

Movement Lawyers in the Fight for Immigrant Rights

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ABSTRACT

As immigration reform initiatives driven by established advocacy organizations in Washington, D.C. were successively defeated in the mid-to-late 2000s, movement-centered organizations and newly created formations of undocumented youth mobilized against the federal-local immigration enforcement regime of the Bush and Obama administrations. This mobilization included a mix of community organizing, litigation, policy and media advocacy, and direct action tactics. Lawyers supported movement-centered social change campaigns as counsel to existing organizations and to the undocumented youth groups that grew, evolved, and multiplied during this period. Drawing on media, scholarly, and first person accounts, this Article describes the campaigns that constituted the anti-enforcement mobilization between 2009 and 2012, with particular focus on the range of roles played by lawyers and the implications of that repertoire in theorizing about resistance to legality and the place of law and lawyering in social movement activism.

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INTRODUCTION

In the last decade, social movement organizations and newly created formations of undocumented youth mobilized against the immigration enforcement regimes of the Bush and Obama administrations. This mobilization included a mix of community organizing, litigation, policy and media advocacy, and direct action tactics. Lawyers supported movement-centered social change campaigns as counsel to existing organizations and to the undocumented youth groups that grew, evolved, and multiplied during this period.¹

The first phase—between 2009 and 2012—is the subject of this Article.² As immigrant activism was ascendant due to the political maturation and engagement of a generation of mostly undocumented youth, lawyers worked with social movement organizations and newly created activist groups to advance a series of organizing initiatives against the detention and deportation regime. They confronted entrenched white supremacist forces in Arizona terrorizing immigrant communities through racial profiling and criminalization.³ They simultaneously faced incumbent policy advocates in Washington, D.C. waiting for a grand deal that would both expand immigration enforcement and offer an extended and highly contingent route to citizenship for undocumented residents.⁴ In this environment of instability and inefficacy, movement actors and lawyers waged surprisingly successful campaigns to discourage local authorities from enforcing federal immigration law and to defend immigrants from interior enforcement through categorical grants of relief from deportation. This Article looks closely at how those campaigns unfolded, with particular focus on the role of lawyers engaged in collaborations with movement leaders, activists, and constituents.

This work extends and complicates at least two sets of legal academic literatures. First, within socio-legal studies, a group of scholars—most prominently,

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1. This Article refers to movement formations as composed of undocumented activists, though individuals with a variety of legal statuses were core members.
 2. The latter two phases extend from 2012 to 2014 when newly emboldened immigrant activists engaged in extra-legal activities, including civil disobedience, that illuminated foundational alterations in immigrant defense lawyering and governing ethical frameworks. Between 2014 and 2016, the immigrant rights movement confronted a nation-wide federal court injunction. I will discuss these latter phases in subsequent work. Another delineation: this Article focuses largely on the Southern California node of a nation-wide, complex, and multi-polar social movement of immigrant activists. It is not intended to be a complete history of all of the social movement organizations active in the field in this period.
 3. See discussion *infra* Section I.B.
 4. See discussion *infra* Sections I.A, I.B.

Patricia Ewick and Susan Silbey⁵ and Austin Sarat⁶—have engaged in qualitative research on how individuals resist legal regimes in everyday life. Their findings expand how we conceive of law and legality: as formal and informal, constraining and liberating, immersive and iterative. However, as it redefines law and resistance, this literature pays less attention to the roles of lawyers, perhaps due to the overarching effort to expand the field of study beyond courtrooms and legislative chambers where lawyers predominate. The narrative of social movement mobilization documented in this Article portrays resistance activities largely outside of those formal venues of law. However, lawyers remain a part of the story, as facilitators, enablers, and defenders, especially as governing regimes adapt and deploy legality to abate burgeoning resistance. If we work to uncover a process of resistance rather than individual acts in isolation, we can begin to disaggregate the essential roles of participants in that process. This Article describes a process of resistance in the context of immigrant rights advocacy and discerns a distinctive role for lawyers, particularly in efforts led by laypeople to reconstruct legality.

Second, this Article extends and renews the critical legal academic literature on public interest lawyering, exemplified by the work of Gerald López,⁷ Lucie White,⁸ Tony Alfieri,⁹ and others. Following a wave of critical studies within the legal academy, these authors captured disillusion with public interest law in the aftermath of the civil rights era and in the midst of Reagan-era assaults on poor people and the social safety net. They looked to the bottom within the United States or to the Global South to unearth stories of collaborations between lawyers and clients. Consistent with the client-centered advocacy ideology being advanced in clinical legal education at the time,¹⁰ these scholars were particularly attentive to the problem of lawyer domination in relationships with poor clients. The result was a body of work that charged generations of law graduates with the responsibility to respect and defer to laypeople, to advance the agency of

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5. See generally Patricia Ewick & Susan S. Silbey, *Conformity, Contestation, and Resistance: An Account of Legal Consciousness*, 26 NEW ENG. L. REV. 731 (1992) [hereinafter Ewick & Silbey, *Conformity*]; Patricia Ewick & Susan Silbey, *Narrating Social Structure: Stories of Resistance to Legal Authority*, 108 AM. J. SOC. 1328 (2003) [hereinafter Ewick & Silbey, *Narrating*].
 6. See generally Austin Sarat, “. . . *The Law Is All Over*”: *Power, Resistance, and the Legal Consciousness of the Welfare Poor*, 2 YALE J. L. & HUMAN. 343 (1990).
 7. See, e.g., Gerald LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (1992).
 8. See, e.g., Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 BUFF. L. REV. 1 (1990).
 9. See, e.g., Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659 (1987–88) [hereinafter Alfieri, *Antinomies of Poverty*]; Anthony V. Alfieri, *Impoverished Practices*, 81 GEO. L.J. 2567 (1993).
 10. See, e.g., DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977).

clients, and to put aside the grander visions of lawyer-centered social change harbored by preceding generations. Like the recent historical work on the long civil rights movement,¹¹ this Article brings to the surface recessive threads of ambitious public interest lawyers and activated collectives dynamically collaborating with a higher level of engagement, solidarity, and efficacy than contemplated in earlier scholarly work.

This Article also contributes to a much-needed collection of works focused on contemporaneous movement lawyering, including focus on the roles of lawyers supporting Black Lives Matter-affiliated groups around the country, as well as environmental justice, Indigenous Peoples', Title IX, and transgender activism. In this particular moment in American political culture, the propagation of accounts of activists and lawyers engaged in creative social justice campaigns is a worthy end in and of itself.

Part I of this Article sets out the mobilization narrative of immigrant rights activists fighting for movement control, who were supported by lawyers located outside of the most prominent public interest litigation shops in the field. The arc of the story moves from renewed hope for a path to citizenship at the dawn of the Obama era to disappointment, recalibration, and renewal. Part II situates the mobilization narrative within socio-legal studies on resistance to legality and sets forth a process of resistance with an essential role for allied lawyers. As described below, movement actors resist legality and attempt to reconstruct it, particularly when their very existence as participants in the polity is at stake. Lawyers support that existential turn to reconstruction. Part III sets out the core features of movement lawyering as documented in this immigrant rights narrative, including the development of critical movement infrastructure—both ideational and organizational, co-generation of resources for organizing, and accompaniment and openness to transformation. This Article concludes with a brief reflection on the meaning of this mobilization narrative in the Trump era.

I. MOBILIZATION

The campaigns waged by immigrant advocates between 2009 and 2012 culminated in the announcement by President Obama of relief from deportation

11. *See, e.g.*, TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT (2011); SUSAN D. CARLE, DEFINING THE STRUGGLE: NATIONAL RACIAL JUSTICE ORGANIZING, 1880–1915 (2013); KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER (2012).

for undocumented youth with strong ties to the United States.¹² The Deferred Action for Childhood Arrivals program (DACA) was a significant and surprising victory for a determined network of undocumented youth activists and their allies. This Part discusses the mobilization that led to this victory in four stages: first, the initial hope for comprehensive immigration reform (CIR)¹³ offered by the election of President Obama and Democratic majorities in both houses of Congress; second, the failure of legislative reform and the rise of an advocacy network opposed to some of the tactics and goals of the incumbent political actors; third, the continued expansion of immigration enforcement in the interior of the United States and the need for creative advocacy responses; and fourth, the policy struggle that led to the establishment of DACA.

A. Legislative Opportunity

Immigration advocacy organizations agitated to create a path to naturalization for the undocumented in the 2000s against a backdrop of policy and cultural shifts precipitated by 9/11. Immigration enforcement—first at the Department of Justice and later at the Department of Homeland Security—became a central site within the federal government for the Bush Administration’s “war on terror.”¹⁴ Government actors deployed their enhanced enforcement capacity against Latinx communities,¹⁵ while immigration restrictionists outside of government crafted “a powerful apocalyptic narrative, relying on emotionally evocative metaphors

12. Press Release, Office of the Press Sec’y, The White House, Remarks by the President on Immigration (June 15, 2012, 2:59 PM), <https://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration> [<https://perma.cc/Y9AU-GJEN>].

13. Comprehensive immigration reform proposals have varied in content but have generally included increased border security, immigration verification requirements for employers, and a pathway to citizenship or conditional immigration relief for undocumented immigrants already living in the United States. A recent example is S. 744, 113th Cong. (2013).

14. David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 RUTGERS L.J. 1, 5, 17–19 (2006) (outlining the advantages offered by immigration law in enforcement efforts against individuals alleged to be involved in terrorist activity).

15. See Nicholas De Genova, *The Production of Culprits: From Deportability to Detainability in the Aftermath of “Homeland Security”*, 11 CITIZENSHIP STUD. 421, 427–28 (2007). I refer to members of immigrant communities with origins in Mexico, Central and South America, and parts of the Caribbean basin as “Latinx” in this Article. See Raquel Reichard, *Why We Say Latinx: Trans & Gender Non-Conforming People Explain*, LATINA (Aug. 29, 2015), <http://www.latina.com/lifestyle/our-issues/why-we-say-latinx-trans-gender-non-conforming-people-explain> [<https://perma.cc/P8A9-AKNP>].

and synecdoches to shift the debate in an anti-immigrant direction by making immigrants synonymous with criminals, and then terrorists.”¹⁶

Between 2001 and 2008, established advocacy organizations worked to construct the counter-narrative of the “DREAMers,” talented young undocumented students deprived of equal opportunity due to their lack of legal status.¹⁷ Senator Orrin Hatch and Representative Luis Gutierrez had introduced the first iteration of the DREAM (Development, Relief, and Education for Alien Minors) Act just before 9/11 on August 1, 2001.¹⁸ The legislation would have allowed those undocumented residents of “good moral character” who had come to the United States at a young age and had since completed high school to adjust their status and avoid deportation.¹⁹ Later versions of the bill also promised a path to naturalization to U.S. military enlistees.²⁰ According to sociologist Walter Nicholls, established advocacy organizations devised the DREAMer campaign in Congress and controlled its messaging in the public sphere.²¹ Nicholls goes on to describe the strict framing imposed on participants in the political organizing:

[T]he leadership centralized message production, structured messages through the use of talking points, and silenced utterances and symbols that detracted from the core argument. Just as important, they disci-

