THE SUBJECT OF RIGHTS AND DACA: ARGUING FOR RIGHTS IN *BATALLA VIDAL V. NIELSEN* (2016)

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Abstract: The aim of this paper is to analyze how rights are argued in the construction of a subject of rights in the lawsuit Batalla Vidal v. Nielsen (2016). Understanding the subject of rights as a category constructed during dissenting political struggle, we hypothesize that such subject could be constructed through struggles that qualify both as political and legal. Hence, I propose a case study of Batalla Vidal v. Nielsen, one of the main lawsuits against the tentative rescission of the Deferred Action for Childhood Arrivals, in September 2017. Literature has already demonstrated the cleavages promoted by the program and the much-needed immigration reform in the United States; however, little has been asked on the transformation of rights' subjectivities through the lawsuits generated by such rescission. To do this, I will code the public documentation of Batalla Vidal v. Nielsen through ATLAS.ti, to organize what are the terms used – especially the names applied to the undocumented population and the conception of rights. Qualitative analysis indicates a change in legal language from before and after the rescission of DACA, identified as a shift from an injustice grammar to one of 'damage' and rights that the undocumented population have in spite of the policy.

Keywords: rights subjectivities; DACA lawsuits; Dreamers; Batalla Vidal v. Nielsen; dissent.

1. Introduction

When the Department of Homeland Security (DHS) rescinded the Deferred Action for Childhood Arrivals (DACA), one of the reasons argued was the litigation risk, considering that, some years previous, Texas and other American states had filed a lawsuit against a similar program, the Deferred Action for Parents of Americans (DAPA) and DACA's extension, and were successful in granting a preliminary injunction nationwide (State of Texas v. United States 2014). In addition, there was a significant pressure from the other memoranda of the then-Republican Government and its president, Donald J. Trump (Republican Party). However, such

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a move sparked resistance from the so-called 'illegal aliens': several lawsuits were filed by DACA beneficiaries, those that would be able to apply if the program had not been rescinded, associations and other American states. In total, the United States and DHS were faced to ten lawsuits, which were grouped in four main groups, considering geographical standing: CASA de Maryland v. US Department of Homeland Security (2017), Batalla Vidal v. Nielsen (2016), Regents of the University of California v. US Department of Homeland Security (2017), and National Association for the Advancement of Colored People v. Trump (2017). The latter three reached the Supreme Court of the United States (SCOTUS), which in June, 2020, decided on the illegality of rescinding DACA the way the government did (Department of Homeland Security et al. v. Regents of the University of California et al. 2020).

This very brief summary of the lawsuits may indicate a victory for the undocumented population, at least those that were DACA beneficiaries (Liptak and Shear 2020), and in many points it was. However, such lawsuits also emphasized some discursive aspects: cleavages among the undocumented population, identities of the ideal undocumented migrant, and how rights were represented and conceived. DACA's legality was not the only issue at stake, as a closer look into the lawsuits reveal a richness of arguments on rights, immigration, community belonging and life narratives.

Thus, the aim of this paper is to analyze how rights were argued in one of these lawsuits, Batalla Vidal v. Nielsen (2016). This case was selected due to being the first one filed, as an opposition to the preliminary injunction from Texas v. United States (2014), but had its object modified in light of the change of government and migration policies. In this sense, it is a lawsuit that tells a story about the rescission of DACA: the spark initiated by Texas v. United States (2014), the lack of Congress action, the pressure on changing immigration policies, and, in the middle of these fights for power, the life narratives of those who had DACA or could apply for the program to fulfil their dream. In the midst of such a competition, rights have been argued, and its subject was discursively altered – sometimes pointing towards an 'ideal type' of undocumented migrant.

The subject of rights is not conceived as a fixed category, but as provisional and temporary, emerging in moments of political struggle. It is a concept that results from action and, especially, when dissensus is argued (Rancière 2018). Therefore, I understand the subject of rights directly connected with his enactment of such rights. It is noteworthy that such rights are not performative, as they do not come into existence when argued; they are temporarily previous to their argumentation, as they are the rights that the rightless always had (Rancière

2004; May 2008). Nevertheless, I also understand that such political action could happen in courts, as law can be used in many creative ways (Silverstein 1996; M. McCann 2006) and may be the last resort of institutional access (Amenta et al. 2002). Thus, dissenting political action could also be legal action.

