Of the 28 (35%) who had formal involvement with a college, eleven (39.3%) had enrolled in non-degree English, GED, or wordprocessing classes; nine (32.1%) had taken coursework in a vocational-technical institute; three (10.7%) had enrolled in a non-degree preparatory summer bridge program; and five (17.9%) had actually received a scholarship or been admitted but were unable to enroll. Of the 80 total interviewees, ten (12.5%) had attended college in their home county but now were unable to enroll in a U.S. college.319

The Rodriguez study also proved to authenticate the earlier findings by Padilla, who had interviewed Texas registrars. Of the 12 Houston-area colleges, admissions officials from only 1 institution acknowledged a practice of admitting undocumented students, and then only if they paid international student fees.320 Rodriguez found the same inconsistencies as had Padilla, and even probed within-institution discrepancies: "Interestingly, in two universities where upper-and mid-level administrators had indicated earlier that they would be receptive to undocumented students, lower-level staff contacted by the study responded they would exclude undocumented students. The lower-level staff were ignorant of upper-level decisions. In one of the two cases, an admissions-office worker indicated that his response to applicants seeking admission varied by the characteristics of the applicants. The office worker simply directed applicants who 'look immigrant' or spoke with a marked accent to the admissions office for international students. Hispanics and Asians were usually the applicants sent by the office worker to the international-student admissions office."321 This resembles discriminatory hiring practices, such as those prohibited by the Immigration Reform and Control Act. In a 1990 Government Accounting Office study, nearly 20% of the employers surveyed conceded they had discriminated against job applicants or employees either by engaging in illegal national origin discriminatory practices or by deliberately not hiring "foreign-appearing" or "foreign-sounding" job applicants -- even if the applicants had employment authorization documents or were otherwise eligible to work in the United States.322

The Rodriguez study also uncovered enrollment inconsistencies, depending upon the funding sources of the programs. Area colleges, particularly community colleges, enrolled students without regard to their citizenship status in federally-and state-funded citizenship, English, and General Equivalent Diploma (GED) courses, but required immigration eligibility for enrolling in English as a Second Language (ESL), adult basic education, and GED coursework funded by other federal funds.323 When the IRCA funds for citizenship classes began to flow, the Houston Community College received so many funds that a scandal arose over its enrollment tactics and lavish curriculum purchases.324 However, once the aliens had completed these classes but prior to having gained permanent residence, they were not allowed to attend regular academic credit or technical courses in the same institution.326

Not one of the students, even those with some college experience outside the United States, entered the U.S. in the hope of attending college.326 All had come to avoid war in their country, to make a better life with their families, or for another related reason. Martinez v. Bynum, the followup case to Plyler v. Doe, made it clear that aliens whose families did move solely for taking advantage of education benefits without residing in the district could be legitimately denied those benefits.327

Even so, a casual reader of newspapers and other materials would think that aliens, alien students, and alien college students were overrunning the states, California in particular.328 This climate of hysteria has been fuelled by California’s economic recession, false impressions created by inaccurate studies, and shameless racebaiting attempts to scapegoat undocumented aliens as a
greedy and dangerous population. While closer examination reveals the claims to be incorrect or exaggerated, the discourse of this campaign has largely succeeded in halting any genuine reform efforts or counterstories to place the issue in a more balanced light.

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

To document his charges, he has drawn from several studies, particularly one conducted to measure the relative costs and benefits of immigration for Los Angeles, California County. This ambitious 1992 project, the Impact of Undocumented Persons and Other Immigrants on Costs, Revenues, and Services in Los Angeles County, is one of the more comprehensive governmental analyses of immigration economic costs and benefits. The study concluded that immigrant groups -- who constitute 25% of the LA county population -- consumed $947 million of County services, or 30.9% of the total net L.A. County costs for 1991-92; it also estimated that they contributed $4.3 billion in all tax revenues, including $139 million to the County. While these figures seem lopsided against the County, this group of immigrants also generated 9 times more California State revenue and 18 times more federal revenue than they did LA County revenue. These data, which show a net contribution to tax revenues but an inefficient reimbursement/outray distribution of costs to the County from other tax entities, were seized upon by Gov. Wilson and others to fan a campaign of inaccurate anti-alien sentiment generally, to veto legislation aimed at solving the college residency problem, and to introduce restrictionist legislation designed to make aliens ineligible for other public benefits.

