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# Illegal Aid: Legal Assistance to Immigrants in the United States

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# ILLEGAL AID: LEGAL ASSISTANCE TO IMMIGRANTS IN THE UNITED STATES

*Geoffrey Heeren\**

## ABSTRACT

*There is an enormous unmet need for immigrant legal aid in the United States. This is partly due to regulations that bar federally funded legal services organizations from representing many types of immigrants. The possible repeal of these restrictions is rarely discussed as a means to expand immigrant access to counsel. Federal funding for immigrant legal aid appears to have become taboo, despite the fact that for much of its history, legal aid was deeply connected to immigration. This forgotten history reveals that there was once broad national consensus in favor of immigrant legal aid; it became contentious and faced restriction only after legal aid lawyers began to represent “illegal aliens” during the War on Poverty. Congress reacted to legal aid lawyers’ bringing high-profile civil rights litigation on behalf of undocumented immigrants by enacting a restriction scheme that authorized representation only of those immigrants that Congress deemed permanent. This Article contends that as a constitutional matter, government should not be in the business of carving out castes of people entitled to fewer civil rights than others. The denial of legal aid to certain immigrants conflicts with a Jeffersonian view of democracy and with the principle of anti-subordination at the heart of the Fourteenth Amendment. Civil legal aid may not—at this point in time—be an absolute right, but it does represent an important way for indigent and powerless minorities to have their grievances heard. This Article concludes that there is no substantial justification for discriminating against immigrants as to this basic democratic safeguard.*

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\* Clinical Teaching Fellow, Georgetown University Law Center. I would like to thank Alice Clapman, Daniel R. Ernst, Stephen H. Legomsky, Allegra McCleod, Andrew I. Schoenholtz, Philip G. Schrag, and the participants of the May 2011 American University Washington College of Law Emerging Immigration Law Scholars & Teachers Conference for their helpful comments on this Article.

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## INTRODUCTION

Immigrant legal aid is in crisis. Poor immigrants not only suffer from the same range of potentially devastating legal problems as citizens—eviction, fraud, discrimination, and domestic abuse<sup>1</sup>—but also face a uniquely draconian penalty reserved for them alone: deportation.<sup>2</sup> The specter of deportation infects immigrants’ choices and remedies, making them sometimes powerless to appeal for protection against exploitation and abuse. Congress has carved out some special remedies for

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<sup>1</sup> See, e.g., Laura K. Abel & Risa E. Kaufman, *Preserving Aliens’ and Migrant Workers’ Access to Civil Legal Services: Constitutional and Policy Considerations*, 5 U. PA. J. CONST. L. 491, 493 (2003) (“Undocumented aliens are particularly vulnerable to workplace exploitation.”); Andrew F. Moore, *Fraud, the Unauthorized Practice of Law and Unmet Needs: A Look at State Laws Regulating Immigration Assistants*, 19 GEO. IMMIGR. L.J. 1, 2 (2004) (“[A]t least tens of thousands of immigrants are defrauded every year [by unlicensed immigration services providers].”); Rob Paral, *The Legal Needs of Immigrants in Illinois: A Report to the Lawyers Trust Fund of Illinois*, ROB PARAL & ASSOC., at 13 (2004), <http://www.robparal.com/downloads/Immigrant%20Legal%20Needs%20Report%2010-2204.pdf> (“38.8 percent of all surveyed immigrant households had an unaddressed legal need in 2003, compared to 33.7 percent of all households.”).

<sup>2</sup> See 8 U.S.C. § 1182 (2006) (grounds for denial of admission); *id.* § 1227 (grounds for deportation).

vulnerable immigrants,<sup>3</sup> but exercising a legal remedy often requires an attorney, and there are too few lawyers for poor immigrants in the United States.<sup>4</sup> This is partly due to the fact that publicly funded immigrant legal aid is controversial in this country, even though legal aid began as an immigrant institution.

The first major legal aid office in the United States opened its doors in lower Manhattan in 1876. Created by and for German immigrants, the *Deutscher Rechts-Schutz Verein*, as it was then called, “existed to protect German immigrants from the rapacity of runners, boarding-house keepers, and a miscellaneous coterie of sharpers who found that the trustful and bewildered newcomers offered an easy prey.”<sup>5</sup> By 1889, the sole attorney in the organization, “following the dictates of humanity, found himself obliged to extend his field of operations to all sufferers,” including American citizens.<sup>6</sup> In 1896 the organization changed its name to the one it still bears: “The Legal Aid Society.”<sup>7</sup>

Legal aid grew gradually after its nineteenth century beginnings, to reach its apex in the United States as the War on Poverty waned.<sup>8</sup> By then, several legal aid offices featured full-fledged immigration projects that pursued aggressive immigrant rights agendas. They filed civil rights cases and class actions, brought cases to the Supreme Court, and extracted hundreds of thousands of dollars in attorneys’ fees from their defeated opponents. However, during the Reagan years, Congress slashed federal legal aid funding and attached restrictions to the remainder concerning the types of cases legal services offices could handle. Ironically, given the immigrant beginnings of legal aid, one of these restrictions barred representation of all but certain limited categories of noncitizens.<sup>9</sup> In 1996, Congress further restricted this work, barring

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<sup>3</sup> See *id.* § 1101(a)(15)(T) (“T visa” for immigrant victims of a severe form of human trafficking); *id.* § 1101(a)(15)(U) (2011) (“U visa” for immigrant victims of certain crimes who are helpful to law enforcement); *id.* § 1154(a)(1)(A–B) (scattered subsections) (allowing for immigrant spouses abused by a United States citizen or lawful permanent resident to self-petition for lawful permanent residency); *id.* § 1229b(b)(2)(A) (allowing for “cancellation of removal” of certain abused spouses or children of US citizens or lawful permanent residents).

<sup>4</sup> See Jennifer L. Colyer et al., *The Representational and Counseling Needs of the Immigrant Poor*, 78 FORDHAM L. REV. 461, 462 (2009); Donald Kerwin, *Charitable Legal Programs for Immigrants: What They Do, Why They Matter and How They Can Be Expanded*, 04-06 IMMIGR. BRIEFINGS, June 2004, at 1.

<sup>5</sup> REGINALD HEBER SMITH, *JUSTICE AND THE POOR* 135 (1919).

<sup>6</sup> *Id.* at 137 (internal quotation marks omitted).

<sup>7</sup> *Id.* at 139.

<sup>8</sup> See ALAN W. HOUSEMAN & LINDA E. PERLE, CTR. FOR LAW & SOC. POL’Y, *SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES* 24 (2007), available at <http://www.clasp.org/admin/site/publications/files/0158.pdf> (“[B]y 1981 LSC was funding 325 programs that operated in 1,450 neighborhood and rural offices . . . [each funded] at a level sufficient to theoretically support two lawyers for every 10,000 poor people in its service area.”).

<sup>9</sup> Pub. L. No. 97-276, § 122, 96 Stat. 1186, 1194–95 (1982).

organizations that took the federal funding from using even non-federal funds to represent immigrant clients.<sup>10</sup>

Federally funded legal services offices today handle a limited portfolio of immigration work. Chiefly, they represent immigrant victims of domestic violence in petitions for legal status as a result of their abuse. Even this work, however, gets little official acknowledgement. In a sign of how contentious free representation of immigrants has become, the website of the Legal Services Corporation (LSC), the nonprofit organization that administers federal funding for legal services, does not mention immigration as an area of law met by legal services.<sup>11</sup> There is reference to immigration or immigrants neither in the LSC Office of Inspector General's Reports to Congress nor in recent LSC testimony to Congress.<sup>12</sup> When advocates today discuss ways of increasing legal assistance for immigrants, they rarely mention federally funded legal services, despite the fact that LSC is the largest and most logical funder of civil legal aid.<sup>13</sup>

The transition of legal aid from an institution exclusively serving noncitizen immigrants to one that is self-consciously focused on the legal needs of citizens is not due to demography; the current percentage of foreign-born persons is not far off today what it was in 1876 at the inception of the Legal Aid Society.<sup>14</sup> Nor is it a function of need. Immigrants are experiencing many of the same consumer and employment law problems today as in the nineteenth century,<sup>15</sup> and immigration law

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<sup>10</sup> See Omnibus Consolidated Recissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(11), 110 Stat. 1321, 1354-55; Restrictions on Legal Assistance to Aliens, 61 Fed. Reg. 45,750 (Aug. 29, 1996) (amending 45 C.F.R. pt. 1626) (interim rule).

<sup>11</sup> See *What Is LSC?*, LEGAL SERVS. CORP., <http://www.lsc.gov/about/lsc.php> (last visited July 17, 2011).

<sup>12</sup> See, e.g., OFFICE OF THE INSPECTOR GEN., LEGAL SERVS. CORP., SEMIANNUAL REPORT TO THE CONGRESS: OCTOBER 1, 2008-MARCH 31, 2009 (2009), available at [http://www.lsc.gov/pdfs/sar\\_2009-05-27.pdf](http://www.lsc.gov/pdfs/sar_2009-05-27.pdf) (no mention of immigration work); *Testimony Before the House Subcomm. on Commerce, Justice, Science and Related Agencies of the H. Comm. on Appropriations by LSC Interim President Victor M. Fortuno, Feb. 24, 2010*, LEGAL SERVS. CORP., [http://www.lsc.gov/government/testimony\\_detail\\_T116\\_R17.php](http://www.lsc.gov/government/testimony_detail_T116_R17.php) (last visited July 6, 2011) (no mention of immigration work).

<sup>13</sup> See *What Is the Legal Services Corporation?*, LEGAL SERVS. CORP. (Jan. 2011), <http://www.lsc.gov/pdfs/WhatisLSC.pdf>.

<sup>14</sup> In 1870, the population of the U.S. was 14.4% foreign-born, see Campbell J. Gibson & Emily Lennon, *Historical Census Statistics on the Foreign-born Population of the United States: 1850-1990* (U.S. Census Bureau Population Div., Working Paper No. 29, 1999), compared with 12.2% today, see U.S. CENSUS BUREAU, FOREIGN-BORN POPULATION OF THE UNITED STATES, CURRENT POPULATION SURVEY—MARCH 2009, available at <http://www.census.gov/population/www/socdemo/foreign/cps2009.html> (last visited July 6, 2011) (navigate to Table 1.1).

<sup>15</sup> See *supra* note 1.

has grown far more complicated and difficult to unravel without the help of a lawyer.<sup>16</sup>

To understand what happened to immigrant legal aid in the last century, it is necessary to understand the history of immigration in the United States. The United States has always been a nation of immigrants, but in some ways, it is a different kind of nation of immigrants today than in 1876. Immigration law today consists of a complex hierarchy of legal categories: lawful permanent residents, an alphabet soup of nonimmigrant visas, persons residing under color of law, and others whose presence is unauthorized.<sup>17</sup> The nineteenth century had its own hierarchy, one primarily based on race: Asians were considered inassimilable and thus ineligible to naturalize; in the late nineteenth and early twentieth centuries they were excluded outright.<sup>18</sup> In contrast, there were few restrictions on European immigration, and European immigrants were presumed to be on a path toward citizenship.<sup>19</sup> Early legal aid offices considered it part of their mission to “Americanize” these European immigrants and make them into good citizens; on the other hand, they rarely ever represented Asians, who were ineligible to naturalize.<sup>20</sup>

By 1982, when Congress restricted free legal aid to immigrants, it no longer excluded Asians from admission or naturalization. Rather, it had become preoccupied with a new “‘shadow population’ of illegal migrants—numbering in the millions,”<sup>21</sup> who had replaced Asians as a primary source of the nation’s low-wage labor. Policymakers identified these “illegal aliens” as predominately young, male Mexican workers who filled agricultural and other low-wage jobs.<sup>22</sup> For decades, employ-

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<sup>16</sup> One court has observed that “[t]he proliferation of immigration laws and regulations has aptly been called a labyrinth that only a lawyer could navigate.” *Hernandez v. Mukasey*, 524 F.3d 1014, 1018 (9th Cir. 2008) (quoting *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005)).

<sup>17</sup> The Immigration Act of 1924, §§ 2–4, ch. 190, 43 Stat. 153, created the first temporary visa categories.

<sup>18</sup> DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 109–21 (2007); MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 37–50 (2004).

<sup>19</sup> See HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 115–25 (2006).

<sup>20</sup> For example, from 1909 to 1917, the Chicago Legal Aid Society represented just twenty-eight Asians, who made up about .03% of its client population of 97,570 during that time period. See LEGAL AID SOC’Y OF CHI., FIFTH ANNUAL REPORT 15 (1910) (hereinafter FIFTH ANNUAL REPORT); LEGAL AID SOC’Y OF CHI., SIXTH ANNUAL REPORT 10 (1911); LEGAL AID SOC’Y OF CHI., SEVENTH ANNUAL REPORT 14 (1912); LEGAL AID SOC’Y OF CHI., EIGHTH ANNUAL REPORT 24 (1913); LEGAL AID SOC’Y OF CHI., NINTH ANNUAL REPORT 17–18 (1914); LEGAL AID SOC’Y OF CHI., TENTH ANNUAL REPORT 20 (1915) (hereinafter TENTH ANNUAL REPORT); LEGAL AID SOC’Y OF CHI., ELEVENTH ANNUAL REPORT 18–19 (1916); LEGAL AID SOC’Y OF CHI., THIRTY-FIRST ANNUAL REPORT 20–21 (1917).

<sup>21</sup> *Plyler v. Doe*, 457 U.S. 202, 218 (1982).

<sup>22</sup> See COMPTROLLER GEN., U.S. GEN. ACCOUNTING OFFICE, *ILLEGAL ALIENS: ESTIMATING THEIR IMPACT ON THE UNITED STATES* 8–9 (1980) (“most studies show that illegal aliens gener-

ers had virtual *carte blanche* to exploit them,<sup>23</sup> yet illegal aliens provoked nativist anger, not sympathy, from other workers whose wages were depressed by the immigrant “invasion.”<sup>24</sup>

While immigration law changed in many ways between the late nineteenth and twentieth centuries, it stayed the same in one way: there remained an immigration hierarchy with prospective citizens on the top and “illegal aliens” on the bottom; the predominant race of these persons had simply shifted from Asian to Hispanic.<sup>25</sup> Another thing changed too, which is central to this story. Early legal aid lawyers emphasized that they were representing future citizens. In contrast, the legal aid lawyers of the 1960s–1970s began to represent illegal aliens and to do so in high-profile cases where they sought to position their clients as equal claimants on American civil rights.

That this was controversial should come as no surprise: “illegal aliens” have always been central to a debate about American identity and civil rights. From the time that Congress passed the Alien and Sedition Acts in the eighteenth century, policy-makers have argued about the extent to which noncitizen immigrants should share in citizens’ civil rights. The term “illegal alien” may be of relatively recent provenance, but in a way, it pointedly captures one old set of ideas about immigrant rights (or the lack thereof): by implying criminality, the term also suggests disenfranchisement. The word “alien” posits an essentially foreign and transitory visitor (whereas “immigrant” connotes intent to permanently settle in a new country). Thus, an “illegal alien” is a foreigner without legal rights, whose status is ephemeral at best.

Legal aid offices in the 1970s challenged this conception by fighting on a systemic level for just treatment of undocumented immigrants.<sup>26</sup> This provoked Congress to reassert the hierarchy of immigrant rights by enacting the LSC restrictions, which authorized representation

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ally are male, young (average age is less than 30), single (or married men with spouses and children living outside the United States), and support, on the average, 4.6 dependents in their countries of origin. They are unskilled, poorly educated (average 6.7 years of education), and speak little or no English.”)

<sup>23</sup> See, e.g., NGAI, *supra* note 18, at 137–47; Juan F. Perea, *A Brief History of Race and the U.S.-Mexican Border: Tracing the Trajectories of Conquest*, 51 UCLA L. REV. 283, 303–10 (2003).

<sup>24</sup> See Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 GA. L. REV. 65, 74 (2009).

<sup>25</sup> Not all Asians in the United States, of course, lacked a legal right to remain. Those Chinese persons who entered prior to the enactment of the Chinese Exclusion Act could stay, provided they satisfied onerous documentation requirements. See MOTOMURA, *supra* note 19, at 26. Other Asian immigrants who entered prior to the complete bar to Asian migration enacted in the 1920s presumably had a claim to lawful status. However, I refer to nineteenth and early twentieth century Asian Americans as “illegal aliens” because they—like Mexican illegal aliens throughout much of twentieth century history—were impeded from naturalizing. Without any way to formalize their legal status, they were, in essence, permanently temporary.

<sup>26</sup> See *infra* Part III.

of only four categories of immigrants: those who were “expected to remain in the United States permanently.”<sup>27</sup> Under the new restrictions, access to counsel was a privilege reserved for citizens and persons on track to citizenship, such as lawful permanent residents. This judgment was consistent with the historical role of legal aid organizations and their emphasis on justice as an Americanization strategy. It also tied in with an emerging strand of constitutional jurisprudence recognizing the privileged status of lawful permanent residents relative to other immigrants. The same year that Congress codified the alienage restrictions, the Supreme Court noted, in *Landon v. Plasencia*, that “an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application.”<sup>28</sup> By contrast, a “continuously present permanent resident alien has a right to due process” in her deportation proceedings.<sup>29</sup> Thus, the Court affirmed that a spectrum of constitutional rights exists for immigrants, depending on their legal categorization.

The Court decided another case in 1982 that presents a markedly different view of the rights of immigrants. *Plyler v. Doe* was both a product of the legal services movement and a herald of its retrenchment. It was argued by a lawyer at the LSC-funded National Center for Immigrants’ Rights, a support center for legal services immigration work, and when the Reagan Administration tried unsuccessfully in the early 1980s to eliminate LSC, it cited *Plyler* as an example of the program run amok.<sup>30</sup> In an opinion that remains controversial today, Justice Brennan wrote in *Plyler* that Texas’s effort to cut off education for undocumented immigrant children “poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.”<sup>31</sup> In his view, the denial of basic rights to undocumented immigrants marks them as a “subcaste,” and thereby compromises the integrity of a political system that is premised on a notion of equality.<sup>32</sup>

In what may be the most significant case ever argued by an immigrant legal aid lawyer, *Plyler* provides the best argument against the restriction of legal assistance to immigrants. The United States has

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<sup>27</sup> See Restrictions on Legal Assistance to Aliens, 48 Fed. Reg. 19,750, 19,751 (proposed May 2, 1983) (“These categories reflect a general division Congress made between aliens who can be expected to remain in the United States permanently or indefinitely and those whose status is expected to be temporary.”).

<sup>28</sup> *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

<sup>29</sup> *Id.*

<sup>30</sup> See *Federal Legal Help for the Poor: A Debate Over Means and Ends*, N.Y. TIMES, June 28, 1981, at E5 (“The Reagan Administration has cited as a representative legal aid case a suit that established the constitutional right of illegal aliens to free public education in Texas.”).

<sup>31</sup> *Plyler v. Doe*, 457 U.S. 202, 221–22 (1982).

<sup>32</sup> *Id.* at 219 (“The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.”).



achieved a more or less cohesive civil society despite its heterogeneity by affording rights and benefits to persons regardless of their race, ethnicity, or national origin.<sup>33</sup> The LSC alienage restrictions ostensibly discriminate based on permanent immigration status—not race—but they have a disparate impact on the Mexican illegal aliens who have historically been exploited, even as they have done much of our nation's hard work. By denying to poor undocumented immigrants attorneys to assert their rights to be free from fraud and exploitation, the restrictions suggest that these persons are not full rights-bearing members of our society—that mistreating an “illegal alien” is less consequential than exploiting a citizen. Yet *Plyler* teaches that democratic comity is inconsistent with the subordination of discrete and insular minorities.