In order to do this, I proposed a qualitative case study of Batalla Vidal v. Nielsen (2016), in which the documents of the lawsuit tell the story of the struggles for DACA. I collected all the public documentation of this lawsuit at the website Civil Rights Litigation Clearinghouse, from the Law School of the University of Michigan[2]. The documents were uploaded to the software ATLAS.ti, and coded according to groups of arguments, which were 'DACA as policy' (criteria, approval, work authorization), 'DACAmented' (effects of the policy, life narratives comparing before and after DACA), 'DACAlimited' (perceiving the limitations of the policy, its rescission), and, finally, 'rights/entitlements'. Since Batalla Vidal v. Nielsen (2016) was filed first against the preliminary injunction from Texas v. United States (2014) and later amended to comprehend the DACA rescission, arguments on DAPA were not considered for this analysis.

This paper is organized in two parts, in addition to this introduction and the conclusion. In the first part, I review literature on the construction of the subject of rights through dissensus and I make a case for also considering lawsuits as *loci* for dissensus, using the Legal Mobilization framework. In the second part, I present a brief summary on DACA and how literature has analyzed its cleavages and limits. Finally, in the third part, I retell the lawsuit through presenting data analysis of its documents and focusing on the subjectivities of rights there argued. In the conclusion, I sum up the main arguments of this paper and indicate the next steps of this research.

2. Dissensus and lawsuits: expressing rights subjectivities in courts

Comprehending the subject of rights from a dissensus perspective in lawsuits demands two theoretical movements. First, I build on Jacques Rancière's political thought, considering how the author defines politics and dissensus, and in which conditions does the subject of rights emerges to claim for their rights (Rancière 2004). Secondly, I argue against such author on the impossibility of building political subjectivities in institutional arenas, especially in lawsuits. My main arguments are that institutions, in a broader sense, can be modified through bottom-up political activism (Skocpol 1992; Amenta et al. 2002), and that such activism can come from

[2] The website's address is: https://clearinghouse.net/.

the creative use of law, as observed by the Legal Mobilization framework (M. McCann 2006; Silverstein 1996). Thus, I present some of the contours of the theoretical framework that I have been developing.

Jacques Rancière's definition of the subject of rights can be understood from the standpoint of the differentiation that he makes between politics and *police*, and the relation of the former to a demand for political equality in the public scene (Cardoso 2020). According to the author, politics is neither the exercise of power, nor institutions and rules. It is defined according to itself, as a specific way of acting enacted by its subject (Rancière 1998b). Thus, it is precarious and provisional, a moment in which equality is argued despite of the definitions and names attributed by a *partage du sensible*[3] (Rancière 2018).

Opposed to politics is the *police*, which does not mean law enforcement agencies, but the responsible for operating the *partage du sensible*. It defines the names, functions and spaces of each thing and self. Its operation is complete: there are no blank spaces or gaps, as each one has their place and their function in the *partage* of the world (Rancière 1998b), as well as the definition of their visibility of enunciability in the public scene. It defines what can be seen and what can be heard in the common space, generating 'damage'[4] (Rancière 2018). Differently from an injustice, damage cannot be defined in a scheme of losses and rewards, since it defies the rules of the game itself: it questions the rules of visibility and enunciability (Fjeld 2018).

Therefore, politics works in redefining its own space, in creating gaps in the *partage du sensible*; it enacts manifesting *dissensus*, that is, a disagreement on such rules of visibility and enunciability defined by the police. As a concept, dissensus is the expression of options of the sensitive world in itself, demonstrating the existence of intervals of names, functions and spaces that were assumed as already defined (Rancière 1998b). It is a verification of equality in the public scene through the precarious manifestation of those who would be considered improper for it according to the police.

This is the framework in which Rancière introduces how he understands the subject of rights. As political subjects, they emerge in the moments of dissensus, challenging an assumption that they do not have the rights that they claim they have and always had (Rancière 2004). Thus, Rancière enables a view of rights, and those that constitute their subjects, that highlights the agency of those that emerge in the public scene to demand for the rights that they understand as theirs (Cardoso 2020). Demonstrating their double meaning, as inscriptions of

[3] I had some trouble in finding some correspondence in English to the idea of 'partage', which means both sharing and dividing. Hence, to avoid any confusion, I opted to keep the French term.
[4] From the French *tort* (Rancière 1998a).

the community that reinforce division and hierarchies, they are also what people do about them. Thus, rights can be summarized in the following paradox: '(…) the Rights of Man are the rights of those who have not the rights that they have and have the rights that they have not' (Rancière 2004, 302).

