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CLUSTER V

MIGRATIONS, CITIZENS AND LATINAS/OS: THE SOJOURNER'S TRUTH AND OTHER STORIES

*Robert S. Chang**

I.	CENTERING THE IMMIGRANT	481
II.	THE BORDER, THE FAMILY, AND THE NATION	484
III.	MY HOUSE IN THE LAST WORLD	486
IV.	THE SOJOURNER'S TRUTH	488

I want to say a few words about this matter. I am for a woman's rights. I have as much muscle as any man and can do as much work as any man. I have plowed and reaped and husked and chopped and mowed, and can any man do more than that? I have heard much about the sexes being equal; I can carry as much as any man, and can eat as much too, if I can get it. I am as strong as any man that is now. As for intellect, all I can say is, if woman have a pint and man a quart—why can't she have her little pint full? You . . . need not be afraid to give us our rights for fear we will take too much, for we can't take more than our pint'll hold. The poor men seem to be all in confusion, and don't know what to do. Why children, if you have woman's rights give it to her and you will feel better. You will have your own rights, and they won't be so much trouble.

—Sojourner Truth¹

I came to America because I heard the streets were paved with gold. When I got here, I found out three things: First, the streets weren't paved with gold; second, they weren't paved at all; and third, I was expected to pave them.

—Italian immigrant saying²

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1. Sojourner Truth, Speech delivered at the Universalist Church (May 29, 1851), in 4 THE BLACK ABOLITIONIST PAPERS 81, 81-82 (C. Peter Ripley ed., 1991), quoted in Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 309-10 (1996).

2. GEORGE BROWN TINDALL & DAVID EMORY SHI, AMERICA: A NARRATIVE HISTORY 890

A sojourner is someone who is a visitor or temporary resident.³ As an outsider, the sojourner is sometimes able to see what the permanent resident cannot.⁴ Yet we seldom listen to the sojourner, perhaps because of our belief that the sojourner has only limited knowledge or ties to our country. After all, the sojourner is temporary. We also tend to discount other contributions that the sojourner makes. We forget that the sojourner of the past helped to make our railroads.⁵ We forget the sojourner of the present who helps to put food on our tables.⁶ Perhaps our forgetting is a

(4th ed. 1996).

3. RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 1272 (1991).

4. For example, two of the most incisive commentaries about America were written by foreigners. See GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (rev. ed. 1962) (1944); ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Harvey C. Mansfield & Delba Winthrop trans., 2000) (1992).

5. Workers from China were crucial to the building of this nation's railroads. See SUCHENG CHAN, *ASIAN AMERICANS: AN INTERPRETIVE HISTORY* 30-32 (1991). It is with caution that I include these Chinese workers as sojourners. Many historians refer to all the early Chinese as sojourners who intended to return to China rather than as immigrants who intended to settle in the United States. See SUCHENG CHAN, *THIS BITTERSWEET SOIL: THE CHINESE IN CALIFORNIA AGRICULTURE, 1860-1910*, at xx (1986) (arguing that neither term is completely correct but that "[t]o insist that all Chinese who came to America were sojourners—as some scholars have done—is to exclude them categorically from American immigration history"). Further, this notion of the Chinese as solely sojourners perpetuates certain misperceptions:

The Chinese, so the argument goes, unlike all other immigrant groups, did not come to this country with a desire to settle and assimilate, but rather with the intention to make a quick fortune and return home. It was this feature of their immigration, according to this view, that was most responsible for the misfortunes that were visited upon them. White Californians had offered the hand of welcome to the newcomers from Asia but were rebuffed because these immigrants had no interest in staying or being acculturated. Having made overtures of goodwill and having seen them ungenerously rejected by the ethnocentric Chinese, the white majority population then turned on the Chinese and determined to exclude them "from the privileges and obligations of other immigrants"

Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CAL. L. REV. 529, 532 (1984) (footnotes omitted) (quoting GUNTHER BARTH, *BITTER STRENGTH: A HISTORY OF THE CHINESE IN THE UNITED STATES, 1850-1870*, at 1 (1964)).