Part I of this Article tells the story of immigrant legal aid in the nineteenth and early twentieth centuries and describes how early legal aid lawyers justified their representation of immigrant clients as part of an Americanization mission; their clients were European immigrants on a presumptive path toward citizenship, not the “illegal aliens” of the era—Asian immigrants ineligible for naturalization. Part II describes how new policies of immigration restriction problematized Americanization and led to a shift in the type and source of legal aid for immigrants. In order to represent immigrants, legal aid organizations now needed to undertake the controversial work of contesting quotas, defending against deportation, and challenging governmental detention. Part III describes the apotheosis of this brand of immigrant legal aid during the 1960s and 1970s, when federally funded legal services lawyers sought to enforce their clients' civil rights. Part IV describes the backlash to this work in the 1980s and 1990s, when Congress passed a series of restrictions on representing illegal aliens. These restrictions, as Part V describes, have largely succeeded in reining in legal services lawyers from pursuing federal immigrant rights litigation. A survey of legal services managers shows that federally funded legal aid programs now undertake immigrant representation chiefly in cases involving applications for legal status filed by immigrant domestic violence victims, who are not rights-claimants but sympathetic petitioners for administrative discretion. Part VI considers the various rationales for restrictions on immigrant legal aid and argues that none of them adequately justify barring federally funded lawyers from giving voice to the most powerless and easily exploitable class of persons among us. From a policy perspective, this Article argues that there is a dire need for more immigrant representation in the United States, and that legal services offices, which already do some immigration work and have a wealth of poverty law expertise, are well positioned to help fill this gap. From a constitu-

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<sup>33</sup> See LAWRENCE H. FUCHS, *THE AMERICAN KALEIDOSCOPE: RACE, ETHNICITY, AND THE CIVIC CULTURE* 5–6 (1990).

tional standpoint, this Article posits that basic justice should not be rationed out only to members; justice should belong to everybody.

I. THE EARLY YEARS OF IMMIGRANT LEGAL AID:  
HEGEMONY AND AMERICANIZATION

In 1913, a boy named Charles Sprino traveled on a crowded ocean liner from Cyprus to New York.<sup>34</sup> Like many immigrants of the era, he was herded to the imposing stone edifice of the Bureau of Immigration on Ellis Island, where he may have spent the night “with hundreds of other recently arrived immigrants, in an immense hall with tiers of narrow iron-and-canvas bunks, four deep.”<sup>35</sup> Second- and third-class passengers were subjected to an assembly line inspection (first-class passengers were exempt) to determine whether they were excludable under the Immigration Act.<sup>36</sup> The Act made inadmissible persons convicted of a “crime involving moral turpitude,” prostitutes, “idiots, imbeciles, feeble-minded persons, epileptics, insane persons,” and “persons likely to become a public charge.”<sup>37</sup>

In order to avoid a public charge finding, applicants were required to have twenty-five dollars in their possession.<sup>38</sup> Charles Sprino did not have twenty-five dollars, so the immigration officials ordered him deported to Greece.<sup>39</sup> He somehow managed to contact his brother, who in turn sought help from the Legal Aid Society. The Society rushed to federal court and obtained an emergency stay of deportation until the case could be investigated.<sup>40</sup> When the representatives of the Society arrived at the pier where Charles’s boat, the *Olympic*, had been docked, it was already in midstream. Undeterred, they rented a tugboat to chase it down, and also contacted the ship’s owner, the White Star Line (which is now probably best known as the owner of the Titanic). The Vice President of the company sent a message (via wireless) to the captain of the *Olympic* asking him to slow down and wait for the tug. Even-

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<sup>34</sup> *Stop Liner to Return Lad—Legal Aid Society Charters a Tug to Take Deported Boy from Olympic*, N.Y. TIMES, Aug. 3, 1913.

<sup>35</sup> LOUIS ADAMIC, LAUGHING IN THE JUNGLE 41–42 (1969) (describing the author’s December 1913 arrival in the United States).

<sup>36</sup> See *Ellis Island History: A Brief Look*, NAT’L PARK SERV., <http://www.nps.gov/elis/historyculture/loader.cfm?csModule=security/getfile&PageID=294652> (last visited July 6, 2011).

<sup>37</sup> Immigration Act of 1907, § 2, ch. 1134, 34 Stat. 898.

<sup>38</sup> ADAMIC, *supra* note 35, at 41.

<sup>39</sup> *Stop Liner to Return Lad—Legal Aid Society Charters a Tug to Take Deported Boy from Olympic*, N.Y. TIMES, Aug. 3, 1913.

<sup>40</sup> *Id.*

tually, the legal aid representatives caught up with Sprino and took him back to Ellis Island, where he was ultimately released.<sup>41</sup>

This anecdote, which appeared on the front page of the New York Times, reveals that early twentieth century legal aid lawyers were handling immigration cases in a dramatic and highly visible way. In so doing, they were flouting a growing national movement to restrict immigration from eastern and southern European countries like Charles Sprino's native Greece. At the same time, they were remaining true to their origins: the two earliest legal aid organizations, the Legal Aid Society in New York and the Bureau of Justice in Chicago, began as immigrant institutions<sup>42</sup> during an era when immigration was recasting the ethnic makeup of the nation and when issues of poverty and immigration seemed inextricably linked. The majority of both organizations' early clients were immigrants,<sup>43</sup> and when cities like Detroit, Cleveland, and Buffalo later established their own legal aid programs in the early twentieth century, a large proportion of their clients were also noncitizens.<sup>44</sup>

By the time that the Legal Aid Society took Charles Sprino's case, it had evolved considerably from the obscure German immigrant-rights

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<sup>41</sup> *Id.* Legal aid offices sometimes helped the relatives of excluded immigrants ask for reconsideration of a public charge finding by presenting proof that they would take care of the applicant. See IMMIGRANTS' PROTECTIVE LEAGUE, EIGHTH ANNUAL REPORT OF THE IMMIGRANTS' PROTECTIVE LEAGUE 7 (1917) (during 1916, the Chicago-based League handled 274 "detention cases" where it assisted friends or relatives of immigrants detained at a port of entry with evidence of the relatives' willingness to help the detainee if allowed entry).

<sup>42</sup> As discussed in the Introduction, the Legal Aid Society began as the *Deutscher Rechtshilfsverein*. Founded in 1876 by German immigrants, including Edward Salomon, the former governor of Wisconsin, it was originally dedicated exclusively to serving the needs of German immigrants and began serving all nationalities only after the need for such a society became apparent. See JOHN MACARTHUR MAGUIRE, *THE LANCE OF JUSTICE: A SEMI-CENTENNIAL HISTORY OF THE LEGAL AID SOCIETY 1876-1926*, at 18-19 (1928). The need for a general legal aid office in New York is evidenced by an 1890 editorial in the New York Herald favorably describing Chicago's Bureau of Justice, which served applicants regardless of nationality. *The Bureau of Justice. Its Good Work Attracting Much Attention in the East*, CHI. DAILY TRIB., Oct. 8, 1890, at 12 (reprinting an editorial from the New York Herald). The Bureau of Justice was organized in 1888 in Chicago "by German-American businessmen working through Chicago's branch of the Ethical Cultural Society." Jack Katz, *Caste, Class, and Counsel for the Poor*, 10 AM. B. FOUND. RES. J., 251, 263 (1985); see also SMITH, *supra* note 5, at 136. "[I]ts universalistic name, Bureau of Justice, reflected an appreciation for legal assistance that Bismarck's social welfare policies had brought to Germany." Katz, *supra*.

<sup>43</sup> In 1889, the Legal Aid Society represented 2438 Germans, 346 Russian Poles, 148 Russians, 147 Hungarians, and 31 American citizens. SMITH, *supra* note 5, at 137. The first applicants for services at the Bureau of Justice were "of nearly all nationalities. Most of them [were] foreigners, and Germans [were] in the majority." *The Poor Shall Have their Rights. The Bureau of Justice—Its Mission—What It Has Accomplished*, CHI. DAILY TRIB., Apr. 11, 1888, at 2.

<sup>44</sup> See KATE HOLLADAY CLAGHORN, *THE IMMIGRANT'S DAY IN COURT* 490-92, 494 (1923) (noting that about one-third of the clients of the Buffalo Legal Aid Society were foreign-born, thirty to forty-five percent of the clients represented by the single Czech attorney of the Legal Aid Bureau of Detroit were foreign-born, and forty-one percent of the clients of the Cleveland Legal Aid Society were unnaturalized immigrants).

organization it started out as in 1876. Along with removing the requirement of German nationality from its constitution and anglicizing its name, it had enthusiastically adopted a high-profile agenda of Americanization. It kept careful statistics concerning client nationality and whether clients were native-born, naturalized citizens, or aliens.<sup>45</sup> By 1898, a New York City commentator remarked that “no charity and scarcely any institution in this city has done, or is doing, so much practical work in the way of Americanizing ignorant foreigners” as the Legal Aid Society.<sup>46</sup> By substituting a self-consciously American identity for its earlier German one, the Legal Aid Society was able to tap into a powerful network of establishment friends. Among its “honorary vice presidents” were William Taft, Theodore Roosevelt, and former Supreme Court Justice and American Bar Association President Charles Evans Hughes, who eventually became President of the Society.<sup>47</sup>

Other new legal aid organizations were eager to follow the Legal Aid Society as proponents of Americanization. The Educational Alliance of New York opened a Legal Aid Bureau in 1902 to assist the primarily Jewish-immigrant clientele of the organization. In 1904 it “devoted a goodly share of its time and attention to the aid of intending citizens—in preparing them for citizenship and procuring their ‘first’ and ‘second’ papers.”<sup>48</sup> A social worker who surveyed the office said that “[m]uch of the work of the bureau is of a propaganda nature.”<sup>49</sup> Essentially, they considered themselves tasked with training Eastern European Jews “for participation in American civic life.”<sup>50</sup>

The Chicago Legal Aid Society followed the lead of its New York counterpart in keeping statistics concerning client nationality and in enlisting powerful establishment figures like Theodore Roosevelt, William Taft, and Woodrow Wilson as honorary vice presidents.<sup>51</sup> By 1920, the Boston Legal Aid Society had also come to realize the value

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<sup>45</sup> See, e.g., LEGAL AID SOC’Y, THIRTY-SIXTH ANNUAL REPORT OF THE PRESIDENT, TREASURER AND ATTORNEYS OF THE LEGAL AID SOCIETY 36 (1912).

<sup>46</sup> Frederick W. Holls, *The Legal Aid Society—Its Past and Future*, 8 CHARITIES REV. 18–19 (1898).

<sup>47</sup> See LEGAL AID SOC’Y, *supra* note 45, at 2.

<sup>48</sup> Henry Fleischman, *Helping the Poor to Right their Wrongs Legally*, N.Y. TIMES, Mar. 2, 1913, at SM11.

<sup>49</sup> CLAGHORN, *supra* note 44, at 498; see also *Splendid Work Accomplished by the Educational Alliance*, N.Y. TIMES, Feb. 3, 1907, at SM4.

<sup>50</sup> CLAGHORN, *supra* note 44, at 498.

<sup>51</sup> See FIFTH ANNUAL REPORT, *supra* note 20, at 15; TENTH ANNUAL REPORT, *supra* note 20, at 3. The Chicago Legal Aid Society was formed in 1905 through the consolidation of the Bureau of Justice and the Protective Agency for Women and Children. See Marguerite Reader Gariepy, *Legal Aid Bureau of the United Charities of Chicago*, 124 ANNALS AM. ACAD. POL. & SOC. SCI. 33, 34 (1926). In 1919 it became a department of United Charities, called the Legal Aid Bureau of the United Charities of Chicago. *Id.* at 35. It is still in existence today, primarily handling domestic cases. See *Legal Aid Bureau*, METRO. FAMILY SERVS., <http://www.metrofamily.org/programs-and-services/legal-aid/default.aspx> (last visited June 23, 2011).

of touting its work as an Americanization initiative. That year, for the first time, it kept figures on the national origin of its clients, finding that thirty-eight percent of the Society's clients were immigrants—mostly from Ireland, Italy, and Russia.<sup>52</sup> Noting the prevalence of “committees on Americanization” and the heated national conversation on immigration, the Society urged that “the contribution of the Legal Aid Society to the adjustment of the troubles of the foreign-born has great significance, because the work of the Society determines, in part, the attitude of these people toward the government.”<sup>53</sup>

Legal aid lawyers often touted their Americanization work as an antidote to anarchism. As Legal Aid Society attorney Cornelius P. Kitchel remarked in a *New York Times* interview in 1906:

“We want to prevent chronic grumbling. Ignorant foreigners cry, ‘Courts are for the rich!’ and these very men produce the stuff Anarchists are made of, if not set right. Very often their grievances come from misunderstandings, which we try to straighten out. The laws are all right, but these men do not understand the law, and do not know how to get their rights. We stand as the link between wrong and remedy. . . . If the public fully understood the efforts this society is making to transform these men into contented citizens we would not have to ask for funds.”<sup>54</sup>

Not everybody was happy about the Legal Aid's Society's focus on Americanization: at least some immigrants appear to have found it a bit patronizing. Writers for the preeminent German-language newspaper in New York, the *Staats-Zeitung*, were seriously peeved by a 1901 fundraising dinner held by the Legal Aid Society, which was attended by luminaries including then–Republican Vice President Theodore Roosevelt and the Democratic former Secretary of the Treasury, Charles S. Fairchild. According to the paper,

[Fairchild] “had the effrontery to assert that the chief object of the society was to teach immigrants the meaning of law and justice, and that the country should be proud to possess an organization that aims to put into the heads of the new-comers, who would perhaps otherwise become Anarchists, the true American conception of equality before the law and justice.”<sup>55</sup>

The paper also took umbrage at Roosevelt, who “closed a ‘long and incoherent speech by declaring that the greatest and best achievement of the society consisted in this, that it had become Americanized, and by dropping the German name had shown itself worthy of the American

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<sup>52</sup> BOSTON LEGAL AID SOC'Y, JUSTICE WITHIN REACH, A SURVEY OF THE WORK OF THE BOSTON LEGAL AID SOCIETY, INCLUDING THE TWENTIETH ANNUAL REPORT 25 (1921).

<sup>53</sup> *Id.*

<sup>54</sup> *Legal Aid Society Proves Courts Are for Poor as Well as Rich*, N.Y. TIMES, June 3, 1906, at SM6.

<sup>55</sup> *Hearts That Lie Over the Ocean*, N.Y. TIMES, Mar. 27, 1901, at 8.

spirit.”<sup>56</sup> The *Staats-Zeitung* offered an alternate history: “‘The *Rechtsschutzverein*’ . . . ‘was not founded to transform immigrants into good Americans, but to protect honest, industrious men, accustomed to the safeguards of justice, against corrupt and bad Americans.’”<sup>57</sup>

This debate set the stage for an inherent tension in immigrant legal aid. What began as a minority immigrant rights organization had arguably shifted to become an instrument of majoritarian accommodation. During its first several decades of existence, the Legal Aid Society’s justifications for representing immigrants appeared to be well in line with national policy, which was open to large-scale European immigration. Prior to the late nineteenth century, there had been no federal restrictions on immigration in the United States<sup>58</sup> and European immigrants were presumed to be on a path toward citizenship.<sup>59</sup> From 1880 to World War I, the immigration authorities deported only one percent of twenty-five million European immigrants who arrived during that

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* The reaction of other newspapers to the *Staats-Zeitung* editorial are telling of the dogmatic sway that Americanization held at the time. The New York Times sarcastically and somewhat foppishly lampooned the German newspaper:

This early and noble purpose the society has shamelessly abandoned under the promptings of a pernicious Nativismus and the detestable teachings of some of its members who hold that when a German assumes American citizenship and accepts the protection of American laws he ought to become an American in heart as well as in fact. To this degrading and outrageous doctrine the *Staats-Zeitung* will never subscribe. Deutschthum, an unconquerable German habit of mind, the German way of thinking, of seeing things—especially American things—and of saying things, a rooted and controlling Germanism, is in its life and soul. . . . Hoch der Kaiser!

*Id.* The Washington Post also chastised the *Staats-Zeitung*. Responding to the newspaper’s charge that the evening smacked of “Know-nothingism” (a nativist nineteenth century movement), the paper protested (perhaps too much) that nativism was dead: “Proscription of foreigners and Roman Catholics could not last in a country largely peopled by immigrants and under a Constitution guaranteeing religious freedom.” However, it went on to issue a warning:

[I]f the spirit which inspired the *Staats Zeitung*’s comments on the remarks of Roosevelt and Fairchild were the real German-American spirit—which, thank God, it is not and never can be—there would be great difficulty in maintaining those amicable relations which now exist between native Americans and our fellow citizens of German birth or extraction.

“*Conceited Know-nothingism*,” WASH. POST, Mar. 31, 1901, at 18.

<sup>58</sup> Section 5 of the Page Act of 1875, ch. 141, 18 Stat. 477, prohibited the entry of convicts currently serving a sentence and “women imported for the purpose of prostitution,” *id.* at 477. Section 1 of the Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882), suspended the immigration of Chinese laborers to the United States for ten years. *Id.* § 1, 22 Stat. at 59. That same year, the Immigration Act of 1882, ch. 376, 22 Stat. 214, imposed a fifty-cent tax on all immigrants landing at United States ports and gave powers to the authorities to deny entry to convicts (except those convicted of political offenses), *id.* § 4, 22 Stat. at 214, lunatics, idiots and persons likely to become public charges, *id.* § 2, 22 Stat. at 214. The Alien Contract Labor Law of 1885, ch. 164, 23 Stat. 332, made it unlawful to import aliens into the United States under contract for the performance of labor or services of any kind. Finally, section 6 of the Geary Act of 1892, ch. 60, 27 Stat. 25, 25–26, imposed registration requirements and criminal sanctions on Chinese immigrants in the United States.

<sup>59</sup> MOTOMURA, *supra* note 19, at 8, 115–25.

period:<sup>60</sup> “Between 1892 and 1907, the Immigration Service deported only a few hundred aliens a year and between 1908 and 1920 an average of two or three thousand a year—mostly aliens removed from asylums, hospitals, and jails.”<sup>61</sup> In this environment, it furthered national policy for legal aid attorneys to work “to preserve and strengthen the loyalty and idealism of the coming citizens of the country.”<sup>62</sup>

However, by the time that the Legal Aid Society stopped Charles Sprino’s deportation, the tide had begun to shift. A wave of immigration restrictionism began in 1907, when Congress responded to growing pressure from nativist groups by forming a joint committee, composed of members of the House and Senate, to study immigration policy.<sup>63</sup> Known as the Dillingham Commission (after the Commission’s chair, Senator William P. Dillingham of Vermont), the Commission concluded its work in 1911, finding that immigrants from eastern and southern Europe (like Sprino) posed a serious threat to American society and that such immigration should be reduced in the future.<sup>64</sup>

At least at first, the Legal Aid Society stubbornly resisted this nascent restrictionist movement. In 1911, the Society created a short-lived “Immigration Department” in partnership with the North American Civic League for Immigrants and the Bureau of Industry and Immigration.<sup>65</sup> The same year, the Board of Directors of the Legal Aid Society passed a series of resolutions concerning immigration policy. Viewed from today’s perspective, the resolutions are a bizarre combination of paternalistic measures that discount immigrants’ civil liberties and other resolutions that seem naively liberal. On the one hand, the Society wanted to make it easier to deport immigrants convicted of crimes, favored regular government inspection of immigrants’ homes and workplaces,<sup>66</sup> wanted school instruction of immigrant youth on “the advantages and laws pertaining to naturalization” and of adult immigrants in day and night school in English.<sup>67</sup> On the other hand, the So-

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<sup>60</sup> NGAI, *supra* note 18, at 18.