In this double approach to the meaning of rights, the author defies the definitions of their subjects, demonstrating that the subject of rights can emerge in processes of political struggle by affirming a construction of the self that is different of the identities attributed to them by institutions, government, and even the population of a certain country. Nevertheless, as he tends to identify institutions with the structure of the police, he hardly would assume that lawsuits could be an enactment of dissensus. Actually, he affirms the difference between the political and the legal disputes: "It is distinguished, first and foremost, from the legal dispute capable of being objectified as a relation between determined parties, adjustable by appropriate legal procedures" (Rancière 2018, 53).

If we consider legal dispute in a strict sense, that is, what happens exclusively on courts and focusing on the legal arguments presented, much in a winner-loser logic, it does seem that lawsuits would not be an ideal scene for the emergence of dissensus and of the subject of rights. However, this is a reductive view on the potential of law and bottom-up activism to challenge institutions and, perhaps, bringing change through dissenting from definitions of visibility and enunciability. I highlight two possibilities, already explored, to some extent, by literature: (i) bottom-down activism can change institutions and promote a demand for inclusion and equality (Skocpol 1992; Amenta et al. 2002; Gurza Lavalle et al. 2019); and (ii) law can be an instrument of such activism, both as, sometimes, the only means of accessing institutional power, and as a creative form of presenting new social categories and arguments. Winning a lawsuit, hence, is less important than the arguments presented in it and the impact caused by them (M. McCann 1996).

Recent literature on social movements indicate that the state is not completely alien to activism, and that it relates to social movements and civil society through a process of mutual constitution. Therefore, social demands could be brought into the state through a process of institutionalization (Skocpol 1992; Gurza Lavalle et al. 2019). Institutionalizing means bringing the agenda, social actors, or ideas into the state structure, finding or building what Skocpol (1992) called a *fit*, that is, a point of access to the state. More than the target of social actors' activities, this literature presents the state also as the background of their action, able to determine how they act. Depending on some factors, such as the possible longevity of social

gains, openness of power structure, and federal entity that could receive demands, social actors can decide for different strategies and targets inside the state (Amenta and Caren 2007; Amenta et al. 2002).

Institutionalization can become the target of social activism (Clemens 2010), as well as it can assume different form depending on the objectives of collective action. Szwako and Gurza Lavalle (2019): positional, referring to occupying offices in the state structure; technical-practical, directly related to policy tools; programmatic, which affects how policies and programs are formulated; and, finally, symbolic, describing the input of social categories in the state's operation. Nevertheless, despite the studies on these different forms (Gurza Lavalle et al. 2019; Dowbor 2012), little has been explored on the institutionalization through the access to courts, especially in the creative use of law by social actors.

As noted above, recurring to law and the Judiciary may be of value when other state structures seem closed to social demands – as would be the case of an Executive power that does not recognize mobilization in defense of migrants' rights and the lack of Legislative action on the matter. Also, when time is vital in the protection of minorities and social groups, courts can provide fast remedies in comparison to the creation and approval of laws. Finally, depending on the state's structure, the Judiciary has a more active role, not only promoting what is written on rules, but also defining interpretations and entitlements through binding interpretations[5]. In this sense, bottom-up activism and the search/building of fits could also apply to the Judiciary.

The Legal Mobilization literature has demonstrated that, contrary to a top-down approach to Law, much of it is constructed 'bottom-up', that is, through processes of building legal consciousness, mobilization, and even resistance to legal orders (M. McCann 1996). It is an analysis of the judicial system not from the institutional actors, but from those that access such a system and seek remedies through it (Maciel 2011). Silverstein (1996), when analyzing the animals' rights mobilization, indicates that law is not only the laws and regulations of the country, but also how people perceive and react to such norms, as well as what is built on their meanings and concepts through mobilization and resistance.

