

Performative Citizenship in the Civil Rights and Immigrant Rights Movements

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In August 2013, Maria Teresa Kumar, the executive director of Voto Latino, spoke alongside civil rights leaders at the 50th anniversary of the March on Washington. A month earlier, immigrant activists invited the Rev. Al Sharpton to join a press conference outside the federal court building, as they celebrated a legal victory over Joe Arpaio, the anti-immigrant sheriff of Maricopa County. Undocumented youth organizing for immigration reform explain their persistence with Martin Luther King's statement that "the arc of the moral universe is long but it bends toward justice."

The Civil Rights movement remains a potent reminder that politically marginalized groups can shape the law through mobilization and collective action. This has made the movement a crucial source of symbolism for those activists who have come after. But it has also been a source of what sociologist Doug McAdam has called "cultural innovations"²: transformative strategies and tactics that can be embraced and modified by later movements. In this paper I examine the legacy of the Civil Rights Act by revisiting the social movement that produced it, and comparing that movement to a recent and galvanizing successor, the movement

¹ Herma Hill Kay Distinguished Professor of Law, UC-Berkeley School of Law. This paper draws not only on the secondary literatures I cite, but on my own ongoing empirical study of the immigrant justice movement in the state of Arizona. The Arizona Immigrant Justice Project (Kathryn Abrams, P.I.) draws on interview data and ethnographic observation of pro-immigrant organizations in Phoenix and Tucson, to answer questions about the mobilization, legal consciousness, and emotion management of immigrant activists, particularly those who are undocumented, during a period bracketed by the enactment of SB 1070 (2010) and the congressional debate over comprehensive immigration reform (2013-14). (Interview data and other relevant materials on file with author). I want to thank colleagues in the UC-Berkeley Immigration, Framing, and Rights Workshop for helpful comments on an early draft of this paper, and colleagues in the UC-Berkeley Law and Humanities Workshop and Center for the Study of Law and Society, for lively discussions of some of the ideas elaborated here.

² Doug McAdam, *"Initiator" and "Spinoff" Movements: Diffusion Processes in Protest Cycles*, in *REPERTOIRES AND CYCLES OF COLLECTIVE ACTION* 217, 236 (Mark Traugott, ed., 1995).

for immigrant rights.³ I argue that this movement has not simply used the storied tactics of the civil rights movement, it has modified them in ways that render them more performative: undocumented activists implement the familiar tactics in that enact – in daring and surprising

³The term that those activists in the movement use to refer to themselves is still a work in progress. Some activists, particularly those fighting for federal reform, use the term “immigrant rights movement,” perhaps as part of the effort to underscore similarities to the civil rights movement and to emphasize the aspiration to formal rights for immigrants, such as those reflected in S. 744’s path to citizenship. In Arizona, I have heard activists refer to their struggle with the term “immigrant justice movement.” (They may also describe their work less globally, and more specifically, as “advocating for the community” or “fighting deportations.”) The term “immigrant justice” may reflect the fact that resistance to legislation such as Arizona’s anti-immigrant statute SB 1070 may be more a matter of justice than of presently enforceable rights: there are not many rights that an undocumented immigrant can assert in the face of an official demand to show his or her papers. Perhaps more to the point, this term seems intended to emphasize the moral imperative behind the movement. I see value in both terms: the latter for its moral impetus, the former for its performative self-assertion (participants in the civil rights movement, one might argue, could point to a range of formal rights whose recognition and enforcement comprised the goals of their movement). I will use both, as appropriate, in this paper.

ways – the public belonging to which they aspire.⁴ This performative dimension would seem to distinguish the immigrant rights movement, at the level of organizational strategy, from its civil

⁴ The term “performative,” which in the last two decades has attained broad theoretical usage, is subject to different kinds of understandings or interpretations. In this paper, I will have recourse to three distinct, though sometimes interrelated understandings. The first draws on J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962). Austin distinguishes “performative utterances” from “constative utterances,” the latter of which purport to describe or report on phenomena in the world and may be true or false. *Id.* at 1. Performative utterances “do not ‘describe’ or ‘report’ or constative any thing at all . . . [and] the uttering of a sentence is, or is part of, the doing of an action” *Id.* at 5. Paradigmatic examples include saying “I take this woman to be my wife” in the context of a wedding ceremony or “I name this ship the Queen Elizabeth,” while smashing a bottle across the stem. Austin clarifies that the uttering of the words is not “the *sole* thing necessary if the act is deemed to have been performed . . . it is always necessary that the *circumstances* in which the words are uttered should be in some way, or ways, *appropriate*, and it is very commonly necessary that either the speaker himself or other persons should *also* perform certain *other* actions, whether ‘physical’ or ‘mental’ actions or even acts of uttering further words.” *Id.* at 8.

rights counterpart, whose participants were constitutionally acknowledged as citizens. However, if we focus instead on the legal consciousness and self-conception of individual activists, we can glimpse greater similarities between participants in the two movements. As the individual narratives elicited by sociologists and historians of the civil rights movement demonstrate, participants in many civil rights campaigns were asserting a citizenship in which they did not feel secure, notwithstanding its formal legal status. In this respect, both movements relied on

The second draws on the work of Judith Butler. Butler, who has written on this concept famously and extensively, contrasts an “expressive” understanding of gender, as a “core or identity . . . [that] is prior to the various acts postures and gestures by which it is dramatized and known” with a “performative” understanding of gender in which “these attributes [acts postures and gestures] effectively constitute the identity they are said to express or reveal.” Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 THEATER J. 519, 527-28 (1988). This understanding may be viewed as having an Austinian resonance in the sense that those acts which might conventionally be understood to describe, actually bring into being. Butler uses this understanding, *inter alia*, to challenge what she views as a pervasive notion of gender as an ontology, its external signs functioning as an expression of an internal essence. Through her contrasting notion of gender as “repeated acts within a highly rigid regulatory frame that congeal over time to produce . . . a natural sort of being[.]” JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 33 (1990), she suggests both the ways that we intuitively make use of the social scripts and materials through which gender is constructed in mainstream culture, and the possibility of using gender performance to disrupt those scripts. This understanding has certain parallels with the third notion of performativity, which draws on recent work on immigrant activism in particular, by Cristina Beltrán. In her article, *Going Public: Hannah Arendt, Immigrant Action, and the Space of Appearance*, 37 POL. THEORY 595 (2009), Beltrán uses the work of Hannah Arendt and Michael Warner to offer a provocative characterization of the pro-immigrant marches of 2006. By appearing in the public domain to march in large numbers, undocumented immigrants constituted themselves as a Warnerian “counterpublic,” forging a resistant collectivity and creating individual subjectivities that had not existed before. As Beltrán notes, “when subjects enter the public realm, they are not simply enacting their already-existing commitments. Instead, subjectivity is produced and transformed through these civic encounters.” *Id.* at 616. In this way, the marchers of 2006 exercised what Arendt called the “power of beginnings”: “the freedom to call something into being, which did not exist before, which was not given, not even as an object of cognition or imagination, and which therefore, strictly speaking, could not be known.” *Id.* at 601 (quoting HANNAH ARENDT, *What is Freedom?*, in BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT 151 (2006)). Although in evoking Arendt’s performativity, Beltrán is not marking a contrast between a public performance and some ostensibly expressed interior state, her vision is confluent with Butler’s in its sense of the way a public performance creates conforming or resistant meaning through its iteration of familiar and unfamiliar elements. “By elaborating new citizenships, new privacies, and new critical languages,” Beltrán argues, “this plurality of counterpublics challenged familiar scripts regarding the undocumented, unsettling traditional notions of sovereignty and blurring the boundaries between legal and illegal, assimilation and resistance, civic joy and public outrage.” *Id.* at 598. Beltrán’s analysis in turn draws on work by Bonnie Honig, who in DEMOCRACY AND THE FOREIGNER 99, 101 (2001), describes the “taking” of rights and privileges, as opposed to petitioning for them, as a feature of citizenship. “The practice of taking rights and privileges rather than waiting for them to be granted by a sovereign power is,” Honig argues “a quintessentially democratic practice.” Leti Volpp has recently described such efforts, using the four-part framework of citizenship introduced by legal scholar Linda Bosniak, as exercising “citizenship as [political participation]” in order to achieve “citizenship as formal legal status.” See Leti Volpp, *Civility and the Alien*, in Austin Sarat, ed., CIVILITY, LEGALITY, AND THE LIMITS OF JUSTICE (forthcoming 2014).

what Patricia Williams has called the “alchemy” of claiming rights which may be emergent or precarious as a means of securing their formal recognition.