<sup>61</sup> *Id.* at 59.

<sup>62</sup> See CLAGHORN, *supra* note 44, at 485.

<sup>63</sup> U.S. IMMIGRATION COMM’N, ABSTRACTS OF REPORTS OF THE IMMIGRATION COMMISSION, WITH CONCLUSIONS AND RECOMMENDATIONS AND VIEWS OF THE MINORITY, S. DOC. NO. 61-747, at ii (1910).

<sup>64</sup> See *id.* at 13–14, 47.

<sup>65</sup> LEGAL AID SOC’Y, *supra* note 45, at 39. The Society described the clients of this new office as “generally of a very ignorant class, either having just landed or having lived in this country for a very short time.” *Id.* at 40. The office was closed after eight months of operation “on the ground that the work was identical with that done in the regular office, and a special provision for the foreign born was an unnecessary duplication. Apparently the methods used were the same.” CLAGHORN, *supra* note 44, at 481.

<sup>66</sup> LEGAL AID SOC’Y, RESOLUTIONS RELATING TO IMMIGRATION 3–4 (1911). The Society wanted to abolish the five-year time limit for deporting immigrants convicted of a crime involving moral turpitude.

<sup>67</sup> *Id.* at 6.

ciety wanted Congress to suspend deportation orders for five years “(except as to excluded Mongolian races)” for persons inadmissible on public-charge– or health-related grounds.<sup>68</sup> The Society opposed the Dillingham Commission’s proposed literacy test,<sup>69</sup> and—in stark contrast to the Commission’s call for greater restriction—suggested that the nation recruit European immigrants by distributing information on labor and agricultural opportunities through U.S. consuls.<sup>70</sup>

The Society’s resolutions make sense when considered from the perspective of pre–Dillingham Commission immigration policy, a view that was explicitly stated in the preamble to the document:

The Immigration Laws and the rules thereunder should be drawn upon the theory that immigrants are wards of the nation and should be regarded as such for five years after their admission or until fully able to care for themselves, with a view to their protection and preparation for naturalization and good citizenship . . . .<sup>71</sup>

An article from the time characterized the Legal Aid Society Resolutions and the Dillingham bill as being “based on principles diametrically opposed. One considers the immigrant as a ward of the nation, to be welcomed and guarded, while the other considers him as an intruder to be suspected and deported.”<sup>72</sup>

Ultimately, the Dillingham Commission’s views on immigration carried the day. Congress passed a literacy test over Wilson’s veto in 1917,<sup>73</sup> and the Commission’s findings<sup>74</sup> were influential in the enactment of the Emergency Immigration Act of 1921<sup>75</sup> and the more comprehensive Immigration Act of 1924,<sup>76</sup> which, taken together, arguably form the foundation upon which current United States immigration policy was built. The 1921 Act created the first immigration quotas;<sup>77</sup> the 1924 Act further tightened the quotas and codified many of the other features of immigration restriction that today we take for granted, such as visa and passport requirements, and a border patrol.<sup>78</sup> The 1924 quotas were infamously based on calculations of the ancestral national origins of citizens living in the United States in 1890, a formula that was

<sup>68</sup> *Id.* at 2.

<sup>69</sup> *Id.* at 5.

<sup>70</sup> *Id.* at 3.

<sup>71</sup> *Id.* at 1.

<sup>72</sup> *Admission of Immigrants*, THE INDEPENDENT...DEVOTED TO THE CONSIDERATION OF POLITICS, SOCIAL AND ECONOMIC TENDENCIES, HISTORY, LITERATURE, AND THE ARTS, Jan. 25, 1912, at 212.

<sup>73</sup> Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 877.

<sup>74</sup> U.S. IMMIGRATION COMM’N, *supra* note 64, at 45–47.

<sup>75</sup> Ch. 8, 42 Stat. 5.

<sup>76</sup> Ch. 190, 43 Stat. 153.

<sup>77</sup> § 2, 42 Stat. at 5 (restricting the number of aliens of any nationality who may be admitted in any fiscal year to three percent of the number of foreign-born persons of such nationality in the United States as determined by the United States census of 1910).

<sup>78</sup> See §§ 2–4, 43 Stat. at 153–55; NGAI, *supra* note 18, at 10, 19.



meant to prioritize western and northern European immigration over eastern and southern European immigration; Asian immigration was barred outright.<sup>79</sup>

The era when immigrant legal aid could justify its existence by drawing on a broad national consensus in favor of Americanization was over. In the new order of quotas and deportations, the nation struggled with the question of who should be considered an American. Immigrants' legal problems were now not merely a matter of unscrupulous employers or sharpers: as a result of new deportation and visa laws, all immigrants were potentially in the same boat as Asian immigrants—possible “illegal aliens” who could be arrested and deported by the government. Legal aid to immigrants became a much more controversial endeavor in this restrictionist America, where a poor immigrant might no longer be a “ward” to be protected, but an illegal alien hunted by the U.S. government.

## II. THE MIDDLE PERIOD OF IMMIGRANT LEGAL AID: RETRENCHMENT AND SPECIALIZATION

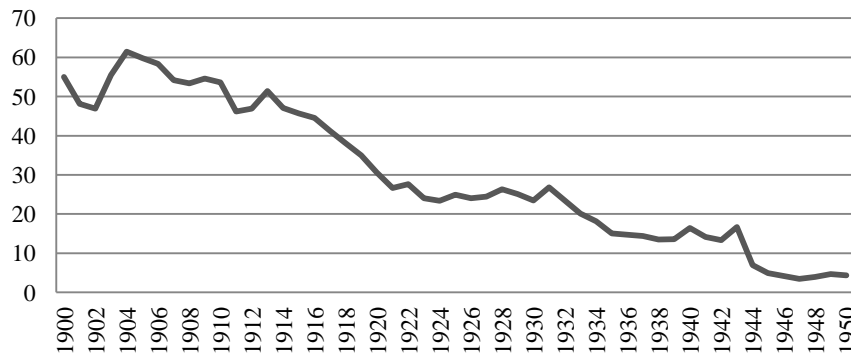
After the enactment of 1920s immigration restrictions, immigrant legal assistance morphed from a field that formed the bulk of legal aid work into a specialty practice handled by a much smaller group of lawyers. The most obvious indication of this change was a dramatic decrease in the number of immigrants represented by the mainstream legal aid organizations. In 1904, approximately sixty-two percent of the New York Legal Aid Society's clients were noncitizens; by 1950, the number was four percent.<sup>80</sup>

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<sup>79</sup> See §§ 11–13, 43 Stat. at 159–62; NGAI, *supra* note 18, at 21–23.

<sup>80</sup> This chart likely understates the Legal Aid Society's representation of noncitizens—at least for the early years. Until 1900, the Society explicitly stated that it counted as citizens all persons who had resided in the United States for five years or more. See LEGAL AID SOC'Y, TWENTY-FIFTH ANNUAL REPORT OF THE PRESIDENT, TREASURER AND ATTORNEYS OF THE LEGAL AID SOCIETY 24 (1901).

**New York Legal Aid Society  
Immigrant Representation: 1900–1950**



This reduction may have been partly a function of demography: the foreign-born population of the United States peaked at fifteen percent in 1890 and fell steadily after 1920 until reaching a low point of less than five percent in 1970.<sup>81</sup> However, demography alone cannot explain this precipitous decline, and it seems that at least three other factors contributed: changes in the nature of immigrants' legal problems, changes in the ethnic makeup of immigrants, and changes in public perceptions of immigrants.

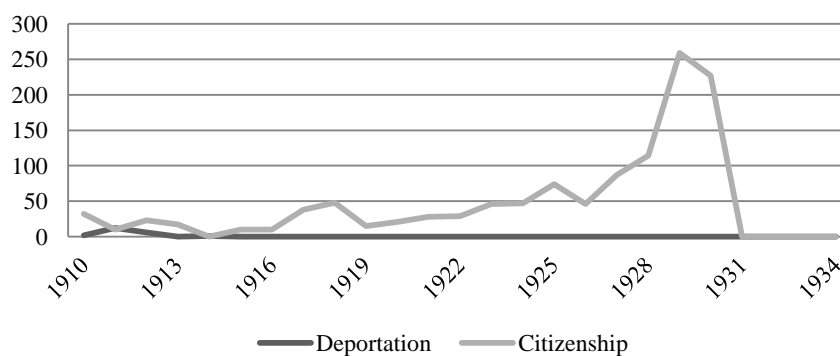
Early immigrant legal aid clients were the European victims of private fraud and exploitation; the lawyers who handled these cases relied on consumer, employment, and tort laws of general application. But as the field of immigration law coalesced, immigrants' legal problems were increasingly problems of immigration law. From the 1920s on, the field of immigration law became increasingly complex, draconian, and bureaucratic, meaning that its mastery required technical specialization and a willingness to engage with and sometimes combat the federal government. At the same time, the clients were no longer Europeans on track to citizenship; they were increasingly Mexicans who were impeded from naturalization by a hostile public and new administrative strictures.

This shift is evidenced by the decline in numbers of immigration law cases handled by traditional legal aid organizations and the growth in new specialty immigration-law organizations. For a brief moment, the New York Legal Aid Society dabbled—perhaps out of frustration with the Dillingham Commission—with aggressive immigrant represen-

<sup>81</sup> Campbell Gibson & Kay Jung, *Historical Census Statistics on the Foreign-born Population of the United States: 1850 to 2000*, at 1 (U.S. Census Bureau Population Division Working Paper No. 81, 2006), available at <http://www.census.gov/population/www/documentation/twps0081/twps0081.pdf>.

tation. In 1911, the Society handled twelve deportation cases, but from 1914 to 1934 (when the Society stopped keeping such statistics), it did not report a single deportation case. Its representation of aliens in naturalization cases increased steadily up until the Great Depression, when it abruptly ceased—or it at least ceased reporting the cases. Thereafter it appears to have engaged in little or no immigration law work until around 1966, when the Society created a new immigration department.<sup>82</sup>

**New York Legal Aid Society:  
Immigration Law Cases 1910–1934**



By 1949 there were ninety legal aid offices in the United States.<sup>83</sup> Yet a comprehensive 1951 study of legal aid by Emery A. Brownell is remarkable for the lack of any information about the citizenship status of clients, or any sign that legal aid lawyers around the country even tangentially practiced immigration law. Moreover, the language of the study implicitly discounts legal aid for immigrants—throughout the study referring to legal aid clients as “citizens” and to the importance of universal representation of “citizens” in significant civil matters.<sup>84</sup> In the one case in which the study referred to an (hypothetical) immigrant client—a Syrian national who had gone into arrears on an installment contract—the author was careful to note that he had applied for citizenship.<sup>85</sup>

This was a radical shift from the earlier era of legal aid, when the very justification for the work related to immigration. In the conservative 1940s and 1950s, the war, not the immigrant experience, shaped

<sup>82</sup> See Robert P. Patterson, *A Brief History of the Legal Aid Society*, 66 *LEGAL AID REV.* 31 (1968).

<sup>83</sup> EMERY A. BROWNELL, *LEGAL AID IN THE UNITED STATES: A STUDY OF THE AVAILABILITY OF LAWYERS' SERVICES FOR PERSONS UNABLE TO PAY FEES* 87 (1951).

<sup>84</sup> *Id.* at 45, 50, 52, 55, 61.

<sup>85</sup> *Id.* at 48.

attitudes about legal aid. The Brownell study noted that legal aid had been established for members of the armed forces during the war, and it suggested that the continuing high incidence of legal problems among servicemen was a primary justification for increasing legal aid.<sup>86</sup>

In contrast, immigrants—or at least certain immigrants—were subjects of suspicion during World War II and afterwards. A comparison of the nationalities represented by the New York Legal Aid Society immediately preceding and during the war years reveals that the Society had—until 1942—represented at least a handful of Japanese clients every year.<sup>87</sup> After the United States declared war on Japan, the Legal Aid Society abruptly stopped representing Japanese clients, and there is no record of it doing so in any other year until 1947, when it stopped keeping statistics on its clients' nationality.<sup>88</sup> Racism may have been a factor, since the Society continued to represent thousands of nationals of the Axis powers Germany and Italy during the same period.<sup>89</sup>

In general, post-war proponents of legal aid sought to forge consensus by emphasizing the uncontroversial nature of the work. According to Brownell, the typical legal aid cases were not the “subjects of hotly contested litigation which in the popular mind constitute most of a lawyer's practice. . . . They require service of a less dramatic nature, and

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<sup>86</sup> *Id.* at 82.

<sup>87</sup> See LEGAL AID SOC'Y, FIFTY-FIFTH ANNUAL REPORT OF THE LEGAL AID SOCIETY FOR THE YEAR 1930, at 51 (1931) (thirty-four Japanese clients); LEGAL AID SOC'Y, FIFTY-SIXTH ANNUAL REPORT OF THE LEGAL AID SOCIETY FOR THE YEAR 1931, at 26 (1932) (thirteen Japanese clients); LEGAL AID SOC'Y, FIFTY-SEVENTH ANNUAL REPORT OF THE LEGAL AID SOCIETY FOR THE YEAR 1932, at 28 (1933) (seven Japanese clients); LEGAL AID SOC'Y, FIFTY-EIGHTH ANNUAL REPORT OF THE LEGAL AID SOCIETY FOR THE YEAR 1933, at 28 (1934) (seven Japanese clients); LEGAL AID SOC'Y, FIFTY-NINTH ANNUAL REPORT OF THE LEGAL AID SOCIETY FOR THE YEAR 1934, at 28 (1935) (six Japanese clients); LEGAL AID SOC'Y, SIXTIETH ANNUAL REPORT OF THE LEGAL AID SOCIETY FOR THE YEAR 1935, at 28 (1936) (two Japanese clients); LEGAL AID SOC'Y, SIXTY-FIRST ANNUAL REPORT OF THE LEGAL AID SOCIETY FOR THE YEAR 1936, at 24 (1937) (six Japanese clients); LEGAL AID SOC'Y, SIXTY-SECOND ANNUAL REPORT OF THE LEGAL AID SOCIETY FOR THE YEAR 1937, at 24 (1938) (nine Japanese clients); LEGAL AID SOC'Y, SIXTY-THIRD ANNUAL REPORT OF THE LEGAL AID SOCIETY FOR THE YEAR 1938, at 22 (1939) (five Japanese clients); LEGAL AID SOC'Y, SIXTY-FOURTH ANNUAL REPORT OF THE LEGAL AID SOCIETY FOR THE YEAR 1939, at 20 (1940) (three Japanese clients); LEGAL AID SOC'Y, SIXTY-FIFTH ANNUAL REPORT OF THE LEGAL AID SOCIETY FOR THE YEAR 1940, at 20 (1941) (seven Japanese clients); LEGAL AID SOC'Y, SIXTY-SIXTH ANNUAL REPORT OF THE LEGAL AID SOCIETY FOR THE YEAR 1941, at 2 (Supp. 1942) (one Japanese client); LEGAL AID SOC'Y, SIXTY-SEVENTH ANNUAL REPORT OF THE LEGAL AID SOCIETY FOR THE YEAR 1942, at 2 (Supp. 1943) (no Japanese clients).

<sup>88</sup> LEGAL AID SOC'Y, SIXTY-SEVENTH ANNUAL REPORT OF THE LEGAL AID SOCIETY FOR THE YEAR 1942, at 2 (Supp. 1943); LEGAL AID SOC'Y, SIXTY-EIGHTH ANNUAL REPORT OF THE LEGAL AID SOCIETY FOR THE YEAR 1943, at 3 (Supp. 1944); LEGAL AID SOC'Y, SIXTY-NINTH ANNUAL REPORT OF THE LEGAL AID SOCIETY FOR THE YEAR 1944, at 3 (Supp. 1945); LEGAL AID SOC'Y, SEVENTIETH ANNUAL REPORT OF THE LEGAL AID SOCIETY FOR THE YEAR 1945, at 3 (Supp. 1946); LEGAL AID SOC'Y, SEVENTY-FIRST ANNUAL REPORT OF THE LEGAL AID SOCIETY FOR THE YEAR 1946, at 3 (Supp. 1947); LEGAL AID SOC'Y, SEVENTY-SECOND ANNUAL REPORT OF THE LEGAL AID SOCIETY FOR THE YEAR 1947, at 3 (Supp. 1948).

<sup>89</sup> See *supra* note 88.

they are less time-consuming, but they require expert knowledge, a sympathetic understanding of people, and professional skill.”<sup>90</sup> In short, legal aid was less about litigation and more about “sympathetic understanding”—more, in other words, like social work.

The increasingly complicated and controversial nature of immigrant legal aid led to a shift in the workload from mainstream to specialized organizations, such as the Hebrew Sheltering and Immigrant Aid Society (HIAS), which provided social services and specialized immigration law assistance to Jewish immigrants.<sup>91</sup> Another large specialized immigrant legal aid organization, the Immigrants’ Protective League (IPL), formed in Chicago in the early twentieth century. In 1907, the Woman’s Trade Union League of Chicago organized a committee to visit newly arrived immigrant women and girls to make sure they safely arrived at their destinations and to educate them about local issues.<sup>92</sup> This resulted in the creation in 1908 of the League for the Protection of Immigrants, which became the IPL in 1910.<sup>93</sup> The IPL was at first essentially a social work organization with an academic bent, headed by Grace Abbott. From 1919 until 1921 it was folded into the Illinois state government as the Immigrants’ Commission of Illinois.<sup>94</sup> However, passage of restrictionist immigration legislation in the 1920s led to a shift in the purpose of the organization. After several years of inactivity, the IPL decided in 1926 “that special services needed in problems of detention, admission under supervision, deportation, naturalization, execution of documents and exploitation must be performed by a responsible organization.”<sup>95</sup>

As it began its reorganization, the IPL considered whether it should embark on a full-fledged project of immigrant legal aid or leave such work to the Legal Aid Bureau of United Charities in Chicago.<sup>96</sup> It appears that its interim solution was to engage a Legal Aid Bureau attorney to work at the League one night a week, an arrangement that was likely facilitated by the presence on the IPL Executive Committee of Joel D. Hunter, the General Superintendent of the umbrella organization for the Legal Aid Bureau, United Charities.<sup>97</sup>

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<sup>90</sup> BROWNELL, *supra* note 83, at 49.

<sup>91</sup> See Michael J. Churgin, *Immigration Internal Decisionmaking: A View from History*, 78 TEX. L. REV. 1633, 1646 (2000); see also Michael J. Churgin, *Lobbying by Jewish Organizations Concerning Immigration: A Historical Study*, 83 U. DET. MERCY L. REV. 947 (2006).

<sup>92</sup> LEAGUE FOR THE PROTECTION OF IMMIGRANTS, ANNUAL REPORT 1909–10, at 8.

<sup>93</sup> IMMIGRANTS’ PROTECTIVE LEAGUE, ANNUAL REPORT 1910–11, at 8.

<sup>94</sup> *Immigrant Aid League Formed: Chicago Alien Protective Society Reorganizes to Help Americanization*, CHRISTIAN SCI. MON., June 10, 1926.

<sup>95</sup> *Id.*

<sup>96</sup> Letter of Wilfred S. Reynolds, Director, to Miss Breckinridge, Secretary, Jan. 14, 1926, at 2, in IMMIGRANTS’ PROTECTIVE LEAGUE RECORDS (on file as a Special Collection at the University of Illinois at Chicago, Supp. II, Box 18, Folder 64).

<sup>97</sup> See *Immigrant Aid League Formed*, *supra* note 94.