Before I explore such a possibility, there are some cautions that I must highlight. First, law has specific procedures and language, which may condition how the Judiciary power is accessed by social actors. Much of these specificities demand for the action of a law

[5] It is illustrative the case of common law judicial systems, in which courts' decisions are described as one of the sources of law(Dainow 1966).

professional, able to translate demands into rights, and the social text into judicial discourse (Engel and Munger 2003). While this translation may enable demands to become discursively stronger, as entitlements draw on limits which the state should not have crossed, something can be lost in this operation, and social actors may feel they have lost control of their own activism (Marshall 2006). Secondly, the Judiciary cannot create new policies, what limits the scope of the strategy (M. W. McCann 1995). Thus, there should not be an expectation on the creation of new substantive rules.

However, to use law as a strategy of collective action means to consider it as a set of meanings and symbols that work as cognitive lenses to articulate the mobilization of social groups (Martínez Carmona 2020). Law can be changed by its own creative mobilization, calling for new meanings and applications of already existing rules, as well as highlighting limitations to protecting rights. This calls to a bottom-up and case-by-case analyses of these operations, and, despite their little power to make generalizations, they demonstrate the influence of law in social processes in general (M. McCann 1996). Winning or losing a lawsuit is less important than the social impact they create, since the complaint to the decision.

From this the Legal Mobilization perspective, then, law constitutes and is constituted by society, and rules can be altered by new social meanings put forward. Silverstein (1996) indicates that the transformation of legal meanings – understood as all the legal concepts, expressions and practices that mold legal and moral behavior - occur in the margins and gaps of official rules and their interpretations, defying them and presenting new understandings. A lawsuit, or several of them, may create challenges in the institutional framework (or police framework, in a Rancièrian fashion) in order to seek for social gains, in spite of the legal result.

McCann (1995) describes how in lawsuits for women's rights at work did not result in positive rulings by courts, but built the basis for the movement and changed how many workers saw their rights at the workplace. When evaluating how the subject of rights is constructed inside lawsuits, this is similar to what we seek: it is less important the SCOTUS June 2020 ruling that President Trump could not end DACA the way he did, but how plaintiffs, both individual and collective argued that they, as subject of rights, who had important interests at stake, understood they had the right to keep DACA and its benefits. Therefore, the forming of a dissenting moment could be analyzed when winning or losing a lawsuit is no longer relevant to its social impacts. These are the main contours of the framework under development, in which dissensus, bottom-up state activism and legal mobilization are combined to understand why the DACA beneficiaries fought for the rights that they did not have.

3. DACA and its cleavages

Literature on the Deferred Action for Childhood Arrivals (DACA) has already demonstrated its timeline and much of the impacts it had in the United States. Many authors highlight the motivation behind its promulgation, the historical use of deferred action in immigration matters, the halt of its expansion by a court in Texas and, with the election of Donald J. Trump (Republican Party), its tentative of rescinding the DACA memo in 2017. These analyses have been rich in pointing what DACA was and was not, the cleavages it created among the immigration population, and how it does not resolve the need for an immigration reform. Thus, in this section, I briefly summarize recent findings of such literature in relation to DACA and the undocumented population. I highlight how DACA has been described, and how its impacts on the immigrant population have been reported.

DACA's timeline begins before 2012, in the activism that prompted the Obama administration (Democratic Party) to create the program. Before DACA, there was the *Development, Relief and Education for Alien Minors Act* (DREAM Act), first proposed in 2001 by Dick Durbin (Democratic Party) and Orrin Hatch (Republican Party), which aimed at providing relief for those who entered as children in the United States. It was not approved in the legislation, nor in the following times it had been presented (Bono 2014). Concomitantly, the events of September 11, 2001, provided the background for a series of policy changes in immigration policies, being noticeable the change of the Immigration National Service (INS) into Immigration and Customs Enforcement (ICE)[6].

After approximately ten years of ICE's activities, in 2010, undocumented youth started a movement for immigration rights, under the motto 'Undocumented and Unafraid', organizing marches, acts of civil disobedience and elevating their mobilization from the local to the federal level (Ramírez Solorzano 2016). It is reported that the undocumented status can impact a person's development, especially young people, as they cannot go through the cultural rites of the country due to the lack of documentation and the constant fear of being removed (Benuto et al. 2018; Cebulko and Silver 2016). Therefore, DACA is a result of this mobilization, what explains why one of the administrations that deported the most was also responsible for creating the program (Johnson 2018).

[6] Interestingly, this is described in a DHS's document included in the administrative record of Batalla Vidal v. Nielsen (2016).