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16. Julie Stewart, *Fiction Over Facts: How Competing Narrative Forms Explain Policy in a New Immigration Destination*, 27 SOC. F. 591, 609 (2012); see, e.g., Mark Krikorian, *Keeping Terror Out*, NAT'L INT., Spring 2004, at 77, 78. “Restrictionists” seek to limit immigration, while “restrictionism” refers to a policy or philosophy favoring the restriction of immigration. See Daniel Kanstroom, *Crying Wolf or a Dying Canary?*, 25 N.Y.U. REV. L. & SOC. CHANGE 435, 455–56 (1999) (book review) (discussing definitions of restrictionism).
17. WALTER J. NICHOLLS, *THE DREAMERS: HOW THE UNDOCUMENTED YOUTH MOVEMENT TRANSFORMED THE IMMIGRANT RIGHTS DEBATE* 13–14 (2013). The National Immigration Law Center (NILC) and the Center for Community Change were the primary drafters of the DREAM Act and advocated for it in Congress. *Id.* at 31. NILC later helped found United We Dream, “a site where national rights associations worked with youths to produce the core messages of the campaign.” Walter J. Nicholls & Tara Fiorito, *Dreamers Unbound: Immigrant Youth Mobilizing*, NEW LAB. F. (Jan. 19 2015), <http://newlaborforum.cuny.edu/2015/01/19/dreamers-unbound-immigrant-youth-mobilizing/> [<https://perma.cc/W4VX-5FVF>]. Nicholls characterizes these organizations, and a few others noted below, *infra* note 41, as “well-established advocacy organizations” in possession of cultural and symbolic capital that they shared with immigrant youth activists. NICHOLLS, *supra*, at 13. I refer to these organizations collectively as the “established advocacy organizations” throughout this Article.
18. S. 1291, 107th Cong. (2001).
19. *Id.* § 3(a)(1)(e). But see Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101, 141–54 (2013) (criticizing the DREAM Act framework for determining worthiness); Fanny Lauby, *Leaving the ‘Perfect DREAMer’ Behind? Narratives and Mobilization in Immigration Reform*, 15 SOC. MOVEMENT STUD. 374, 380–82 (2016) (noting that the DREAMer narrative focused on the relative deservingness of a subset of the undocumented population).
20. See S. 1545, 18th Cong. § 5(d)(2003).
21. NICHOLLS, *supra* note 17, at 13–14.

plined undocumented youth activists who were responsible for carrying the message into the public sphere. . . . Training sessions helped socialize youth activists into the DREAMer discourse, shaped their views of their place and rights in the country, and contributed to forming individual undocumented youths into a common political subject with common worldviews, aspirations, and emotional dispositions.²²

The established advocacy organizations worked closely with allies in Congress to create a class of “good” undocumented immigrants especially deserving of a path to naturalization.

Introduction in 2005 of an “enforcement-first” bill by Representative Jim Sensenbrenner telegraphed that many in power believed there are no “good” immigrants among those who have entered the country illegally. The Border Protection, Anti-Terrorism and Illegal Immigration Control Act (the Sensenbrenner Bill) emphasized the perceived need to crack down on the undocumented population in the United States.²³ The bill would have changed an initial illegal entry from a misdemeanor²⁴ to a felony and increased criminal liability for anyone who assists an undocumented person in remaining in the United States, among other punitive enforcement measures.²⁵ The bill passed in the U.S. House of Representatives at the end of 2005²⁶ but failed to progress in the Senate.²⁷ Established advocacy organizations and new institutional players, such as state federations of hometown associations, services unions, ethnic radio, and religious organizations without prior involvement in advocacy, used the Sensenbrenner Bill to mobilize Latinx and immigrant communities.²⁸ In March 2006, one hundred thousand people marched in Chicago against the bill and in favor of CIR.²⁹ One month later, there were similar marches in 140 cities across the country; a second march in Chicago and in Dallas numbered in the hundreds of thousands.³⁰ The Comprehensive Immigration Reform Act of 2006,

22. *Id.* at 14.

23. See H.R. 4437, 109th Cong. (2005).

24. See Immigration and Nationality Act § 275(a), 8 U.S.C. § 1325 (2012).

25. *Id.* § 274, 8 U.S.C. § 1324.

26. H.R. 4437, 109th Cong., 151 CONG. REC. H12014 (2005).

27. S. 2454, 109th Cong., 152 CONG. REC. S3358 (2006).

28. See Louis DeSipio, *Drawing New Lines in the Sand: Evaluating the Failure of Immigration Reforms from 2006 to the Beginning of the Obama Administration*, in RALLYING FOR IMMIGRANT RIGHTS: THE FIGHT FOR INCLUSION IN 21ST CENTURY AMERICA 215, 216–18 (Kim Voss & Irene Bloemraad eds., 2011).

29. See Oscar Avila & Antonio Olivo, *A Show of Strength; Thousands March to Loop for Immigrants' Rights*, CHI. TRIB., Mar. 11, 2006, at A1.

30. See Laura Griffin, *Huge Rally in Dallas in Support of Immigrants*, N.Y. TIMES (Apr. 9, 2006), <http://www.nytimes.com/2006/04/09/us/09cnd-protest.html>; *Rallies Across U.S. Call for Illegal*

supported by the Bush Administration,³¹ passed the Senate in May 2006³² but was not taken up by the House.

The Bush Administration was unable to overcome the objections to CIR of Republican restrictionists, even as it moved aggressively to enforce immigration law in the field. On May 12, 2008, the Administration mounted the largest immigration raid in U.S. history at a meatpacking plant in Postville, Iowa, in which undocumented workers were rounded up, threatened with criminal prosecution, and subjected to summary immigration proceedings in makeshift courtrooms created specifically to process captives from the raid.³³ That same year, the Bush Administration initiated “Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens” (S-Comm), which expanded federal-local immigration enforcement coordination by automating information sharing and imposing mandated detention policies for immigrants caught up in local law enforcement.³⁴ Under S-Comm, a participating local law enforcement agency would run an individual’s biometric information through multiple databases, including one for civil immigration violations.³⁵ This would occur subsequent to any kind of arrest, even on minor charges or on charges later dropped.³⁶ U.S. Immigration and Customs Enforcement would then ask the local agency to hold an individual with a civil immigration violation on record for later transfer to federal authorities.³⁷ In September 2008, Congress appropriated funds to support the program.³⁸

Candidate Obama campaigned on fixing the immigration system and so raised the hopes of reformers.³⁹ However, the rollout of S-Comm continued

Immigrant Rights, CNN (Apr. 10, 2006, 10:08 PM), http://www.cnn.com/2006/POLITICS/04/10/immigration/index.html?section=cnn_us [<https://perma.cc/CJ7N-6W86>].

31. S. 2611, 109th Cong. (2006).

32. *Id.*

33. See Erik Camayd-Freixas, *Interpreting After the Largest ICE Raid in US History: A Personal Account*, 7 *LATINO STUD.* 123 (2009).

34. U.S. IMMIGRATION & CUSTOMS ENFT, *SECURE COMMUNITIES: A COMPREHENSIVE PLAN TO IDENTIFY AND REMOVE CRIMINAL ALIENS 1* (2009) [hereinafter *SECURE COMMUNITIES PLAN*], https://www.ice.gov/doclib/foia/secure_communities/securecommunitiesstrategicplan09.pdf [<https://perma.cc/9EYS-C7PD>]; see also U.S. IMMIGRATION & CUSTOMS ENFT, *SECURE COMMUNITIES PROGRAM PRESENTATIONS (2009–10)* [hereinafter *SECURE COMMUNITIES PRESENTATIONS*], https://www.ice.gov/doclib/foia/secure_communities/secure_communitiespresentations.pdf [<https://perma.cc/Z7AT-PZ7D>].

35. *SECURE COMMUNITIES PLAN*, *supra* note 34, at 2.

36. *Id.*

37. See *id.*

38. See *SECURE COMMUNITIES PRESENTATIONS*, *supra* note 34, at 4.

39. See Molly Ball, *Obama’s Long Immigration Betrayal*, *ATLANTIC* (Sept. 9, 2014) <http://www.theatlantic.com/politics/archive/2014/09/obamas-long-immigration-betrayal/379839> [<https://perma.cc/M4VB-C4EJ>].

unabated in his administration. For example, in January 2009, an ICE official initiated the program's implementation in California in a letter to the state Department of Justice requesting the execution of a memorandum of agreement.⁴⁰ Nevertheless, advocates were hopeful that they might see legislative progress on immigration reform under the new administration. In Washington, D.C. (and at more than forty events in thirty-five states), a broad coalition of labor, business, civil rights, religious, and community organizations joined together in June 2009 to announce the formation of Reform Immigration FOR America (RIFA).⁴¹ The coalition advocated a path to citizenship for the undocumented with an emphasis on preserving family unity, strengthening labor standards, and enforcing the border.⁴² RIFA deployed a "national text messaging system and various on-line organizing strategies" to begin mobilizing for the expected legislative push for comprehensive immigration reform.⁴³

B. Dissident Organizing

That push never came. The poor economy and high unemployment rate, the oppositional tack of the Republican minorities in both houses, and the focus of the Obama Administration and congressional leadership on the American Recovery and Reinvestment Act and the Affordable Care Act put immigration reform in suspension.⁴⁴ RIFA turned out 250,000 people for a demonstration in Washington, D.C. in March 2010 that did not move the needle in Congress.⁴⁵

40. Letter from David J. Venturella, Exec. Dir., Secure Comtys., to Linda Denly, Dep't of Justice (Jan. 23, 2009), http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/z_Personal/AJohnson/Venturella_Letter_090410.pdf [<https://perma.cc/4W82-VBPE>].

41. Press Release, Mark McCullough, Serv. Emps. Int'l Union, Reform Immigration FOR America Campaign Launched to Spearhead National Immigration Reform Effort (June 3, 2009), <http://old.seiu.org/2009/06/reform-immigration-for-america-campaign-launched-to-spearhead-national-immigration-reform-effort.php> [<https://perma.cc/EGQ5-YNQ6>]. Reform Immigration for America (RIFA) was funded by major foundations such as Atlantic Philanthropies and principal members included Center for Community Change, National Council of La Raza, and the National Immigration Forum. NICHOLLS, *supra* 17, at 43. NILC, Mexican American Legal Defense and Education Fund (MALDEF), National Day Laborer Organizing Network (NDLON) were members of the coalition but had less central roles. *Id.* at 44. Los Angeles's Coalition for Humane Immigrant Rights (CHIRLA) brought youth chapters from across California into the coalition and in its advocacy for comprehensive immigration reform. *Id.*

42. *Our Principles*, REFORM IMMIGRATION AM., <https://reformimmigrationforamerica.org/our-principles> [<https://perma.cc/VA9W-9CTJ>].

43. Press Release, Mark McCullough, *supra* note 41.

44. See Josh Hicks, *Obama's Failed Promise of a First-Year Immigration Overhaul*, WASH. POST (Sept. 25, 2012), <http://wpo.st/5XJQ2> [<https://perma.cc/FRQ8-8QVY>].

45. See N.C. Aizenman, *Broad Coalition Packs Mall to Urge Overhaul of Immigration Laws*, WASH. POST (Mar. 22, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/21/AR2010032100956.html>.

The legislative stasis, as well as the continued expansion of S-Comm by the Administration, strained relationships and alliances within RIFA. Immigrant youth leaders that were mobilized—and in some cases trained—by RIFA were less patient with the politicians than established advocacy organizations with close ties to the Administration and Congress. They began to agitate for the use of more aggressive tactics and different strategic goals.