By 1927, the IPL was engaged in substantial direct representation of immigrants. One of its clients, for example, was Joseph Caruso, an Italian bookkeeper who had been arbitrarily detained and charged with deportation in the anti-Italian environment of mafia-plagued Chicago.<sup>98</sup> Caruso was a socialist who had fled Italy after fascists shot at him while he was making a speech, and he understandably feared returning to fascist Italy. The IPL took over his case after a private immigration attorney had botched it, and sought permission from the Secretary of Labor for Caruso to try to obtain a French or South American visa so that he would not have to return to Italy.<sup>99</sup>

By the end of 1927, the IPL had hired Helen Jerry, the young Lithuanian Legal Aid Bureau attorney who had been working one night a week with the office.<sup>100</sup> In addition to hiring a full-time attorney, the IPL also continued to collaborate with current and former Legal Aid Bureau attorneys in complex deportation and detention cases.<sup>101</sup> By 1929, the IPL was handling hundreds of legal matters on behalf of immigrants, including naturalization, deportation, exclusion, detention, and assistance to immigrants with bringing their family members to the United States.<sup>102</sup>

In 1930, the IPL noted a development that would soon change the face of American immigration and have dramatic consequences for the future of immigrant legal aid: Mexico had become the largest country of origin for IPL clients.<sup>103</sup> Before the 1924 Act, Asian laborers had filled much of the nation's need for agricultural and other low-wage work. By

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<sup>98</sup> Immigrants' Protective League, *An Italian Taken in the Alien Deportation Raids of February and March 1926*, Jan. 1927, in IMMIGRANTS' PROTECTIVE LEAGUE RECORDS (on file as a Special Collection at the University of Illinois at Chicago, Supp. II, Box 18, Folder 64).

<sup>99</sup> *Id.*

<sup>100</sup> Immigrants' Protective League, *Report of the Director*, Dec. 5, 1927, at 1, in IMMIGRANTS' PROTECTIVE LEAGUE RECORDS (on file as a Special Collection at the University of Illinois at Chicago, Supp. II, Box 18, Folder 64); IMMIGRANTS' PROTECTIVE LEAGUE, *supra* note 93, at 8.

<sup>101</sup> *Id.* at 15 (describing an immigration appeal referred by the IPL to a Bureau attorney). The League also retained a former Legal Aid Bureau attorney to file a successful habeas challenge to the detention of three Romanian brothers being held in the crowded Cook County Jail awaiting their deportation. Immigrants' Protective League, *Report of the Director for October, November, December, 1928*, Jan. 22, 1929, at 15, in IMMIGRANTS' PROTECTIVE LEAGUE RECORDS (on file as a Special Collection at the University of Illinois at Chicago, Supp. II, Box 18, Folder 64). The same attorney obtained a decision finding unconstitutional the indefinite detention of Russian persons who could not be deported because of the lack of diplomatic relations with Russia, a decision predating the Supreme Court's similarly reasoned, *Zadvydas v. Davis* decision, 533 U.S. 678 (2001), by more than seventy years. Immigrants' Protective League, *supra*, at 16.

<sup>102</sup> Immigrants' Protective League, *Report of the Director, June, July, August, September, 1929*, Oct. 14, 1929, in IMMIGRANTS' PROTECTIVE LEAGUE RECORDS (on file as a Special Collection at the University of Illinois at Chicago, Supp. II, Box 18, Folder 65) (chart found on last page). In 1929, the League handled a total of 3080 cases, although many of these were undoubtedly of a social work rather than legal nature. See Immigrants' Protective League, *Immigrants' Protective League in 1930*, at 24, in IMMIGRANTS' PROTECTIVE LEAGUE RECORDS (on file as a Special Collection at the University of Illinois at Chicago, Supp. II, Box 18, Folder 60a).

<sup>103</sup> *Id.* at 21.

banning Asian immigration outright, the Act created a void in the nation's low-wage workforce. Growers in California and Texas lauded Mexican labor as a solution, in no small part because they believed Mexicans would not settle permanently in the United States.<sup>104</sup> Although the 1924 Act had capped annual immigration at 155,000 per year and created quotas for European immigration, it exempted Western Hemisphere countries from the caps and quotas, and Mexican immigration grew rapidly during the 1920s.<sup>105</sup> Mexicans were well on the way to replacing Asians as the nation's low-wage working class.

In time they also came to share another trait held by Asian immigrants: illegality. Unlike Asians, Mexicans were eligible for naturalization; the courts could hardly hold otherwise, given the treaties that had granted citizenship to former Mexican nationals living in California and Texas at the time of their annexation. However, in 1929, the State Department began to restrict Mexican immigration by denying visas to Mexicans seeking to legally immigrate into the United States.<sup>106</sup> This, in turn, led to an increase in illegal immigration along the Mexican border and a corresponding increase in deportations.<sup>107</sup> The removal of Mexicans accelerated during the Great Depression, when a wave of anti-Mexican sentiment gripped much of the country. Local authorities throughout the Southwest and Midwest repatriated over 400,000 Mexicans in the early 1930s. "An estimated 60 percent were children or American citizens by native birth; a contemporary observed that the 'vast majority' spoke English and that many had been in the United States for at least ten years."<sup>108</sup>

Although neither the IPL nor any other mainstream legal aid organization had ever represented significant numbers of Asians,<sup>109</sup> the IPL did represent Mexicans. For example, in October 1931, there were two raids in Chicago as part of the Department of Labor's new anti-smuggling initiative: one targeting Chinese nationals; the other, Mexicans. The Department of Labor seized approximately 200 individuals in the Chinatown raid and "more than 40 of them were held by Labor Department investigators as alien suspects." Afterwards the Chinese consul protested to the State Department that "property had been destroyed and injuries inflicted."<sup>110</sup>

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<sup>104</sup> NGAI, *supra* note 18, at 50.

<sup>105</sup> *Id.* at 22–23, 52.

<sup>106</sup> *Id.* at 55.

<sup>107</sup> *Id.* at 67.

<sup>108</sup> *Id.* at 72.

<sup>109</sup> From 1926 to 1929, the IPL represented 9626 clients, of whom twelve (about one-tenth of one percent) were Asian. See Immigrants' Protective League, *Immigrants' Protective League in 1930*, at 22, in IMMIGRANTS' PROTECTIVE LEAGUE RECORDS (on file as a Special Collection at the University of Illinois at Chicago, Supp. II, Box 18, Folder 60a).

<sup>110</sup> See Immigrants' Protective League, *Report of the Director, July, August, September, October, November, 1931*, Dec. 14, 1931, at 12–14, in IMMIGRANTS' PROTECTIVE LEAGUE RECORDS

The IPL did nothing about the Chinatown raid, but it took action when shortly thereafter Department of Labor agents arrested more than 100 Mexican men from the streets and pool rooms of Chicago. IPL staff interviewed the arrested Mexicans, took affidavits from some, and arranged for the release of at least one individual who was being wrongly held.<sup>111</sup> The IPL also sent a letter to the Secretary of Labor, William Doak, protesting the Mexican raid and requesting removal of the Department of Labor's anti-smuggling detail.<sup>112</sup>

By undertaking these first tentative steps toward representation of Mexican "illegal aliens," the IPL embarked on a new and controversial course. This may not have been clear at the time, but over the following decades, the status of Mexicans as prototypical illegal aliens solidified. A number of factors contributed to this development. First, the Immigration Bureau by administrative fiat excluded Mexicans from forms of discretionary relief from deportation, like the Seventh Proviso of the Immigration Act of 1917.<sup>113</sup> On the legislative front, agricultural workers (by that point predominately Mexican) were left out from key protections of the New Deal: the National Labor Relations Act of 1935, the Social Security Act of 1935, and the Fair Labor Standards Act of 1938.<sup>114</sup>

In 1942 the United States implemented the Bracero Program in an attempt to fill the country's growing need for agricultural labor with temporary Mexican workers. During the program's problematic twenty-two year history, the United States annually imported an average of 200,000 *braceros*, yet the program was undermined by continued illegal immigration, which many growers preferred as an even cheaper form of labor. Thus, in 1954 the Immigration and Naturalization Service (INS) began "Operation Wetback," apprehending 170,000 undocumented immigrants in its first three months of operation.<sup>115</sup> This combination of a temporary guest worker program for Mexicans with a military-style program of mass Mexican deportation cemented in the public consciousness the idea of Mexican nationals as transitory workers who would be deported if they overstayed.

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(on file as a Special Collection at the University of Illinois at Chicago, Supp. II., Box 18, Folder 65) (internal quotation marks omitted).

<sup>111</sup> Immigrants' Protective League, *Persons Arrested in the Deportation "Drive," October, November, 1931*, in IMMIGRANTS' PROTECTIVE LEAGUE RECORDS (on file as a Special Collection at the University of Illinois at Chicago, Supp. II, Box 18, Folder 54a).

<sup>112</sup> Letter of Abel David, President, Immigrants' Protective League, to William N. Doak, Secretary, Department of Labor, Nov. 2, 1931, in IMMIGRANTS' PROTECTIVE LEAGUE RECORDS (on file as a Special Collection at the University of Illinois at Chicago, Supp. II, Box 18, Folder 54a).

<sup>113</sup> NGAI, *supra* note 18, at 87.

<sup>114</sup> *Id.* at 136.

<sup>115</sup> *Id.* at 156.



Mexican immigrants had become the quintessential illegal aliens. In the coming decades, however, legal aid lawyers would not shirk from representing Mexican illegal aliens the way that their predecessors had from representing Asians. The War on Poverty, the civil rights movement, and the anti-war movement ushered in a more progressive and confrontational legal culture—a distinctive era for American lawyers when it became prestigious to represent the powerless.<sup>116</sup>

### III. IMMIGRANT LEGAL AID DURING THE WAR ON POVERTY: EXPANSION AND RADICALIZATION

On December 28, 1970, California governor Ronald Reagan tried to veto the 1971 federal appropriation for California Rural Legal Assistance (CRLA),<sup>117</sup> a statewide migrant worker legal aid project.<sup>118</sup> CRLA had been created under the auspices of the Office of Economic Opportunity (OEO), a War on Poverty program that had included, for the first time, federal funding for legal aid.<sup>119</sup> The OEO was remarkable for its commitment to law reform.<sup>120</sup> Legal aid lawyers were supposed to “be not only advocates for individuals trapped by poverty” but also participate in a movement to marshal “the forces of law and the power of lawyers in the War on Poverty to defeat the causes and effects of poverty.”<sup>121</sup> CRLA was one of the most aggressive of the new programs: soon after its 1966 founding it was filing complex litigation on behalf of immigrants in the areas of education, employment, and civil rights.<sup>122</sup> In the minds of some unlikely allies, this work was important and effec-

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<sup>116</sup> Comparing Chicago’s Legal Aid staff from 1950 to 1960 to the Chicago legal services staff from 1965 to mid-1973, Jack Katz found that the proportion of Chicago legal aid lawyers who had been members of the law review or had graduated with honors increased from none to more than one-third; the proportion of lawyers from major national law schools increased from eleven to twenty-five percent; the proportion of lawyers from nationally prestigious colleges increased from none to eighteen percent; and the proportion of lawyers who were former law firm associates, federal judicial clerks, or teachers at national law schools increased from none to eighteen percent. At the same time, the proportion of female lawyers, for whom legal aid had been a rare bastion, dropped from thirty-five to twelve percent. JACK KATZ, *POOR PEOPLE’S LAWYERS IN TRANSITION* 71 (1982).

<sup>117</sup> REPORT OF THE OFFICE OF ECONOMIC OPPORTUNITY COMMISSION ON CALIFORNIA RURAL LEGAL ASSISTANCE, INC. TO THE HONORABLE FRANK CARLUCCI, DIRECTOR 3 (1971) [hereinafter OEO REPORT].

<sup>118</sup> *About Us*, CAL. RURAL LEGAL ASSISTANCE, <http://www.crla.org/about-us> (2011).

<sup>119</sup> HOUSEMAN & PERLE, *supra* note 8, at 7.

<sup>120</sup> *Id.* at 11.

<sup>121</sup> Clinton E. Bamberger, *Legal Services Program of the Office of Economic Opportunity*, 41 NOTRE DAME L. REV. 847, 852 (1966).

<sup>122</sup> OEO REPORT, *supra* note 118, at 28. For example, in 1970 the California Supreme Court upheld a CRLA challenge to the voting requirement of English literacy in California, allowing Spanish-speaking residents to vote. *See* *Castro v. State of California*, 466 P.2d 244, 258–59 (Cal. 1970).

tive. At the end of 1970, the outgoing OEO director, Donald Rumsfeld, recommended an increase in CRLA's funding, commenting favorably on the "scope and quality of the CRLA program."<sup>123</sup>

Reagan vetoed the OEO grant to CRLA soon afterwards, citing "gross and deliberate violations" of OEO regulations.<sup>124</sup> In January 1971, Lewis K. Uhler, the director of the California OEO office, released a 283-page report setting out some 150 charges of alleged misconduct by CRLA, including disruption of prisons, disruption of schools, organizing labor unions, criminal representation, and representation of ineligible, over-income clients.<sup>125</sup>

The new acting director of the OEO, Frank Carlucci, announced a temporary grant to CRLA while the OEO studied the issue.<sup>126</sup> He appointed a commission on March 27, 1971, consisting of the former chief justice of the Maine Supreme Court and then current justices of the Colorado and Oregon Supreme Courts.<sup>127</sup> The California OEO refused to defend its charges by participating in the series of public hearings held by the commission.<sup>128</sup> Thus, much of the anti-CRLA testimony came from the California Farm Bureau, an organization of agricultural employers that had been frequently at odds with CRLA and its clients.<sup>129</sup>

The commission considered the Uhler allegations at length and declared them baseless; it found "that CRLA has been discharging its duty to provide legal assistance to the poor under the mandate and policies of the Economic Opportunity Act of 1964 in a highly competent, efficient, and exemplary manner."<sup>130</sup> Thus closed the first major chapter in what would become a prolonged controversy over federal legal aid for immigrants. Interestingly, CRLA's representation of undocumented immigrants does not seem to have been an issue in the debate, perhaps because the charge was led by growers who were increasingly reliant on undocumented workers as a source of labor.

Congress had terminated the Bracero program in 1964<sup>131</sup> and the immigration reforms of the 1960s and 1970s dramatically restricted the supply of legal Mexican immigration. The Immigration Act of 1965 abolished the national origins-based quotas, replacing them with 170,000 total quota slots to Eastern Hemisphere countries according to a

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<sup>123</sup> OEO REPORT, *supra* note 118, at 1.

<sup>124</sup> HOUSEMAN & PERLE, *supra* note 8, at 9.

<sup>125</sup> *Id.* at 15.

<sup>126</sup> OEO REPORT, *supra* note 118, at 3.

<sup>127</sup> Jerome B. Falk & Stuart R. Pollak, *The Future of Legal Services*, 24 HASTINGS L.J. 599, 607 (1973).

<sup>128</sup> OEO REPORT, *supra* note 118, at 19.

<sup>129</sup> HOUSEMAN & PERLE, *supra* note 8, at 15.

<sup>130</sup> OEO REPORT, *supra* note 118, at 88.

<sup>131</sup> NGAI, *supra* note 18, at 139.

hierarchy of labor- and family-based preferences.<sup>132</sup> It allotted a quota of 120,000 to the Western Hemisphere without any preference system, representing a forty percent reduction from pre-1965 immigration levels for the Western Hemisphere.<sup>133</sup> As a result, by 1976 there was more than a two-year backlog for obtaining a Western Hemisphere visa.<sup>134</sup> In 1976, Congress further exacerbated matters for Mexicans seeking to legally immigrate by enacting a country quota of 120,000 for all Western Hemisphere countries, including Mexico.<sup>135</sup> That year, the INS deported 781,000 Mexicans from the United States; the total apprehensions for the rest of the world combined was below 100,000.<sup>136</sup>

At the same time that immigration reforms were further illegalizing Mexican labor in the United States, the federal government was increasing funding for legal services, including for illegal aliens. The federal legal services budget grew from \$25 million in 1966 to \$71.5 million in 1972.<sup>137</sup> The OEO earmarked funding for aid to migrant laborers<sup>138</sup> and new migrant projects were quick to follow the CRLA model of aggressive law reform work.<sup>139</sup> In 1974, passage of the Legal Services Corporation (LSC) Act<sup>140</sup> shifted federal funding for legal aid to a private, nonprofit corporation that was controlled by an independent, bipartisan board, appointed by the President and confirmed by the Senate.<sup>141</sup> By 1981, the LSC budget had grown to \$321.3 million.<sup>142</sup> As originally enacted, the LSC Act contained no restriction on representing immigrants and several legal services programs created highly aggressive new immigration projects.<sup>143</sup>

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<sup>132</sup> *Id.* at 258.

<sup>133</sup> *Id.* at 261.

<sup>134</sup> See H.R. REP. NO. 94-1553, at 2 (1976), reprinted in 1976 U.S.C.C.A.N. 6073, 6074.

<sup>135</sup> Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, § 2, 90 Stat. 2703 (codified as amended at 8 U.S.C. § 1151 (2006)).

<sup>136</sup> NGAI, *supra* note 18, at 261.

<sup>137</sup> HOUSEMAN & PERLE, *supra* note 8, at 11.

<sup>138</sup> *Id.* at 9.

<sup>139</sup> For example, in 1971, Ness Flores started an OEO-funded migrant project in Wisconsin that eventually became a division of the LSC-funded program, Legal Action of Wisconsin. *Legal Services Corporation Reauthorization: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary, 97th Cong.* 398 (1981) (testimony of the Hon. Ness Flores, Judge, Circuit Court, Waukesha County, Wis.). By 1981, there were thirty-two legal services programs in thirty-two central offices and approximately sixty branch offices serving one million migrant and seasonal farm workers in thirty-five states and Puerto Rico. *Id.*

<sup>140</sup> Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified as amended at 42 U.S.C. § 2996a-1 (2006)).

<sup>141</sup> HOUSEMAN & PERLE, *supra* note 8, at 22.

<sup>142</sup> *Id.* at 24.

<sup>143</sup> In the late 1970s, there were three LSC-funded immigration projects doing significant law reform work: the Legal Assistance Foundation of Los Angeles, the Legal Aid Society of San Diego, and the Legal Assistance Foundation of Chicago. See LEGAL SERVS. CORP., SPECIAL LEGAL PROBLEMS AND PROBLEMS OF ACCESS TO LEGAL SERVICES OF VETERANS, NATIVE AMERICANS, PEOPLE WITH LIMITED ENGLISH-SPEAKING ABILITIES, MIGRANT AND SEASONAL

The LSC-funded Legal Assistance Foundation of Chicago (LAF), for example, obtained foundation grants in 1976 to form an immigration project that would perform law reform work, do administrative advocacy, and provide community education to Chicago immigrant communities.<sup>144</sup> At the time, the only major source of immigrant legal aid in Chicago was the IPL—now known as Traveler’s and Immigrant Aid after its merger with the Traveler’s Aid Society.<sup>145</sup>

The new LAF immigration project, called the Legal Services Center for Immigrants, began by filing a series of federal lawsuits, including a successful class action suit on behalf of more than 300,000 Western Hemisphere–visa applicants who had been subjected to more than a two-year delay and possible deportation as a result of the government’s practice of unlawfully counting visas issued to Cuban refugees against the Western Hemisphere immigration quota.<sup>146</sup> Within just a few years, LAF filed challenges to the Federal Communications Commission’s refusal to license aliens for radio operator positions, the INS’s delays in processing naturalization applications, the detention and interrogation of persons of Mexican descent without first advising them of their rights, and the denial of Illinois state scholarships to refugees.<sup>147</sup> LSC-funded programs in Los Angeles and San Diego pursued similar high-profile challenges to the government’s treatment of immigrants.<sup>148</sup>

LSC not only approved of this work, but also decided—after conducting a study in the late 1970s—that it should foster similar projects elsewhere. In 1977, Congress passed a reauthorization act for LSC, which mandated the study of access to legal aid for several groups, one

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FARM WORKERS, INDIVIDUALS IN SPARSELY POPULATED AREAS 119–20 (1980) [hereinafter 1007(H) STUDY] (on file at Georgetown University Law Center, Equal Justice Library).