Hence, in opposition to the Congress' lack of consensus for passing an immigration reform, the Obama administration promulgated a policy in which undocumented migrants who entered in the United States when children, and met a range of other criteria, could apply and, thus, not fear deportation for a 2-year period (Alulema 2019; Bono 2014; Johnson 2018; Rheinstrom 2016). DACA would not provide a pathway to citizenship nor amnesty, but a status of liminal legality. However, even in its 2012 form, DACA faced opposition. Bono (2014) describes a lawsuit from 2012 whose plaintiffs were ten ICE agents from Texas questioning the constitutional and statutory validity of DACA. This would later be accompanied by Texas v. United States (2014), which challenged the DACA expansion of 2014 and a similar program for the parents of American children. As the latter is important to analyzing Batalla Vidal v. Nielsen (2016), I will return to this legal dispute later.

Nevertheless, these disputes were not the only difficulty caused by DACA. The program created cleavages inside the undocumented population, both due to its criteria and the clash with local policies. It seemed that there were undocumented migrants with 'more rights' than others, and due to factors they could not control, such as age and the year they entered the United States. At the same time, those that could apply for DACA, and had the differed action approved – called the DACAmented –, did not have the same rights of citizens and, in some states, this was significant, as local policies tended to limit the access to the benefits that DACA sought to guarantee. These were the DACAlimited (Benuto et al. 2018). It was as if there was an intermediary category of the subject of rights, one that could only have access to benefits, as opposed to rights.

Literature has also highlighted a profile of the undocumented that benefitted from DACA: young (between 20 and 30 years old), single, English speakers, educated and seeking higher education or working. Most of them were born in Latin America and had a high participation in the formal labor market (Alulema 2019). Nevertheless, this indicates a possible construction of an ideal identity of this migrant – a projection f who they should be. I will explore this in the next section, while describing some of the discursive resources used in Batalla Vidal v. Nielsen (2016). DACA was experienced very differently depending on the local background (Cebulko and Silver 2016).

In 2014, when the Obama Administration decided for an expansion of DACA and a similar policy for immigrant parents, the opposition escalated to the courts. The result was a nationwide preliminary injunction that halted the expansion of the program (State of Texas v. United States 2014) and created even more conflicts and confusion surrounding the legality of

DACA (Bono 2014). With the election and the inauguration of Donald Trump (Republican Party), the federal Executive closes to the undocumented agenda, confirming the result of Texas v. United States (2014) and rescinding the DACA 2012 memo in September 2017. This sparks a series of political and legal struggles. The use of lawsuits was not novel for immigration lawyers (Bono 2014), and the first of them, proposed as a result of Texas v. United States (2014), was adapted to the DACA rescission, illustrating the policies and discursive changes of the Trump administration. In the next section, I turn to this lawsuit, Batalla Vidal v. Nilsen (2016).

4. Batalla Vidal v. Nielsen (2016)

Batalla Vidal v. Nielsen (2016) is a lawsuit that tells many stories: how DACA was extended and then rescinded; how DACAmented noticed they were DACAlimited; but, especially, stories of people, and how they perceive and struggle for their rights. It was, originally, filed against a liminal injunction from Texas v. United States (2014), which halted DACA's expansion nationwide. I called this as the first moment of the lawsuit. However, when the government changed, the policy was itself at stake, and the complaint was adapted to cover DACA's tentative rescission in September 2017 – its second moment. Due to limitations of space, and to the objectives defined above, I will focus on the transition between DACAmented to DACAlimited and the formulation of rights subjectivities.

In the first moment of Batalla Vidal v. Nielsen (2016), DACA is presented as a policy, and much of the discourse refers to its criteria and expansion. As there was a certain stability of the policy at the time, legal arguments were focused on keeping its expansion, challenged by the liminal injunction from Texas v. United States (2014). Thus, much of the arguing was that they were 'entitled to' relief: the liminal injunction had a nationwide effect, hampering those that were never part in the lawsuit, nor lived in any of the states that were against DACA's expansion. Entitlement here was drawing a limitation on what courts could do, as they should observe territorial limits and consider the interests of those who had paid for the extension.