Four undocumented students—Felipe Matos, Gaby Pacheco, Carlos Roa, and Juan Rodriguez—set out on foot on what they called the “Trail of DREAMS” on January 1, 2010, from Miami to Washington, D.C.⁴⁶ Five others—Marisol Ramos, Martin Lopez, Daniela Hidalgo, Jose Luis Zacatelco, and Gabriel Martinez—left from New York for D.C. on April 10.⁴⁷ The students were supported by state-based immigrant advocacy organizations in Florida and New York, as well as the National Day Laborer Organizing Network (NDLON) and Puente Arizona.⁴⁸ Juan Rodriguez recalled the moment in late 2009 that he was spurred to begin the campaign:

I’m leaving. . . . I can’t keep waiting for them to give me an answer, hoping that maybe SOMEDAY, someone will actually listen to my question. I can’t just stay here in my daily cycles acting like this way of life is manageable or bearable. It isn’t. It can NEVER be bearable to lose the people that we love. It can NEVER be bearable to wake up each morning and know that people in our communities have disappeared—taken in the darkness of the night by those that claim to be keeping our communities “secure.”⁴⁹

The Trail of DREAMS was motivated by a strong sense of frustration with the wait for progress in D.C., as well as the ongoing deportations and an expanding S-Comm program. On April 23, 2010, while the students were walking, Arizona Governor Jan Brewer signed SB 1070—the Support Our Law Enforcement and Safe Neighborhoods Act⁵⁰—into law.⁵¹ The legislation, drafted by then-law professor and “issue entrepreneur” Kris Kobach, carried forward the enforcement-only approach that animated the 2006 Sensenbrenner Bill and empowered local crim-

46. David Montgomery, *Trail of Dream Students Walk 1,500 Miles to Bring Immigration Message to Washington*, WASH. POST (May 1, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/30/AR2010043001384.html> [https://perma.cc/B7LR-2FGG].

47. *About*, TRAILDREAMS, <http://trail2010.org/about/#NYC> [https://perma.cc/LC8E-MR3X].

48. *Id.*

49. Juan Rodriguez, *New Year’s Day 2010*, TRAIL DREAMS (Jan. 1, 2010), <http://trail2010.org/blog/2010/jan/1/new-years-day-2010> [https://perma.cc/3ZVF-LHQM].

50. Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, 49th Leg., Reg. Sess. (Ariz. 2010) (codified in scattered sections of ARIZ. REV. STAT. ANN. titles 11, 13, 23, 28, 41).

51. Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES (Apr. 23, 2010), <http://www.nytimes.com/2010/04/24/us/politics/24immig.html> [https://perma.cc/KJ2Z-QN76].

inal justice actors in Arizona to stop, arrest, and convict those suspected of being undocumented.⁵² After this development, the student walk to Washington, D.C. culminated in meetings with Administration officials and a protest on May 1, 2010, timed to coincide with nationwide demonstrations against the new Arizona law.⁵³ Thirty-five people, including Illinois Representative Luis Gutierrez, were arrested in front of the White House.⁵⁴ Nicholls noted that “dissident DREAMers in Los Angeles, Chicago, Michigan, and New York felt the time was right to escalate the struggle.”⁵⁵ They agitated against the new Arizona law and, at the federal level, came to embrace a standalone bill focused on DREAMers and the AgJOBS bill (which would have provided immigration status to a class of farmworkers)⁵⁶ rather than continuing to wait for movement on CIR.⁵⁷

The expanding network of student leaders and their quest for a standalone DREAM Act had the support of NDLO and lawyers from the Mexican American Legal Defense and Education Fund (MALDEF), as well as the UCLA Labor Center, a key bridge-building institution in Southern California.⁵⁸ NDLO maintained a small legal department and collaborated extensively with MALDEF in its earlier campaigns in defense of day laborers in various

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52. See S. Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, 44 ARIZ. ST. L.J. 1431, 1445 (2012) (“Our framework highlights the influence of these issue entrepreneurs in creating optimal conditions for subnational immigration regulation, framing the narrative necessary for judicial and political acceptance of restrictionist legislation, and targeting specific jurisdictions with partisan conditions that are ripe for enacting such regulation, with an eye to more widespread adoption.”); Alia Beard Rau, *Arizona Immigration Law Was Crafted by Rising Star Activist*, ARIZ. REPUBLIC (May 31, 2010, 12:00 AM), <http://archive.azcentral.com/news/articles/2010/05/31/20100531arizona-immigration-law-kris-kobach.html> [https://perma.cc/Q4VW-P5XK].
53. Julia Preston, *Immigration Advocates Rally for Change*, N.Y. TIMES (May 1, 2010), <http://www.nytimes.com/2010/05/02/us/02immig.html> [https://perma.cc/H6YZ-YWA8].
54. *Immigration Law “Awakened a Sleeping Giant”*, CBS NEWS (May 1, 2010, 10:07 PM), <http://www.cbsnews.com/news/immigration-law-awakened-a-sleeping-giant> [https://perma.cc/JL4A-URL7].
55. NICHOLLS, *supra* note 17, at 80.
56. See H.R. 2414, 111th Cong. (2009).
57. See Alexander Bolton, *Durbin’s Dream Act Could Run Afoul of Schumer’s Bill*, HILL (May 24, 2010, 11:44 PM), <http://thehill.com/homenews/senate/99629-durbins-dream-act-could-run-afoul-of-schumers-bill> [https://perma.cc/9EKK-RCER] (describing the competition between standalone and comprehensive immigration reform bills within Congress).
58. Nicholls & Fiorito, *supra* note 17, at 90. MALDEF President and General Counsel Thomas Saenz made comments as early as 2009 indicating an acceptance of piecemeal reform. Suzanne Gamboa, *Leader Has Back-up Immigration Plan*, SAN DIEGO UNION-TRIB. (Sept. 25, 2009, 2:03 PM), <http://www.sandiegouniontribune.com/sdut-us-immigration-ap-interview-092509-2009-sep25-story.html> [https://perma.cc/XB46-HN5J]. He maintained strong ties to NDLO on its anti-enforcement work and to student leaders who were rapidly finding their voice and asserting independent views. Telephone Interview with Chris Newman, Legal Dir., Nat’l Day Labor Org. Network (June 29, 2016).

jurisdictions in Southern California.⁵⁹ According to Nicholls, NDLOM saw strategic advantage in allying its day laborer constituents with the dissident organizers and provided key legal, organizing, and logistical support to the nascent movement among undocumented youth.⁶⁰ NDLOM Legal Director Chris Newman remembers the alliance as being constructed less strategically and more as a reaction to ineffective theories of social change inherent in the approach of the other established immigrant rights organizations:

This more radical group came to us to ask for their support as they were breaking off from the rest. This became the most potent and dynamic element of the movement. . . . We wanted to support them without contributing to more conflicts in the movement. We quietly made the infrastructure of NDLOM available to the youths. We said, “If you need office space, we have an office in Washington, DC, here it is. If you need a place to stay around the country, here is a list of our organizing staff, you can stay in their houses.” We have made everything we have available to them: here are our lawyers, here are our contacts, use them. And, they did.⁶¹

While RIFA remained closely aligned with the Administration’s enforcement-first approach to comprehensive reform, the large and influential immigrant rights legal organizations that came to Arizona to fight SB 1070—including the ACLU Immigrant Rights Project (ACLU-IRP) and the National Immigration Law Center (NILC)—pursued an impact litigation strategy that relied on federal courts to reinforce a less racist and more nuanced federal approach to immigration enforcement.⁶² Ultimately, in 2012, the U.S. Supreme Court, applying preemption doctrine,⁶³ struck down provisions of SB 1070 that enabled the state criminalization of immigration status, but upheld what became known as the “show your papers” provisions allowing state law enforcement officials to determine the immigration status of anyone they stop or arrest based on reasonable

59. See Scott L. Cummings, *Litigation at Work: Defending Day Labor in Los Angeles*, 58 UCLA L. REV. 1617, 1641–63, 1672–74 (2011) (describing the NDLOM-MALDEF alliance in successive day labor ordinance battles in the region).

60. NICHOLLS, *supra* note 17, at 82.

61. *Id.* at 83 (quoting Chris Newman).

62. Telephone Interview with Chris Newman, *supra* note 58.

63. Preemption is a doctrine of American constitutional law which stems from notions of federalism and the Supremacy Clause. Under this principle, Congress has the power to preempt state law. See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000). Generally, there are three ways a state or local law may be preempted; through a federal statute containing an express preemption provision; in a field that Congress has determined must be regulated through its exclusive governance; and when state laws conflict with federal law. See *Arizona v. United States*, 567 U.S. 387, 398–400 (2012).

suspicion.⁶⁴ However, the established advocacy organizations and some of the lawyers litigating in Arizona had “an allergy [to] justice-based arguments” and did not invoke white supremacy as a core motivation for the Arizona legislative enactments.⁶⁵ Lawyers on the ground—most prominently at the ACLU of Arizona—had strong ties with community organizations and consistently worked to integrate their narratives, particularly around race, into the SB 1070 litigation.⁶⁶ The litigation team was large; no one doubted the racial animus embedded in the Arizona enactments, but lawyers had differing levels of commitment to advancing movement narratives in litigation. The emphasis of some of the public interest litigators and the federal government was on constructing effective legal arguments and not necessarily on building political power on the ground.⁶⁷

64. *Arizona*, 567 U.S. 387, 411–15.

65. Telephone Interview with Chris Newman, *supra* note 58.

66. E-mail from Annie Lai, former Staff Atty., ACLU of Ariz., to author (Aug. 29, 2017, 07:37 PST) (on file with author); *see, e.g.*, Complaint for Declaratory and Injunctive Relief, at 47–51, 56, 60, *Friendly House v. Whiting*, 846 F. Supp. 2d 1053 (D. Ariz. 2012) (No. CV 10-1061), 2010 WL 11417816 (including race-based allegations and Equal Protection and Section 1981 claims). *Friendly House* was a parallel case to the one ultimately heard by the U.S. Supreme Court and brought by the U.S. Department of Justice (DOJ). *See Arizona*, 567 U.S. 387. Local and movement-centered lawyers had significantly less influence in the conduct of the DOJ litigation.

67. E-mail from Annie Lai, *supra* note 66. The open question is whether the content of arguments in complaints and briefs irretrievably shape or limit the scope of narratives that can be used outside of court to undertake political mobilizations. Former MALDEF litigator Kristina M. Campbell thinks that legal argument matters in her analysis of the use of the First Amendment in the defense of day laborers. *See generally* Kristen M. Campbell, *The High Cost of Free Speech: Anti-Solicitation Ordinances, Day Laborers, and the Impact of “Backdoor” Local Immigration Regulations*, 25 GEO. IMMIGR. L.J. 1, 27–32 (2010). Campbell posits that the litigation strategy trades away a necessary focus on racism in law enforcement—which would support an equal protection argument—for short-term success in the courts. *Id.* Hiroshi Motomura challenges the alleged mutual exclusivity of litigation strategy, instead arguing that preemption doctrine may serve as a container for equal protection concerns in litigation. Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1731–46.

[P]reemption and equal protection can function roughly as alternative vehicles for expressing concern about racial and ethnic discrimination. Plaintiffs will likely lose an equal protection argument because of the law’s requirement of discriminatory intent and its presumption against finding it. A preemption argument can manage doubt differently by shifting the risk of uncertain knowledge from the plaintiff to state and local governments. Courts may sustain preemption challenges out of concern that state and local laws addressing unauthorized migration give state and local actors a zone of discretion that is too broad because it enables improper reliance on race and ethnicity.

Id. at 1744. *But see* David S. Rubenstein, *Black-Box Immigration Federalism*, 114 MICH. L. REV. 983, 1006–12 (2016) (book review) (characterizing as unlikely the wide use by courts of preemption doctrine as a proxy for equal protection); *see also* Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763, 768–72 (1995) (arguing for expanding the scope of factual matter included in civil rights complaints so as to provide courts and other readers of legal argument with a deeper understanding of the injustices being alleged). In the Freedom of Information Act litigation described in the next section, *see infra* Section I.C,

From the crucible in Arizona, NDLO's alliance with the dissident organizers gained strength. NDLO was involved on the ground through its Alto Arizona campaign in collaboration with local activists such as Salvador Reza with Tonatierra⁶⁸ and Carlos Garcia with Puente Arizona.⁶⁹ The expanding youth-led organizations in Southern California mobilized for protests and other campaign activity in Arizona on a regular basis and came to rely on NDLO's logistical and organizing support.⁷⁰ In Newman's words, the campaign work in Arizona created a "stage" or "scaffolding" that galvanized the media's coverage of events in the state.⁷¹ He also believes that the escalating street organizing ultimately acted as "amicus" in the Supreme Court case.⁷²

C. Interior Enforcement

For the dissident organizers, the lack of progress on CIR and the established advocacy organizations' opposition to a standalone DREAM Act was juxtaposed with the expansion of the deportation apparatus. Following the failed Bush playbook on CIR, the Obama Administration continued to escalate immigration enforcement in the interior of the country, which had been significantly ramped up in 1986 and then again following 9/11.⁷³ One of the core Obama Administration strategies was the use of the S-Comm program to transfer targets efficiently from local law enforcement to ICE for detention and removal.⁷⁴ Though the Obama enforcement strategy was quieter and less performative than the Bush approach, it was nonetheless devastating to families and communities.