<sup>144</sup> Telephone Interview with Kalman Resnick, former Supervising Attorney, Legal Services for Immigrants, Nov. 3, 2010.

<sup>145</sup> *Id.* Traveler’s and Immigrant Aid was renamed Heartland Alliance in 1995. See *Mission and History*, HEARTLAND ALLIANCE, <http://www.heartlandalliance.org/whowere/history> (last visited Oct. 10, 2011). Its immigrant legal aid office is now called the National Immigrant Justice Center. See *Heartland Alliance National Immigrant Justice Center*, HEARTLAND ALLIANCE, <http://www.heartlandalliance.org/whatwedo/our-programs/directory/national-immigrant-justice-center.html> (last visited Oct. 11, 2011).

<sup>146</sup> LEGAL ASSISTANCE FOUND. OF CHICAGO, 1977 DOCKET OF FEDERAL LITIGATION, APPEALS, AND STATE COURT CLASS ACTIONS 25 (1977) (on file at Georgetown Law School, Equal Justice Library) (case of *Silva v. Levi*).

<sup>147</sup> LEGAL ASSISTANCE FOUND. OF CHICAGO, FEDERAL COURT CASES, STATE COURT CLASS ACTIONS AND APPEALS, AND OTHER SIGNIFICANT CASES, JUNE 15, 1981–NOVEMBER 1, 1982 57–62 (1982) (on file at Georgetown Law School, Equal Justice Library) (cases of *Campos v. FCC*, *Cornejo v. Landon*, *Escamilla-Montoya v. Landon*, and *Phan v. Curry*, respectively).

<sup>148</sup> See, e.g., Complaint, *Vallejo v. Sureck*, No. 78-1912-WMB (C.D. Cal. May 17, 1978) (challenge filed by the Legal Services Aliens’ Rights Program of the Legal Assistance Foundation of Los Angeles to the arrest and interrogation of a class of alien workers without first giving them notice of available free legal assistance); Complaint, *Varela v. Swoap*, No. 251426 (Cal. Super. Ct. Sacramento Cnty., Oct. 28, 1974) (class action filed by the San Diego Legal Aid Society challenging California’s eligibility criteria for alien participation in the Aid to Families for Dependent Children welfare program).

of which was persons with limited English proficiency.<sup>149</sup> As part of this study, LSC sent questionnaires to “language minority organizations” throughout the United States.<sup>150</sup> These organizational respondents marked immigration law, including the rights of noncitizens and the treatment of citizens by those enforcing immigration laws, as the number one unmet need of their client base.<sup>151</sup>

The study noted a list of immigration-related issues and legal barriers faced by persons with limited English proficiency, including (ironically) “a tendency for Congress, the State legislatures and administrative agencies to impose some form of citizenship or permanent residency rule on most programs.”<sup>152</sup> It concluded that effective representation of persons with limited English proficiency “requires a strong support capacity, including research, co-counseling, assistance on factual development, training and the like.”<sup>153</sup> Thus, it vowed to “undertake training and research on the rights of non-citizens; develop, publish and distribute practice manuals and materials; and create a national support capacity to assist local programs with immigration and other legal problems of aliens.”<sup>154</sup>

By the time the study was released, LSC had already funded an immigration law support center, the National Center for Immigrants’ Rights (NCIR),<sup>155</sup> in Los Angeles.<sup>156</sup> In the year of its founding, 1979, NCIR released a comprehensive manual for immigration legal services lawyers.<sup>157</sup> The manual emphasized “that the foreign-born need not remain forever on the defensive.”<sup>158</sup> It contained sample district court pleadings and made a pitch for filing impact litigation: “[T]he affirmative lawsuit permits the practitioner to survey the current legal problems of the alien community, select a potential case with a favorable factual setting and articulate a cause of action in broad and meaningful terms.”<sup>159</sup> The manual instructed that impact litigation skills “must be

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<sup>149</sup> Legal Services Corporation Act Amendments of 1977, Pub. L. No. 95-222, § 13, 91 Stat. 1619, 1623 (amending 42 U.S.C. § 2996f (2006)).

<sup>150</sup> 1007(H) STUDY, *supra* note 143, at 24–25.

<sup>151</sup> *Id.* at 110–11.

<sup>152</sup> *Id.* at 118.

<sup>153</sup> *Id.* at 130.

<sup>154</sup> *Id.* at 140–41.

<sup>155</sup> In 1989, the organization changed its name to the National Immigration Law Center. It still exists today, although without LSC funding. See NAT’L IMMIGRATION LAW CTR., <http://www.nilc.org> (last visited June 30, 2011).

<sup>156</sup> See *Thirty Years of Trailblazing for Immigrants’ Rights*, NAT’L IMMIGRATION LAW CTR., <http://www.aisonmedia.com/niltimeline/index.html> [hereinafter *NILC Timeline*] (last visited June 30, 2011).

<sup>157</sup> LEGAL SERVS. CORP. & NAT’L CENTER FOR IMMIGRANTS’ RIGHTS, IMMIGRATION DEFENSE MANUAL (1979) [hereinafter IMMIGRATION DEFENSE MANUAL].

<sup>158</sup> *Id.* ch. 7, at 1.

<sup>159</sup> *Id.* ch. 7, at 2.

acquired by ever larger numbers of attorneys if the legal rights of immigrants are to be furthered in the years to come.”<sup>160</sup>

The NCIR manual did not shy away from politics. It included an essay against the Carter Administration’s proposed immigration reform, written by the NCIR director, Peter Schey.<sup>161</sup> Schey was one of the attorneys who later argued *Plyler v. Doe*, and the essay foreshadows the Court’s concern in *Plyler* for a permanent underclass of exploited undocumented aliens. One provision of Carter’s reform would have created “a new immigration category of temporary resident alien for undocumented aliens who have resided in the U.S. continuously prior to January 1, 1977.”<sup>162</sup> Such aliens would have been authorized to live in the United States for five years but not to bring in family members or apply for public benefits, despite the fact that they would pay taxes.<sup>163</sup> Schey argued that “this portion of the work force will find itself in a position analogous to that of black workers in the Republic of South Africa who similarly contribute hard labor, are required to present documentation on demand, and reap only minimal economic and political benefits for their toil.”<sup>164</sup> He concluded his essay with a quote from the First International Conference of American States in Washington in 1889: “Foreigners are entitled to enjoy all the civil rights enjoyed by natives; and they shall be afforded all the benefits of said rights in all that is essential as well as in the form or procedure, and the legal remedies incident thereto, absolutely in like manner as said natives.”<sup>165</sup>

This principle seems to have inspired NCIR as it filed immigrant-rights litigation in the years to come. It won a series of early litigation victories, including a preliminary injunction in 1981 against INS home raids and, the next year, a nationwide preliminary injunction to stop the INS from coercing thousands of detained Salvadoran refugees into signing “voluntary departure” forms that waived their right to apply for asylum.<sup>166</sup> At the same time, Congress began a debate as to the equal treatment of immigrants on an issue of central importance to NCIR: the availability of free legal aid itself. Ultimately, Schey’s vision of immigrant equality would not carry the day; Congress would soon limit free legal aid to citizens and certain categories of legal residents.

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<sup>160</sup> *Id.*

<sup>161</sup> Essay, Peter Schey, Carter’s Immigration Package: A Windfall for Big Business, Anathema for Undocumented Persons, in IMMIGRATION DEFENSE MANUAL, *supra* note 157, ch. 1, at 117.

<sup>162</sup> *Id.* at 136–37 (internal quotation marks omitted).

<sup>163</sup> *Id.* at 137.

<sup>164</sup> *Id.* at 140.

<sup>165</sup> *Id.* at 156 (internal quotation marks omitted).

<sup>166</sup> See *Zepeda v. INS*, 753 F.2d 719, 722–23 (9th Cir. 1983); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 385–86 (C.D. Cal. 1982); *NILC Timeline*, *supra* note 156.

## IV. THE RESTRICTION OF IMMIGRANT LEGAL AID

The battle to restrict federal legal aid to immigrants began in the House of Representatives in March of 1979. An exchange between the outgoing LSC president, Thomas Ehrlich, and Representatives Tom Railsback and Robert Kastenmeier gave a foretaste of the coming skirmish. During a hearing of a subcommittee of the House Judiciary Committee, Railsback asked Ehrlich if LSC had a "position as to whether the assistance provided should be to just U.S. citizens?"<sup>167</sup> Ehrlich replied that his "own personal view is a limitation would be a mistake."<sup>168</sup> Railsback rejoined that "we have a situation in this country where not all poor persons are able to receive free legal aid. And so, then what that means is refugees or, even illegal aliens, might be the beneficiaries of legal aid, while many other poor persons are not receiving it."<sup>169</sup> Shortly afterwards, Kastenmeier asked Ehrlich whether a distinction "between American citizens and others such as illegal aliens or permanent resident aliens" would create "equal protection or similar types of problems."<sup>170</sup> After Ehrlich responded that he hadn't fully considered the issue, Kastenmeier let the matter rest, but warned that "it may well develop in the succeeding months, perhaps after you are gone, that Congress will be somewhat more interested in this point."<sup>171</sup>

As promised, things heated up that summer. In May 1979, the House Appropriations Subcommittee on State, Justice, Commerce, the Judiciary and Related Agencies attached a rider to LSC's appropriations for the fiscal year 1980, which contained a restriction on the representation of aliens.<sup>172</sup> The Subcommittee did not take testimony on the impact of the restriction, but the House Appropriations Committee adopted it and the House later passed the bill.<sup>173</sup> As the enemies of immigrant representation lobbied on the Hill, antipathy against immigrant legal aid played out in a palpable way across the country. That summer a farm labor contractor stabbed and seriously injured a staff attorney with Camden Regional Legal Services in New Jersey when the attorney tried to collect unpaid wages owed to migrant farm workers he represented;

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<sup>167</sup> *Legal Services Corp. General Oversight: Hearing before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice, H. Comm. on the Judiciary*, 96th Cong. 33 (1979) [hereinafter *1979 General Oversight Hearings*] (statement of Rep. Railsback).

<sup>168</sup> *Id.* (statement of Thomas Ehrlich).

<sup>169</sup> *Id.* (statement of Rep. Railsback).

<sup>170</sup> *Id.* at 38 (statement of Rep. Kastenmeier).

<sup>171</sup> *Id.*

<sup>172</sup> H.R. 4392, 96th Cong. (1979).

<sup>173</sup> *Legal Services Corp. Reauthorization: Hearings before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice, H. Comm. on the Judiciary*, 96th Cong. 579 (1979) [hereinafter *1979 Reauthorization Hearings*] (statement of Raphael O. Gomez and Mark S. Schact on behalf of Migrant Legal Action Program, Inc.).

an employee of Farmworkers Legal Services of North Carolina also was assaulted by a farm owner.<sup>174</sup>

The Senate initially rejected the alien rider but eventually receded to the House position, and in September the restriction passed.<sup>175</sup> On September 28, 1979, Carter signed the bill, which provided that:

[N]one of the funds appropriated . . . may be used to carry out any activities for or on behalf of any individual who is known to be an alien in the United States in violation of the Immigration and Nationality Act or any other law, convention or treaty of the United States relating to the immigration, exclusion, deportation, or expulsion of aliens . . . .<sup>176</sup>

As a result of a brief exchange between Senators Cranston and Hollings during the floor debate, LSC interpreted this language to bar only representation of aliens who are subject to a final order of deportation.<sup>177</sup>

Around the same time, the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee began considering a second LSC reauthorization. The bill never passed—Congress has failed in every attempt since 1977 to pass reauthorization legislation for LSC—but the debates give an interesting picture of legal services representation of immigrants at the time. Programs in San Francisco, Boulder, Miami, and San Antonio submitted letters describing their immigration work.<sup>178</sup> The San Antonio letter, for example, described the office's representation of an epileptic immigrant veteran and a schizophrenic lawful permanent resident facing deportation due to his temporary absence from the United States.<sup>179</sup>

The growth of immigrant legal services may have been partly buoyed by a 1979 INS regulation requiring that immigration judges inform aliens in deportation or exclusion proceedings of the availability of free legal services programs.<sup>180</sup> Both the Department of Justice and individual immigration judges expressed support for legal services during the committee hearings, noting that lawyers help expedite and assure the fairness of deportation cases.<sup>181</sup>

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<sup>174</sup> Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 *UCLA L. REV.* 474, 484–85 (1985).

<sup>175</sup> *1979 Reauthorization Hearings*, *supra* note 173, at 579.

<sup>176</sup> Departments of State, Justice and Commerce, the Judiciary and Related Agencies Appropriations Act, 1980, Pub. L. No. 96-68, 93 Stat. 416, 433 (1979).

<sup>177</sup> See 96 Cong. Rec. S23, 879 (1979); John A. Dooley & Alan W. Houseman, *Legal Services History* at ch. 3, pg. 15 (Nov. 1985) (unpublished manuscript) (on file with the National Center on Poverty Law).

<sup>178</sup> *1979 Reauthorization Hearings*, *supra* note 173, at 527, 532, 611, 614.

<sup>179</sup> *Id.* at 614–16.

<sup>180</sup> Notification to Aliens of the Availability of Free Legal Services Programs, 44 Fed. Reg. 4651 (Jan. 23, 1979) (amending 8 C.F.R. pts. 103, 235, 236, 242, 287, 292a).

<sup>181</sup> *1979 Reauthorization Hearings*, *supra* note 173, at 531, 605, 598 (letters of immigration judges Neale S. Foster of the Miami Immigration Court; Chester Sipkin, Barnard Hornback, and



Congress, however, was headed in a different direction than the Justice Department. Part of the momentum for restriction came from a new presidential administration. As readers will recall from the CRLA funding conflict, Ronald Reagan was no fan of legal services lawyers: he once described them as “a bunch of ideological ambulance chasers doing their own thing at the expense of the poor who actually need help.”<sup>182</sup> He proposed that funding for LSC cease at the end of 1981, to be replaced with block grants to states for judicial programs and law school clinics.<sup>183</sup> In response to White House pressure, Congress slashed LSC funding by twenty-five percent. In 1980, there were 1406 local field program offices; by the end of 1982 that number had dropped to 1121; the number of legal services attorneys dropped from 6559 in 1980 to 4766.<sup>184</sup>

Reagan also stacked the LSC board with members who at times “expressed outright hostility” to the program they were overseeing.<sup>185</sup> At least one of his board nominees also openly expressed hostility to immigrants. George E. Paras once criticized a Hispanic judge for trying to be a “professional Mexican rather than a lawyer.” He later clarified his statement: “There are such things as professional blacks, professional Greeks, professional dagos, professional Jews, people who put their ethnic origin ahead of everything else.”<sup>186</sup>

A number of members of the House Judiciary Committee, including several Republicans, decided that they could save legal services if they could draft legislation that would rein in legal aid lawyers from doing controversial work.<sup>187</sup> In addition to restrictions on class action suits, lobbying, and representing homosexuals, their proposed reauthorization bill would have essentially codified the alien rider that had been attached to the LSC appropriations since 1979.<sup>188</sup> Representative Harold Sawyer, who was one of the Republican allies of legal services, made clear that in his opinion, these restrictions were necessary to save the program. After a witness from the League of United Latin American Citizens (LULAC) stated in a subcommittee hearing that much of the immigration work of legal services lawyers had been with “the encouragement of many Federal district courts and even some of the adjudica-

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Philip P. Leadbetter of the San Francisco Immigration Court; and Assistant Attorney General Alan A. Parker).

<sup>182</sup> Joy Horowitz, *60s 'Poverty' Lawyers Join Private Sector*, L.A. TIMES, Sept. 30, 1982, at H1.

<sup>183</sup> HOUSEMAN & PERLE, *supra* note 8, at 29.

<sup>184</sup> *Id.* at 30.

<sup>185</sup> *Id.* at 30–31.

<sup>186</sup> Nicholas D. Kristof, *Scorned Legal Services Corp. on the Rebound*, WASH. POST, July 21, 1982, at A21.

<sup>187</sup> Dooley & Houseman, *supra* note 177, at ch. 4, pg. 6.

<sup>188</sup> H.R. 3480, 97th Cong. § 11 (1981) (as reported by H. Comm. on the Judiciary on May 19, 1981).

tion courts that deal with immigration law,” Sawyer responded that curtailment of that work “might be the difference between letting the dog go with the tail or saving the program.”<sup>189</sup>

What seems to have been most controversial was immigrant-rights work. For example, a witness from the Florida Farm Bureau Federation complained about Florida Rural Legal Services’ provision of educational handbills to immigrants. One referred to the right to remain silent when questioned by the INS and the other stated that “if you are an illegal alien, you have the same rights to the minimum wage and safe working conditions as other farmworkers. You have a right to seek legal advice and representation.”<sup>190</sup> Others referred derisively to impact litigation on behalf of illegal aliens. In his dissent to the committee report on the reauthorization bill, Congressman Sam B. Hall, Jr. noted various lawsuits he considered objectionable, including a “successful Federal district court suit to compel New York to pay State welfare benefits to [an] illegal alien parent.”<sup>191</sup>

By the time that the bill passed the House, it contained an alienage restriction that authorized representation of only four categories of aliens: lawful permanent residents; applicants for lawful permanent residency who have a U.S.-citizen parent, spouse, or child; refugees and asylees; and persons granted an asylum-type remedy called “withholding of deportation.”<sup>192</sup> The reauthorization bill ultimately died in the Senate. However, the alienage restriction eventually made its way into law at the end of 1982. That year, Congress was unable to pass an appropriations bill, but the continuing resolution specified that no funds for legal services could be expended “to provide legal assistance for or on behalf of any alien unless the alien is a resident of the United States” and a member of one of the same four categories that had been set out in the failed 1981 reauthorization bill.<sup>193</sup> Later that year, Congress passed a second continuing resolution that reiterated the restriction.<sup>194</sup>

LSC promulgated a regulation to implement the Second Continuing Resolution in May 1983.<sup>195</sup> In its commentary, LSC explained its interpretation of Congress’s rationale: “These categories reflect a general division Congress made between aliens who can be expected to remain in the United States permanently or indefinitely and those whose

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<sup>189</sup> *Legal Services Corporation Reauthorization: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice, H. Comm. on the Judiciary, 97th Cong.* 321 (1981) [hereinafter *1981 Reauthorization Hearings*].

<sup>190</sup> *Id.* at 352–53.

<sup>191</sup> H.R. REP. NO. 97-97, at 31 (1981).

<sup>192</sup> H.R. 3480, 97th Cong. § 14 (as passed in the Senate on June 22, 1981).

<sup>193</sup> Pub. L. No. 97-276, § 122, 96 Stat. 1186, 1195 (1982).

<sup>194</sup> Pub. L. No. 97-377, 96 Stat. 1874 (1982).

<sup>195</sup> Restrictions on Legal Assistance to Aliens, 48 Fed. Reg. 19,750, (proposed May 2, 1983); see also Restrictions on Legal Assistance to Aliens, 48 Fed. Reg. 28,089 (June 20, 1983) (codified at 45 C.F.R. pt. 1626 (2011)).

status is expected to be temporary.”<sup>196</sup> Those most obviously excluded by this standard were the illegal aliens whose representation had infuriated legislators like Representative Hall.