The individual plaintiff viewed himself as DACAmented and entitled to the extension; his life narrative was presented in order to demonstrate how he met all of DACA's criteria and had applied – with success – for its extension. Batalla Vidal is described as educated, working to support himself and his family, seeking higher education and participant in his community. The inclusion of Make the Road New York as plaintiff, in the amended complaint, adds his participation in the undocumented community, orienting others to seek for the policy. I

highlight once more that DACA did not provide a pathway to citizenship or legal status – only deferred action. Nevertheless, this 'tolerated permanence' – as described by part of the literature (Bono 2014; Johnson 2018) – was enough to grant some *quasi-rights*, that is, benefits that seemed as rights, but were not.

Indeed, when drawing a cloud of words in ATLAS.ti from this first moment (Figure 1), the main words are related to the lawsuit: plaintiffs' and defendants' names, references to rules and Texas v. United States (2014). The main words related to DACA's benefits are 'employment' and 'authorization', which illustrate much of what was at stake at that moment and what was the most valued of DACA's expansion, the possibility of a three-year expansion of work authorization. Resorting to life narratives, the reader discovers that this allowed the undocumented migrants to seek and obtain better paying jobs, as well as ensured employers of the stability of their employee in the country.

Figure 1: Cloud of words of Batalla Vidal v. Nielsen's (2016) first moment: before DACA's rescission

Source: Own elaboration at ATLAS.ti, from the public documents of Batalla Vidal v. Nielsen (2016).

In the figure above, it is also noteworthy how 'rights' do not figure between the most frequent words in this phase of the lawsuit. In fact, when 'entitlements' are mentioned, they refer to relief, in this sense, to a negative conception of rights – rights as limitations to what the state can or cannot do, exercised through a complaint to the Judiciary. Dissensus is not operating in this first moment, as the arguments seem to focus more on an injustice: institutional rules allow the DACAmented population to argue that they have suffered losses from the liminal injunction from Texas v. United States (2014). Relief can be read here as the rewards they are entitled to.

DACA's rescission in September 2017 was a turning point, not only for all the DACAmented population, as fears of deportation resurfaced, and the limitations of DACA became more evident, but also for the language of rights employed in the lawsuit under analysis. They no longer were entitled to a relief, considering that the rule was no longer appliable; they had to focus on what were the 'damages' generated by the end of DACA, that is, what this movement of the undocumented population back to the shadows would indicate, as well as to try to convince the courts that such an administrative act could not be in accordance with laws applying to the administrative procedure.

In technical terms, the lawsuit suffered important modifications. Many individual plaintiffs were included, and life narratives were adapted to include how DACA had changed their lives and of the community they lived in. However, it is possible to discern, in such life narratives, the emphasis on an 'ideal type' of migrant – studying and/or working, socially and economically participating in his community and, except for their entrance in the country, law-abiding people. Recipients of DACA are, therefore, described as 'model' people, whose lack of a citizenship and legal status hampers the possibility of them achieving their full potential. We read, in the second amended complaint:

> Plaintiff Carlos Vargas ("Mr. Vargas") is a recipient of DACA. He resides in Staten Island, New York. […] He came to the United States with his mother, who was struggling to raise Mr. Vargas and his siblings after Mr. Vargas's father passed away two months before he was born. Mr. Vargas has lived in New York City since he was four, and in Staten Island since he was sixteen. *Mr. Vargas began working in restaurants at age thirteen to help his family*, leaving school at 3 P.M. and working shifts from 4 P.M. to midnight, five days a week. He had hoped to attend college but was told by a school counselor that he could not attend because he was undocumented. After graduating from James Madison High School in Brooklyn, *Mr. Vargas began working sixty hours per week to support his family, while remaining committed to going to college and earning a degree*. Mr. Vargas learned that his undocumented status would not prevent him from enrolling in CUNY College of Staten Island ("CUNY CSI"), provided he could pay his tuition without government loans. […] Mr. Vargas applied for DACA in August 2012. His application was granted on December 13, 2012. DHS renewed his DACA on November 14, 2014 and again on September 14, 2016, with his current grant expiring on September 13, 2018. Mr. Vargas is no longer eligible to renew DACA as a result of Defendants' termination of the program. DACA allowed Mr. Vargas to obtain work authorization and a New York driver's license for the first time in his life, thereby opening up new employment and life opportunities. (Second Amended Complaint, Batalla Vidal v. Nielsen 2016, 7–9, author's emphasis)

As noted above, the DACAmented are described as migrants that sought higher education and, mostly without governmental loans, worked long hours to pay for it. When DACA was approved, 'new employment and life opportunities' were opened, enabling a

movement of visibility without the fear of deportation. However, much is halted by the impossibility of renewing DACA once again – as if they were forced to move back to the conditions of invisibility and lack of enunciability. Mr. Vargas's life narrative, above, illustrates this point, as he could not, at first, seek aid for enrolling in a university due to his permanence status. They can no longer argue for losses, in terms of an injustice, but there is clearly a 'damage' for the undocumented population and the community as whole.