Part I of this chapter will examine the civil rights movement and the immigrant rights movement from the standpoint of organizational strategy and tactics. It will focus on two “cultural innovations” that have become hallmarks of the civil rights movement: the use of direct action, particularly civil disobedience, to protest Jim Crow laws in Southern states; and the campaigns that sought to prepare and register black residents for the franchise in rural communities of the deep South, such as Mississippi. Both direct action and civic engagement campaigns have been central to the emerging movement for immigrant rights. But they have been implemented with distinctive variations, which enable the assertion of belonging by one visible and compelling segment of the immigrant population, undocumented youth. Part II will reconsider the claim advanced in Part I, that the immigrant rights movement is distinct in its performative dimension, by focusing on the individual legal consciousness of participants. This analysis suggests that early civil rights activists also performed a citizenship they did not experience as secure in order to bring it more fully into being. The work of social scientists, such as Francesca Polletta and Charles Payne, who have studied the civil rights movement at the level of individual legal consciousness, demonstrates that the sense of belonging experienced by grassroots activists in the movement, was shaped as much by the pervasive threat of state-sanctioned violence as by the formal rights of citizenship they were seeking to enforce. The role of “first-class citizens,” which activists undertook to secure the enforcement of their rights, may have felt to them as uncertain or aspirational as the civic roles embraced by undocumented immigrants.

I. Organizational Tactics: Adoption and Adaptation

A. Direct Action and Civil Disobedience

The civil rights movement deployed a range of direct action tactics, whose moral impetus and visual imagery became synonymous with the movement in the public mind. Boycotts brought coordinated economic pressure to bear on those who followed segregationist laws or practices.⁵ Sit-ins violated Jim Crow laws, which protesters viewed as inconsistent with federal guarantees of equal protection.⁶ Freedom riders exercised the federal right to integrated public accommodations, in state contexts where that act of integration sparked violent resistance.⁷ These actions made visible to the public that constitutional guarantees of equal protection and

⁵ For an interesting history of the Montgomery Bus Boycott from a legal scholar’s perspective see Randall Kennedy, *Martin Luther King’s Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999 (1989) [hereinafter *MLK’s Constitution*].

⁶ See, e.g., Michael Walzer, *A Cup of Coffee and a Seat*, DISSENT, 112 (1960). For a discussion of the range of tactics employed by the civil rights movement, see Doug McAdam, *Tactical Innovation and the Pace of Insurgency*, 48 AM. SOC. REV. 735 (1983) [hereinafter *Tactical Innovation*].

⁷ For a comprehensive history of the 1961 Freedom Rides, see RAYMOND ARSENAULT, *FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE* (2006).

full citizenship were being flouted by Jim Crow laws and Southern resistance. Direct action tactics also highlighted the moral resolve of protesters and their willingness to endure hardship in order to communicate their message.⁸

But these tactics served an additional purpose: they exposed the regime of often-violent enforcement that held segregative practices in place.⁹ The dogs and firehoses that Bull Connor loosed on student protesters in Birmingham and the angry mobs who attacked Freedom Riders as they debarked at interstate bus terminals set in motion several responses which were critical to movement strategy. These repressive responses often triggered court challenges, which enabled federal judges to articulate the federal guarantees applicable to African-Americans.¹⁰ Moreover, where state officials targeted protesters with violence, or failed to restrain the violent response of their citizens, protesters could demand – and occasionally received – federal intervention and protection.¹¹ Finally, and perhaps most importantly, confrontations between non-violent protesters and violent state officials or citizens elicited broad media coverage, which could incite empathy, indignation, and outrage across broad swaths of the American public.¹² Campaigns targeting communities which combined Jim Crow laws with volatile law enforcement were particularly effective in influencing legislative response.¹³ The meetings, trainings in non-violent protest, and mass arrests that surrounded direct action events also built deep solidarity among protesters.¹⁴

⁸ See, e.g., *MLK's Constitution*, *supra* note 5, at 1023 (ability of African-Americans in Montgomery to create alternatives to bus use during the boycott reflected “the extraordinary sense of political commitment that suffused and mobilized the black community”). See also Jeff Goodwin & Steven Pfaff, *Emotion Work in High-Risk Social Movements: Managing Fear in the U.S. and East German Civil Rights Movements*, in *PASSIONATE POLITICS: EMOTIONS AND SOCIAL MOVEMENTS* 282 (Jeff Goodwin et al. eds., 2001) (describing process through which protesters learned to manage the fears created by high-risk tactics in civil rights movement) [hereinafter *Emotion Work in High Risk Social Movements*].

⁹ See Doug McAdam, *The Framing Function of Movement Tactics: Strategic Dramaturgy in the American Civil Rights Movement*, in COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS 338 (Doug McAdam et al. eds., 1996) [hereinafter *Strategic Dramaturgy*].

¹⁰ See, e.g., *MLK's Constitution*, *supra* note 5, at 1001 (describing First Amendment decisions on rights of protesters that emanated from civil rights movement).

¹¹ See *Tactical Innovation*, *supra* note 6, at 745 (1983) (quoting James Farmer, architect of the Freedom Rides, as saying the intention was “to provoke the Southern authorities into arresting us and thereby prod the Justice Department into enforcing the law of the land”).

¹² See *Strategic Dramaturgy*, *supra* note 9.

¹³ *Tactical Innovation*, *supra* note 6, at 748-50 (describing role of community-wide protest campaigns in Birmingham and Selma in passing civil rights legislation).

¹⁴ For vivid discussions of the sense of purpose, intimacy, and solidarity that emerged among movement participants, see CHARLES PAYNE, *I'VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE* 236-64 (2007); DOUG MCADAM, *FREEDOM SUMMER* 66-115 (1988); *Emotion Work in High Risk Social Movements*, *supra* note 8.

The immigrant justice movement has deployed many of these tactics with full awareness of the expressive value of their legacy. Protest over the enactment of Arizona's SB 1070, the first in a spate of anti-immigrant state laws, utilized many of the direct action tactics that had helped civil rights activism to gain purchase. The enactment of the law was followed swiftly by the announcement of economic boycott of the state, organized by coalition of immigrant groups and endorsed by Rep. Raul Grijalva, a pro-immigrant member of Congress.¹⁵ A cascade of protests, including a 100-day vigil at the state capital, followed.¹⁶ Protesters sat-in on public streets, and at state and federal buildings; they occasionally blocked the vehicles of anti-immigrant Sheriff Joe Arpaio of Maricopa County. A group of undocumented activists boarded the Undocubus for an interstate journey to the 2012 Democratic National Convention.¹⁷ However, the contexts in which movement activists utilized these tactics, and the ways in which they were executed, often diverged from those of the civil rights movement.

First, the appeal to the federal government implicit in these tactics was a more ambivalent undertaking. While the Obama administration ultimately challenged SB 1070 on the ground that it was pre-empted by federal authority over immigration, a complex array of laws and programs, such as 287(g) and Secure Communities, created partnerships between state and local officials and the federal government in the enforcement of immigration law. This meant the federal government was often directly implicated in the very patterns of enforcement to which protesters objected. Second, although direct action tactics have been similar, they have been directed toward different targets and reflected different kinds of strategies. Because enforcement of federal immigration law rests substantially in the discretion of state and federal law enforcement agents, it is more difficult to stage a protest that targets a particular law, or captures its symbolism, in the way that the lunch counter sit-ins, for example, captured the quotidian yet corrosive character of segregation. Early examples of direct action by immigrants were often staged to manifest generalized resistance, with protesters sitting on a banner in the middle of a busy street or in a courtyard in front of a state or federal building. More recently, activists have

¹⁵ See Randall C. Archibold, *In Wake of Immigration Law, Calls for an Economic Boycott of Arizona*, N.Y. TIMES, Apr. 26, 2010. See also Randall C. Archibold, *Phoenix Counts Big Boycott Cost*, N.Y. TIMES, May 11, 2010.

¹⁶ Daniel González, *SB 1070 Protesters Hold Vigil, Pray Court Overturns Law*, AZCENTRAL.COM (Jun. 21, 2012, 10:58 PM), <http://www.azcentral.com/12news/news/articles/2012/06/21/20120621sb-1070-protesters-hold-vigil-pray-court-overturms-law.html> (describing vigil held at state capitol for 103 days, from the signing of SB 1070, to decision of federal district court to enjoin several of its provisions, and subsequent vigil between Supreme Court argument and decision on constitutionality of SB 1070).