The controversial status of illegal aliens was emphasized again in 1986, when Congress passed the Immigration Reform and Control Act (IRCA), which granted an immigration “amnesty” to undocumented immigrants who had resided continuously in the United States since 1982.<sup>197</sup> IRCA provided that immigrants granted amnesty would be ineligible for a period of five years for “any program of financial assistance,” such as the Aid to Families with Dependent Children welfare program.<sup>198</sup> Both the Department of Justice and LSC interpreted this provision to bar legal services programs from representing immigrants legalized through the amnesty.<sup>199</sup> LSC retracted the ban only after CRLA successfully sued to enjoin it.<sup>200</sup>

The implicit logic of LSC’s interpretation of IRCA—that legal aid is a welfare magnet for illegal aliens—soon resurfaced. In 1994, Republicans swept Congress. Led by Speaker Newt Gingrich, the House enacted restrictive new immigration and welfare policies, justified in large part by a narrative of immigrants being drawn to the United States by generous public benefits.<sup>201</sup> One provision of the new Republican leadership’s “Contract with America” was the elimination of LSC in favor of block grants to the states. The House of Representatives adopted a budget plan that assumed that LSC’s funding would be cut by one-third in 1996, by another third in 1997, and completely thereafter.<sup>202</sup>

In 1995, the House considered legislation that would have abolished LSC and funneled money to states to handle legal aid, with an attached ban on class action suits, constitutional claims, and the representation of all aliens other than lawful permanent residents.<sup>203</sup> The 1995 legislation did not pass. However, in the 1996 appropriations bill,

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<sup>196</sup> Restrictions on Legal Assistance to Aliens, 48 Fed. Reg. at 19,751.

<sup>197</sup> Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, § 201, 100 Stat. 3359, 3394 (codified at 8 U.S.C. § 1255a (2006)).

<sup>198</sup> 8 U.S.C. § 1255a(h)(1)(A)(i).

<sup>199</sup> See Temporary Disqualification of Certain Newly Legalized Aliens From Receiving Benefits From Federal Programs of Financial Assistance, 54 Fed. Reg. 29,434, 29,436 (July 12, 1989) (codified at 8 C.F.R. pt. 245A (2011)); Restrictions on Legal Assistance to Aliens, 54 Fed. Reg. 18,109 (Apr. 27, 1989) (amending 45 C.F.R. pt. 1626); Restrictions on Legal Assistance to Aliens, 53 Fed. Reg. 40,914 (proposed Oct. 19, 1988).

<sup>200</sup> Cal. Rural Legal Assistance, Inc. v. Legal Servs. Corp., 727 F. Supp. 553 (N.D. Cal. 1989), *aff’d*, 917 F.2d 1171 (9th Cir. 1990); Restrictions on Legal Assistance to Aliens, 58 Fed. Reg. 6608 (Feb. 1, 1993) (amending 45 C.F.R. pt. 1626); Restrictions on Legal Assistance to Aliens, 57 Fed. Reg. 33,699 (proposed July 30, 1992).

<sup>201</sup> LINA NEWTON, ILLEGAL, ALIEN, OR IMMIGRANT 57 (2008).

<sup>202</sup> HOUSEMAN & PERLE, *supra* note 8, at 36.

<sup>203</sup> Legal Aid Act of 1995, H.R. 2277, 104th Cong. (as reported by the H. Comm. on the Judiciary Sept. 21, 1995).

the congressional opponents of legal services accomplished much of what they had attempted the previous year: Congress cut overall funding by thirty percent, eliminated funding entirely for support centers, and imposed a series of new restrictions on top of the old ones, such as restrictions on collecting attorney's fees and welfare-reform advocacy.<sup>204</sup> Congress also enacted a new "entity restriction" that prohibited programs from using non-LSC funds to engage in conduct prohibited by LSC regulations, including representation of ineligible aliens.<sup>205</sup> Organizations that had previously used private funding to engage in restricted work could no longer do so under the new rule.

The policy justification for the 1990s restrictions was ostensibly neutral priority-setting: legal services offices represented only twenty percent of poor U.S. citizens and "LSC offices turn away hundreds of needy clients every day."<sup>206</sup> Given the state of resource scarcity, legal services' record of high-profile litigation on behalf of illegal aliens was an easy target. The argument went that legal aid lawyers should represent U.S. citizens who needed help with conventional legal problems before allocating scarce resources to litigation against the government on behalf of persons who were not even authorized to be in the United States.<sup>207</sup> There was another subtext, too, which tied into the Gingrich-led Congress's concern with welfare as a magnet. At a 1996 House subcommittee hearing to oversee the new restrictions, one witness submitted materials claiming: "Legal Services Aids Illegal Immigration."<sup>208</sup> By substituting "immigration" for "immigrants," the document shifted the role of legal services lawyers from that of advocates for

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<sup>204</sup> HOUSEMAN & PERLE, *supra* note 8, at 37.

<sup>205</sup> See Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(11), 110 Stat. 1321, 1321-54-55; see also Restrictions on Legal Assistance to Aliens, 61 Fed. Reg. 45,750 (interim rule Aug. 29, 1996) (amending 45 C.F.R. pt. 1626).

<sup>206</sup> H.R. REP. NO. 104-255, at 21, 21 n.12 (1995).

<sup>207</sup> A 1995 House report cited disapprovingly two federal lawsuits in which "Legal Services attorneys represented illegal aliens." *Id.* at 21 n.13 (citing *Reauthorization of Legal Services Corporation: Hearings Before the Subcomm. on Commercial and Administrative Law, H. Comm. on the Judiciary*, 104th Cong. (1996) (hearing of May 16, 1995). The cases were *Nat'l Ctr. for Immigrants Rights, Inc. v. INS*, 743 F.2d 1365 (9th Cir. 1984) (successful challenge by the National Center for Immigrants Rights to a new INS regulation barring employment to persons granted release from immigration detention on bond), and *Davila-Bardales v. INS*, 27 F.3d 1 (1st Cir. 1994) (requiring—in a case litigated in part by Greater Boston Legal Services—that the Board of Immigration Appeals comply with its own precedent and regulations creating protections for unaccompanied alien minors being interrogated by immigration officials).

<sup>208</sup> The materials referred to various allegedly problematic instances, such as a statement from the National Immigration Law Center that it supported a BIA decision granting asylum based on sexual orientation. *Reauthorization of Legal Services Corporation: Hearings Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 104th Cong. 47 (1996) (hearing of June 26, 1996) (exhibit accompanying the statement of Kenneth F. Boehm, Chairman of the National Legal and Policy Center). This decision is now rather uncontroversial black-letter law. See *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990).

individuals to that of participants in the larger phenomenon of illegal immigration. Rather than aiding individuals, they were abetting an invasion.<sup>209</sup> Within this framework, legal aid was yet another generous government benefit that drew illegal aliens to the United States. The reformers of the 1990s therefore sought to reorient legal services toward individual representation in cases involving the basic legal needs of citizens and lawful permanent residents—not illegal aliens.

#### V. THE CURRENT STATE OF IMMIGRANT LEGAL AID: EXCEPTION AND ACCOMMODATION

On May 7, 1996, a Cuban woman named Mariella Batista was shot outside a family court building in Riverside, California. She had been scheduled to have a custody hearing concerning her nine-year-old son when she was killed by her abusive common-law husband; he was shot and killed by the police minutes later. A week beforehand, she had sought help from a legal services office, which had been forced to turn her down because of the LSC alienage restrictions enacted twelve days earlier. Mariella—who had come to the United States from Cuba on an inner-tube raft—was scheduled in less than a month for an INS interview that might have resulted in her being granted permanent resident status.<sup>210</sup>

After this incident, Congress added a provision to the LSC appropriation allowing for representation of otherwise ineligible abuse victims on matters related to the abuse.<sup>211</sup> Congress has since expanded on this exception to allow representation of certain other categories of immigrant victims. In the Trafficking Victims Protection Act (TVPA) of 2000, Congress authorized recipients to represent immigrant victims of human trafficking.<sup>212</sup> In 2005, Congress authorized legal services pro-

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<sup>209</sup> For a discussion of the role that aggregation—the description of immigrants en masse rather than as individuals—has played in the discourse of those advocating immigration restriction, see Legomsky, *supra* note 24, at 70.

<sup>210</sup> Linda A. Malone, *Beyond Bosnia and In re Kasinga: A Feminist Perspective on Recent Developments in Protecting Women from Sexual Violence*, 14 B.U. INT'L L.J. 319, 339 (1996); Editorial, *A Test of Congressional Conscience*, N.Y. TIMES, June 9, 1996, at 4-14.

<sup>211</sup> Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2440 (1997); *see also* Restrictions on Legal Assistance to Aliens, 62 Fed. Reg. 19,409 (Apr. 21, 1997) (amending 45 C.F.R. pt. 1626) (interim rule); Restrictions on Legal Assistance to Aliens, 62 Fed. Reg. 45,755 (Aug. 29, 1997) (amending 45 C.F.R. pt. 1626). The provision is commonly called the “Kennedy Amendment” after Senator Edward Kennedy, who proposed it.

<sup>212</sup> Pub. L. No. 106-386, § 107, 114 Stat. 1464, 1474-77 (codified at 22 U.S.C. § 7105 (2006)). LSC has not amended its regulations to reflect this change, but it has issued a Program Letter authorizing recipients to represent victims of trafficking under the TVPA. Legal Servs. Corp., Program Letter 05-2 (Oct. 6, 2005) [hereinafter Program Letter 05-2], *available at*

grams to provide “related legal assistance” to persons who are eligible for a “U visa,” a special visa for immigrants who have been victims of certain (mostly gender-related) crimes.<sup>213</sup>

With the addition of these exceptions, legal services lawyers are now authorized to represent the following assortment of immigrants:

- lawful permanent residents;
- applicants for various types of immigration benefits who have a spouse, parent or child who is a U.S. citizen;
- refugees, asylees, persons granted a similar humanitarian remedy called “withholding of removal,” and persons who were admitted under a now largely defunct humanitarian remedy called “conditional entry”;
- trafficking victims, certain crime-victim “U visa applicants” on matters related to the U visa case, and abuse victims in matters related to the abuse; and
- a hodgepodge of other categories of individuals, including certain noncitizen Indians, Pacific Islanders, temporary resident Special Agricultural Workers, foreign nationals seeking assistance related to child abduction under the Hague Convention, and H2 agricultural workers concerning issues of housing, transportation, and employment.<sup>214</sup>

As this jargon-heavy thicket of legal categories should make clear, it is not easy for a legal services lawyer to understand what types of immigrants she is allowed to represent. In fact, it appears that most legal services lawyers simply do not even try to take immigration cases. In 2009, LSC-funded programs reported that they closed 5280 immigration cases, representing 0.6% of the total legal services caseload.<sup>215</sup> The majority of these, 2054, involved only counsel and advice, followed by 1766 administrative agency decisions.<sup>216</sup>

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[https://grants.lsc.gov/Easygrants\\_Web\\_LSC/Implementation/Modules/Login/Controls/PDFs/Progltr05-2.pdf](https://grants.lsc.gov/Easygrants_Web_LSC/Implementation/Modules/Login/Controls/PDFs/Progltr05-2.pdf).

<sup>213</sup> Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 104(a), 119 Stat. 2960, 2978 (2006) (amending 42 U.S.C. § 3796gg-6(a) (2006)); Legal Servs. Corp., Program Letter 06-2, at 4 (Feb. 21, 2006) [hereinafter Program Letter 06-2], available at [https://grants.lsc.gov/Easygrants\\_Web\\_LSC/Implementation/Modules/Login/Controls/PDFs/Progltr06-2.doc](https://grants.lsc.gov/Easygrants_Web_LSC/Implementation/Modules/Login/Controls/PDFs/Progltr06-2.doc).

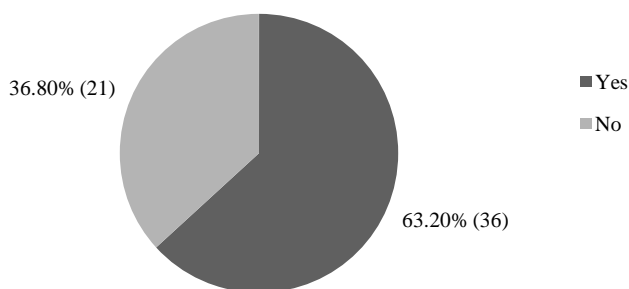
<sup>214</sup> 45 C.F.R. §§ 1626.3–.5, 1626.10–.11 (2011); Program Letter 05-2, *supra* note 212; Program Letter 06-2, *supra* note 213.

<sup>215</sup> LEGAL SERVS. CORP., LEGAL SERVICES FACT BOOK: 2009 at 14 (2010) [hereinafter LEGAL SERVS. FACT BOOK], available at [https://grants.lsc.gov/Easygrants\\_Web\\_LSC/Implementation/Modules/Login/Controls/PDFs/factbook2009.pdf](https://grants.lsc.gov/Easygrants_Web_LSC/Implementation/Modules/Login/Controls/PDFs/factbook2009.pdf).

<sup>216</sup> *Id.*

The author surveyed legal services managers to find out what type of immigration cases they were taking, and, if they were not taking immigration cases, to find out why. Fifty-six of the 137 legal services organizations in the United States responded.<sup>217</sup> About 63% of the respondents indicated that they do handle some immigration-law matters.<sup>218</sup>

**Does your organization provide legal assistance with immigration matters?**



Only the New York and Los Angeles legal services programs reported having large immigration projects, with eleven immigration attorneys in each project.<sup>219</sup> About half of the organizations had no attorneys engaged primarily in immigration law; about a quarter had one or two attorneys.<sup>220</sup>

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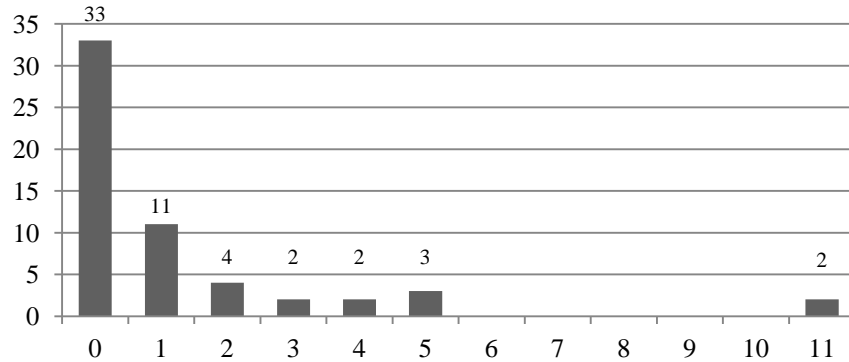
<sup>217</sup> Survey of Federally Funded Legal Services Organizations Concerning Immigrant Legal Aid, Oct. 5, 2011–Nov. 1, 2011 [hereinafter Immigrant Legal Aid Survey] (on file with author).

<sup>218</sup> *Id.* It is very possible that the percentage of organizations handling immigration matters is lower than this figure suggests, since organizations that take immigration cases may have been more willing to take the time to complete my survey than those that do not.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

**How many attorneys at your organization are primarily engaged in the practice of immigration law?**



The LSC restrictions were the most commonly cited reason for not handling immigration cases: 87.5% of managers reported this as a rationale.<sup>221</sup> Significant numbers of managers also cited as justifications inadequate expertise, priorities, and insufficient staff.<sup>222</sup> The justification cited by some legislators during the 1990s for cutting back on immigrant legal aid—that lawyers should focus their efforts first on citizens—appears to have been effectively internalized by some managers, who reported that they do not do immigration work because of a crushing load of other types of cases.<sup>223</sup> Given the choice of work on which to cut back, many legal services programs choose immigration work.

Unsurprisingly, given the complicated nature of the restrictions and of immigration law, some respondents were confused about what types of cases were permissible. One respondent, for example, erroneously stated that the restrictions prevented the office from handling removal cases.<sup>224</sup> Some directors were dismissive of immigration law as a legal-aid practice area. Despite the fact that there are at least a few offices in the country that employ numerous immigration lawyers, one respondent claimed that no LSC-funded legal aid offices “feature a brisk immigration practice.”<sup>225</sup>

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<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

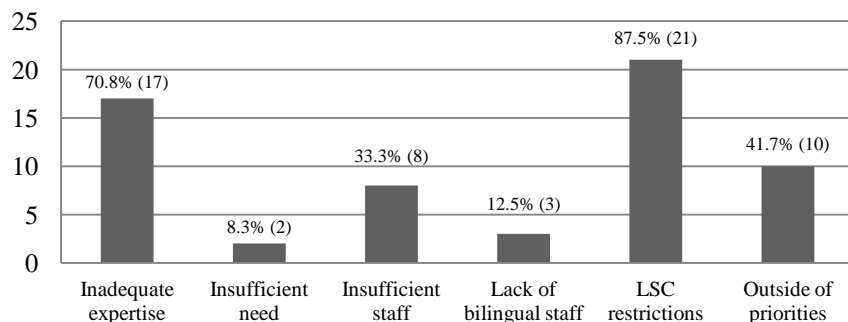
<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*



**If your organization does not provide assistance with immigration matters, please choose any of the following factors that explain this policy:**



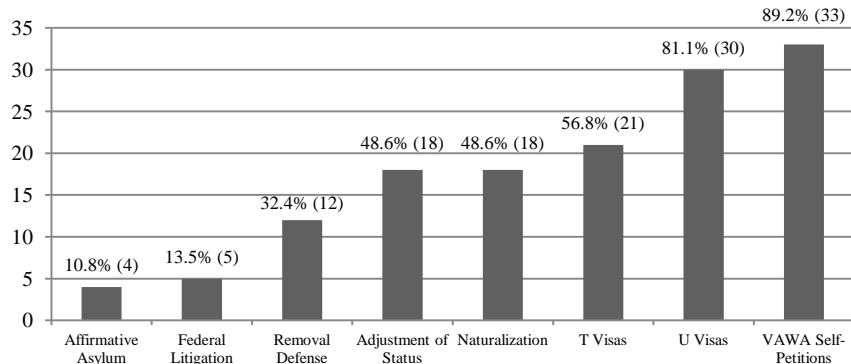
LSC-funded programs appear to be doing very little of the federal immigration litigation that Congress found objectionable in the 1980s and 1990s. Five legal services programs reported that they do handle federal immigration litigation,<sup>226</sup> but in 2009, legal services programs only closed ten immigration cases nationwide where the disposition was a contested court decision or appeal.<sup>227</sup> By far the most common type of immigration cases reported by legal services are those that fall under the immigrant-victim exceptions created by Congress in the years following the Batista tragedy. Eighty-nine percent of the programs that do immigration work reported handling self-petitions for abused spouses and children under the Violence Against Women Act; 81% of programs reported handling U visa petitions for immigrant-crime victims; and 57% of programs reported that they take T visa cases for trafficking victims.<sup>228</sup>

<sup>226</sup> *Id.*

<sup>227</sup> LEGAL SERVS. FACT BOOK, *supra* note 215, at 14.

<sup>228</sup> Immigrant Legal Aid Survey, *supra* note 217.

**Which of the following types of immigration cases  
does your organization handle?**



In summary, legal services organizations today either steer clear entirely of immigration law or represent a limited number of victimized immigrant women in petitions for lawful status. There appear to be only a few organizations that do any of the federal immigrant-rights litigation that Congress found objectionable in the 1980s and 1990s, and even these do a very small amount of such work. Immigrant legal aid has withered but survived by coalescing around the narrative of the deserving immigrant—the immigrant as victim.