6. See generally Karen Fleshman, Note, *Abrazando Mexicanos: The United States Should Recognize Mexican Workers' Contributions to Its Economy by Allowing Them to Work Legally*, 18 N.Y.L. SCH. J. HUM. RTS. 237, 238 (2002); Guadalupe T. Luna, "Agricultural Underdogs" and *International Agreements: The Legal Context of Agricultural Workers Within the Rural Economy*, 26 N.M.L. REV. 9 (1996). I should note, though, that the contribution of today's sojourner is not limited to agriculture. See Kevin R. Johnson, *The End of "Civil Rights" as We Know It?: Immigration and Civil Rights in the New Millenium*, 49 UCLAL. REV. 1481, 1494 (2002) (stating: "Today's Mexican migrants do not fit the stereotype of the poor, rural Mexican citizen coming to

willful amnesia because we do not want to think about what we might owe the sojourner with regard to her entry into the United States, her stay, and her departure. This is especially the case if she does not leave, because sometimes the sojourner turns out not to be so temporary. Of course, she is no longer a sojourner then, but what marks the point at which a sojourner becomes an immigrant? The label sojourner may mark the intention of the person who plans to return to her country of origin; or it may reflect the wishful thinking of the host country who wishes such a return. Perhaps the host country uses the label as a way to diminish or deflect the claims that the sojourner may make upon it.⁷

The essays in this cluster, *Migrations, Citizens and Latinas/os*, examine various aspects of the sojourner/immigrant experience. Ruben Garcia's contribution examines the tenuous legal position that the sojourner/immigrant holds during her stay in the United States and suggests a reconstruction of antidiscrimination law to more directly address her concerns.⁸ Victor Romero looks at a different aspect of the sojourner/immigrant's stay: how border enforcement contains race and class dimensions that disrupt family ties.⁹ Camille Nelson explores what happens when the sojourner returns to her country of origin and finds that home is not what she remembered it to be.¹⁰ This cluster may be thought to embody various truths of the sojourner. I discuss each essay in turn.

I. CENTERING THE IMMIGRANT

Several years ago, Keith Aoki and I made an argument for centering the immigrant in the inter/national imagination.¹¹ We suggested that "[e]xamining the immigrant's entry into and presence in the racialized space of the United States provides an opportunity to explore the racial

the United States to work in agriculture. Many come from urban rather than rural areas in Mexico and, once in this country, are more likely to find jobs in commercial service industries, not agriculture." I use the example of food production because it is something that affects directly and materially everyone in this country.

7. See McClain, *supra* note 5, at 532-33.

8. See generally Ruben J. Garcia, *Across the Borders: Immigrant Status and Identity in Law and LatCrit Theory*, 55 FLA. L. REV. 511 (2003).

9. See generally Victor C. Romero, *The Child Citizenship Act and the Family Reunification Act: Valuing the Citizen Child as Well as the Citizen Parent*, 55 FLA. L. REV. 489 (2003).

10. See generally Camille A. Nelson, *Carriers of Globalization: Loss of Home and Self Within the African Diaspora*, 55 FLA. L. REV. 539 (2003).

11. Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CAL. L. REV. 1395 (1997), reprinted in 10 LA RAZA L.J. 309 (1998). This article was followed by a symposium of the same title. See Ibrahim J. Gassama et al., *Foreword: Citizenship and Its Discontents: Centering the Immigrant in the Inter/National Imagination (Part II)*, 76 OR. L. REV. 207 (1997).

structures that undergird and constitute this nation-state.”¹² Professor Ruben Garcia takes this insight one step further and asks if we can center the sojourner/immigrant¹³ in the legal imagination to rework antidiscrimination law. The immigrant would operate as a cognizable legal subject whose immigrant status is the relevant unit on which discrimination operates, and which, necessarily, requires legal remediation to act also upon that immigrant identity aspect.

Professor Garcia is correct in noting that antidiscrimination law does not presently recognize the immigrant *as rights holder*. What protections an immigrant is able to gain under current antidiscrimination law comes from other aspects of the immigrant’s identity, such as race, national origin, alienage, or gender. While there are points of intersection between race and immigrant status, national origin and immigrant status, and so on, the law does not explicitly protect immigrant status as such. Professor Garcia argues that this provides incomplete protection for immigrants and the wonders at about such an omission.¹⁴ He urges LatCrit scholars and others who care about equality to engage this problem through a series of questions: “What if the law recognized immigrants *as immigrants*? Do immigrants have any identity interest that the law is obliged to protect? What do we lose, and what do we gain, if we recognize immigrant status and history as an identity axis deserving independent legal protection?”¹⁵

These are provocative questions. Professor Garcia makes his case for recognizing immigrant status as a cognizable aspect of antidiscrimination law through his examination of existing legal doctrines and such doctrines failure to protect adequately the rights of immigrants. He looks at workplace law, fair housing, public accommodations and hate crimes, finding them all wanting.¹⁶ One of the more bizarre aspects of our current regulatory scheme allows employers with fifteen or more employees to discriminate on the basis of citizenship status,¹⁷ whereas employers with four to fourteen employees cannot discriminate on that basis.¹⁸ Professor Garcia argues that the resulting “patchwork of legal protection for

12. Chang & Aoki, *supra* note 11, 85 CAL. L. REV. at 1399, reprinted in 10 LA RAZA L.J. at 313.

13. Garcia does not use the term sojourner, but he includes those who are temporary as immigrants. See Garcia, *supra* note 8, at 514 (stating: “[W]hy does law not provide full legal protection to immigrants, undocumented, temporary, or otherwise, on the basis of their *immigration status*?”).