¹⁷ Griselda Nevarez, *The Undocubus: DREAM Activists Arrive in Charlotte to Make Their Voices Heard at the Democratic National Convention*, HUFF. POST, (Sept. 3, 2012, 12:36 PM), http://www.huffingtonpost.com/2012/09/03/undocubus-dream-activists-democractic-convention_n_1852019.html. For an array of opinions on the politics of the Undocubus, see *Is Getting on the 'UndocuBus' a Good Idea?*, THE OPINION PAGES: ROOM FOR DEBATE, NYTIMES.COM, (Aug. 1, 2012), <http://www.nytimes.com/roomfordebate/2012/08/01/is-getting-on-the-undocubus-a-good-idea>. For the travelers' own blog relating the events and images of their journey, see NO PAPERS NO FEAR: RIDE FOR JUSTICE, nopapersnofear.org/ (last visited Feb. 11, 2014).

sought to target the operation of immigration enforcement, by chaining themselves to buses carrying immigrants toward deportation, or buildings where the detention or processing of those subject to deportation occurs.¹⁸ Moreover, direct action tactics by immigrant groups haven't predictably provoked the repressive response that sparked widespread publicity during the civil rights movement. Although a sea of cellphones has been raised to capture each encounter between police and protesters,¹⁹ there have been few incidents of brutality in the confrontation or arrest of those practicing civil disobedience. This may be partly because law enforcement officials have learned the lessons of the civil rights protests. But it may be because officials have had a different weapon to wield against protesters, particularly as undocumented activists began to join in acts of protest and civil disobedience. The fact that undocumented activists taken into custody in connection with civil disobedience or other acts of protest could be subject to detention or deportation on the basis of their immigration status has introduced a new dynamic into direct action events. The fear of deportation and family separation is present for undocumented protesters, as the fear of violence had been for civil rights demonstrators. But it is a less visible fear, and when realized – in the context of an “off-camera” administrative process – it has not subjected law enforcement to publicity or to comparably widespread moral judgment. Consequently, activists have been required to develop additional tactics to turn direct action protests to their strategic advantage.

One particularly powerful tactic was introduced by DREAMers, undocumented youth who were among the first undocumented activists to assume visible leadership in the larger immigrant justice movement. Beginning in 2010, as they mobilized for a federal law, which would have granted a path to citizenship for childhood arrivals, DREAMers began to “come out”

¹⁸ *DREAMers Switch to Civil Disobedience to Help Cause*, UPI.COM, (Aug. 26, 2013, 3:09 PM), http://www.upi.com/Top_News/US/2013/08/26/Dreamers-switch-to-civil-disobedience-to-help-cause/UPI-95551377544151/ (describing shift in strategy suggested by direct action protests at ICE building and immigration facility). Perhaps the most controversial direct action protest to date has been the return of the DREAM 9, a group of undocumented activists who re-entered the U.S. after either experiencing deportation or leaving to be reunited with family in Mexico. Although they were initially taken into custody at the border and detained, they were subsequently released and have cleared the initial, comparatively low hurdle (a “credible fear” screening) in their claims for asylum. Aura Bogado, *Undocumented Activists Take a Giant Risk to Return Home*, COLORLINES (July 23, 2013, 8:30 AM), <http://colorlines.com/archives/2013/07/Undocumented%20Activists%20Take-a-Giant-Risk-to-Return-Home.html>. See also Julia Preston & Rebekah Zemansky, *Demonstration at Arizona Border Divides Supporters of Immigration Overhaul*, N.Y. TIMES Aug. 4, 2013, available at http://www.nytimes.com/2013/08/05/us/demonstration-at-arizona-border-divides-supporters-of-immigration-overhaul.html?_r=0; David Leopold, *The Dream 9's Misguided Protest*, FOX NEWS LATINO (Aug. 9, 2013), <http://latino.foxnews.com/latino/opinion/2013/08/09/david-leopold-dream-s-misguided-protest/#ixzz2dfw3ygPj>.

¹⁹ Conventional media sources covered these protests as well, and were tuned into potential sites of conflict. However, the use of cellphones to capture potential confrontations (which was vigorously encouraged as protests unfolded, both by activist groups and by allies such as the ACLU) signaled the increasing contribution of movement-generated coverage and social media in communications strategies of the movement.

as “undocumented and unafraid.”²⁰ This tactic drew inspiration from the self-disclosures that became paradigmatic for the LGBT movement, as a vehicle for fighting isolation and generating both community and public awareness.²¹ It also drew on the practices of self-narration common in feminist consciousness raising and in mass meetings of the civil rights movement.²² This self-narration had several functions in immigrant activism. The first was raising consciousness and conveying information. The stories of undocumented activists communicated what it was like to be a person without legal status, thus conveying a reality that was starkly unfamiliar to most Americans. Young activists described surviving day to day without even the assurance provided by legal presence that a family would not be deported or separated; they described the difficulties of trying to make a living or get an education without a social security number or any of the government-conferred benefits – from a SSN to in-state tuition or scholarships – that many with legal status take for granted.²³ But the stories of undocumented youth were not simply narratives of suffering: they were also stories about progress made in confronting and transcending these limitations, both through individual effort and through political solidarity. Finally there was also a persuasive and performative dimension of “stories of self” that was directed at the larger public. Coming out as “undocumented and unafraid” reflected an almost Austinian performativity. Those who declared their fearlessness in coming “out of the shadows” may well

²⁰ See Dream Activist: Undocumented Students Action & Resource Network, “National Coming Out of the Shadows Week,” <http://webcache.googleusercontent.com/search?q=cache:http://www.dreamactivist.org/comeout/>. [I can’t find this website.] For sociological discussions of “coming out” in the DREAM Act movement, see WALTER J. NICHOLLS, *THE DREAMERS: HOW THE UNDOCUMENTED YOUTH MOVEMENT TRANSFORMED THE IMMIGRANT RIGHTS DEBATE* (2013); Hinda Seif, “*Unapologetic and Unafraid*”: *Immigrant Youth Come Out from the Shadows*, in *YOUTH CIVIC DEVELOPMENT: WORK AT THE CUTTING EDGE* 59-75 (C. A. Flanagan & B. D. Christens eds., 2011).

²¹ See Rose Cuison Villazor, *Coming Out of the Undocumented Closet*, __ 92 N.C. L. REV. 1, __ (forthcoming 2014).

²² A public form of this kind of self-narration in the civil rights movement was Fanny Lou Hamer’s statement to the Credentials Committee at the Democratic National Convention in 1964.

²⁴ Many undocumented immigrants, particularly those who have been in the US since early childhood, express the feeling that they are “citizens in every way but the papers.” Arizona Immigrant Justice Project, *supra* (interview transcripts and notes on file with author). On the other hand, they understand that this experience of familiarity and cultural belonging can be shattered at any moment by an encounter with a law enforcement official or the detention of a family member. This contradictory reality was captured vividly by the experience of Arizona DREAMer Erika Andiola, a co-founder of the Arizona Dream Act Coalition, and a highly visible and effective activist. Her home was raided by ICE agents on the evening of January 10, 2013, and her mother and older brother were taken into custody. Stephen Lemons, *DREAM Activist Erika Andiola Says Mom and Brother Taken into Custody by ICE*, PHOENIX NEW TIMES BLOGS (Jan. 11, 2013, 9:00 AM),

http://blogs.phoenixnewtimes.com/bastard/2013/01/dream_activist_erika_andiola_s.php. Andiola made a video, which was then circulated nationwide through social media, in which she related her mother’s and brother’s detentions and sought help. Relating the circumstances of the ICE raid and her family members’ arrests, Andiola wept and said “I need everyone to stop pretending that nothing is wrong, stop pretending that we’re just living normal lives, because this can happen to any of us any time.” Carla Chavarria, *Erika Andiola’s Family Separated*, YOUTUBE (Jan. 11, 2013), <http://www.youtube.com/watch?v=FVZKfoXsMxk>. The national outcry prompted by Andiola’s video resulted in her mother’s release, and the video petition has become a powerful tool in immigrant activists’ arsenal for fighting detentions and deportations.

have felt fear, yet found energy, strength and resolve in their own declarations, the parallel actions of others, and the responsive shouts of “undocumented and unafraid” that surrounded them as they exposed their identities, crossed borders, or chained themselves to public property. By speaking directly and candidly to the public, and petitioning the government for redress of grievances, they were claiming the role of citizens – a role that felt both earned and precarious.²⁴ They were also enacting, in salient respects, the political reality to which they aspired: a political world in which they could engage, as members, over critical questions of national policy. But because undocumented immigrants did not yet enjoy, as a matter of formal law, the role that they were claiming, these disclosures had persuasive as well as performative value. They showcased DREAMers as participants with moral courage and political responsibility – willing to take risks to win a role for which they were otherwise prepared – much as the willingness to endure violent attacks with non-violent perseverance had distinguished civil rights protesters.