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

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

To be sure, Governor Wilson and others are not arguing elegant econometric models, arithmetic calculations, or fine-grained immigration status distinctions. Instead, he is inaccurately lumping together all the "other" categories to overinflate their social service participation -- as when he incorrectly avers that "two thirds of all babies born in Los Angeles public hospitals are born to parents who have illegally entered the United States." But in his most cynical discourse, he waxes eloquent for the resources directed at the undocumented depriving legally resident children of services when cuts are made.

The LA County data, whatever the assumptions and data flaws, corroborate virtually all other studies conducted since the 1970's that measure undocumented alien benefit rates and tax contributions. Julian Simon, one of the leading scholars in this field, estimated in 1985 that the undocumented pay five to ten times greater an amount of taxes than they consume in services, in his 1989 book, The Economic Consequences of Immigration, he estimated that immigrants' net contribution (tax payments minus benefits received) was over $1300 per person. A 1986 RAND Corporation study of Mexican immigration in California summarized that the taxes paid by Mexican immigrants were greater than the costs of all benefits received, except those of education. This was confirmed by a 1985 Urban Institute study, The Fourth Wave. A similar 1984 study conducted on Texas undocumented aliens showed a substantial net gain of revenues over expenses, as did a California State Department of Finance 1991-92 study and a 1990 U.S. Department of Labor study. Virtually all the thorough and non-partisan studies show the same result.

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

These studies concentrate upon more basic benefits of housing, welfare, health care, and elementary/secondary education, with virtually no data on higher education participation. Those that do include such data estimate or measure negligible rates. In San Diego, California's second largest city and largest border community, a State Auditor study reported from CSU estimates that only 86 students were undocumented, 85 at CSU-San Diego and 1 at CSU-San Marcos. While the more selective University of California system estimated that only 100-125 of their nearly 165,000 students were affected by Bradford. As Table 3 notes, there have been very few undocumented UC students. The most accessible public system in the State is the I10-campus, open admissions California Community College (CCC) System, whose officials estimated that fewer than "several hundred" students were undocumented; the CCC System had first faced this issue in a 1981 case, Gurfinkel v. Los Angeles Community College District, and was considered to be bound by Bradford. (Insert Table 3)
<table>
<thead>
<tr>
<th>Campus</th>
<th>U.S. Citizens</th>
<th>Noncitizen U.S. Residents</th>
<th>International Students</th>
<th>Other</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Berkeley</td>
<td>24,266</td>
<td>4,074</td>
<td>1,924</td>
<td>77</td>
<td>30,341</td>
</tr>
<tr>
<td>Davis</td>
<td>19,065</td>
<td>2,748</td>
<td>650</td>
<td>23</td>
<td>22,486</td>
</tr>
<tr>
<td>Irvine</td>
<td>12,347</td>
<td>3,796</td>
<td>497</td>
<td>175</td>
<td>16,815</td>
</tr>
<tr>
<td>Los Angeles</td>
<td>27,137</td>
<td>5,528</td>
<td>1,703</td>
<td>79</td>
<td>34,447</td>
</tr>
<tr>
<td>Riverside</td>
<td>8,339</td>
<td>62</td>
<td>263</td>
<td>13</td>
<td>8,677</td>
</tr>
<tr>
<td>San Diego</td>
<td>15,262</td>
<td>1,980</td>
<td>600</td>
<td>9</td>
<td>17,851</td>
</tr>
<tr>
<td>San Francisco</td>
<td>3,285</td>
<td>321</td>
<td>125</td>
<td>0</td>
<td>3,731</td>
</tr>
<tr>
<td>Santa Barbara</td>
<td>16,492</td>
<td>1,584</td>
<td>502</td>
<td>3</td>
<td>18,581</td>
</tr>
<tr>
<td>Santa Cruz</td>
<td>9,271</td>
<td>745</td>
<td>138</td>
<td>19</td>
<td>10,173</td>
</tr>
<tr>
<td>Total</td>
<td>135,464</td>
<td>20,838</td>
<td>6,402</td>
<td>398</td>
<td>163,102</td>
</tr>
</tbody>
</table>