The lack of rules and the necessity of 'moving back' to a state in which the undocumented population had to remain occulted and recur to false information and documentation (Benuto et al. 2018) is demonstrated in all life narratives contained in the Second and Third Amended Complaints. Similar to Mr. Vargas's narrative, individual plaintiffs demonstrate what they would lose in terms of benefits and public appearance with the end of DACA. They no longer argue for a negative conception of entitlements, but insist on this movement backwards, of a 'damage' being caused to themselves, the community and the state, especially in an economic sense.

Also, with the program's rescission, DACAlimited gains a new meaning: DACA, as a policy that did not provide a pathway for citizenship nor a legal status, was in itself limited, and its benefits could be suspended with a change in government. Hence, such limitations were intrinsic to DACA, and the lack of Congress action was evidenced by how the policy could be easily suppressed. This leads to a change in the most recurring words in the lawsuit (Figure 2, below), which now seems highlight 'immigration' and 'deferred action'.

Figure 2: Cloud of words of Batalla Vidal v. Nielsen's (2016) second moment: after DACA's rescission

Source: Own elaboration at ATLAS.ti, from the public documents of Batalla Vidal v. Nielsen (2016).

Once again, there are many words referring to the legal procedure. But a closer look demonstrates how 'authorization' and 'employment' are no longer the main points, being substituted by words referring to the policy and deferred action more generally. It is noteworthy the appearance of 'individuals', 'injury' and 'right' at the margins of the cloud of words, indicating a focus, from the illegality of a nationwide liminal injunction to the existence of interests and negative impacts of the end of a policy, and discursive change, as the claim is no longer for relief but for the maintenance of DACA.

The rights grammar is marginal in such argumentation – in fact, little does it appear when defending the necessity of DACA for the community and the economy. There is a continuance of a negative claim of rights, in the sense that there are procedural limits for the end of the program; nevertheless, by presenting life narratives and the injuries directly connected to the September 2017 rescission, there is an underlying argument of an inevitable 'damage', that is, forcing the DACAmented back into the shadows and removing their contributions from the public scene. In a Rancièrian fashion, forcing them back to a state of a counting error, in the only place that they understand as their home.

Therefore, they argue for a 'right' of keeping DACA effective, a right that is denied by the Trump administration. And they claim such right based on the benefits their visibility and enunciability bring to the community, such as providing care for immigrants and American citizens, contributing through taxes or business, seeking higher education. There might be a negative impact of insisting on such 'ideal' that is constructed through this argumentation (something to be explored in farther studies), but it proves effective in, at least, moving forward the lawsuit, both in society and in courts.

Fourteen *amicus curiae* briefs[7] were annexed to Batalla Vidal v. Nielsen (2016), repeating much of the claims already mentioned above, and they supported a preliminary injunction to keep DACA operating, at least for those who were already DACAmented. In addition, the case received media coverage, which emphasized the arguments of the

[7] These *amici curiae* were: 114 Companies; Partnership for Educational Justice, Delawarecan: the Delaware campaign for achievement now, Hawaiikidscan, Newmexicokidscan, and Virginia Excels; 40 Historians and the Fred T. Korematsu Center for Law and Equality; Public Education Groups; Current and Former Law Enforcement Leaders; Service Employees International Union, American Federation of State, County and Municipal Employees, Communications Workers of America, United Farm Workers of America, and International Union of Painters and Allied Trades; Legal Services Organizations; New York University; Latinojustice PRLDEF, et al.; Government of the United Mexican States; 87 Religious Organizations; Public Interest Organizations; the City Of Los Angeles, 27 Additional Cities and Counties, the National League of Cities and the United States Conference of Mayors; and the Lawyers' Committee for Civil Rights under Law, the Anti-Defamation League, and other Civil Rights and Social Justice Organizations (Amicus Curiae Briefs, Batalla Vidal v. Nielsen 2016).

undocumented population and the anti-immigration campaign speeches of Donald J. Trump (Liptak and Shear 2020).