14. *Id.*

15. *Id.* at 513.

16. *Id.* at 515-24.

17. *Id.* at 518 n.35 (discussing *Espinoza v. Farah, Inc.*, 414 U.S. 86 (1973), which held that discrimination on the basis of citizenship was not prohibited under Title VII’s national origin category).

18. *Id.* at 518 nn.34, 35 (citing IRCA, 8 U.S.C. § 1324b(a)(1) (2000)).

immigration status under various federal statutes calls out for explicit, uniform treatment of immigration status under Title VII and other civil rights statutes”¹⁹ and that “[e]xplicit legal recognition of discrimination based on perceived or actual immigrant status as a category *in addition* to race or national origin would be a first step toward protecting a greater number of immigrants.”²⁰

While I agree with Professor Garcia that this arbitrary legal patchwork is unacceptable, I am not yet persuaded that explicit recognition of immigrant status as a legally cognizable identity is the best approach. Professor Garcia notes other approaches, notably Professor Natsu Saito’s effort to use perceived foreignness²¹ and Professor Juan Perea’s effort to make national origin a more robust category for purposes of antidiscrimination law.²² Whether or not immigrant status will be considered the best approach will require a more explicit comparison with and evaluation of these competing approaches. I would suggest a more specific focus on the following questions to guide this future discussion:

- (1) Are immigrants situated in a sufficiently similar way to justify grouping them together? Are there problems of overinclusion and underinclusion in the proposed immigrant category?
- (2) In what way is immigrant status a lived identity?
- (3) Is immigrant status itself socially constructed, especially if the protection goes not just to actual but perceived immigrant status? Does this sufficiently overcome the first-generation problem (protection reaching the first generation but not their descendents)?
- (4) What is gained and lost by having another identity category?

Professor Garcia’s provocative thought experiment begins a much-needed discussion of these questions. However, I would like to see a more explicit comparison of existing and proposed antisubordination paradigms before saying yes to immigrant status as an independent protected identity category for purposes of antidiscrimination law.

19. *Id.* at 518-19.

20. *Id.* at 524.

21. See Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, “Foreignness,” and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997).

22. See Juan F. Perea, *Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805 (1994).

II. THE BORDER, THE FAMILY, AND THE NATION

While Professor Garcia's essay focuses on the rights of the sojourner/immigrant in the context of the workplace and housing, Professor Victor Romero's symposium contribution examines the rights that a sojourner/immigrant may assert based on family ties.²³ How the law treats the sojourner/immigrant in this context reveals much about this country's view toward who may join the family that is this nation. I would suggest that a focal point of the racial/national project known as the United States is the family. Family offers a convenient way to talk about inclusion and exclusion.²⁴ Throughout much of this country's history, the familial nature of national identity has been organized around the White American family and its needs.²⁵ Thus, it should not come as too much of a surprise to see racial narratives undergirding the Child Citizenship Act of 2000 (CCA)²⁶ and the proposed Family Reunification Act of 2001 (FRA).²⁷

Professor Romero applauds the sentiment behind the Child Citizenship Act and the proposed Family Reunification Act, both of which dealt with the potential disruption to family unity posed by the possible deportation of a non-citizen family member who commits a crime.²⁸ The impetus for the Child Citizenship Act, which began as the Adopted Orphans

23. See generally Romero, *supra* note 9.

24. See WALTER BENN MICHAELS, *OUR AMERICA: NATIVISM, MODERNISM, AND PLURALISM* 6 (1995). Michaels argues that, in the 1920s (the same period when Asian exclusion was completed), family became an important component in the reconceptualization of collective national identity:

[I]t was in terms of familial relations (as opposed, say, to economic relations or regional or even generational relations) that the new structures of identity were articulated. *America, A Family Matter* was the title of Charles W. Gould's nativist polemic of 1922. And, although Horace Kallen's *Culture and Democracy in the United States* (1924) was directed against nativism, Kallen shared Gould's model of national identity; according to him, the very idea of "nationality" was "familial in its essence."

Id.