**NOTES:**

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

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

* "Other" category includes students who:

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

Source: UC System Office data, February, 1994 (on file with author)
The small numbers affected and the perceived inequity had led the California State Legislature to pass a Bradford/Leticia "A" bill that would have resolved the issue and allowed the undocumented students to establish domicile after a waiting period. Governor Wilson vetoed the bill, in a state where legislative overrides are extremely rare. The issue in California remains unresolved at the Leticia "A" Appeal Court stage. Other states have either settled law suits, enabling the undocumented to establish residency, or have determined without litigation that undocumented students who can meet all other residency criteria may establish residence for tuition purposes. In addition, other states and institutions treat this issue on an ad hoc, discretionary basis: for example, one college treats undocumented students as residents if they were brought to the country surreptitiously by their parents, if they otherwise are residing in the state for the requisite period of time, and if they attended high school in the state. This same school excludes the undocumented who came on a visa but violated the terms of the visa (e.g., for holding unauthorized employment while in a tourist or student category). This is a modified "clean hands" approach to resolving the issue, inasmuch as the children's immigration status was not due to their own actions, but those of their parents.

V. Conclusion: The Discourse and the Danger

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

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

This was my first professional taste of how benefits are accorded by place and duration, and my first high-level political success. In the years since, I have established residency as my subfield of study, by conducting research, litigating cases, serving on campus residency appeals committees, being an expert witness in residency cases, and, in an ironic twist, being sued for my university committee's denial of the residency appeal by one of my law students, and serving both as a hostile fact witness and expert in that case. I know residency.
But others do not, or they misperceive it. These students have met all admissions criteria, have met all traditional residence requirements, and displace no one. Except for the different fee bills they receive, they are indistinguishable from other college students. Even in the state where 40% of all undocumented residents are assumed to live, undocumented college students constitute an almost invisible minority of students. The colleges have accustomed themselves to the students' presence, and, since 1985, have administered their enrollment without incident -- even though federal financial aid funds are unavailable to this population.\textsuperscript{377} No study has shown them to be a substantial number, even in border-area colleges; through expert testimony and research, it is evident that the lure of college is not a "pull" factor to attract illegal immigration.\textsuperscript{378} Congress felt strongly enough about the need for college that it made federal assistance available to legalizing aliens undergoing amnesty.\textsuperscript{379} Although the Supreme Court has never faced the question squarely, \textit{Toll v. Moreno},\textsuperscript{380} \textit{Pyler v. Doe},\textsuperscript{381} and a host of other residency cases\textsuperscript{382} make it clear that California cannot exclude long term undocumented aliens who have met all the traditional tests for establishing domiciles from establishing postsecondary residency. Even as harsh an opinion as AAW concedes the students may be admitted into colleges, albeit as non-residents. \textit{Leticia "A"} is a well-reasoned, careful opinion that grasps the essential issue; the California Appeal Court should affirm it.