Whether activists were mobilizing for federal reforms, or resisting oppressive state laws, practices of “coming out of the shadows” and “telling your story” had a flavor of civil disobedience. They made visible an (ongoing) violation of the law, and exposed violators to potential consequences,²⁵ in order to change the law. When these practices of self-disclosure²⁶

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²⁵ The risk to which an undocumented activist was exposed through such self-revelation depended, in part, on the context in which he or she made it. Sharing one’s status or one’s story at an organization meeting created less risk of consequences than sharing one’s status at a public rally, which in turn was less risky than sharing one’s status at public rally at which one was about to be arrested for sitting down in a public thoroughfare. The varying consequences of self-disclosure permitted activists some ability to regulate the risk to which they were exposing themselves.

²⁶ Over time, self-narration in the context of direct action enabled demonstrators who might not possess the familiar credentials of DREAMers to engage in similar performative, persuasive acts: they highlighted their civic courage and commitment by talking about their work or family – implicitly, the jobs they would imperil or the children who would have to be cared for by others – while they took the risk of coming out in the context of likely arrest.

were combined with familiar forms of direct action, the combination made the risk-taking of undocumented activists visible and generated visibility for the movement. For example, in July 2012, during the federal civil rights trial of Sheriff Joe Arpaio, four undocumented Phoenix activists held a press conference announcing their status, and sat down in the street in front of the federal court building, subjecting themselves to arrest.²⁷ Or, later that summer, several dozen undocumented activists rode the Undocubus across several states which had enacted or considered anti-immigrant legislation, en route to the Democratic National Convention in Charlotte, N.C.²⁸ These protests enacted tactics popularized by the civil rights movement: the sit-in, the freedom ride, the confrontation at the Democratic National Convention. But in each case, protesters used a new and innovative tactic – self-disclosure and self-narration by undocumented activists – to attain the visibility and mount the kind of moral claim that civil rights protesters had achieved by exposing themselves to state-sponsored violence.

B. Voter Registration and Civic Engagement

As a movement of citizens who were, for all practical purposes, disenfranchised, the civil rights movement embraced twin imperatives. First, it sought to enable African Americans to exercise their right to vote, which would signal the advent of “first-class citizenship” and would be integral in securing future legislative reforms. Second, because that right, and any future reforms, would likely to require legislative action for their vindication, the movement sought to elicit the political mobilization of those who were already able to exercise the franchise, namely sympathetic whites. The vote was sometimes the object of direct action campaigns, such as the SCLC’s efforts in Selma in 1964²⁹; but it was also the focus of a second kind of campaign. In the counties of the deep South, activists from groups like the Student Non-Violent Coordinating Committee (SNCC) sought to persuade black residents to register to vote. This was no modest

²⁷ “No Papers, No Fear”: As Arpaio Fights Arizona Suit, 4 Undocumented Immigrants Reveal Their Status, DEMOCRACY NOW! (July 26, 2012), http://www.democracynow.org/2012/7/26/no_papers_no_fear_as_arpaio [hereinafter “No Papers, No Fear”].

²⁸ The riders of the Undocubus did not seek to be seated at the DNC, but they staged a sit-down, in protest of the Obama administration’s record of deportation, in the course of which ten protesters were arrested. The arrest was not violent, and protesters were released the following day. However, this example of civil disobedience still entailed substantial risks, given the undocumented status of all of the arrested protesters, many of whom were not DACA-eligible. See Elise Foley, *DNC Protest Leads to Arrest of 10 Undocumented Immigrants*, HUFFINGTON POST, (Sept. 5, 2012, 2:50 PM), http://www.huffingtonpost.com/2012/09/05/dnc-protest-undocumented-immigrants_n_1858331.html?1346871007. Another focus for riders of the Undocubus was organizing with members of the undocumented communities in targeted cities and states along their route. This organizing was also fueled by events at which undocumented activists publicly disclosed their status, and subsequently exchanged stories with members of the communities they visited. For an evocative narrative of this experience, see Marco Flores, *Letter to My Mother*, NO PAPERS NO FEAR: RIDE FOR JUSTICE (Sept. 18, 2012), <http://undocubus.org/blog/post.php?s=2012-09-18-letter-to-my-mother> (from CULTURESTRIKE (Sept. 18, 2012), <http://culturestrike.net/letter-to-my-mother>).

²⁹ *Tactical Innovation*, *supra* note 6, at 749-50 (describing community-wide protests at Selma as pivotal in the passage of the Voting Rights Act).

undertaking, as blacks who attempted to register suffered economic retaliation and physical violence from employers, neighbors, and state actors.³⁰ Yet organizers sought to highlight voter participation as a vehicle for full citizenship, and to impart to participants the knowledge and civic responsibility that would sustain it. In SNCC's "Mississippi Project," for example, organizers not only sought to facilitate black voter registration; they also provided registrants and residents of local communities with the experience of electoral participation through the Mississippi Freedom Democratic Party (MFDP).³¹ The MFDP conducted its own primaries and conventions for local African-American participants, giving those who had not previously participated direct experience of the electoral process. It also enabled some MFDP activists to communicate their experience and commitment to a dubious white public, as the MFDC claimed the right to be seated at the 1964 Democratic National Convention. Another innovation of the Mississippi Project, sometimes referred to as "Freedom Summer," brought hundreds of elite, white college students to work with local organizers in rural Mississippi.³² The role of whites in promoting registration in Mississippi, which built on years of organizing by SNCC activists, was more than an injection of relief troops in a sharply embattled region. The dangers to which both black and white activists were exposed – captured chillingly by the murders of organizers Goodman, Cheney, and Schwerner in the summer of 1964 – made the meaning of massive resistance, and of second-class citizenship, stunningly concrete to the students and their well-connected parents. Their concrete understanding of the ways that racial hierarchy was maintained by state-supported violence prompted demands for protective federal intervention in Mississippi, and created a body of influential allies for the movement as a whole.³³

Civic engagement has also played a large role in the movement for immigrant rights, but it has been structured by a different set of dynamics. Undocumented immigrants face a barrier to the franchise that is different from the registrars and sheriffs of Mississippi: with no legal status (and for most undocumented immigrants, no legal presence), they cannot assert even a formal right to the franchise. Legislative reform, providing some path to citizenship, is necessary before such a claim can be made. To enlist support for such legislation, immigrant activists – like their civil rights counterparts – have been required to mobilize voters beyond the group who stands directly to benefit. The immigrant rights movement, however, can draw on a group of Latino voters that is more proximate than the general population of whites, and far larger than the group of "Freedom Summer" parents whose familial connection to segregationist violence spurred their political participation. Many Latino voters have first-hand exposure to the struggles of undocumented

³⁰ Francesca Polletta, *The Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961-1966*, 34 *LAW & SOC'Y REV.* 367, 384 (2000).

³¹ For two accounts of this campaign with contrasting foci, see DOUG MCADAM, *FREEDOM SUMMER* (1988) (focusing on the experience of white volunteers who went south for SNCC's Mississippi Project); Polletta, *supra* note 30 (focusing on the experience of rural African Americans taking part in SNCC's voter registration campaigns). See also DOUG MCADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY 1930-1970* (1982).

³² SEE DOUG MCADAM, *FREEDOM SUMMER* (1988); SALLY BELFRAGE, *FREEDOM SUMMER* (1965).

³³ SEE DOUG MCADAM, *FREEDOM SUMMER* 157-60 (1988).

family members, friends, and neighbors, or have experienced their own fear of family separation. The challenge, however, has been to reach and mobilize a group of voters who have not historically turned out in high numbers,³⁴ and help them make the connection between the changes they want to see, and their own electoral participation.