25. Cf. ROBERT S. CHANG, *DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE* 13-26 (1999) (discussing the policing of race and sex and family as a metaphor for nation); *id.* at 77-86 (discussing the history of discriminatory immigration and naturalization laws directed against persons of Asian ancestry). The explicit racial dimension to our naturalization laws were finally erased with the McCarran-Walter Act of 1952. See generally 8 U.S.C. § 1101 (2000). Although race-neutral family reunification became a priority in that act, there remained a strong racial dimension to our immigration policy. For example, the McCarran-Walter Act retained national origin quotas based on two percent of the members of that nationality living in the United States as determined by the 1890 Census, with a minimum of 100 for each nationality. *Id.*

26. Pub. L. 106-395, 114 Stat. 1631 (2000).

27. H.R. 1452, 107th Cong. 1st sess. (2001).

28. See generally Romero, *supra* note 9.

Citizenship Act, was the tragic stories of the failure of adoptive U.S. citizen parents to complete the process to confer U.S. citizenship upon their adoptive foreign-born children.²⁹ The two step process required “parents . . . to first petition that their foreign-born children become LPRs [legal permanent residents] and enter the United States as immigrants. After their children entered the United States, the parents had to file a second application for the naturalization of these LPR children, using virtually identical paperwork.”³⁰ A number of adoptive parents failed to file the second petition, perhaps assuming mistakenly that their children automatically became U.S. citizens. The result of these failures was that “adopted LPR children whose parents never filed for naturalization have been subject to deportation, often for minor crimes, including petty drug offenses.”³¹ The Child Citizenship Act forecloses the possibility of deportation for foreign-born adoptive children who enter the United States as LPRs by making them automatic U.S. citizens upon adoption.³² It also worked retroactively and conferred automatic citizenship upon “biological and foreign-born children who are: (1) under eighteen years old; (2) admitted to the United States as an LPR; and (3) in the legal and physical custody of at least one U.S. citizen parent.”³³

Professor Romero then compares the Child Citizenship Act with the proposed Family Reunification Act, which also addresses the possible deportation of a non-citizen family member. However, unlike the CCA, which protects the interests of the citizen parent with regard to the non-citizen child, the FRA deals with the inverse situation—the interest of the citizen child not to be separated from her non-citizen parent.³⁴ Romero suggests that, at first glance, both acts are motivated by the compassionate interest of not separating families without a compelling reason.³⁵ However, Romero suspects that the FRA will not enjoy the same broad support of the CCA.³⁶ His suspicions are founded on the racial makeup of the families implicated by the CCA and FRA.³⁷

The family impacted by the CCA is likely to be White adoptive parents and nonwhite adopted children.³⁸ This nuclear family is one where the White parents have chosen to adopt across the color line.³⁹ That this choice

29. *Id.* at 493-94.

30. *Id.* at 494.

31. *Id.* at 495.

32. *Id.*

33. *Id.* at 494.

34. *Id.* at 492.

35. *Id.*

36. *Id.* at 493.

37. *Id.*

38. *Id.*

39. Although the percentage of mixed race couples is increasing, most whites are married to

was in some ways mandated by the pool of adoptable White children is downplayed in this progressive antiracist narrative. Protecting the interests of the White adoptive parents fits within this narrative, especially because, as suggested by Professor Romero, “[m]any of the white senators and representatives easily identified with the white United States citizen parents who wanted to make sure their nonwhite adopted children were United States citizens.”⁴⁰

This same easy identification does not hold with the families impacted by the FRA. Families with a citizen child and a non-citizen parent are likely to be identified as nonwhite immigrant families.⁴¹ Professor Romero suggests that this difference, along with accompanying class narratives, will likely lead to the FRA’s demise.⁴² He argues that the underlying value of family reunification behind the CCA and FRA will be betrayed if the FRA is not passed.⁴³ The family formed when a sojourner/immigrant, who is a non-citizen, has a citizen child is as much a family as the one formed when a citizen parent adopts a non-citizen child. The fact that they are likely to be treated differently is another truth we can learn from the sojourner/immigrant.

III. MY HOUSE IN THE LAST WORLD⁴⁴

Growing up, I remember hearing stories my parents told about the house in which I was born. They told me that there was a natural spring underneath the house and that people used to come to our house for spring water until my father became tired of the intrusions and somehow connected a hose so that people could access the water without bothering us. I wondered at the wisdom of building a house on a spring in the first place, but it was not for me to question the story. My childhood imagination constructed a glorious spring bubbling out of rocks flowing into a stream framed by lush vegetation. In 1979, when as a twelve-year-

other whites. See Roger Sanjek, *Intermarriage and the Future of Races in the United States*, in RACE 103, 114 (Steven Gregory & Roger Sanjek eds., 1994) (stating that 99% of whites, in 1987 were married to other whites).