NDLO and its lawyers followed Eastman's imperative and included an expansive group of allegations in the federal complaint, going well beyond open records law.

68. For information about the activist work of Tonatierra, see *Movimiento Macehualli*, TONATIERRA, <http://www.tonatierra.org/movimiento-macehualli> [https://perma.cc/P7WR-PU86].
69. For information about Puente, see *Alto Arizona*, PUENTE MOVEMENT, <http://puenteaz.org/campaigns/past-campaigns/alto-arizona> [https://perma.cc/6P9V-3M26].
70. See NICHOLLS, *supra* note 17, at 166.
71. Telephone Interview with Chris Newman, *supra* note 58.
72. *Id.*; cf. Linda Greenhouse, *The Lower Floor*, N.Y. TIMES: OPINIONATOR (May 2, 2012, 9:00 PM), <http://opinionator.blogs.nytimes.com/2012/05/02/the-lower-floor> [https://perma.cc/SG2R-TTTC] (lamenting the absence of consideration for human suffering in the oral argument of *Arizona v. United States*, 567 U.S. 387 (2012)).
73. See Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1149–68 (2008) (describing expansion of interior immigration enforcement since the enactment of employer sanctions in the Immigration Reform and Control Act of 1986).
74. See SECURE COMMUNITIES PLAN, *supra* note 34, at 1.

Deportation levels remained at a historic high point in 2010 and 2011 and hit new peaks in 2012 and 2013.⁷⁵

It was challenging to formulate a strategy to oppose S-Comm. The dichotomy between “good” and “bad” immigrants was a core premise of CIR advocates who sought to enact legislation that would offer a path to citizenship for some undocumented immigrants while increasing interior enforcement resources and hardening the southern border with Mexico.⁷⁶ S-Comm extended this dichotomy and sought to use local authorities more extensively to sift “bad” immigrants out of the undocumented population in the United States.⁷⁷ The tight embrace of CIR by established advocacy organizations—committing them to the assumption that immigrants who commit crimes in the United States did not deserve a path to citizenship—made it difficult for them to oppose S-Comm. Indeed, Department of Homeland Security (DHS) Secretary Janet Napolitano’s discussion in 2009 on the first anniversary of S-Comm focused extensively on the criminals and gang members purportedly targeted by the program.⁷⁸ However, local advocates suspected, based on individual deportation cases, that the population being targeted for detention and deportation included many immigrants without significant criminal history, not just among those stopped at the border, but also among residents who had spent significant time in the United States. This

75. Ana Gonzalez-Barrera & Jens Manuel Krogstad, *U.S. Immigrant Deportations Declined in 2014, but Remain Near Record High*, PEW RES. CTR. (Aug. 31, 2016), <http://www.pewresearch.org/fact-tank/2016/08/31/u-s-immigrant-deportations-declined-in-2014-but-remain-near-record-high> [<https://perma.cc/C5FL-ZYU2>].

76. See Muneer I. Ahmad, *Beyond Earned Citizenship*, 52 HARV. C.R.-C.L. L. REV. 257, 273–90 (2017) (analyzing conditional path to citizenship in 2010 CIR legislation and the neoliberal and penal assumptions about undocumented people underlying those conditions); Angélica Cházaro, *Beyond Respectability: Dismantling the Harms of “Illegality”*, 52 HARV. J. ON LEGIS. 355, 373–87 (2015) (cataloging problematic narratives advanced in arguments for legalization); Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 226–37 (2012) (discussing the dichotomization in immigration adjudication of “good” and “bad” immigrants). *But see* Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 824–35 (2007) (describing *ex post* screening of immigrants on the basis of criminal history as a rational approach to immigration policy-making and adjudication).

77. S-Comm also swept in legal permanent residents (or “green card” holders) who had committed crimes that made them deportable under federal law. See MICHELE WASLIN, IMMIGRATION POLICY CTR., *THE SECURE COMMUNITIES PROGRAM: UNANSWERED QUESTIONS AND CONTINUING CONCERNS* 4 (2011), https://www.americanimmigrationcouncil.org/sites/default/files/research/Secure_Communities_112911_updated.pdf [<https://perma.cc/CQ4Q-7U27>].

78. See Editorial, *The “Secure Communities” Illusion*, N.Y. TIMES (Sept. 5, 2014), <https://www.nytimes.com/2014/09/06/opinion/the-secure-communities-illusion.html> [<https://perma.cc/3QEP-RWX4>] (indicating that Janet Napolitano, secretary of DHS, later walked back claims about the number of serious convicted criminals deported as a consequence of the program).

over-inclusive enforcement approach would have been consistent with the overall mix of deportees in the years prior, and was thought to have been advanced during the Bush administration so that ICE agents could meet numerical arrest and removal goals.⁷⁹

This suspicion regarding S-Comm was shared by both NDLO and the dissident organizers who were closest to the families and communities affected by the program. In the same month that SB 1070 was enacted in Arizona, NDLO, the Center for Constitutional Rights (CCR), and the Benjamin Cardozo School of Law Immigration Justice Clinic (Cardozo) brought Freedom of Information Act (FOIA) litigation against the federal government in *National Day Laborer Organization Network v. United States Immigration and Customs Enforcement Agency*.⁸⁰ NDLO Legal Director Newman and Puente lead organizer Carlos Garcia had met CCR attorney Sunita Patel at an Open Society Foundations conference on the convergence of criminal justice reform and immigrant rights and discussed how to head “where the hockey puck is going to.”⁸¹ Cardozo clinic director Peter Markowitz remembers being frustrated by the sense that they were fighting yesterday’s battles, when new threats were imminent.⁸²

Though the complaint was focused on the release of data on arrest, detention, and deportations resulting from the S-Comm program, it included paragraphs alleging racial profiling, potential pre-textual arrests by local police, and accounts of low priority deportees who appeared to have committed no significant offense.⁸³ NDLO lawyer Jessica Bansal called the use of FOIA in this case “advocacy through inquiry.”⁸⁴ NDLO, CCR, and Cardozo created a website, “Uncover the Truth,” on which they revealed information and analysis from

79. See MARGOT MENDELSON ET AL., MIGRATION POLICY INST., COLLATERAL DAMAGE: AN EXAMINATION OF ICE’S FUGITIVE OPERATIONS PROGRAM 10 (2009), https://www.law.yale.edu/sites/default/files/documents/pdf/Clinics/wirac_CollateralDamage.pdf [<https://perma.cc/2YHK-GAJP>] (describing a 1000 arrests per ICE Fugitive Operations Team quota that was imposed as of 2006 and correlated with a significant increase in arrests of noncriminal immigrants).

80. 811 F. Supp. 2d 713 (S.D.N.Y. 2011). The groups later brought in Mayer Brown, LLP to help manage the volume of documents turned over by DHS in the litigation. NDLO was lead plaintiff but not an attorney of record in the case. *National Day Laborer Organization Network (NDLO) v. US Immigration and Customs Enforcement Agency*, CTR. CONST. RTS. (Aug. 7, 2013), <https://ccrjustice.org/home/what-we-do/our-cases/national-day-laborer-organizing-network-ndlon-v-us-immigration-and-customs> [<https://perma.cc/FNT8-FAPQ>].

81. Telephone Interview with Chris Newman, *supra* note 58.

82. Telephone Interview with Peter Markowitz, Professor, Cardozo Sch. of Law (June 28, 2016).

83. Complaint for Declaratory and Injunctive Relief at 12, *Nat’l Day Laborer Org. Network*, 877 F. Supp. 2d 87 (No. 10-CV-3488).

84. Interview with Jessica Bansal, Litigation Dir., Nat’l Day Laborer Org. Network, Class Lecture at University of California, Irvine School of Law (Feb. 21, 2013).

successive waves of documents released over the course of the litigation starting in August 2010.⁸⁵ The records largely confirmed the mismatch between the public safety rhetoric espoused by federal enforcement authorities and the actual population subject to detention and deportation as a result of the program.⁸⁶

The data and case stories made public through the Uncover the Truth campaign fueled two distinct forms of local opposition strategies. First, local activists opposed the detention and removal of particular individuals by bringing attention to the equities that they possessed. Even those with criminal convictions had families, employers, pastors, organizers, and others who would speak out on their behalf. The local activists also raised particularly egregious examples of federal overreach—the attempted removal of a domestic violence victim wrongly arrested by local police, for example⁸⁷—on social media (with the hashtag “Not1More”) and in traditional media.⁸⁸ These individual cases were portrayed by activists and advocates as emblematic of S-Comm and consistent with the statistics being released through the FOIA litigation.

The second form of local advocacy fueled by data uncovered through *National Day Laborer Organizing Network v. United States Immigration and Customs Enforcement Agency* was the proliferation of S-Comm opt-out campaigns in jurisdictions across the country. As they learned about the mismatch between the anti-crime rhetoric of the program and the actual targets of enforcement, cities, counties, and states, encouraged by advocates and immigrant rights attorneys, were attempting to opt out of cooperating with federal enforcement agencies. On

85. *Uncover The Truth: ICE and Police Collaborations*, UNCOVERTHETRUTH.ORG, [https://perma.cc/3CBM-PUTD].

86. NDLO nested insights from the Freedom of Information Act records in a broader report that includes contributions by local police officials, individuals who have been targeted for deportation, and community-based organizations that were monitoring rollout of the program. *See generally* NAT'L CMTY. ADVISORY COMM'N, RESTORING COMMUNITY: A NATIONAL COMMUNITY ADVISORY REPORT ON ICE'S FAILED “SECURE COMMUNITIES” PROGRAM 27 (2011), <http://altopolimigra.com/documents/FINAL-Shadow-Report-regular-print.pdf> [https://perma.cc/E4NC-S3LR].

87. *See, e.g., Domestic Violence Survivor Calls Police and Is Detained, Could Be Deported, #NOT1MORE*, <http://www.notonemoredeportation.com/portfolio/marcela> [https://perma.cc/D8QY-KJZ4].

88. Local activists originated strategies with little outside guidance, particularly with regard to the mounting of public campaigns in cases in which individuals have no discernible relief from deportation. Dozens of deportations nation-wide have been halted as a result of national mobilizations led by undocumented youth, who have organized mass letter-writing, call-in and online petitions. These campaigns are person-specific, launched as deportation dates draw near, calling for a stay of deportation in the short term and amnesty in the longer term. Genevieve Negrón-Gonzalez, *Undocumented, Unafraid and Unapologetic: Re-articulatory Practices and Migrant Youth “Illegality”*, 12 *LATINO STUD.* 259, 274 (2014). Movement organizers have tried to capture their methods for new organizers and activists. *E.g., Introduction, #NOT1MORE*, <http://www.notonemoredeportation.com/resources/introduction> [https://perma.cc/CYL8-YMCB] (presenting the introduction to a resource titled “Anti-Deportations Toolkit”).