But this analysis suggests that the objections to undocumented alienage and higher education are reasonably arrived at on the basis of careful research and analytic study. My reading of the hateful discourse and xenophobic scapegoating leads me to believe that the David Bradfords of the world do not object on meritocratic or substantive grounds: Governor Wilson's objections that the money used for serving undocumented aliens deprives lawfully resident aliens from their benefits ring hollow.\textsuperscript{383} Not only is there considerable resistance even to permanent residents receiving benefits -- so much so that these is an entire legal literature devoted to the topic --\textsuperscript{384} but the imprecise, undifferentiated, and broad-brush swipes at "illegals," "immigrants," and "aliens" generally tar all the groups. One is reminded of how racist Japan-bashing led to the murder of Vincent Chin, a Chinese-American.\textsuperscript{385} Free-floating racial animus often leads to a generalized resentment against all people of color, or "others." Governor Wilson has even made so mean-spirited a suggestion as to advocate a "repealing" of \textit{Pyler v. Doe}\textsuperscript{386} and the Constitutional provisions that enable native born children to be U.S. citizens,\textsuperscript{387} irrespective of their parents' immigration status. All of these arguments, mixed in a cauldron amidst shrill warnings about the rights of "real Americans," lead inevitably to a sense of divisiveness, racial superiority, and undifferentiated prejudice. In California, dozens of anti-alien bills have been introduced,\textsuperscript{388} as if the aliens were the source of the sputtering economy, even though government studies have shown that immigrants -- however defined -- are net economic contributors.

Moreover, the arguments are not properly waged on economic grounds in any event. Much is made of the detrimental effects of immigration: that criminals are not deterred from entering the country, that aliens are stubbornly monolingual in languages other than English, that they take jobs and services from citizens, that they undercut or depress wages, that they do not understand the American character, that their general lawlessness or unlawful presence is itself a sign of an unwillingness to abide by rules or accept responsibility for their actions.\textsuperscript{389} Of course, these traits do describe some aliens in a legal status or in undocumented status, just as they describe some natives. However, if there were a group that holds promise to become productive, longterm residents and citizens, alien college students would surely be that group. With the generally dismal schooling available to these students\textsuperscript{390} that they could meet the extremely high standards of the University of California or moderately high standards of the California State University is extraordinary. Given their status and struggle, each represents a success story of substantial accomplishment.

The truth is, the United States needs this talent pool. In many highly technical fields, foreign scholars enroll in high numbers and, after consuming the benefit, return to their countries.\textsuperscript{391} This is as it should be, as learning respects no borders, and U.S. institutions are surely enriched by recruiting internationally. However, the undocumented have every incentive to
remain in the United States, to adjust their status through formal or discretionary means, and to contribute to the U.S. economy and polity. My own experiences over the years with these students are that they are more loyal and patriotic to the United States than are most native born students. They believe in the immigrant success story, having lived it in most instances. Some, like "Jose" and "Manuel," the two students cited at the beginning of this article, have literally never known any other life. Why deny these students the benefit of resident tuition?

In my native New Mexico each year, Santa Feans ritualistically burn Zozobra, or "Old Man Gloom," a 40-foot straw figure, to expiate the year’s accumulation of grief and indignities. Fiesta-goers are not aware of their culture’s sociological significance, and would be astounded to find themselves the subject of an anthropologist’s probing of their community norms and mores. The inner logic of their acts of expiation is not questioned or even manifest; they do it each year because the community did it the year before. It is widely regarded as an Indian-Hispanic ritual, despite its origins in Santa Fe’s Anglo artist traditions.982

After examining all the arguments raised by immigration restrictionists on the issues of undocumented college residence, I have come to believe that those who raise objections, particularly those who act upon these beliefs -- the David Bradfords, FAIR members, conservative elected officials -- do so to burn Zozobra and thus to expiate their own fear and loathing of the unknown. Just as 19th century California officials banned pigtails on prisoners and oppressed them through a series of measures to keep Chinese immigrants in their place,393 these storytellers have resorted to false stories and scapegoating in their campaign to vilify immigrants. Their own data show negligible undocumented participation in the state’s vast higher education system, far less than 1%. Unconcerned with the true data, they have told tales out of school, of massive displacement and lawlessness.596 Neither of these is true. On balance, immigrants, whether lawfully admitted or undocumented, are present and future contributors. California, for its part, benefits tremendously by their stories and loyalties. Precluding their incorporation into California society through higher education is a foolishly shortsighted policy, and those who actively oppose the integration of long term undocumented college students should be ashamed of themselves for their actions. Important public policy should not be premised upon such prejudice.