This narrative is uncontroversial because it appeals to sympathy and discretion rather than entitlement. The immigrants-rights lawyers of the 1960s and 1970s brought claims based on their clients' status as putative rights holders in a constitutional scheme that guaranteed equal treatment for all persons in the United States. By contrast, the immigrant clients of legal services today are wounded women who plead clemency. In a way, this narrative also feeds on the very antipathy to illegal aliens that drove the restrictions in the first place. For every victim there is a victimizer, and for immigrant women, that victimizer is usually an immigrant man—a criminal alien, which is a variation on the theme of “illegal alien.”

The “illegal alien” as he exists in the symbolic realm of the national consciousness has most commonly been male.<sup>229</sup> By definition, he is

<sup>229</sup> See COMPTROLLER GENERAL, *supra* note 22, at 8 (“[M]ost studies show that illegal aliens generally are male, young (average age is less than 30), single (or married men with spouses and children living outside the United States), and support, on the average, 4.6 dependents in their countries of origin. They are unskilled, poorly educated (average 6.7 years of education), and speak little or no English.); STEVEN A. CAMAROTA, CTR. FOR IMMIGRATION STUDIES, IMMIGRANTS IN THE UNITED STATES, 2007: A PROFILE OF AMERICA’S FOREIGN-BORN POPULATION (2007), available at <http://www.cis.org/articles/2007/back1007.pdf> (“[I]t is well known that illegal aliens are disproportionately male, unmarried, under age 40, have few years of schooling, etc.”). Undocumented immigrants are disproportionately (if not “generally”) male, although undocumented immigrants are also more likely to live in nuclear families than U.S.-born resi-

a criminal; his mere presence is a violation. Immigrant criminality has been a powerful theme throughout the history of the American immigration debate, and if anything, policy-makers have become more preoccupied with the issue of late.<sup>230</sup> Since the 1990s, legal services lawyers have largely avoided being drawn back into the controversy over alien illegality by avoiding immigration law entirely, or by representing the immigrant foil to illegal aliens: alien victims.

## VI. AN ARGUMENT FOR THE FUTURE OF IMMIGRANT LEGAL AID

Immigrants today are no less in need of legal aid than they were in 1876, when the Legal Aid Society was founded. Indigent immigrants face the same range of legal problems confronted by poor citizens: housing, consumer, employment, and family law issues that threaten their basic well-being.<sup>231</sup> These problems are exacerbated by immigrants' uncertain legal status in this country, which puts them at greater risk of exploitation by unscrupulous actors, such as employers, landlords, consumer vendors, or abusive spouses, who may use the threat of deportation to intimidate such immigrants. Therefore, an immigrant in trouble is likely to care about two issues: her problem and her legal status in this country. In many cases, the two issues are intertwined with respect to not only their cause, but also their resolution. Abused immigrants might qualify under VAWA for U visas; trafficking victims, for T visas; and victims of exploitative employment relationships, for U, T, or S visas. Unfortunately, a host of issues—language, poverty, lack of legal sophistication, and tenuous legal status—impede immigrants from

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dents or legal immigrants. See MICHAEL HOEFER ET AL., OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009, at 5 (2010), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf); JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 4–5 (2009), available at <http://pewhispanic.org/files/reports/107.pdf>.

<sup>230</sup> See, e.g., MAJORITY STAFF OF THE SUBCOMM. ON INVESTIGATIONS OF THE H. COMM. ON HOMELAND SEC., A LINE IN THE SAND: CONFRONTING THE THREAT AT THE SOUTHWEST BORDER (2006), available at [http://www.house.gov/sites/members/tx10\\_mccaul/-pdf/Investigations-Border-Report.pdf](http://www.house.gov/sites/members/tx10_mccaul/-pdf/Investigations-Border-Report.pdf). The report cites a study from the Violent Crimes Institute, which extrapolated from the fact that more illegal aliens are male than female to conclude that “there are approximately 240,000 illegal immigrant sex offenders in the United States” with an estimated number of 960,000 victims for the eighty-eight months of the study. *Id.* at 25. There are various special Immigration and Customs Enforcement initiatives to deal with criminal aliens, including “Operation Community Shield” to disrupt and dismantle transnational gangs, Operation Predator to apprehend sex criminals, “Secure Communities” to facilitate the transfer of criminal aliens from state to federal custody and the “287(g) program” to allow local law enforcement agents to enforce federal immigration law.

<sup>231</sup> See Paral, *supra* note 1, at 13.

tapping into these solutions. Instead, they often end up in removal proceedings, where the stakes are high and a majority of immigrants are unrepresented by counsel.<sup>232</sup>

Representation for indigent immigrants in the United States today comes from a patchwork of pro bono attorneys, law school clinics, and nonprofit organizations.<sup>233</sup> Some civil legal aid offices that have declined federal funding continue to offer a full range of immigrant legal aid, but a large share of the work is handled by nonprofits like the National Immigrant Justice Center (NIJC), the successor to the Immigrants' Protective League. Such offices are well qualified—if perhaps under-resourced—to handle the immigration-law problems of immigrants, but generally do not address their other legal problems. Federally funded legal services offices that practice general civil law, conversely, are well suited to provide a holistic service to immigrants, but still shy away from their immigration-law problems because of the arcane and onerous alienage restrictions and the history of political controversy surrounding this work. Nonetheless, 100% of the legal services providers whom the author surveyed responded that there was a need for immigrant legal aid in their service area.<sup>234</sup>

If the LSC alienage restrictions were lifted, it would probably result in a considerable infusion of resources for immigrant legal aid, both for general civil legal problems and for the special legal problems that immigrants face—like deportation. As early as 1953, the *Harvard Law Review* called for the right to counsel in deportation and exclusion proceedings,<sup>235</sup> and the American Bar Association recently passed a similar resolution.<sup>236</sup> Repealing the restrictions would not guarantee the right to counsel for immigrants in removal proceedings, but it would alleviate somewhat the current crisis in representation.

Before the restrictions were enacted, legal services offices were expanding the scope of their representation in deportation cases. The Department of Justice and a number of immigration judges opposed the first alienage restrictions because they believed that the representation

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<sup>232</sup> EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2010 STATISTICAL YEAR BOOK G1 (2011), available at <http://www.justice.gov/eoir/statspub/fy10syb.pdf> (noting that forty-three percent of immigrants in removal proceedings are represented by counsel); Colyer, *supra* note 4, at 466 (noting that about ten percent of detained immigrants in removal proceedings are represented by counsel).

<sup>233</sup> Colyer, *supra* note 4, at 467.

<sup>234</sup> Immigrant Legal Aid Survey, *supra* note 217.

<sup>235</sup> See *Developments in the Law: Immigration and Nationality*, HARV. L. REV. 643, 692–93 (1953) (“Though general prosperity and the development of organizations providing legal aid for the indigent have undoubtedly raised the proportion of aliens who have lawyers above the one-fifth shown in an earlier survey, fairness if not due process seems to demand that counsel be provided in all cases.”).

<sup>236</sup> See AM. BAR ASS'N., ENSURING FAIRNESS AND DUE PROCESS IN IMMIGRATION PROCEEDINGS 2 (2008), available at [http://www.americanbar.org/content/dam/aba/mi-grated/poladv/priorities/immigration/2008dec\\_immigration.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/mi-grated/poladv/priorities/immigration/2008dec_immigration.authcheckdam.pdf).

of immigrants by legal services lawyers expedited and improved the fairness of deportation hearings.<sup>237</sup> Since then, immigration law has only grown more draconian and difficult to unravel without the help of a lawyer.<sup>238</sup> Moreover, the growth of immigration detention has created special problems for immigrants trying to present their cases: detainees are held in remote locations, without easy means of acquiring the documentation that is often required to win removal cases.<sup>239</sup> Often their hearings occur by videoconference, which creates additional hurdles for pro se respondents in the form of technical defects and problems related to interpretation, credibility assessment, and presentation of evidence.<sup>240</sup>

Immigrants in removal proceedings risk losing lives they have built in the United States, being separated from their families, and being banished to countries to which they may have little connection, or where they may be at risk of persecution. Leaving aside all of immigrants' other legal difficulties, there clearly is a need for counsel for this problem alone. Acknowledging this need, Department of Justice regulations require that immigrants in proceedings be informed of the availability of free legal services providers.<sup>241</sup> Ironically, however, the LSC restrictions prevent any of those providers who take federal money from representing many immigrants. The restrictions discriminate against immigrants as to the provision of legal aid. More precisely, they discriminate *among* immigrants: aliens that Congress has classified as permanent or potentially permanent are favored over supposedly impermanent aliens.

Congress has justified its restriction with several arguments, which the author will consider in turn. As an initial matter, however, any challenge to the restrictions must contend with the conflicting jurisprudence of immigrant rights, which has sometimes seemed to endorse a hierarchy that places prospective citizens over illegal aliens. The subordination of illegal aliens is evident even in the history of immigrant legal aid: in the early days, programs focused their representation on the European immigrants who were presumed to be on a pathway to naturali-

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<sup>237</sup> 1979 *Reauthorization Hearings*, *supra* note 173, at 531, 605, 598 (letters of immigration judges Neale S. Foster of the Miami Immigration Court; Chester Sipkin, Barnard Hornback, and Philip P. Leadbetter of the San Francisco Immigration Court; and Assistant Attorney General Alan A. Parker).

<sup>238</sup> See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1479–80 (2010) (citing the increasing harshness of immigration law as a factor weighing in favor of finding that a criminal defense attorney has a duty to advise her client on the possible immigration consequences of a conviction).

<sup>239</sup> See REAL ID Act of 2005, Pub. L. No. 109-13, div. B, § 101(a)(3)(B)(ii), 119 Stat. 231, 303 (codified at 8 U.S.C. § 1158(h)(1)(B)(ii) (2006)) (“Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.”).

<sup>240</sup> See *Developments in the Law—Access to Courts, IV. Access to Courts and Videoconferencing in Immigration Court Proceedings*, 122 HARV. L. REV. 1181, 1186–88 (2009).

<sup>241</sup> 8 C.F.R. § 1240.10(a)(2) (2011).

zation, rather than on the Asian immigrants who were the illegal aliens of the day. Thus, a powerful counter to any argument against restriction might simply be that the United States can—and always has—privileged some immigrants over others. However, this normative argument for restriction is in conflict with another aspect of American constitutionalism: the anti-subordination principle at the root of the equal protection clause.<sup>242</sup> Before turning to the various policy justifications for restriction, these two strands must be reconciled.

### A. *Constitutional Caste Drawing*

The jurisprudence of immigration law reveals a tenuous balance between the push of immigrant rights and the pull of governmental discretion over immigration—what is commonly called the “plenary power” doctrine. From the time of the Alien and Sedition Acts,<sup>243</sup> Congress has debated whether immigrants should be considered sojourners on sufferance or residents with rights on an equal footing to citizens.<sup>244</sup> Both sides of the Alien and Sedition Acts debates appealed to social contract theory to justify their view of immigrant rights, but each had different notions of who was a party to the contract, and what the compact meant. Some of the Democratic-Republicans, like James Madison, argued that because immigrants were subject to the jurisdiction of the laws of the United States, they must enjoy corresponding rights.<sup>245</sup> Conversely, the Federalists argued that only citizens were parties to the Constitution, and that aliens had only those rights set out in the law of nations.<sup>246</sup>

The most influential treatise at the time concerning the law of nations was *The Law of Nations* by Emer de Vattel.<sup>247</sup> Although the most extreme Federalists insisted that immigrants should have no rights, Vattel actually set out a kind of hierarchy of rights for three categories of persons: citizens, alien inhabitants, and “perpetual inhabitants.” Alien

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<sup>242</sup> See Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1011 (1986).

<sup>243</sup> There were four laws making up what are commonly referred to as the “Alien and Sedition Acts,” which were passed in a period of diplomatic tension with France. Act of July 14, 1798 [Sedition Act], ch. 74, 1 Stat. 596; Act of July 6, 1798 [Alien Enemy Act], ch. 66, 1 Stat. 577; Act of June 25, 1798 [Alien Friends Act], ch. 58, 1 Stat. 570; Act of June 18, 1798 [Naturalization Act], ch. 54, 1 Stat. 566. One controversial provision of the Alien Friends Act authorized the president to issue ex parte orders of deportation against any resident alien suspected of being “dangerous to the peace and safety of the United States.” § 1, 1 Stat. at 570–71.

<sup>244</sup> See generally GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 52–60 (1996).

<sup>245</sup> *Id.* at 58–59.

<sup>246</sup> *Id.* at 54.

<sup>247</sup> *Id.* at 9.

inhabitants, according to Vattel, were entitled to “only the advantages which the law or custom gives them”; by contrast, perpetual inhabitants were foreigners who had been granted the “right of perpetual residence” and were “a kind of citizen[] of an inferior order.”<sup>248</sup> Thus, implicit within the Federalist position was the possibility of caste-drawing among immigrants; Congress, in its discretion, might have afforded privileges to some noncitizen residents that it denied to others.

It is possible to see traces of this debate in the Supreme Court’s immigration decisions, which have fluctuated wildly between those upholding unfettered governmental discretion over immigrants and those affirming that at least some immigrants, in some contexts, enjoy the same constitutional guarantees as citizens.<sup>249</sup> With respect to equal protection, the Court has vacillated between solicitude for immigrants and the government. In *Graham v. Richardson*, the Burger Court first held that alienage is a “suspect” class, meaning that laws that discriminate based on alienage are subject to “strict scrutiny”: they must be narrowly tailored to serve a compelling governmental interest.<sup>250</sup> Yet, the Court rejected a challenge just five years later brought by documented aliens to a lawful-permanent-residency requirement for the receipt of Medicare benefits.<sup>251</sup> The Court in *Mathews v. Diaz* distinguished *Gra-*

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<sup>248</sup> EMER DE VATTEL, *THE LAW OF NATIONS* 176 (1852) (bk. i, ch. XIX, § 213).

<sup>249</sup> Compare *United States v. Mendoza-Lopez*, 481 U.S. 828, 838 (1987) (holding that if the result of a prior deportation proceeding is used to establish the crime of illegal reentry, the government must permit an alien to collaterally attack the validity of the prior deportation), *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (holding that a state may not deny a free public education to children of illegal immigrants), *Yamataya v. Fischer*, 189 U.S. 86, 101 (1903) (holding that executive officers are not authorized to arbitrarily deport an alien without due process), *Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (holding that the Constitution does not permit Congress to subject aliens to ‘infamous punishment’ without trial), and *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (“The [F]ourteenth [A]mendment to the [C]onstitution is not confined to the protection of citizens.”), with *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding that the Fourth Amendment did not apply to a search of an alien’s home on foreign soil conducted by U.S. officials), *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 216 (1953) (holding that continued exclusion of an alien, without hearing does not deprive the alien of any statutory or constitutional right), and *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (holding that regulations could reasonably grant the Attorney General power to deny an alien a hearing on the basis of confidential information that establishes the alien’s excludability, but that would be prejudicial to the public interest if disclosed). There are various ways to try to make sense out of the Court’s fluctuating immigration jurisprudence, none of which are particularly satisfying. One reading is that the Court has “appeared to separate the questions of noncitizens entering and remaining in the United States from the questions of their constitutional protection on matters other than admission and expulsion itself.” THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 1191 (6th ed. 2008). However, as the above textual discussion makes clear, a notable exception to this rule is *Mathews v. Diaz*, 426 U.S. 67 (1976) (upholding Congress’s right to condition eligibility for government benefits on an alien’s residence and immigration status, despite the fact that such a classification by a state would violate the Fourteenth Amendment), a case that seems particularly on point to discussion of the LSC restrictions.

<sup>250</sup> See *Graham v. Richardson*, 403 U.S. 365, 372, 375 (1971).

<sup>251</sup> *Mathews*, 426 U.S. at 84.

ham by noting that *Graham* concerned *state* welfare benefits, and that the analysis was fundamentally different where the power of the federal government was at issue.<sup>252</sup>

With logic that would have rung true to the eighteenth century Emer de Vattel, the Court clarified that Congress was free to privilege long-term residents over other immigrants:

Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and some of its guests. The decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence.<sup>253</sup>

Six years later, Congress enacted the LSC alienage restriction, which essentially codified this principle of immigrant caste-drawing.

That same year, the Court decided two important cases concerning the rights of immigrants. Both are commonly cited as pro-immigrant-rights decisions, but the first, *Landon v. Plasencia*,<sup>254</sup> implicitly endorsed the privileging of some immigrants over others, whereas the other, *Plyler v. Doe*,<sup>255</sup> held that the "Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation."<sup>256</sup>

In *Landon*, the Court considered whether a returning lawful permanent resident charged with alien smuggling was entitled to a deportation hearing that would have afforded greater procedural protection than the exclusion hearing she received. The Court held that she was not, affirming that in general, an alien seeking admission "requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative."<sup>257</sup> However, it added an important caveat: because Plasencia was a lawful permanent resident who had developed significant ties to the United States, she was entitled to due process.<sup>258</sup> The Court expressed no opinion about what due process might look like for a returning lawful permanent resident, but instead sent the case back to the Ninth Circuit, which further remanded it to the district court.

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<sup>252</sup> *Id.* at 84–85 ("The equal protection analysis also involves significantly different considerations because it concerns the relationship between aliens and the States rather than between aliens and the Federal Government.").

<sup>253</sup> *Id.* at 80.

<sup>254</sup> 459 U.S. 21 (1982).

<sup>255</sup> 457 U.S. 202 (1982).

<sup>256</sup> *Id.* at 213.

<sup>257</sup> *Landon*, 459 U.S. at 32.

<sup>258</sup> *Id.* at 34.



It might be inferred from *Landon* that persons who lack legal status and significant ties to the United States would have a weaker due process claim.<sup>259</sup> By contrast, in *Plyler*, the Court rejected Texas's argument that the Equal Protection Clause ought to be read to exclude persons who are not legally within the jurisdiction of the state.<sup>260</sup> Like James Madison, Justice Brennan asserted that the subjection of immigrants to the laws of the United States entitled them to corresponding rights—in that case, the right of undocumented children to the same education as citizens.<sup>261</sup> The Court's reasoning was informed throughout by a Jeffersonian concern that immigrant children, deprived of education, would become a "permanent underclass" prevented from fully participating in civil society.<sup>262</sup> The integrity of the American system depends, the Court seems to have been saying, on preventing the subordination of discrete and insular minorities, like undocumented immigrants.

*Landon* and *Plyler* present very different paradigms of immigrant rights: in *Landon*, immigrant due process is contingent on lawful status; in *Plyler*, important rights are systemic and impermeable to state action. *Landon* presumes that Congress has a right to define the rights-bearing members of the polity by according or denying them lawful status; *Plyler* explicitly holds that a state may not define away who is "subject to its jurisdiction." A natural inference from *Landon* is that immigrant rights can be hierarchical; the courts will be more receptive to the claims of some immigrants than others. In contrast, the rhetoric of *Plyler* reflects a profound suspicion of any constitutional caste-drawing.

Beyond the connection of these paradigms to the Alien and Sedition Act debates, both might also be traced to slavery. Slavery grew in the seventeenth and eighteenth centuries as a more economical alternative to an earlier class of immigrant labor: white indentured servants imported from Britain.<sup>263</sup> Arguably, slavery presents the best example of a hierarchical framework for immigrant rights: slaves were (involuntary) immigrants whose movement was strictly regulated according to their origin (African or domestic), legal status (slave, freedman, free-

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<sup>259</sup> Additional support for this proposition can be found in the Court's more recent immigration decisions. See *Demore v. Kim*, 538 U.S. 510, 547 (2003) (Souter, J., concurring in part and dissenting in part) ("[W]e have accorded LPRs greater protections than other aliens under the Due Process Clause."); *Zadvydas v. Davis*, 533 U.S. 678, 694 (2001) (noting that the nature of due process protection may vary depending upon an alien's status).