40. Romero, *supra* note 9, at 501 (footnote omitted). One interesting feature of the CCA is that it exempted children who had already turned eighteen by the time of the bill’s passage. *Id.* at 499 n.50. Thus, adult non-citizen children who committed crimes were not given protection, perhaps because in the eyes of the legislators, the dominant image shifted from child to criminal. *Id.* at 498.

41. *Id.* at 493.

42. *Id.* at 500-03.

43. *Id.* at 507-08. *Editor’s Note*: The 107th congress has concluded without this legislation becoming law.

44. I take this part heading from a book by OSCAR HUIJUELOS, *OUR HOUSE IN THE LAST WORLD* (1983), about a family of Cuban exiles whose dream of a return to their homeland is so strong that they keep the keys to their old house in anticipation of their return.

old I visited Korea, all I saw was a house in the crowded streets of Seoul. I saw no spring. As Salman Rushdie has commented, once you leave, all that remains is an imaginary homeland whose happy memory is sometimes best left to the imagination.⁴⁵

Professor Camille Nelson writes about sojourners from Jamaica who leave that island in order to seek better lives and greater economic opportunities.⁴⁶ They live diasporic lives, maintaining close connections with the island and the families and communities they left behind. They “send commodities and money home in amounts second only to tourism in contributing to the economy’s net foreign earnings.”⁴⁷ The Jamaican economy, like that of many other Caribbean islands, and the families that receive them, depend on these remittances.⁴⁸ Although the sojourners have left, they have not forgotten their homeland, especially given their experiences in their host countries:

[R]eturnees who spend years abroad often endure the compounded travails of economic hardship, isolation, racial violence, and harassment in their adopted homes, all the while dreaming of the day when they could return home to breathe the ocean air and live in peace in the invigorating sunshine. They deal not only with the pain of separation from family and loved ones, but often with the resentment of hostile populations in their adopted homes.⁴⁹

Yet when they return, they are often greeted with resentment and violence.⁵⁰ Professor Nelson recounts an article in the *London Times* “chronicling the targeting of returnees . . . [which resulted in] the violent demise of fifty returnees to Jamaica in the past few years.”⁵¹

Professor Nelson argues that “one cannot understand the recent violence against the returnee without considering both its material and symbolic effects.”⁵² She posits that returnees, as carriers of globalization who spread and reproduce its effects, are blamed and targeted by those disaffected by globalization and its effects.⁵³ She explores this phenomenon through a close examination of the economic impact of

45. SALMAN RUSHDIE, *IMAGINARY HOMELANDS: ESSAYS AND CRITICISM 1981-1991*, at 9-10 (1991).

46. See generally Nelson, *supra* note 10.

47. *Id.* at 542 (footnotes omitted).

48. *Id.* at 543.

49. *Id.* at 541.

50. *Id.* at 543.

51. *Id.*

52. *Id.* at 544-45.

53. *Id.* at 545.

globalization juxtaposed with the way globalization is experienced through the medium of reggae music.⁵⁴

While I find her account persuasive and engaging, I am left wondering about what to do. Part IV of Professor Nelson's paper is entitled "Searching for Solutions."⁵⁵ It is aptly titled because perhaps that is all there is—the search—in the same way that within a diasporic existence life is experienced as migration, where even the return home is really just another migration because there can never be a return home, but a place one can only visit in the imagination.

IV. THE SOJOURNER'S TRUTH

I am a sojourner/immigrant. And like the authors above,

I am for a [sojourner/immigrant's] rights. I have as much muscle as any [native] and can do as much work as any [native]. I have plowed and reaped and husked and chopped and mowed, and can any [native] do more than that? I have heard much about [human dignity and the equality of persons]; I can carry as much as any [native], and can eat as much too, if I can get it As for intellect, all I can say is [that the sojourner/immigrant is on an equal footing as the native]. You need not be afraid to give us our rights for fear we will take too much, for we can't take more than our [persons can] hold. The poor [natives] seem to be all in confusion, and don't know what to do. Why children, if you have [the sojourner/immigrant's] rights give it to her and you will feel better. You will have your own rights, and they won't be so much trouble.⁵⁶

The essays in this cluster embody this truth.

54. *See generally id.*

55. *Id.* at 576.

56. Harris, *supra* note 1, at 309-10 (quoting Sojourner Truth).