May 18, 2010, San Francisco County Sheriff Mike Hennessey sent a letter to ICE and then-California Attorney General Jerry Brown requesting further information about participation in S-Comm, saying that he was “concerned about the unintended consequences of ICE technology.”⁸⁹ In August, he wrote again to opt out of the program.⁹⁰ Santa Clara County Counsel and the San Mateo County Board of Supervisors requested clarification of the participation requirements in that same time period.⁹¹ In response to a congressional inquiry in September 2010, DHS Secretary Napolitano first indicated that jurisdictions may opt out of S-Comm with appropriate notice.⁹² One month later, she revoked that advisal, saying: “We don’t consider Secure Communities an opt-in, opt-out program.”⁹³ NDLO, CCR, and Cardozo filed for an emergency injunction on October 28, 2010, seeking critical documents on the ability of jurisdictions to opt out of S-Comm.⁹⁴ The requests for nonparticipation fed the confusion within DHS concerning the participation rules of the flagship interior enforcement program. In many ways, this political process provided a blueprint for local immigration enforcement organizing and the template for the “uncooperative federalism” that we see in the current efforts to create sanctuary jurisdictions.⁹⁵

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89. Letter from Michael Hennessey, Sheriff, City & Cty. of S.F., to Edmund G. Brown, Cal. Attorney Gen. (May 18, 2010), <http://uncoverthetruth.org/wp-content/uploads/2010/05/Sheriff-Hennessey-Ltr-Opting-Out-of-S-1-Comm-5-18-2010.pdf> [<https://perma.cc/E3VX-QLH7>].
90. Letter from Michael Hennessey, Sheriff, City & Cty. of S.F., to Edmund G. Brown, Cal. Attorney Gen., David Venturella, Exec. Dir., DHS Office of Secure Cmty., & Marc Rapp, Dep. Dir., DHS Office of Secure Cmty. (Aug. 31, 2010), http://media1.s-nbcnews.com/i/MSNBC/Sections/NEWS/z_Personal/AJohnson/Secure-Comunities-Setting-the-Record-Straight.pdf [<https://perma.cc/7CJX-58W3>].
91. Letter from Richard Gordon, President, San Mateo Cty. Bd. of Supervisors, to John Morton, Assistant Sec’y, U.S. Immigration & Customs Enf’t (July 21, 2010) <http://uncoverthetruth.org/wp-content/uploads/2010/09/Letter-Morton-072110.pdf> [<https://perma.cc/3EC4-6BV9>]; Letter from Miguel Marquez, Cty. Counsel, Cty. of Santa Clara, to David Venturella, Exec. Dir., Secure Cmty. (Aug. 16, 2010), <http://ccrjustice.org/sites/default/files/assets/files/SCC%20County%20Counsel%20letter%20to%20Venturella.pdf> [<https://perma.cc/78VN-F77B>].
92. OFFICE OF INSPECTOR GEN., DEP’T OF HOMELAND SEC., COMMUNICATION REGARDING PARTICIPATION IN SECURE COMMUNITIES 12 (2012), <http://trac.syr.edu/immigration/library/P6276.pdf> [<https://perma.cc/GBK9-HYCF>].
93. Dara Lind, *Why Cities Are Rebelling Against the Obama Administration’s Deportation Policies*, VOX (June 6, 2014, 11:00 AM) <http://www.vox.com/2014/6/6/5782610/secure-communities-cities-counties-ice-dhs-obama-detainer-reform> [<https://perma.cc/R8H6-W8KN>] (quoting Napolitano).
94. Motion for Preliminary Injunction, Nat’l Day Laborer Org. Network v. U.S. Immigration Customs & Enf’t Agency, 877 F. Supp. 2d 87 (S.D.N.Y. 2012) (No. 10-3488).
95. See generally Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009) (theorizing states, sometimes disobedient, as internal critics of federal policy).

D. Executive Discretion

As noted above, another major animating force in the activism against interior immigration enforcement in this period was NDLO's Alto Arizona campaign. The racial animus of Sheriff Joe Arpaio against Latinx communities in Arizona was clear; established advocacy organizations feared that a focus on Arizona would siphon resources from the campaign to pass CIR⁹⁶ and prevent Republicans in Congress from working with them on a bipartisan bill.⁹⁷ Deal-making, in their view, appeared to rely on not offending the sensibilities of immigration restrictionists in and out of Congress.⁹⁸ This deepened the divide within RIFA. NDLO and its dissident organizing allies emphatically disagreed with the strategy to diminish the importance of SB 1070,⁹⁹ as five other states—Alabama, Georgia, South Carolina, Utah, and Indiana—enacted copycat bills.¹⁰⁰ Through its Alto Arizona Campaign, NDLO partnered with grassroots organizations Tonatierra and Puente in Phoenix to initiate public demonstrations.¹⁰¹ Other activists also mobilized against SB 1070 and Arpaio. Student leaders mounted a sit-in at the Tucson office of Senator John McCain in May 2010, especially significant because he was seen as an ally by many within the reform coalition.¹⁰²

96. NICHOLLS, *supra* note 17, at 78.

97. Telephone Interview with Chris Newman, *supra* note 58.

98. *Id.*

99. *Id.*

100. *Arizona's SB 1070*, ACLU, <https://www.aclu.org/issues/immigrants-rights/state-and-local-immigration-laws/arizonas-sb-1070> [<https://perma.cc/VBS6-RCDK>].

101. Telephone Interview with Chris Newman, *supra* note 58.

102. Julia Preston, *Illegal Immigrant Students Protest at McCain Office*, N.Y. TIMES (May 17, 2010), <http://www.nytimes.com/2010/05/18/us/18dream.html> [<https://perma.cc/6BXX-ZLUS>]. This was apparently the first demonstration in this wave of immigrant activism in which undocumented students put themselves at risk of arrest. *Id.* When asked how the decision to stage such a confrontational action was made, one of the sit-in participants offered this explanation:

We wanted to take ownership of our lives and our future. We decided to do it inside his office, because outside—they would close the office, lock us out. We need to be in their space, it's a direct thing, that's the purpose of direct action.

You need to be completely unafraid and face your biggest fear. Putting ourselves in front of a huge obstacle. Doing it face to face. Going to his office.

Negrón-Gonzalez, *supra* note 88, at 271. The specter of arrest and possible deportation of undocumented students hung over every civil disobedience action undertaken by the dissident organizers. There were committed attorneys, particularly immigration defense specialists, who strongly counseled undocumented youth to stay away from direct action protests at various points in the development of these campaigns. See, e.g., Miriam Jordan, *Anatomy of a Deferred-Action Dream*, WALL STREET J. (Oct. 14, 2012, 8:46 PM), <https://www.wsj.com/articles/SB10000872396390443982904578046951916986168> (“I told them not to walk, because it was too risky,” says Cheryl Little, an immigrant-rights attorney. She worried that they would face arrest and possible deportation.”).

Dream Team Los Angeles¹⁰³ occupied the federal building on Wilshire Boulevard later that May and shut down a busy thoroughfare.¹⁰⁴ Nine students and their allies were arrested in the demonstration.¹⁰⁵ Groups of student leaders across the country began hunger strikes.¹⁰⁶ Los Angeles activists, led by Neidi Dominguez and others, organized a Freedom DREAM Ride to Washington, D.C. that culminated in the occupation of an atrium and individual Senate offices on July 20, 2010.¹⁰⁷ Twenty-one undocumented students were arrested.¹⁰⁸ That same day, immigrant rights activist Carlos Amador and eight others began a fifteen-day hunger strike outside of Senator Dianne Feinstein's Los Angeles office.¹⁰⁹

That summer, the split within RIFA broke open. After RIFA leadership asked NILC and its affiliate United We Dream (UWD), a significant DREAMer organization with affiliates across the country,¹¹⁰ to tone down their support for a stand-alone bill,¹¹¹ UWD came to support the dissident position in favor of a standalone DREAM Act.¹¹² The Los Angeles-based immigration advocacy group Coalition for Humane Immigrant Rights (CHIRLA) tried to persuade youth activists in Los Angeles who had come up through their networks to stick with RIFA and CIR and indicated that they were selfish if they were supporting a standalone DREAM Act.¹¹³ Nicholls keenly identified the dynamic widening the split between the dominant groups in RIFA and the dissident organizers:

The strategy of top-down centralization was an appropriate and sophisticated effort to maximize advantages within the particular

Undocumented activists themselves wrestled with the risks of participating in movement activity. See, e.g., Jesus, *On Civil Disobedience*, DREAMERS ADRIFT (Aug. 21, 2011), <http://dreamersadrift.com/jesus-musings/on-civil-disobedience#> [<https://perma.cc/DS8G-PKH4>].

103. DREAM Team Los Angeles is a grassroots organization which “aims to create a safe space in which undocumented immigrants from the community and allies empower themselves through activism and life stories.” *About*, DREAM TEAM L.A., <http://dreamteamla.org/about-2/> [<https://perma.cc/4FC2-FCTM>].

104. 9 Cited in *West LA Immigration Rights Protest*, SAN DIEGO UNION-TRIB. (May 20, 2010, 2:15 PM), <http://www.sandiegouniontribune.com/sdut-9-cited-in-west-la-immigration-rights-protest-2010may20-story,amp.html> [<https://perma.cc/V7D5-LHLT>].

105. *Id.*

106. Julianne Hing, *How Undocumented Youth Nearly Made Their DREAMs Real in 2010*, COLORLINES (Dec. 20, 2010, 10:21 AM), <https://www.colorlines.com/articles/how-undocumented-youth-nearly-made-their-dreams-real-2010> [<https://perma.cc/9UDR-8PCZ>].

107. Jordan, *supra* note 102.

108. *Id.*

109. *Id.*

110. *Id.*

111. NICHOLLS, *supra* note 17, at 76.

112. See *id.* at 87–88.

113. *Id.* at 88–89.

context. However, the strategy had two major drawbacks: first the act of maintaining discipline over a diverse movement aggravated powerful conflicts within it. While DREAMers and antienforcement activists were drawn into other battles, RIFA placed great pressure on them to focus all their attention on the passage of comprehensive reform. Rather than corralling these dissenters, RIFA's actions only accelerated their separation. Second, when political opportunities did not materialize, the centralization strategy proved to be inflexible. . . . Instead of shifting to different fronts, RIFA doubled-down and committed itself to a costly strategy that was bearing no fruits. This strengthened the hand of critics and dissidents, which precipitated the decline of RIFA and its strategy of movement centralization.¹¹⁴

The dissident organizers were successfully originating a set of mobilization methods and distinct strategic goals. They were finding a voice of their own, independent of the better-resourced wings of RIFA.¹¹⁵

By fall 2010, the ground had shifted significantly, such that RIFA stalwarts CHIRLA, Center for Community Change, America's Voice, and National Council of La Raza began to support the standalone DREAM Act.¹¹⁶ However, in light of their recent hostility to the dissident position, student leaders distrusted the motives of the mainstream advocates.¹¹⁷ Meanwhile, Democratic Majority Leader Harry Reid was unable to muster the sixty votes he needed to prevent a filibuster of a standalone DREAM Act in the lame duck session at the end of 2010.¹¹⁸

The S-Comm opt-out campaign expanded as NDLOM, CCR, and Cardozo pushed for relevant documents through the litigation. Opposition to the program gained momentum in a series of developments in the first half of 2011. In a January 2011 report, the Migration Policy Institute, a D.C.-based think tank, warned of the probability of racial profiling and pre-textual arrests: "Indeed, Secure Communities may even be more susceptible to this problem since there are no formal agreements defining the activities of participating law enforcement agencies, and local officers do not receive federal training in immigration enforcement."¹¹⁹ DHS Secretary Napolitano was pressed on S-Comm in

114. *Id.* at 166.

115. *Id.* at 16–17 ("Being able to speak in the public sphere was viewed as a precondition of equality, so the act of representing became not simply a means to an end, as the association believed, but rather an end in its own right.")

116. *Id.* at 90–91.

117. *Id.* at 91.