A pivotal innovation in this effort has been the recruitment of undocumented youth to register and mobilize Latino voters. A series of civic engagement campaigns in Arizona demonstrate the potential of this practice. Undocumented youth have been volunteering in civic engagement campaigns in Arizona, since at least 2011, when Randy Parraz and Citizens for a Better Arizona mounted a recall campaign against Russell Pearce, the legislative sponsor of SB 1070.³⁵ Youthful volunteers signed on to challenge a politician who had exposed their communities to fear, surveillance, and harassment. Both those who had already been active in politics, such as members of the Arizona Dream Act Coalition, and those who were entirely new to organizing came out for the effort to register voters. When voters seemed reluctant about registering or doubted that their vote could make a difference, undocumented volunteers engaged them by narrating their own experience under SB 1070, or arguing that if they could make a difference when they could not even cast a ballot, surely a registered voter could make a contribution to bringing about change.³⁶ This tactic was given a powerful boost when Pearce was defeated, by an unlikely confluence of Latino votes, with those of moderate business interests, and concerned Mormons. Both Latino voters and undocumented volunteers saw they could make a difference in the direction of state politics.³⁷ Perhaps the most striking example of this approach occurred in the summer and fall of 2012, when a coalition between a pro-immigrant civic engagement organization and a local union recruited more than 2000 teenage volunteers and organizers, many of them undocumented, to register voters for the November 2012 election. Calling their campaign “Adios Arpaio,” the activists used the re-election campaign of the sheriff of Maricopa

³⁴ Mark Hugo Lopez & Ana Gonzalez-Barrera, *Inside the 2012 Latino Electorate*, PEW RESEARCH HISPANIC TRENDS PROJECT (June 3, 2013), <http://www.pewhispanic.org/2013/06/03/inside-the-2012-latino-electorate/> (finding that despite record Latino turnout in absolute numbers, the rate of Latino turnout has lagged behind African-Americans and whites in last two Presidential elections).

³⁵ Jeff Biggers, *Arizona Topples Senate President Russell Pearce, SB 1070 Immigration Law Architect*, in *Historic Recall Vote*, HUFF. POST BLOG (Nov. 8, 2011, 11:02 PM), http://www.huffingtonpost.com/jeff-biggers/breaking-arizona-topples- b_1083202.html (noting that Citizens for a Better Arizona registered 1,150 new voters in the district).

³⁶ See Arizona Immigrant Justice Project, *supra* (interview transcripts and notes on file with author).

³⁷ A similar approach applied in the 2011 City Council elections resulted in a 500% increase in Latino registration in one city council district and the election of a pro-immigrant, Latino council member, Daniel Valenzuela. See Monica Alonzo, *SB 1070 Fuels a Movement of New Voters*, PHOENIX NEW TIMES (July 5, 2012), <http://www.phoenixnewtimes.com/2012-07-05/news/sb-1070-fuels-a-movement-of-new-voters/2/>.

County as a hook for registering and motivating Latino voters.³⁸ Through a systematic training process, supported by nationwide organizations such as the Center for Community Change, young activists learned to share their stories of racial profiling and family separation perpetuated by Arpaio's forces, and to engage creatively with apathetic or reluctant voters. A DREAM Act organization supplemented their efforts with the "I am a DREAM Voter" campaign, in which DREAMers asked registered voters to cast their ballots in support of pro-DREAMer candidates and policies. Although Arpaio was re-elected, his margin was unprecedentedly narrow, and the campaigns registered tens of thousands of new Latino voters in the greater Phoenix area.³⁹

The civic engagement campaigns reflected another dimension of the performative strategy of the immigrant rights movement. The volunteers who canvassed in Arizona's civic engagement campaigns became deeply involved with not only with the principal goal of replacing particular elected officials, but also with the mechanics of the vote, the issues facing particular neighborhoods, and the concept of political accountability.⁴⁰ In many cases they taught citizens either about the substantive issues, or about filling out a ballot. Placing undocumented youth in an integral facilitative role in relation to one of the most central rights of citizenship created a new political reality, much as the meeting, caucuses, and elections of the MFDP created a new political reality, in which mainstream participants could see the knowledge, and commitment of the new participants differently. Yet if anything, the inauguration of new political relations – the improbable claiming of the "space of citizenship" -- was even more striking in the case of young immigrants. Theirs was not a parallel process: they were integrally involved with citizens in their registration to vote and the casting of their ballots. And the young people who performed this role were not American citizens brutally deprived of their voting rights, but residents with no legal status, and in some cases, no legal right to be present. Both the efficacy and the transformative symbolism of this strategy were such that it was perhaps no surprise that the Arizona legislature soon began to enact legislation regulating the roles of volunteers in the early balloting process.

I. Rights Consciousness, Emergent Rights, and Performative Rights-Assertion

Thus far I have considered the civil rights movement and the immigrant justice movement as constellations of actors on the public stage. I have argued that the discourse, the

³⁸ See Joe Bernick, "Adios Arpaio" Campaign Heats Up In Arizona, PEOPLE'S WORLD (Oct. 1, 2012), http://peoplesworld.org/adios-arpaio-campaign-heats-up-in-arizona/?utm_medium=twitter&utm_source=twitterfeed. See also Alonzo, *supra* note 37. This campaign used the voter registration process to accomplish the kind of "political jujitsu" that civic rights activists achieved through direct action confrontations with official like Bull Connor: the more unreasonable, violent, or suppressive the official response, the more successful the activist effort. For a discussion of "political jujitsu" in the civil rights movement, see *Strategic Dramaturgy*, *supra* note 9.

³⁹ Stephen Lemons, *Joe Arpaio Still Won, Arizona Vote Count Over*, PHOENIX NEW TIMES (Nov. 21, 2012), http://blogs.phoenixnewtimes.com/bastard/2012/11/joe_arpaio_still_won_democrats.php (contrasting Arpaio's 6.02 point victory over main challenger Paul Penzone, and 1.4% margin of victory over all opposing candidates, with 13 point victory in previous election).

⁴⁰ Arizona Immigrant Justice Project (interview transcripts and notes on file with author).

strategies, and the specific tactical repertoires of the civil rights movement have become symbols and templates for the immigrant justice movement – as they have for many other movements. But I have also sought to highlight the ways that immigrant activists have revised these strategies and tactics to encompass new practices: practices of self-narration and multi-faceted civic engagement that are performative along several dimensions. First, they enable immigrants to reject the fear, and the resulting posture of hiding, that governmental officials have sought to impose on them through anti-immigrant legislation and enforcement efforts. Second these tactics have enabled undocumented activists to “claim the space of citizenship” while simultaneously developing and manifesting the skills and attributes that serve to unsettle public understandings of undocumented immigrants and their belonging. Finally, these performances create an outside – a public impression – that emanates more from desire and imagination than from legal foundation or subjective self-conception: in concrete and socially transformative ways, immigrants undertake the tasks of a citizenship they have not yet been granted, and manifest a confidence and self-possession that may belie a far more ambivalent set of feelings and expectations. These performative dimensions of the recent immigrant mobilization might seem to distinguish it from a civil rights activism that was grounded in the guarantees of the Civil War Amendments, and sought to make good on their incomplete promise through federal legislation and enforcement.

But the literature of social movements suggests another way to look at these two efforts: not as movements engaging with legal institutions in carefully-choreographed repertoires, but as situated groups of individual actors, asserting or negotiating rights claims. We might ask, from this perspective, how actors in these two movements think about their rights, or how they see their relation to the polity as they go about their day-to-day work. Viewed in this way, taking the individual activist and her legal or rights consciousness as the focus,⁴¹ the difference between the movements is not as stark as one might initially suspect. For many grass-roots participants in the civil rights movement, the formal rights to citizenship and to equal protection that were conferred on African Americans by the civil war amendments were less constitutive of their sense of rights and of belonging than the regimes of social and institutional exclusion, economic retaliation, and public-private violence that structured their daily existence. In pivotal contexts such as movement organizing in Mississippi, the self-assertion of African-American activists had aspects of performativity that, in some respects, resemble those of the immigrant justice movement.

A. Rights Consciousness and Emergent Rights among Immigrant Activists

As non-citizens who lack a legal status and, in most cases, a legal right to be present, immigrant activists do not instinctively regard their “rights” as formal claims that can be directed

⁴¹ For an excellent example of this focus in the sociolegal literature, see Leisy J. Abrego, *Legal Consciousness of Undocumented Latinos: Fear and Stigma as Barriers to Claims-Making for First- and 1.5-Generation Immigrants*, 45 LAW & SOC’Y REV. 337 (2011).

to courts or enforced by legislatures.⁴² The experience of mobilizing without legal status, and indeed the experience of navigating American society without many formal rights, has engendered in many immigrant activists an attitude of improvisatory self-reliance: they view progress as more likely to arise from their own organizing than from the declarations of the courts.⁴³ Consequently, groups often operate orthogonally to formal occasions of rights declaration.⁴⁴ Immigrant activists have used major court dates as opportunities for rallying, marching, or direct action: for reminding public officials that “we are still here and we are watching.”⁴⁵ Activists across the country marched on the day that the Supreme Court heard argument in *Arizona v. United States*.⁴⁶ Activists in Arizona held a press conference and engaged in civil disobedience on the day that Sheriff Joe Arpaio testified before the district court in *Melendres v. Arpaio*.⁴⁷ Participants also seem to understand their activism as working parallel to formal adjudicative processes. For example, activists sometimes say that the *Melendres* decision

⁴² There are obvious exceptions, as when a state actor clearly violates some of those rights that those without formal legal status enjoy, for example, as “persons” under the U.S. Constitution. For example, when Governor Jan Brewer enacted an executive order stating that those undocumented youth who had just received Deferred Action for Childhood Arrivals (DACA) were ineligible to obtain driver’s licenses, the Arizona Dream Act Coalition sued the Governor in federal court. *Arizona Dream Act Coalition et. al* [sic] *v. Brewer*, ACLU (Sept. 18, 2013), <https://www.aclu.org/immigrants-rights/arizona-dream-act-coalition-et-al-v-brewer> (lawsuit claims that Brewer’s executive order violates Supremacy clause and Equal Protection clause of Fourteenth Amendment).