<sup>260</sup> *Plyler*, 457 U.S. at 210–215. Although, by its terms, the Equal Protection Clause bars states from denying to any person "within its jurisdiction" equal protection of law, U.S. CONST. amend XIV, Texas argued that it ought to be able to define the phrase "within its jurisdiction" to exclude persons who were not legally present in the United States. *Id.* at 210.

<sup>261</sup> *Id.* at 215, 230.

<sup>262</sup> *Id.* at 218–19, 223.

<sup>263</sup> FUCHS, *supra* note 33, at 10.

born black), and each state's laws on the subject.<sup>264</sup> Slavery is also central to how we think about immigrant rights today: the abolition of slavery gave rise to the Fourteenth Amendment, which codified the principle of anti-subordination into United States law upon which Justice Brennan relied in *Plyler*.

*Plyler* is perhaps unique in being willing to extend the logic of anti-subordination to illegal aliens, and it is possible that no other court will be willing to forge deeper into this controversial territory. Notably, the Court was unwilling to apply any rigorous standard of equal protection in *Mathews*, where it was federal—rather than state—power that was at issue. Even in *Plyler*, the Court distinguished federal from state immigration regulation, acknowledging that “it is a routine and normally legitimate part of the business of the Federal Government to classify on the basis of alien status.”<sup>265</sup> One reading of *Plyler* is that it is a case about federalism, and that it would have been decided the opposite way were it the federal government—rather than the state of Texas—denying education to undocumented children. On the other hand, this reading ignores *Plyler*'s persistent anti-subordination logic, which draws a connection between the political integrity of a democracy and the elimination of castes. Under this analysis, federalism is partly about checking the growth of rightless castes of persons who are wholly subject to governmental discretion.

It might also be argued that legal aid is a welfare benefit like the Medicare benefits at issue in *Mathews*. In many ways, the provision of medical care to the poor seems more important than legal aid. Certainly persons who have serious medical problems would take a free doctor over a free lawyer. On the other hand, there is a way in which the restriction of free lawyers to the poor is more like the denial of education at issue in *Plyler* than it is like the denial of Medicare benefits in *Mathews*. Lawyers serve an important role in enhancing the voice of disempowered persons, securing redress for wrongs, and assuring that persons are not railroaded by more powerful actors like the state. In criminal cases, access to counsel is considered a “fundamental right.”<sup>266</sup> Although there is no general right to a free attorney in civil cases, the Supreme Court has required that the government provide attorneys in certain civil proceedings where there is a liberty interest at stake,<sup>267</sup>

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<sup>264</sup> See NEUMAN, *supra* note 244, at 34–37, 39–40. For example, various slave states “barred the entry of free blacks who were not already residents of the state.” *Id.* at 35. Shortly before the Civil War, Arkansas passed legislation requiring free black persons to “choose between enslavement and expulsion.” *Id.* Antebellum Illinois prohibited the entry of all blacks, whether slave or free. *Id.* at 40.

<sup>265</sup> *Plyler*, 457 U.S. at 225 (internal quotation marks omitted).

<sup>266</sup> *Gideon v. Wainwright*, 372 U.S. 335, 343–44 (1963).

<sup>267</sup> See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25 (1981).

which is arguably the case for removal proceedings.<sup>268</sup> No court has been willing to go so far as to find a right to government-funded counsel in removal cases, although a couple have come close.<sup>269</sup> A considerable number of courts have held that the ineffective assistance of counsel in a removal hearing is a due process violation.<sup>270</sup>

Thus, the LSC alienage restrictions implicate the anti-subordination principle at the heart of equal protection. Preventing poor immigrants from obtaining lawyers to right their wrongs furthers their subordination, raising the same “specter of a permanent caste of undocumented resident aliens” that Justice Brennan found troubling in *Plyler*.<sup>271</sup> Therefore, there is an argument that *Plyler*’s test should apply to the restrictions. Under this standard, the restrictions must be rationally related to a substantial state interest.<sup>272</sup> The next Part will consider whether any of the possible governmental justifications for the restrictions are substantial, and whether the restrictions are rationally related to them.

### B. *Neutral Priority Setting*

In 1979, Representative Tom Railsback pointed out in a subcommittee hearing that “we have a situation in this country where not all poor persons are able to receive free legal aid. And so, then what that means is refugees or, even illegal aliens, might be the beneficiaries of legal aid, while many other poor persons are not receiving it.”<sup>273</sup> Several years afterward, Congress enacted the alienage restriction, and in 1996, Congress barred legal services offices from using even non-LSC funds to represent ineligible aliens. One might argue that the alienage restriction represents a congressional judgment about priorities for legal aid. Since, as Railsback pointed out, not all poor persons will receive legal assistance, Congress has decided that federal funding should first go to citizens and prospective citizens.

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<sup>268</sup> See *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) (noting that “the liberty of an individual is at stake” in deportation cases).

<sup>269</sup> See *United States v. Campos-Asencio*, 822 F.2d 506, 510 (5th Cir. 1987); *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 n.3 (6th Cir. 1975).

<sup>270</sup> See *Aris v. Mukasey*, 517 F.3d 595, 600–01 (2d Cir. 2008); *Zeru v. Gonzales*, 503 F.3d 59, 72 (1st Cir. 2007); *Fadiga v. Attorney General*, 488 F.3d 142, 155 (3d Cir. 2007); *Sene v. Gonzales*, 453 F.3d 383, 386 (6th Cir. 2006); *Dakane v. U.S. Attorney Gen.*, 399 F.3d 1269, 1274 (11th Cir. 2004); *Lara-Torres v. Ashcroft*, 383 F.3d 968, 973 (9th Cir. 2004), *amended sub nom. Lara-Torres v. Gonzales*, 404 F.3d 1105 (9th Cir. 2005); *Tang v. Ashcroft*, 354 F.3d 1192, 1196 (10th Cir. 2003).

<sup>271</sup> *Plyler v. Doe*, 457 U.S. 202, 218–19 (1982).

<sup>272</sup> See *id.* at 239; see also *State of Alaska v. Cosio*, 858 P.2d 621, 626–27 (Alaska 1993).

<sup>273</sup> 1979 *General Oversight Hearings*, *supra* note 167, at 33 (statement of Rep. Railsback).

This judgment itself is debatable. During the debates preceding passage of the Alien and Sedition Acts, the Democratic-Republicans argued in favor of equal treatment for noncitizens because creating a class of persons who were wholly dependent on executive discretion might undermine the democracy.<sup>274</sup> Similarly, Justice Brennan suggested in *Plyler* that our civil society suffers when minorities are subordinated. It is also worth noting that civil legal aid is only a scarce resource to the extent that Congress and the states have chosen not to fully fund it. Despite some gaps, the federal and state governments have fully funded a right to counsel in criminal proceedings, and presumably they could afford to do the same for civil proceedings in cases in which a significant right (like the right to remain in the United States) is at issue. Other countries with a similar level of resources have done so.<sup>275</sup>

However, even leaving aside arguments of first principle and the empirical question of resource scarcity, the priorities argument remains specious. Admittedly, it held some force until Congress adopted the “entity restriction” that prevents legal aid organizations from even using non-federal funds to represent immigrants. Having done so, Congress can no longer claim that it is merely setting priorities for the expenditure of scarce federal funds. It now dictates how organizations can use their non-federal funds, including grants or donations that might have been given for the specific purpose of assisting immigrant communities. By prohibiting the largest network of civil legal aid providers in the country from representing certain immigrants, Congress has balkanized legal services and assured that there will not be an efficient delivery system for holistic immigrant legal aid. This is more than just neutral priority setting; it is a judgment about the subordinate status of certain immigrants.

### C. *Legal Aid As a Magnet*

The same year that the Gingrich-led Congress expanded the alienage restriction, it also cut off many immigrants’ eligibility for cash assistance and food stamps.<sup>276</sup> Its rationale for this welfare reform was partly its belief that public benefits were drawing illegal aliens to the United States.<sup>277</sup> The 1996 expansion of the alienage restriction might

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<sup>274</sup> See NEUMAN, *supra* note 244, at 57.

<sup>275</sup> See Raven Lidman, *Civil Gideon as a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World*, 15 TEMP. POL. & CIV. RTS. L. REV. 769, 789 (2006).

<sup>276</sup> See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 402(a), 110 Stat. 2105, 2262 (codified as amended at 8 U.S.C. § 1612 (2006)) (making most qualified aliens ineligible to receive food stamps and SSI benefits).

<sup>277</sup> See 8 U.S.C. § 1601(6) (2006) (“It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.”).

be construed as part of this larger welfare reform. The welfare-as-magnet rationale, in turn, might be implicated as a justification for restrictions on legal aid.

The chief counter to this argument is that it is simply incredible. There is no empirical evidence to show that any immigrant has ever been motivated to come to the United States by the existence of free legal aid; on the rare occasion when such claims have been made, they have been shown to be blatantly false.<sup>278</sup> In general, the welfare magnet hypothesis is disputed by behavioral scientists,<sup>279</sup> and, in any event, legal aid is not a welfare benefit in the traditional sense. The most common legal services dispositions do not involve cash benefits; the majority of cases result only in “advice and referral.”<sup>280</sup> Legal services lawyers typically file litigation or administrative claims only after an extensive screening and intake procedure designed to assure that the person has a meritorious claim. Some empirical evidence even suggests that the prevalence of legal aid reduces some types of litigation.<sup>281</sup> In the end, poor immigrants are no different than most people: they typically go to see a lawyer only because something bad has happened in their life—they have been cheated, they are in a collapsing or abusive relationship, or they are facing a painful legal proceeding like deportation. These tragedies are not the types of events that draw people to the United States.

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<sup>278</sup> During 1981 House hearings, a witness from the Florida Farm Bureau Federation claimed that advertisements were carried on Mexican radio stations offering an immigration permit to Mexicans who agreed to join a lawsuit against a Florida employer. Supposedly, Mexican workers were met at the border by an INS official who gave the worker an immigration permit and by an Arizona Farmworker’s Union organizer who took the worker to a Florida Rural Legal Services (FRLS) attorney in Arizona. *1981 Reauthorization Hearings*, *supra* note 189, at 352–53 (statement of Allison T. French, Florida Farm Bureau Federation). FRLS responded that these allegations were “a complete fabrication.” *Id.* at 1074 (response of FRLS to the testimony of Allison T. French). It appears that there was a criminal case in Arizona District Court that was related to a civil case previously filed by FRLA in which the INS granted visas to witnesses so they could testify—not to foment civil litigation. *Id.*

<sup>279</sup> See Scott W. Allard & Sheldon Danziger, *Welfare Magnets: Myth or Reality?*, 62 J. POL. 350, 352 (2000); William H. Frey et al., *Interstate Migration of the U.S. Poverty Population: Immigration “Pushes” and Welfare Magnet “Pulls,”* 17 POPULATION & ENV’T 491, 494 (1996); Phillip B. Levine & David J. Zimmerman, *An Empirical Analysis of the Welfare Magnet Debate Using the NLSY*, 12 J. POPULATION ECON. 391, 392 (1999).

<sup>280</sup> See LEGAL SERVS. FACT BOOK, *supra* note 215, at 15 (noting that in 2009, 61.3% of cases were closed as a result of advice and referral).

<sup>281</sup> See Erhard Blankenburg, *The Infrastructure for Avoiding Civil Litigation: Comparing Cultures of Legal Behavior in The Netherlands and West Germany*, 28 LAW & SOC’Y REV. 789, 798–99 (1994).

#### D. *Facilitated Deportation*

The history of immigrant legal aid is replete with hostility toward illegal aliens. Early legal aid organizations rarely represented the illegal aliens of their era—Asians. When federally funded legal services organizations in the 1960s and 1970s began filing impact litigation on behalf of illegal aliens, Congress responded with restriction. One argument in favor of these restrictions is that they facilitate the removal of an unwanted and arguably criminal class of persons. There are many who argue that illegal aliens are a drain on the United States economy, criminal justice system, and the cohesiveness of the national identity. Others state that antipathy toward illegal aliens is a pretext for racism and note that illegal aliens have benefited the United States by filling low-wage jobs and often paying taxes. This Article will not address any of these contentions. The argument that facilitated deportation can be refuted on other grounds: even assuming that deportation of illegal aliens is a substantial state purpose, there is no rational relationship between this goal and the LSC restrictions.

First, the United States does not have a substantial interest in deporting persons who have some legal basis to remain in this country. Many of the categories of immigrants excluded from legal services representation are authorized to be in the United States, such as persons with nonimmigrant visas<sup>282</sup> or “temporary protected status” (TPS),<sup>283</sup> a remedy for some persons from disaster-stricken countries, like Haiti. If the goal of the restrictions is to make it easier to remove illegal aliens, the restrictions are radically overinclusive.

Moreover, the question of whether an alien is “illegal” is not a simple one; the mere fact that an immigrant has overstayed her visa or entered without inspection does not mean that she is unauthorized to remain. There are a host of immigration remedies like asylum<sup>284</sup> or “cancellation of removal”<sup>285</sup> that can allow an illegal alien to become legal. Whether a person qualifies for one of these remedies is a complicated question that is often made in our system by an immigration court. Immigration court involves a relatively formal, adversarial process,<sup>286</sup> and the validity of a court’s decision in such a system rests on the availability of counsel for both sides to present their best evidence and most

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<sup>282</sup> See 8 U.S.C. § 1184 (2006).

<sup>283</sup> See *id.* § 1254a.

<sup>284</sup> See *id.* § 1158.

<sup>285</sup> See *id.* § 1229b.

<sup>286</sup> See generally OFFICE OF THE CHIEF IMMIGRATION JUDGE, U.S. DEP’T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL, available at [http://www.justice.gov/eoir/vll/OCIJPracManual/ocij\\_page1.htm](http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm) (last visited July 5, 2011).

forceful arguments. The court's role is to filter this evidence and find the truth somewhere in the middle of each side's zealous representations. It stands to reason that if there is not a lawyer on both sides, the result will be skewed.

The restrictions are also irrational because Congress did not just prohibit representation for immigrants in removal proceedings; it prohibited representation for every type of case, including claims against unscrupulous employers or consumer fraud claims. There is no reason to think that preventing an immigrant from getting a lawyer for her sexual harassment claim against her employer or for her fraud case against a bad lender will make her easier to deport. Immigrants from countries in a state of civil strife or economic devastation might be willing to put up with quite a bit of exploitation before returning to their native country. Making it harder for them to get a lawyer will not make them easier to deport, but it may create a perverse incentive for bad actors to exploit them.

Even if facilitating the deportation of illegal aliens is a substantial state interest, the LSC restrictions are overinclusive as to that interest. They sweep in immigrants who have a legal and compelling basis to remain in the United States, like asylum applicants. They also deny attorneys to illegal aliens who are not in deportation proceedings, but who are simply trying to obtain redress for a wrong committed against them.

#### E. *Practical Observations*

The LSC alienage restriction conflicts with one view of the U.S. Constitution. This view is rooted in a Jeffersonian conception of democracy and *Plyler's* anti-subordination reading of the Fourteenth Amendment. However, cases like *Mathews* suggest that any constitutional challenge to the LSC restriction would face an uphill battle. Without help from the courts, the proponents of immigrant legal aid will be left to make their arguments in Congress. Given the hostility that legislators have often shown to the policy arguments of immigrants, the future of immigrant legal aid may be bleak.

Some hope for at least piecemeal reform might be gleaned from the various immigrant-victim exceptions that have been carved out of the restrictions since 1997. If legal aid lawyers can represent the victims of domestic violence and human trafficking, perhaps they should be allowed to represent other types of victims, too. Both asylum seekers and TPS applicants fit the mold of sympathetic applicants for a discretionary benefit. The original alienage restrictions, after all, were crafted prior to the enactment of TPS and shortly after passage of the Refugee Act, be-

fore asylum was firmly entrenched in the culture of immigration law.<sup>287</sup> Thus, it might be argued that the restrictions ought to be modified to embrace new categories of legal immigrants along the same lines as other recent exceptions. A similar argument might even be made for some categories of undocumented immigrants. Legal aid lawyers have a long history of representing immigrants in employment and consumer cases, and arguably, they too are victims. One strategy to expand immigrant legal aid could be to characterize these cases as providing victim compensation.

The immigrant-victim narrative has pragmatic appeal, but it is fraught with danger.<sup>288</sup> Victimhood connotes weakness and dependency in a culture that highly values strength and self-sufficiency. Shoehorning legal aid's immigrant clients into the category of "victim" marginalizes both immigrants and legal aid. America's heroes may be individuals who have experienced great hardship and suffering, but they do not typically dwell on it. As a nation, we reward those who pull themselves up by their bootstraps when they are down—those who stand up in the face of adversity to claim equal treatment. Although the United States may not have a love affair with lawyers, we do respect people who go to court to enforce their rights. Noncitizens may want to be considered rights-claimants rather than victims just as much as citizens do.

#### CONCLUSION

At the turn of the nineteenth century, Theodore Roosevelt remarked that representation of immigrants was

a good done to society, for it leaves in the mind of the newcomer to our shores not the rankling memory of wrong and injustice, but the feeling that, after all, here in the New World, where he has come to seek his fortune, there are disinterested men who endeavor to see that the right prevails.<sup>289</sup>

True, early proponents of immigrant legal aid were partly motivated by paternalism and prejudice to help immigrants, who they were eager to transform into their version of model citizens. But they were also inspired by a sense of justice, by a faith that there was something extraor-

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<sup>287</sup> The Refugee Act, Pub. L. No. 96-212, 94 Stat. 102, was passed in 1980. Temporary protected status was created in 1990. See Immigration Act of 1990, Pub. L. No. 101-649, § 302, 104 Stat. 4978, 5030 (codified as amended at 8 U.S.C. § 1254a (2006)).

<sup>288</sup> For a discussion of the risks of essentializing clients through the victim narrative, see Dina Francesca Haynes, *Client-centered Human Rights Advocacy*, 13 CLINICAL L. REV. 379, 389-91 (2006).

<sup>289</sup> Theodore Roosevelt, *Reform Through Social Work. Some Forces that Tell for Decency in New York City*, 16 MCCLURE'S MAGAZINE 448, 453 (1901).



dinary about their political system, and by a desire to show newcomers America in her best light.

This idealism has eroded over the last thirty years. Although legal aid has grown enormously since the time of Theodore Roosevelt, legal aid to immigrants has—relatively speaking—shrunk. One cause for this diminution was a congressional backlash to the efforts of 1970s legal aid lawyers to contest the subordination of illegal aliens. Galled by a series of high-profile lawsuits on behalf of undocumented immigrants, Congress restricted legal services lawyers in the early 1980s from representing many immigrants. As LSC has interpreted the restrictions, they are primarily designed to privilege categories that Congress considers permanent over others, like illegal aliens, who are deemed transitory.

LSC-funded programs continue to represent a substantial number of unauthorized immigrants, but they now primarily do so in VAWA and U visa cases. These immigrants are no different, status-wise, than the illegal alien clients that 1970s era legal aid lawyers represented. They fit, however, into the obverse narrative: immigrant victims rather than criminal aliens; supplicants for discretion rather than claimants for equal treatment. Things have changed considerably since 1982, when the Supreme Court agreed with a legal aid lawyer that undocumented children had a right to a decent education.<sup>290</sup>

If the justices and legislators of today will not listen to the anti-subordination logic of *Plyler*, perhaps they will at least pay heed to the 110-year-old appeal of Theodore Roosevelt to the spirit of American idealism and fair play. The LSC restrictions tug at the fabric of something essentially American: the notion that everybody ought to have a fair shake—that if there is a wrong, there should be a remedy. Sometimes, to make these truisms true, people need a lawyer.

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<sup>290</sup> *Plyler v. Doe*, 457 U.S. 202, 230 (1982).