118. Jordan, *supra* note 102.

119. RANDY CAPPS ET AL., MIGRATION POLICY INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT 49 (2011), <http://www.migrationpolicy.org>.

a March meeting with dissident activists, including Natalia Aristizabal, who pointed out that DREAMers were being deported.¹²⁰ In May 2011, Congresswoman Zoe Lofgren requested an investigation by the DHS Inspector General as to the focus of the program on “dangerous criminal aliens, . . . the accuracy of ICE’s data collection, [and] the controversy regarding communities’ requirement to participate and the ability to ‘opt-out’ of the program.”¹²¹ Also in May, the Congressional Hispanic Caucus called on the President to suspend S-Comm, saying “evidence reveals not only a striking dissonance between the program’s stated purpose of removing dangerous criminals and its actual effect; it also suggests that S-Comm may endanger the public, particularly among communities of color.”¹²² The politics surrounding S-Comm had shifted significantly.

The local opt-out campaigns gained strength in several large states. Illinois terminated its S-Comm agreement with DHS in May 2011;¹²³ New York suspended its participation one month later.¹²⁴ Massachusetts declined to sign a memorandum of agreement with DHS with regard to its participation in S-Comm, noting concerns about racial profiling and nonreporting of criminal activity.¹²⁵ In California, a bill to minimize the collaboration of local criminal justice agencies with federal authorities—the TRUST Act¹²⁶—was making its way through the legislature, supported by NDLOM and other close institutional allies, as well as the vibrant network of immigrant youth organizations in the

migrationpolicy.org/sites/default/files/publications/287g-divergence.pdf [https://perma.cc/9KL8-EQMG].

120. Jordan, *supra* note 102.

121. Letter from Zoe Lofgren, U.S. Congress, to Charles K. Edwards, Acting DHS Inspector Gen., & Timothy Moynihan, Assistant Dir., Office of Prof'l Responsibility, Immigration & Customs Enf't (May 17, 2011), <http://cis.org/sites/cis.org/files/letter-to-cadman-re-scomm-w-encls-redacted-1.pdf> [https://perma.cc/UVH3-BYJT] (quoting Letter from Charles K. Edwards, Acting DHS Inspector Gen., to Zoe Lofgren, U.S. Congress (May 10, 2011), <http://cis.org/sites/cis.org/files/letter-to-cadman-re-scomm-w-encls-redacted-1.pdf> [https://perma.cc/UVH3-BYJT]).

122. Letter from Charles A. Gonzalez, Chairman, Cong. Hispanic Caucus, to Barack Obama, U.S. President (May 5, 2011), <http://uncoverthetruth.org/wp-content/uploads/2011/05/05-05-11-SCOMM-Letter-to-President.pdf> [https://perma.cc/3GA9-RHPX].

123. Julia Preston, *States Resisting Program Central to Obama's Immigration Strategy*, N.Y. TIMES (May 5, 2011), <http://www.nytimes.com/2011/05/06/us/06immigration.html> [https://perma.cc/DQR8-9FVZ].

124. Press Release, Office of the Governor, Governor Cuomo Suspends Participation in Federal Secure Communities Program (June 1, 2011), <https://www.governor.ny.gov/news/governor-cuomo-suspends-participation-federal-secure-communities-program> [https://perma.cc/RD3B-6AAR].

125. Letter from Mary Elizabeth Heffernan, Sec'y, Mass. Exec. Office of Pub. Safety & Sec., to Marc Rapp, Acting Dir. Secure Comtys. (June 3, 2011), http://big.assets.huffingtonpost.com/Massachusetts_Rapp.pdf [https://perma.cc/YYE4-SUD4].

126. Assemb. B. 4, 2013–14 Leg., Reg. Sess. (Cal. 2013) (codified at CAL. GOV'T CODE §§ 7282–7282.5 (West Supp. 2017)).

state.¹²⁷ One of the immigrant youth organizers working to pass the TRUST Act articulated a strong intersectional commitment to the struggle against federal-local immigration enforcement:

It has been a broad coalition. We had a conversation about what the focus of this coalition should be and we agreed that it should be broad, and should focus on criminalization and not just immigration. . . . That would allow all of those [nonimmigrant] organizations . . . to contribute to this work and put that in their grants. It would also open up the coalition and really bring in the social justice work that's going on, in terms of youth, homeless, and those other perspectives. NDLO supported this but didn't want to water down the 287(g) and Secure Communities point of the coalition either. IDEPSCA and the normal orgs were at the same table: we can target 287(g) and Secure Communities but do it through a critique of criminalization. It's part of getting to that bigger picture.¹²⁸

In mid-June 2011, ICE announced changes to S-Comm that critics characterized as “cosmetic.”¹²⁹ In the same month, the Obama Administration

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127. See Walter J. Nicholls et al., *The Networked Grassroots. How Radicals Outflanked Reformists in the United States' Immigrant Rights Movement*, 42 J. ETHNIC & MIGRATION STUD. 1036, 1048 (2016); see also Gabriel San Roman, *Undocumented Caravan Stops in OC Today Along Its Statewide Pro-TRUST Act Trip*, OC WEEKLY (June 26, 2013, 7:30 AM), <http://www.ocweekly.com/news/undocumented-caravan-stops-in-oc-today-along-its-statewide-pro-trust-act-trip-6471864> [<https://perma.cc/S6TU-T5SA>] (noting participation of NDLO and local youth-led activist organization RAIZ in the campaign for the TRUST Act in Orange County).
128. NICHOLLS, *supra* note 17, at 157 (first omission in original) (emphasis omitted). For a description of the 287(g) program, see RANDY CAPPES ET AL., *supra* note 119, at 1, which discusses federal delegation of authority to state and local officers to perform immigration enforcement. The criminalization frame was an important link between the new movement-centered wing of immigrant rights advocacy and the Movement for Black Lives that would form after the killing of Michael Brown in 2014. Sociologist Ruth Milkman traces methodological and conceptual continuities (including a focus on intersectional analysis) across four movements of millennials in the aftermath of the 2008 recession: Dreamers, Occupy Wall Street, the campus movement protesting sexual assault, and Black Lives Matter. Ruth Milkman, *A New Political Generation: Millennials and the Post-2008 Wave of Protest*, 82 AM. SOC. REV. 1, 10–25 (2016); see also Michelle Chen, *Phillip Agnew, Dream Defender*, THESE TIMES (Jan. 19, 2015), http://inthesetimes.com/article/17543/phillip_agnew_dream_defender [<https://perma.cc/SB7M-AHKL>] (describing link between Black Lives Matter and Occupy Wall Street). Immigrant activists also appeared to draw from a shared understanding of the African-American civil rights movement. See Negrón-Gonzalez, *supra* note 88, at 268 (describing inspiration drawn by undocumented activists from Rosa Parks and Cesar Chavez).
129. The changes proposed by ICE included new memos on prosecutorial discretion, the creation of an advisory committee, a video on S-Comm for law enforcement, tasking the understaffed DHS Office for Civil Rights and Civil Liberties with responding to S-Comm complaints, and changes to the ICE detainer form. The Uncover the Truth campaign catalogued these changes and critiqued their efficacy in a June 2011 memorandum. UNCOVER THE TRUTH, BRIEFING GUIDE TO ICE'S MINOR “SECURE COMMUNITIES” MODIFICATIONS (2011), <http://uncoverthetruth>.

announced that low-priority immigrant offenders would not be targeted for deportation under new guidelines.¹³⁰ In November, the Administration committed to a case-by-case review of approximately 300,000 cases of undocumented immigrants already in removal proceedings, allowing those who posed no threat to society to remain in the country.¹³¹ Although the selective exercise of discretion may have been intended to prop up S-Comm, it also provided a new path toward relief in the face of legislative inaction on any kind of immigration reform.¹³² UCLA Law Professor Hiroshi Motomura recalls that the turn toward executive action was a contested one within the reform coalition: “[L]ooking back at [it], the broadening of advocacy to this certain administrative relief was something that was initiated more from [the] grassroots . . . that happened *while* NILC for example, was still trying to figure out exactly how to balance [legislative and administrative strategies].”¹³³ Activists such as Neidi Dominguez believed that this path held promise and organizers on both coasts enlisted attorneys to make the legal case for a categorical grant of deferred action to DREAMers.¹³⁴

The effort to secure executive relief gained momentum after Senator Marco Rubio announced his intention to propose legislation that would provide nonimmigrant visas, but not citizenship, to undocumented youth.¹³⁵ One of the original four student leaders who had walked the Trail of DREAMS in 2010, Gaby Pacheco, was at the center of subsequent negotiations, along with other organizers.¹³⁶ After meeting with Senator Rubio’s chief of staff, Pacheco and her colleagues walked to Senator Durbin’s office to seek Democratic support for the

org/wp-content/uploads/2011/06/S-Comm-Adjustment-Analysis-20110624.pdf [https://perma.cc/Y269-WD97] (“This briefing guide analyzes the cosmetic adjustments proposed by ICE and explains why they are woefully inadequate to solve the problems with this troubled deportation program.”).

130. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enft, to U.S. Immigration & Customs Enft (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [https://perma.cc/FT79-HDFW].

131. See Julia Preston, *U.S. to Review Cases Seeking Deportations*, N.Y. TIMES (Nov. 17, 2011), <http://www.nytimes.com/2011/11/17/us/deportation-cases-of-illegal-immigrants-to-be-reviewed.html> [https://perma.cc/S8NL-AFNV].

132. DHS Secretary Napolitano now characterized the exercise of categorical discretion as an extension of S-Comm rather than in any way undermining the program. Telephone Interview with Chris Newman, *supra* note 58. Eventually, even Administration officials acknowledged that the campaigns against S-Comm had created space for them to advocate for administrative relief internally. *Id.*

133. Telephone Interview with Hiroshi Motomura, Professor, UCLA Sch. of Law (June 27, 2016).

134. Jordan, *supra* note 102. MALDEF President and General Counsel Tom Saenz also had a key role in validating a categorical discretionary approach. Telephone Interview with Chris Newman, *supra* note 58.

135. Jordan, *supra* note 102.

136. *Id.*

Rubio proposal.¹³⁷ They then went to meet with Obama Senior Advisor Valerie Jarrett and White House Domestic Policy Council Director Cecilia Muñoz.¹³⁸ UWD's Lorella Praeli indicated in the meeting that they had legal analysis that supported their position—that they “were well-armed.”¹³⁹ Jarrett promised to schedule a meeting between the activists and White House attorneys.¹⁴⁰ NDLO Legal Director Newman thinks that the meeting with Rubio's office and the Administration's awareness of that meeting was a turning point in the debate within the White House, as officials came to realize that they were dealing with an “unconstrained opposition” in an election year.¹⁴¹

After rallies outside of detention centers, federal buildings, and Obama campaign offices on May 17—as well as increasing pressure on Napolitano to fix the mismatch between the Administration's stated goals and its actual apprehension and deportation policy—the activists got their meeting with attorneys from the White House. Lawyers helped movement leaders prepare. Leaders met in Los Angeles with their lawyers from NDLO, MALDEF, NILC, and the Yale Law School Worker and Immigrant Rights Advocacy Clinic.¹⁴² On May 25, Napolitano apparently stunned her staff by suggesting that they exercise discretionary relief for all of those who would have benefitted from the DREAM Act.¹⁴³ When UCLA law professor Motomura volunteered to draft a letter on May 28 outlining the historical precedent for the exercise of executive discretion with NDLO attorney Jessica Bansal and several others, he thought of his clients as being “the loose group of students who were pushing for this.”¹⁴⁴ The activists brought their lawyers—Bansal from NDLO, Betty Hung from Asian Americans Advancing Justice, Florida immigration defense attorney Cheryl Little, and Yale clinic director Muneer Ahmad—to the May 29 meeting¹⁴⁵ in Washington and indicated that they wanted an answer on whether the Administration would act by mid-June; if it did not act, they would “escalate.”¹⁴⁶ Napolitano shared details about a discretionary relief plan with White House officials on May 30 and 31.¹⁴⁷ She received approval to proceed on June 11.¹⁴⁸ It appears

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. Telephone Interview with Chris Newman, *supra* note 58.