⁴³ Carlos Garcia, *Arizona, Arpaio and SB1070 Spur Crusade for Immigrant Rights*, POLITIC365 (June 20, 2012, 5:46 AM), <http://politic365.com/2012/06/20/arizona-arpaio-and-sb1070-spur-crusade-for-immigrant-rights/>. In a call to action framed around the Supreme Court’s opinion in *Arizona v. U.S.*, Garcia, the head organizer of a leading immigrant justice organization in Phoenix, stated:

For more than a decade, we petitioned Congress for immigration reform only to be kicked around as a political football by both parties. We hoped things would change with President Obama but instead of feeling our pain, he caused more of it. Instead of executive action to grant us relief, he gave us record deportations and unprecedented quotas. When all else failed, we looked at the courts but even they seem ready to deny us our humanity . . . migrant communities have responded by losing our fear and peacefully defending ourselves. By learning our rights and more importantly, how to defend them when law enforcement tries to ignore them, we have created networks of protection that are prepared for the raids and the wrongful arrests.

Id.

⁴⁴ Enabling the exercise of rights by Latino citizens and other allies may be another way that undocumented activists work indirectly in relation to rights. Activists involved in the civic engagement campaigns discussed above may draw satisfaction and experience civic investment by enabling (while not being able to exercise) the franchise. “I may not be able to vote,” one volunteer explained, “but I can empower other people to vote.” Arizona Immigrant Justice Project (interview transcripts and notes on file with author).

⁴⁵ Arizona Immigrant Justice Project, *supra* (interview transcripts and notes on file with author).

⁴⁶ *Cities Across Country to Protest SB1070, Call for Federal Action to Reject ‘Arizonification’ as Supreme Court Hears SB1070 DOJ Case in Washington*, NDLO: NATIONAL DAY LABORER ORGANIZING NETWORK (April 23, 2012, 1:30 PM). <http://www.ndlon.org/en/pressroom/press-releases/item/479-sb1070-2012-marches>.

⁴⁷ “*No Papers, No Fear*”, *supra* note 27.

simply confirmed what they knew about Joe Arpaio when they sat down in front of his trucks, or conducted the “Adios Arpaio” campaign.⁴⁸

One primary way in which undocumented activists seem to understand their own rights, however, is as claims to be negotiated or extended through assertion in encounters with law enforcement officials. One starting point for this assertion of rights is the “Know Your Rights” sessions that have been held throughout Arizona and other states, often sponsored by legal organizations such as the ACLU, in conjunction with local pro-immigrant organizations. These forums have been frequent and well-attended events, which have served as both a basis for organizing and a vehicle for preventing panic in the face of legislation like SB 1070.⁴⁹ They advise members of the community about what they should do in preparation for a stop, detention, or deportation. The range of rights that undocumented immigrants can assert in encounters with state law enforcement officials or with agents of Immigration and Customs Enforcement (ICE) is, in a formal sense, limited.⁵⁰ For example, they can decline to tell law enforcement officials where they are from (though this information may become available if they are ultimately held and fingerprinted); they can ask for lawyer if they are detained. They can create an advance directive specifying who will be responsible for their children (or pets or property) if they are deported. None of these rights, however, will predictably prevent detention or deportation. Yet some immigrant activists report that knowing about these rights can make a difference in the way that they engage law enforcement if they are actually stopped, and the way that they live their daily lives.⁵¹ This greater confidence is, in itself, an advantage to the movement because it may prevent daunted immigrants from returning to their countries of origin in the face of restrictive state legislation. Some report that simply having made arrangements for the care of their children gives them greater peace of mind as they travel from home to work and back.⁵² Others say that they feel less panic when they are stopped, and they are less likely to make costly errors. One young woman explained that this kind of preparation helped her to assert her rights over a 36-hour period of detention. She noted, moreover, that the calm and persistent way that she responded when questioned helped to persuade ICE officials that she was “a good person” – the

⁴⁸ Arizona Immigrant Justice Project, *supra* (interview transcripts and notes on file with author). *See also* “*No Papers, No Fear*”, *supra* note 27 (organizer Carlos Garcia observing of DOJ lawsuit against Arpaio, “[t]his just means more evidence of the things we’ve known for the last four years”).

⁴⁹ Arizona Immigrant Justice Project (interview transcripts and notes on file with author).

⁵⁰ ACLU of Arizona makes available a small, portable card that describes the rights immigrants have when stopped by a law enforcement agent and provides advice for managing the encounter. The rights enumerated include a right to remain silent, a right to deny consent to search beyond a manual “pat-down,” a right to leave if you are not under arrest, and a right to a lawyer if you are under arrest. *See What to do if you’re stopped by police, immigration agents or the FBI*, (June 2010), http://www.acluaz.org/sites/default/files/documents/bustcard_eng_20100630.pdf.

⁵¹ Arizona Immigrant Justice Project (interview transcripts and notes on file with author).

⁵² Arizona Immigrant Justice Project (interview transcripts and notes on file with author).

kind of person who should be released rather than deported, even though officials ultimately understood that she was in the United States without authorization.⁵³

This example points to a peculiar feature of immigration enforcement, particularly in a period of legislative stalemate, in which many important decisions related to detention and deportation rest on a broad and differentially applied set of enforcement priorities. In the gray area of intersection between immigration law and discretionary enforcement priorities such as those contained in the Morton memorandum,⁵⁴ one's *de facto* "right" to remain – which is not a formal legal right, but an experientially-grounded judgment about the acts for which, or circumstances under which, one will *not* be deported – may ultimately be established or extended by tendentious efforts to push the envelope. One young man, a naturalized citizen who had been active in the early formation of Arizona's DREAM Act movement, described his disbelief when he heard that the first DREAMers had identified themselves publicly as undocumented. "My God, I thought, those kids are going to be deported. But then they were not. And soon others joined them," making similar self-disclosures.⁵⁵ Had those initial DREAMers not disclosed their status, the entire community might still believe that their self-identification would predictably trigger deportation. After their action, many began to believe that it might not – at least not predictably – do so. Hundreds of DREAMers began to live their lives and conduct their politics

⁵³ Arizona Immigrant Justice Project (interview transcripts and notes on file with author). Another example of this kind of self-assertion yielding results was a story told by an Arizona DREAMer in a recent op-ed. Daniel Rodriguez, *Dear Governor: I'm Legal, So Why Can't I Legally Drive Yet?*, AZCENTRAL.COM (Feb. 22, 2013), <http://www.azcentral.com/opinions/articles/20130214rodriguez-dear-governor-im-legal-why-cant-legally-drive-yet.html>. Soon after receiving his DACA, he was stopped by a local law enforcement agent as he drove across Phoenix. This was one encounter in which displaying his new work permit, which he did, was unlikely to be availing, as DACA-mented Arizonans are prohibited by state executive order from getting drivers' licenses. He explained to the officer the purpose of his trip: he was going to a scholarship luncheon "with a bunch of lawyers." *Id.* The officer, who could have cited him for driving without a license at minimum, "basically let [him] go." *Id.* While both of these examples represent forms of "envelope-pushing" that draw, in various ways on the distinctive (and arguably more privileged) profile of the paradigmatic DREAMer, they nonetheless illustrate the potential value of the performative assertion of emergent rights.