Batalla Vidal v. Nielsen (2016) was one of the lawsuits that reached the SCOTUS, but still in a very initial phase of the legal procedure: only documents were attached, and no hearings were held to provide a wider factual basis for all plaintiffs' claims. Actually, the DACA lawsuits were sent to SCOTUS due to a defendants' *writ of certiorari*, which restricted the court's decision to what was already inside the lawsuit. Nevertheless, in June 2020, SCOTUS decided on the illegality of ending DACA through the September 2017 Memorandum, which did not follow adequate procedure for rescinding a policy as wide in effects as DACA. It was determined that the 2012 Memorandum should be reinstated in its integrity, and DHS should receive new applications and renewal requests. In general, a victory for the DACAmented population.

4. Conclusion

In this paper, I have analyzed, briefly, some documents of the lawsuit Batalla Vidal v. Nielsen (2016) to understand how rights' subjectivities were argued in the two moments of the legal case: before and after the rescission of DACA. Using a theoretical framework that I have been developing, I tried to demonstrate how 'dissensus' could be argued in institutional backgrounds, such as the access to courts. In this analysis, two main specificities were observed: the discursive change of 'injustice' to 'damage' and a focus on injuries and individualities. These discursive transformations were relevant for our theoretical framework.

First, arguing for a 'damage' instead of an 'injustice' reveals a moment previous to establishing the laws and the regimes of visibility and enunciability, which is directly connected to the argument of being forced back to the shadows, repeated in the life narratives that are part of the factual arguments of Batalla Vidal v. Nielsen (2016). DACA, as a policy that granted benefits, created a system of losses and rewards; nevertheless, when its rescission was at stake, it became difficult to argue in terms of an 'entitlement' to keeping the benefits. The provisional and precarious condition of the policy, exacerbated by the change of administration, created the need to change the discursive record of the case, and make a case for the injuries and damages that its end would cause.

The presentation of injuries made necessary the focus on life narratives, which brough to the case rich individualities – that is, no longer only the facts of what was necessary to halt Texas v. United States' (2014) nationwide liminal injunction, but the lives that would suffer for

the rescission of program. The inclusion of other individual plaintiffs gives wait to such observation: life narratives constituted much more of the complaint than the legal arguments, and the clouds of words referred above (Figures 1 and 2) illustrate how this change enabled the discussion of more general immigration matters. Nevertheless, I emphasize the creation of an 'ideal' type of undocumented migrant, an effect that could increase the cleavages of DACA already observed by the literature.

Batalla Vidal v. Nielsen (2016) was selected due to its own timeline, as a lawsuit that captured the moments before and after the rescission of DACA, and it revealed itself as rich in consequences, since it allowed the observation of a discursive change. Life narratives gained more weight in the argumentation, as well as 'relief' and 'losses' were substituted by the demonstration of injuries and damages of returning the DACAmented population to the shadows. In addition, despite the lack of explicit arguing for rights, they were present in a negative conception, that is, of reaffirming the limitations of the state in face of provisional benefits that were granted to this population, a precarious solution to a much-needed immigration reform in the United States.

Therefore, this is a lawsuit that needed to argue a form of 'dissensus', even if aware of the limitations of mobilizing the courts. It revealed a creative use of the law to halt an administrative act that could cause injury to part of the undocumented population, in which the language of rights was not explicit, but worked to transform how the benefits of DACA were perceived. They were presented when life narratives and 'interests' were demonstrated to factually base the legal foundations of the lawsuit. This led to a positive result at SCOTUS, and the recognition that DACA, because of its effects, had a different status from other administrative policies: interests of the undocumented population should be taken into consideration before removing it.

As on-going research, I highlight, however, that this study still needs to be expanded, both in terms of the theoretical framework and the cases included in the analysis. The theoretical framework is under development, hence more specificities need to be added. Rancière's 'dissensus' perspective poses many challenges for the Legal Mobilization framework, and such rich dialogue between them demands for a more detailed analysis. In this paper, I have presented only its main contours and what can be observed by applying them. Considering the cases, Batalla Vidal v. Nielsen (2016) is only one of the lawsuits proposed to halt the rescission of DACA and, since they were grouped according to territorial criteria, it is necessary to expand

our sample to understand how the other cases, from different places of the country, impacted the argumentation in defense of DACA and our theoretical framework.

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