142. Interview with Hiroshi Motomura, *supra* note 133.

143. Jordan, *supra* note 102.

144. Interview with Hiroshi Motomura, *supra* note 133.

145. Interview with Jessica Bansal, *supra* note 84.

146. Jordan, *supra* note 102.

147. *Id.*

148. *Id.*

that the convergence of outside pressure and Napolitano's vigorous support within the administration made executive relief palatable within the White House. President Obama announced the Deferred Action for Childhood Arrivals on June 15, 2012.¹⁴⁹ And so began another phase in the fight for immigrant rights.

II. RESISTANCE AND AGENCY

Undocumented youth and leading organizers were the protagonists of the story just told.¹⁵⁰ They did in some ways what we might expect them to do based on the closely observed accounts of laypeople confronting legality in all of its manifestations, formal and informal. But they also upset expectations as they fought to express their "contentious citizenship."¹⁵¹ This Part places the actions of activists and their lawyers in the fight for immigrant rights within the socio-legal framework of law and resistance and extends that literature. The immigrant rights struggle reveals a *process* of resistance to law, one that begins and ends with courageous activists but that incorporates creative and committed lawyers. This Part focuses on the role of lawyers in the process of social movement-based resistance to law; the next and final Part of this Article focuses on the social resources co-generated through collaborations between organizers and lawyers in the fight for immigrant rights.

A. Resisting Legality

The legal academic literature is replete with references to lawyers suppressing or usurping the agency of the less privileged people that they represent.¹⁵² The

149. Press Release, Office of the Press Sec'y, *supra* note 12.

150. Cf. Jennifer Gordon, *The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CALIF. L. REV. 2133, 2140–41 (2007) (describing community lawyering model in which client groups rather than lawyers are the protagonists in campaigns for social change).

151. Kathryn Abrams, *Contentious Citizenship: Undocumented Activism in the Not1More Deportation Campaign*, 26 BERKELEY LA RAZA L.J. 46, 64 (2016) (describing the increasingly contentious character of undocumented activism). Abrams, in describing undocumented activism as "contentious," draws on the work of social movement theorists Sidney Tarrow and Charles Tilly. See generally SIDNEY TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS* (2d ed. 1998); CHARLES TILLY, *THE CONTENTIOUS FRENCH* (1986).

152. See, e.g., LÓPEZ, *supra* note 7; Alfieri, *Antinomies of Poverty*, *supra* note 9; Michelle S. Jacobs, *People From the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345 (1997); White, *supra* note 8; see also, e.g., COREY S. SHDAIMAH, *NEGOTIATING JUSTICE: PROGRESSIVE LAWYERING, LOW-INCOME CLIENTS, AND THE QUEST FOR SOCIAL CHANGE* 163–65 (2009) (critiquing the critical mind-set in scholarship on public interest lawyering); Lauren B. Edelman et al., *On Law, Organizations, and Social Movements*, 6 ANN. REV. L. & SOC. SCI. 653, 663 (2010) ("[L]awyers direct movement activity into legal channels, potentially snuffing out sustained collective action in favor of 'associations without members.'")

critical urge that swept left legal scholarship in the 1970s and 1980s has had resounding influence on the development of the progressive, public interest segment of the legal profession.¹⁵³ The scope of public interest law since the Reagan Administration has been constrained significantly by cutbacks in governmental funding and restraints on the avenues by which to contest the significant social problems that confront poor clients. The profession has reacted to external discipline by pulling back from larger social engineering projects and retrenching in the cloistered work of individual representation. It reflected what Joel Handler evocatively—if not precisely—called the postmodern turn away from transformational politics.¹⁵⁴ The studies (and the law school pedagogy) bore in on the microcosmic psychological implications of the lawyer-client relationship.¹⁵⁵

Within the socio-legal literature, there was a related shift to discern and document the phenomenon of “*everyday resistance*.”¹⁵⁶ The scholars who considered the issue had a rich understanding of law as not existing outside of social life, but instead as embedded “within the tapestry of ordinary lives and everyday events.”¹⁵⁷ Austin Sarat found that, much as for the undocumented activists who led the three-year fight for DACA, the individuals that he interviewed in welfare offices were unyieldingly enmeshed in legal rules and practices, with significant portions of their lives under the jurisdiction of arbitrary bureaucrats and vulnerable to the predations of private actors.¹⁵⁸ For these individuals, the law is “an enclosure seen from the inside.”¹⁵⁹ People are excluded from participating in the

(quoting Theda Skocpol, *Associations Without Members*, AM. PROSPECT, July–Aug. 1999, at 66 (1999)); *id.* at 665 (“[L]egally institutionalized frames may also influence the activists that use them in subtle and disabling ways.”).

153. Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 450–69 (2001).
154. Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 L. & SOC’Y REV. 697, 710–16 (1992). *But see* Michael W. McCann, *Resistance, Reconstruction, and Romance in Legal Scholarship*, 26 L. & SOC’Y REV. 733, 734–37 (1992) (criticizing Handler’s incomplete and undertheorized use of post-modernism).
155. Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355, 380–83 (2008); William H. Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487, 525–59 (1980).
156. JOHN GILLIOM, *OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY* 12 (2001) (emphasis added); *see* Anna-Maria Marshall & Scott Barclay, *In Their Own Words: How Ordinary People Construct the Legal World*, 28 L. & SOC. INQUIRY 617, 621 (2003) (“More recently, legal consciousness research has shifted away from this ‘institutionally centered, law-first perspective’ in favor of a focus on everyday life in commonplace locations like workplaces, schools, and neighborhoods.” (quoting PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* 20 (1998))); *see, e.g.*, Richard A. Brisbin, Jr., *Resistance to Legality*, 6 ANN. REV. L. & SOC. SCI. 25 (2010).
157. Ewick & Silbey, *Conformity*, *supra* note 5, at 732.
158. *See* Sarat, *supra* note 6, at 344.
159. *Id.* at 345.

constructions of legality through which they are oppressed.¹⁶⁰ Sarat's subjects are able to find narrow spaces in which to contest bureaucratic decision-making, particularly if they have the assistance of willing legal services attorneys. However, they believed that their lawyers were an important component of state oppression, operating through "regulation and internal surveillance rather than prohibition and punishment."¹⁶¹ Lawyers have the power to assist those subject to law if they deign to do so and possess the power to correct mistakes, but they lack the capacity to take apart the bureaucratic structure within which they themselves are also trapped.¹⁶²

Patricia Ewick and Susan Silbey redefined legality to include a broader range of engagements within and without formal legal contexts.¹⁶³ They argued that people had the capacity to "identify the cracks and vulnerabilities of institutionalized power,"¹⁶⁴ expose social structure, and perhaps momentarily reverse the usual direction in which that power flowed.¹⁶⁵ Kathryn Abrams's more recent accounts of undocumented youth activists in Phoenix and Chicago tell a parallel story about resistance to legality. Undocumented youth perform a "contentious citizenship" by taking on the responsibilities of national belonging—participating politically, contesting policies and practices, and reshaping public discourse—while remaining without *de jure* recognition as citizens and under the constant threat of arrest and deportation.¹⁶⁶ Abrams thinks that both the hybrid position of undocumented youth, with strong claims to membership, and the rising local activism in the period on which she is focused (just after the end of the narrative in Part I of this Article) might explain their resistance and political agency.¹⁶⁷

In Sarat's account of enclosed subjects, lawyers are unreliable actors embedded within an oppressive bureaucracy. In Ewick and Silbey's and Abrams's narratives, lawyers are not quite visible, as individuals create moments of agency against institutionalized power.¹⁶⁸ The fight for immigrant rights described in this Article reveals a different process of resistance to legality, one that draws on the courage and creativity of those who are subject to law, acting in conjunction with movement lawyers.

160. *See id.* at 377.

161. *Id.* at 353.

162. *Id.*

163. Ewick & Silbey, *Narrating*, *supra* note 5, at 1340 n.6.

164. *Id.* at 1330.

165. *See id.* at 1329–31.

166. *See* Abrams, *supra* note 151, at 66–69.

167. *Id.* at 62–63; *see supra* Part I.

168. *But see* Kathryn Abrams, *Emotions in the Mobilization of Rights*, 46 HARV. C.R.-C.L. L. REV. 551, 573–88 (2011) (interpreting emotional responses of claimants and implications for lawyering).

B. Reconstructing Legality

Undocumented activists have fought for inclusion through legalization even as they are banned by the state.¹⁶⁹ Past legal regimes, such as Jim Crow-era states and localities in the American South, have suppressed the articulation of membership claims by criminalizing otherwise constitutional speech and conduct.¹⁷⁰ The inherent, relatively unchecked capaciousness of immigration law allows federal executive authority to blur the line between criminal and resister,¹⁷¹ just as sheriffs did in response to civil rights organizing campaigns.¹⁷² The undocumented are discouraged from making affirmative legal claims, and the state attempts to deport them as expeditiously as possible.¹⁷³ Intersecting immigration and criminal legal regimes expose immigrants without formal or certain legal status to various forms of legal violence in homes, workplaces, and schools.¹⁷⁴ Being placed outside of the polity pushes many undocumented Americans to live in fear or with a sense of stigma.¹⁷⁵

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169. 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 L. & SOC'Y REV. 337, 364 (2011).
170. See Steven E. Barkan, *Legal Control of the Southern Civil Rights Movement*, 49 AM. SOC. REV. 552, 554 (1984) ("The entire legal machinery of the South became a tool for social control of civil rights protest."); cf. WARD CHURCHILL & JIM VANDER WALL, *AGENTS OF REPRESSION: THE FBI'S SECRET WARS AGAINST THE BLACK PANTHER PARTY AND THE AMERICAN INDIAN MOVEMENT* 37–62 (2d ed. 2002) (describing the FBI's practice of constantly arresting activist leaders to "simply harass, increase paranoia, tie up activists in a series of [criminal defense proceedings], and deplete their resources" while also fabricating or withholding evidence).
171. See *supra* notes 19 & 77 and accompanying text. Richard Brisbin distinguishes resistance to legality from criminality by defining the latter as conduct motivated by an individual's desire for material goods or attention. Brisbin, *supra* note 156, at 27. The resister, on the other hand, "desires to become included in the community governed by law or other norms." *Id.* This distinction is nearly meaningless in contexts in which individuals are disproportionately and inaccurately subject to policing and criminalization. See, e.g., I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43 (2009) (arguing that the level of policing within a certain community is a function of racial segregation).
172. Barkan, *supra* note 170, at 556–59, 560–62.
173. See Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 220–31 (2017) (describing the increasing use by the federal government in the latter years of the Obama Administration of mechanisms by which to remove immigrants with even less legal process than available in overwhelmed immigration courts).
174. See Cecilia Menjivar & Leisy Abrego, *Legal Violence: Immigration Law and the Lives of Central American Immigrants*, 117 AM. J. SOC. 1380, 1388–91 (2012) (documenting the effects of immigration law in the life experiences of undocumented Central Americans in the United States).
175. See Abrego, *supra* note 169, at 354 ("When fear and stigma centrally inform the legal consciousness of undocumented immigrants, both sentiments can stand as barriers to claim-making."); *id.* at 362–63 (describing differing life experiences and asymmetric rights claiming by segments of the undocumented population in the United States).