⁵⁴ Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs., All Special Agents in Charge, & All Chief Counsel, Exercising Prosecutorial Discretion Consistent With the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>. The memorandum identifies a range of factors that enforcement agents should take into account when deciding whether to exercise discretion to apprehend, remove or detain undocumented immigrants. Among those which militate in favor of apprehension, detention and removal are commission of serious felonies, repeat offenses, unlawful re-entry into the United States, gang membership and clear risks to national security; among those which militate against such enforcement are military service, presence in United States since childhood, victimization through domestic violence or trafficking, and being a minor or an elderly person. *Id.*

⁵⁵ Arizona Immigrant Justice Project (interview transcripts and notes on file with author).

differently as a result.⁵⁶ This assertion of emergent rights⁵⁷ was performative in the sense that it reflected neither a foundation in established law nor a grounding in the subjective expectations of the participants, who likely also assessed the risk of deportation as great. Perhaps more importantly, this act was performative in the sense that activists' willingness to suffer the consequences of a previously untested form of political conduct helped to establish this form of engagement as a plausible strategy, a lower-risk activity than had previously been believed. Because activists' legal status has not changed, these acts of self-assertion continue to occupy a gray area of hazard: although DREAMers may not themselves be deported for coming out as "undocumented and unafraid," for example, there are cases in which their family members have been detained, or have come close to deportation, in the wake of this form of activism.⁵⁸ But due in large part to this purposeful pressing of the envelope, the scope of the *de facto* "right to remain," has expanded a bit.

Activists explain the resolve that has animated these risk-taking acts in many ways.⁵⁹ Some point to a feeling of necessity: they must attempt to press boundaries because there is no other choice. "When your back is to the wall, you come out swinging" is a phrase that emerges regularly among Arizona activists. Another kind of explanation – which reflects some tension

⁵⁶ Similarly, before the DREAM 9 asserted their right to re-enter the United States after deportation or voluntary departure to join family members, no one knew that they would be permitted, even temporarily, to do so; some immigration experts had expressed the view that Mexican nationals were unlikely to be granted the opportunity to make out claims for asylum. Cf. Jason Dzubow, *Mexican Asylum Seekers Need Not Apply*, THE ASYLUMIST (Nov. 13, 2013), <http://www.asylumist.com/2013/11/13/mexican-asylum-seekers-need-not-apply/> (examining reasons that the rate of Mexican asylum claims granted is disproportionately low when violence in Mexico is high).

⁵⁷ I use the term "emergent rights" to designate rights that activists are contending for, but have not been formally recognized or enforced by governmental actors yet. These might be formal rights that have not been enforced, such as the voting rights of African-Americans prior to the enactment of the Voting Rights Act of 1965. Or they might be *de facto* rights that emerge in a discretionary zone of enforcement, such as the *de facto* right to remain that may be enjoyed by undocumented immigrants when enforcement officials decline to detain or deport them under particular circumstances. The point I make here about "emergent" rights is that when protesters assert these rights – by registering to vote or coming out as undocumented in public settings – their acts are more performative (aimed at inaugurating a new political reality or bringing such rights into being) than they are descriptive of a set of entitlements that have been enforced or an expectation about governmental recognition of such rights.

⁵⁸ The family of undocumented student activist Tam Tran was taken into custody only days after she testified before Congress in support of the DREAM Act. (After Tran mobilized the intervention of Rep. Zoe Lofgren of California, they were released.). See Emma Stickgold, *Tam Tran, Brown Student, Fought for Immigrant Rights*, BOS. GLOBE, May 17, 2010. Erika Andiola also questioned whether the arrest and detention of her family members was related to her activism, particularly after her brother reported that an ICE agent had said to him, "[W]e know about your sister, we know what she does, and you need to stay away from that." Lemons, *supra* note 24.

⁵⁹ What feelings, experiences, or self-conceptions give rise to these forms of political self-assertion among undocumented activists is one of the central research questions of the Arizona Immigrant Justice Project, *supra*. Because the empirical research that forms the basis of the project is not yet complete, I do not offer any conclusions here; I simply survey some of the answers that have emerged most prominently from the research thus far, in part to demonstrate their correspondence to some of the feelings, experiences, and self-conceptions articulated by participants in the civil rights movement.

with the preceding explanation – is that undocumented youth often feel like they belong to American society: “we are citizens without the papers,” activists frequently say.⁶⁰ A sense of authorization may also come from a subset of families, who approach being undocumented matter-of-factly and teach their children that it should not be a barrier to their aspirations.⁶¹ A feeling of authorization may also be generated through solidaristic activity within the movement, through which activists learn that “it doesn’t have to be this way: we can empower ourselves to make a change”⁶² or that “the safest place for anyone targeted by these laws is out, proud, and part of an organized community.”⁶³ But performative assertion of emergent rights – asserting oneself and/or one’s right to remain, in a negotiation with a state or federal official acting in a gray area of enforcement discretion – may have value in establishing new boundaries for the activity of undocumented immigrants.

B. Emergent Rights and Performative Citizenship in the Civil Rights Movement

One might expect this pattern of rights-consciousness and rights-assertion to distinguish the immigrant justice movement from the civil rights movement, which is grounded on a conception of rights as legally-established entitlements. No less a document than the Constitution declares the rights of former slaves and their descendants to citizenship and to the non-discriminatory exercise of the right to the vote. These rights faced adamant resistance; they ultimately required articulation by the courts and ultimately enforcement by the elected branches – none of which was a foregone conclusion as the civil rights movement waged its early campaigns. But the specific rights asserted by the movement had a basis in written law. Moreover, as citizens and federal rights-holders, African-Americans assumed a plausible role when they petitioned their government for the redress of their grievances.⁶⁴ The notion of rights as formal constitutional guarantees, which only had to be enforced by the federal government against state and local resistance, was central to the discourse of the movement. As Martin Luther King, Jr., told a mass

⁶⁰ Arizona Immigrant Justice Project, *supra* (interview transcripts and notes on file with author). This contradictory sense of belonging and precariousness seems to be a feature of the legal consciousness of undocumented youth. *See infra* at note 24 (footnote on Erika Andiola’s mother’s detention).

⁶¹ Arizona Immigrant Justice Project (interview transcripts and notes on file with author).

⁶² Arizona Immigrant Justice Project (interview transcripts and notes on file with author).

⁶³ Carlos Garcia, *supra* note 43.

⁶⁴ The First Amendment, in fact, prohibits Congress from making any law that abridges “the right of the people . . . to petition the Government for a redress of grievances.” U.S. CONST. amend. I (emphasis added). But, while First Amendment rights in this context are guaranteed to “the people” members of the public may find see petitioning for redress of grievances as an action more properly taken by citizens, whose electoral relation to governmental actors gives them the power to hold the government accountable.

meeting at the beginning of the Montgomery Bus Boycott: “We are not wrong . . . [and] if we are wrong, the Supreme Court is wrong, and if we are wrong, the Constitution is wrong . . .”⁶⁵

But if we move from the public discourse and group-based tactics of the movement to the self-understandings of participants, doing the work of the movement on a daily basis, a different picture emerges. For the mother sending her child to the first integrated school in her city, or Mississippi sharecropper mustering the courage to register to vote, for countless movement participants facing administrative intransigence, employer retaliation, and the ever present threat of state-sanctioned violence, rights were never simply constitutionally-established objects of federal enforcement.⁶⁶ In individual and family conversations, and in mass meetings at black churches, participants had to persuade themselves and each other that they could claim the role of citizens: a role that was as much a product of their persistent, if uneasy, self-assertion as of the declarations of federal courts.

This dimension of the civil rights struggle can be glimpsed, for example, in Francesca Polletta’s analysis of rights consciousness among SNCC activists in Mississippi in 1961-66.⁶⁷ Studying the sharecroppers and domestic workers who risked their lives and livelihoods to register to vote, Polletta did not find actors who felt that their constitutionally-established rights simply had to be vindicated by federal intervention and affirmation. She saw people whose daily lives drove home the lessons of their marginality and second-class citizenship, and whose

⁶⁵ The concluding sentence of this sequence: “If we are wrong, then God Almighty is wrong” suggests that there were rhetorical as well as strictly legal dimensions to this argument. Nonetheless, a view of the constitution as the ground of civil rights claims comes through in his statement..See MLK’s Constitution, *supra* note 5, at 1000.(quoting speech by Martin Luther King, Jr., at Holt Street Baptist Church, Montgomery, Alabama (December 5, 1955)] Another example of this way of thinking about rights can be found in a recent statement by Justice Ruth Bader Ginsburg. As a litigator for the Women’s Rights Project of the ACLU, she played a leading role in the movement for sex equality, briefing and arguing many of the landmark cases in the Supreme Court. This movement was premised on the same kind of immanent critique as the civil rights movement: the notion that the United States a constitutional democracy based on equal opportunity was obligated to extend that equality to a group which did not yet fully enjoy it, women. Asked about her role in bringing about constitutional change, Ginsburg replied: “I didn’t change the equality principle; it was there from the start. *I was just an advocate for securing its full realization.*” *The Take Away with John Hockenberry: Interview with Supreme Court Justice Ruth Bader Ginsburg* (KQED radio broadcast Sept. 16, 2013) (transcript available at <http://www.thetakeaway.org/story/transcript-interview-justice-ruth-bader-ginsburg/>) (emphasis added).

⁶⁶ *See, e.g.*, Polletta, *supra* note 30, at 384 (“The names of those who registered were published in the local paper (ostensibly to give others an opportunity to challenge their ‘good character’), so black residents knew that once they made the trip to the courthouse they would be fair game for reprisals. They were verbally harassed and often subjected to physical violence.”).

⁶⁷ *See id.* In this article Polletta used archival and interview based data from civil rights activists to assess the rights critique mounted by Peter Gabel and other Critical Legal Studies scholars. Polletta offered this study to demonstrate that far from being ineffectual, atomizing or limiting, rights talk could be powerfully connected with imaginative reinvisioning of unequal structural conditions, and with intra-group solidarity. But her interview data also demonstrate, to my mind, the emergent character of rights, even for those who could point to constitutional declarations of citizenship, and the performative strand of their activism.

struggle – as they put it – to achieve “first-class citizenship” was fraught with retaliation, harassment, and pervasive physical danger. These activists, Polletta explained, played an active role in unsuccessful lawsuits against registrars who denied their rights or sheriffs who beat them. They spent hours giving statements, or testifying in court, because they experienced a pride in being able to tell their stories. They gathered at the courthouse each day for the trials, fueled by a sense of wonder at witnessing efforts – however unsuccessful – to hold white men to account. These activists saw moments of adjudication as opportunities for community organizing, for relating their own experience, for bearing witness to the possibilities of an ongoing struggle, rather than simply as occasions of rights declaration,⁶⁸ in much the same way as immigrant activists in Arizona.

Civil rights organizing in Mississippi was also characterized by moments of improvisatory rights assertion, which sometimes provided activists with greater room to maneuver. The groups of prospective voters who presented themselves to registrars in rural Greenwood county had little idea what awaited them in those encounters; nor did the African-American organizers who made a practice of attending the white movie theater every Wednesday, or the registrants who defended themselves with words, or the occasional shotgun, against neighbors or officials who came to intimidate them.⁶⁹ As the courage of these actors became contagious in a county or a region, the tide of violent enforcement could sometimes recede a little.

While participants may have drawn the courage for these moments of rights-assertion from the knowledge of their formal constitutional rights, scholars of movement organizing point to other sources, sources with greater parallels to the experience of undocumented students. Some of those in the movement drew their strength from the instruction and support of family. Charles Payne quotes one Mississippi organizer: “I think somehow you’ve always had families who were not afraid . . . they just talked to their immediate family and let them know, you know “You’re somebody. You can’t express it right now but you keep this in mind. You’re just as much as anybody, you keep it in mind. And then when the time for this came, we produced . . .”⁷⁰

⁶⁸ To be fair, these particular instances of adjudication were less likely to eventuate in triumphant moments of rights declaration because charges against sheriffs or others who had infringed black civil rights were most often tried to all-white juries, who reliably acquitted the defendant. Yet even where acquittals occurred, “[t]he machinery of litigation, the interviews, the affidavits, the court appearances, all were opportunities for black people to tell their stories of oppression endured, threats withstood, fear surmounted. They all helped to create the public identities on behalf of which residents would take ‘high-risk’ action . . .” *Id.*, at 385 (citation omitted).

⁶⁹ PAYNE, *supra* note 14, at 207-64.

⁷⁰ *Id.*, at 207.

Also crucial in fueling this impetus were mass meetings, often held in local black churches.⁷¹ At these meetings participants were exhorted by leader-organizers like Fanny Lou Hamer or Aaron Henry.⁷² They sang together.⁷³ And they narrated to each other the burdens and dangers of trying to comport themselves like “first-class citizens” – by surmounting the many perils of registering to vote.⁷⁴ Sharing and witnessing each other’s stories, they began to earn the status of first-class citizens in each other’s eyes, if not yet in the eyes of the law.⁷⁵ This attainment enabled them to push forward – much like the DREAMers who have celebrated each other’s “stories of self,” both in public and in smaller, organizational settings. Participants in Mississippi organizing campaigns had formal citizenship, but their daily lives were a constant reminder of its unaccomplished status. Their rights were emergent⁷⁶ and their participation as citizens – though constitutionally warranted – was in important ways performative: it inaugurated a new political reality in which African-Americans in the rural South emerged from the constraints imposed by threat and fear to be participants in public life. And it created a powerful external impression that fueled rather than reflected a subjective sense of entitlement. Their “first-class citizenship” – like the undocumented immigrants *de facto* right to remain – was always in the process of being forged by activists’ own often excruciating efforts.

Conclusion

When immigrant justice activists employ the tactical forms, or the broad equal opportunity frames, of the civil rights movement, this may in fact be part of their performative strategy. They embrace the paradigmatic example of citizens vindicating their rights in the face of brutal opposition and uncertain enforcement as yet another way of modeling the citizenship they hope to attain. Perhaps, the recapitulation of the tactics or frames of the civil rights movement in a more pointedly performative register is the ultimate example of creative adaptation. It

⁷¹ *Id.*, at 256-64, 260-61 (mass meetings “created a context in which individuals created a public face for themselves, which they then had to try to live up to”); Polletta, *supra* note 30, 390-91; Goodwin and Pfaff, *supra* note 8, at 288-93.

⁷² PAYNE, *supra* note 14, at 256-64.

⁷³ *Id.*, at 261-63; Goodwin and Pfaff, *supra* note 8, at 291-93.

⁷⁴ Polletta, *supra* note 30, *supra*, at 290-91.

⁷⁵ Polletta notes: “First-class citizenship was an identity in the making, something claimed now, rather than a means to an end. Such an identity required recognition, but recognition not necessarily from the state (which was outright hostile at the local level and unreliable at the national level). Instead, recognition of first-class citizenship came from kinfolk, congregation, community, and movement.” *Id.*, at 390.

⁷⁶ The rights of both civil rights and immigrant rights activists were emergent in another sense as well: their public performances of civic commitment that I discuss above helped to persuade Congress to enact the Civil Rights and Voting Rights Acts in the mid 1960s, and helped to persuade the Senate, in 2013, to enact S.744 (the comprehensive immigration reform legislation). But when I refer to performativity or the emergent character of rights, I refer to the more immediate effects of these performances in transforming participants’ sense of their circumstances (undocumented students became, as a result of their political posture, less fearful), their role in the polity (as participants engaged with the electoral process), their *de facto* rights or political horizons (members of both groups discovered by pushing the boundaries of the politically possible that they could engage publicly in ways that they might previously have assumed they could not).

demonstrates that the conceptual and tactical vocabulary developed to claim the full measure of citizenship can also be deployed by those who lack even its formal guarantees. But immigrant justice activists may also glimpse something about the civil rights movement that much of the public (and many legal scholars) have tended to miss: that for African Americans fighting for civil rights, their recognition was never a *fait accompli*. Their “first class citizenship” was always at issue, something that had to be contended for every day.⁷⁷ These parallels suggest an insight that may be applicable not only to the civil rights movement, but to many movements for inclusion through law. Even as we most firmly assert our claims to belonging, we are performing, with a fragile mix of hope and insistence, our entitlement to exercise them.

⁷⁷ Patricia Williams is one of the few legal scholars who have specifically taken this vantage point on the civil rights movement. In an early article in which she, like Polletta, sought to answer the Critical Legal Studies critique of rights, she highlighted the performative character of black Americans’ assertion of civil rights:

To say that blacks never fully believed in rights is true; yet it is also true to say that blacks believed in them so much and so hard that we gave them life where there was none before. We held onto them, put the hope of them into our wombs, and mothered them – not just the notion of them. We nurtured rights and gave rights life. . . The making of something out of nothing took immense alchemical fire: the fusion of a whole nation and the kindling of several generations. The illusion became real only for a very few of us; it is still elusive and illusory for most. But if it took this long to breathe life into a form whose shape had already been forged by society . . . imagine how long would be the struggle without even that sense of definition, without the power of that familiar vision.

Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 430 (1987). In her understanding, the form of rights did for African Americans in the civil rights movement what the civil rights movement is now doing for immigrant activists: it gave them a template, with a legitimating grounding in law, which activists, by force of will and determination, could extend into uncharted areas. Williams may be able to access a perspective not available to many legal scholars because her approach, although not systematically empirical, draws – as does Polletta’s – on the narratives and perspectives of actors engaging in the process of asserting and defending their rights.