Against this backdrop, undocumented activists “claim their rights within and against the law.”¹⁷⁶ In the immigration field, there was a clear “endogenous shift and consciousness change,”¹⁷⁷ whereby undocumented activists took control of both the message and the means of their own advocacy, for themselves, their families, and their communities. The “exogenous shock” that likely spurred that shift¹⁷⁸ was the near-simultaneity of the enactment of SB 1070 in Arizona, the collective exhaustion of patience for CIR, and the expansion of S-Comm. In this period, undocumented activists collectively bared their illegality and began to perform their “contentious citizenship.”¹⁷⁹ A period of contestation within the immigrant advocacy sector followed, during which there was uncertainty and mobilization by both incumbents and challengers for strategic control of the movement.¹⁸⁰

Undocumented activists came to resist legality through public expression, collectivity, and solidarity. Individual stories about injustice and exclusion became movement stories that mobilized participation.¹⁸¹ The network of organizations which they joined or formed collaborated with movement lawyers to reconstruct legality. Movement organizations sought to challenge the policy presumptions of incumbent actors in both government and the advocacy sector. They worked with lawyers to support policy prescriptions, such as categorical discretionary relief from the threat of deportation, which earlier had been deemed unworkable. They fought S-Comm by matching community narratives with data generated through open records litigation; this methodology led to media advocacy and local jurisdictional opt-out campaigns. They began to reconstruct legality and did so by changing law on the books, challenging enforcement practices at the local level, and forcing the exercise of categorical discretion at the federal level.

In contrast to the absent lawyers in the Ewick and Sibley narratives or the coopted legal services attorneys in the Sarat story, organizers and activists in the youth-led movement—who themselves were exercising their agency within the immigrant advocacy sector—collaborated with lawyers to create a space for

176. Helge Schwiertz, *Transformations of the Undocumented Youth Movement and Radical Egalitarian Citizenship*, 20 CITIZENSHIP STUD. 610, 624 (2016).

177. Edelman et al., *supra* note 152, at 674.

178. *Id.*

179. *See supra* note 151 and accompanying text (explaining the use of the term “contentious citizenship”).

180. *See* Edelman et al., *supra* note 152, at 671 (setting forth the features for social movement organizations of episodes of contention within a movement).

181. *See* Ewick & Silbey, *Narrating*, *supra* note 5, at 1363–65 (arguing that individual stories may not cause social change but are part of a sociocultural stream that begin to uncover social structures of injustice).

themselves within the polity, as protected from federal detention and deportation and as fully engaged participants in local and state politics. This process suggests an alternative understanding of resistance to legality with a multi-faceted role for movement lawyers in the existential reconstruction efforts undertaken by undocumented activists. It also suggests a collective and solidaristic approach to resistance not fully contemplated in this part of the sociolegal literature.¹⁸² The mutually constitutive relationship built by lawyers and activists in the course of resistance and reconstruction is the core generator of the relational features outlined in the next Part.

III. MOVEMENT LAWYERING

As set out in the preceding Part, lawyers have an essential role in the process of resistance to legality and the subsequent reconstruction of law and social discourse. Within public interest law, between the impact litigator and the lawyer turned community organizer, there lies a middle field in which movement lawyers both deploy conventional legal tools and mechanisms while nurturing critical visions by which to alter law and social discourse. They do this work by the means described below.

Jennifer Gordon describes the lawyers who came to work at the United Farm Workers under General Counsel Jerry Cohen, as relatively free of attachments to law and rules as they were, as well as of conventional institutional constraints and, thus, able to “figure out ways of generating the kind of power that’s needed.”¹⁸³ Lawyers who worked on the campaigns against S-Comm and for DACA appear to have enjoyed a similar freedom to innovate due to their institutional homes and their transformative relationships with movement activists. They brought both their own formative experiences and a willingness to experiment with regard to the form and substance of their work. They made a role for themselves that was most certainly constituted by the systems in which they had been educated and had worked up to that point, but also opened themselves to rich relationships with organizers and activists and allowed the

182. Guinier and Torres note that “[s]ociologists, political scientists, and historians have long studied social movements, yet their theories of social change also separate the role of law and lawyers, as if lawyers and social movements function on parallel but distinctive tracks.” Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demoprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2802 (2014). The critical legal academic scholarship on public interest lawyering better capture: (1) the dialogic relationships between law, lawyers, and social movements; and (2) the mechanics of how those relationships actually works.

183. Jennifer Gordon, *Law, Lawyers, and Labor: The United Farm Workers’ Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. PA. J. LAB. & EMP. L. 1, 48 (2005) (quoting United Federal Workers General Counsel Jerry Cohen).

political moment to challenge their assumptions and ideas. As Gordon says about the United Farm Workers lawyers: “The convergence of the times and the legal context created a set of opportunities that others had not recognized.”¹⁸⁴ This Part spotlights key features of the work of these contemporary movement lawyers, who worked collaboratively with activists to advance a network of affiliated social movement organizations and to alter the public discourse on immigration enforcement.

In the 2009–2012 mobilization, two threads of lawyering documented within the historical civil rights literature¹⁸⁵ were evident: (1) establishment lawyers (and their corresponding organizational clients) operating within a superstructure set by preexisting distributions of political power using more moderate discursive framing; and (2) a recessive strand of the legal profession that sought to challenge the superstructure through the support of activist capacity building and the use of more critical discursive frames.¹⁸⁶ It becomes clear in both historical and contemporary accounts that the divide between establishment lawyers and recessive-strand lawyers is not tactical. That is, lawyers in both threads used a full repertoire of lawyering tactics that included litigation and non-litigation advocacy.¹⁸⁷ Though the lawyers may bring different degrees of emphasis to legal mobilization tools, all of them have an expansive understanding of the legal levers that can be pulled to achieve social change and are among the most effective in their fields.

This Part delineates distinctive features of movement lawyering in the fight for immigrant rights, to suggest a set of understandings shared by the movement lawyers described in this Article and to extend the critical legal academic literature on public interest lawyering. Lawyers helped develop critical ideas and organizational infrastructure, generated resources for organizing, and accompanied movement leaders and constituents. Though my focus in this Article—with the aim of filling a gap in the literature—is on what lawyers did and how that helped advance successive campaigns for social change, the features described below are

184. *Id.* at 50.

185. *See, e.g.*, BROWN-NAGIN, *supra* note 11, at 175–211 (describing tensions between the approaches of the NAACP and NAACP Legal Defense and Education Fund-affiliated lawyers versus that of the Student Nonviolent Coordinating Committee (SNCC), Congress of Racial Equality, the Committee on Appeal of Human Rights, and lawyers affiliated with the National Lawyers Guild (NLG)).

186. *Id.* This split within the legal profession is reflected in the description by Richard Brisbin of how subjects resist legality, some with an “inside” strategy that reinforces the legitimacy of the regime and others with a more confrontational and unsettling “outside” strategy that attempts to challenge foundational distributions of power. Brisbin, *supra* note 156, at 30–31.

187. *See* Scott L. Cummings, *Critical Legal Consciousness in Action*, 120 HARV. L. REV. FORUM 62, 70–71 (2007).

dialogic,¹⁸⁸ that is they became manifest or were co-generated in the context of formal and informal relationships marked by equality and mutuality.

A. Critical Infrastructure

At bottom, the theory of social change advanced by movement lawyers relies on the deployment of legal tactics that emphasize the development of grassroots and activist agency in justice campaigns.¹⁸⁹ There were two forms of critical infrastructure that advanced activist agency in this mobilization narrative: (1) ideational,¹⁹⁰ and (2) organizational. The “exogenous shocks” to immigrant organizing and the turn from CIR to immigration enforcement necessitated the development of new critical ideas untethered from the assumptions of established advocacy organizations.¹⁹¹ The corresponding endogenous shifts within existing social movement organizations and the formation of new organizations required material support.¹⁹² Movement lawyers had a role in both of these processes. Both the classic texts from the critical legal academic literature on public interest lawyering,¹⁹³ as well as newer iterations, such as the recent work on “demopudence” by Lani Guinier and Gerald Torres, extol the authorial and interpretive work of non-lawyers who are themselves subject to conditions of injustice and exclusion.¹⁹⁴ This insight is essential. Guinier and Torres suggest that some movement actors are represented by lawyers,¹⁹⁵ but they pay less attention to the role of lawyers in facilitating critical ideation by movement actors. Movement lawyers help build narratives that offer a universe of actors to name,

188. See RICHARD SENNETT, TOGETHER: THE RITUALS, PLEASURES AND POLITICS OF CO-OPERATION 18–20 (2012) (distinguishing between dialogic and dialectic collaboration, the former emphasizing presence and listening, the latter marked by competition and closure).

189. See Betty Hung, *Essay—Law and Organizing From the Perspective of Organizers: Finding a Shared Theory of Social Change*, 1 L.A. PUB. INT. L.J. 4, 19–23 (2009) (arguing that successful lawyer-organizer collaborations possess a shared a theory of social change).

190. My conceptualization of critical ideation is informed by the work of Amna Akbar on how the Movement for Black Lives challenges and reconceives law. See generally Amna A. Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352 (2015); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. (forthcoming 2018). My conceptualization also owes a great debt to Robert Cover's foundational work on “jurispathic” state. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

191. See Edelman et al., *supra* note 152, at 675 (advancing an exogenous shock/endogenous shift framework for social movement organizations in dynamic contexts).

192. See *id.*

193. See sources cited *supra* notes 7–9.

194. Guinier & Torres, *supra* note 182, at 2781–82.

195. *Id.*

blame, and claim against.¹⁹⁶ This is significant, so that “resistance becomes not just action against legality but action against those believed to have caused [resistors’] legal disadvantages.”¹⁹⁷

When Arizona politicians and law enforcement authorities started enacting and enforcing anti-immigrant policies, movement lawyers with NDLO, MALDEF, and the ACLU of Arizona gravitated toward local activists and helped to support the organizations that they built with their grassroots collaborators.¹⁹⁸ Organizers, activists, and movement constituents—not lawyers—were the face of the campaign in the media and with funders.¹⁹⁹ The critical discursive framing of restrictionism in Arizona, with an explicit critique of white supremacist law enforcement, came to the fore in media accounts. Movement actors and lawyers had critical exchanges in defining and framing what was occurring on the ground in Arizona and sought to bring that understanding into the broader public consciousness through protest and media advocacy. Lawyers helped support the construction of new immigrant advocacy organizations at the grassroots and advanced activist framing of what was happening nationally with elected officials, allies, funders, and journalists.

As youth activists grew uncomfortable with both the DREAMer narrative and the continued support of established advocacy organizations for CIR legislation that would intensify immigration enforcement, movement lawyers helped reinforce critical and solidaristic narratives.²⁰⁰ Day laborers were “the most precarious and stigmatized of the undocumented population.”²⁰¹ The commitment of the lawyers at NDLO, MALDEF, and the UCLA Labor Center to this group²⁰² led them to share the activists’ critique of DREAMer exceptionalism and to develop solidaristic commitments in their advocacy; these lawyers

196. See William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC’Y REV. 631, 635–37 (1980–81) (setting out a framework in which individual actions to generate disputes define law); Deborah Stone, *Causal Stories and the Formation of Policy Agendas*, 104 POL. SCI. Q. 281, 289–93 (suggesting that the advancement of causal stories yields particular policy solutions).

197. Brisbin, *supra* note 156, at 29.

198. Telephone Interview with Chris Newman, *supra* note 58; E-mail from Annie Lai, *supra* note 66. I discuss this choice further in Section III.C.

199. Telephone Interview with Chris Newman, *supra* note 58.

200. See *supra* Section I.C.

201. Walter Nicholls, *Politicizing Undocumented Immigrants One Corner at a Time: How Day Laborers Became a Politically Contentious Group*, 40 INT’L J. URB. & REGIONAL RES. 299, 299, 305 (2016).

202. Nicholls et al., *supra* note 127 at 1040–41. Victor Narro, formerly the Workers’ Rights Project Director at CHIRLA, helped found NDLO and joined the staff of the UCLA Labor Center. Victor H. Narro, UCLA SCH. L., <https://law.ucla.edu/faculty/faculty-profiles/victor-h-narro> [https://perma.cc/S7DY-VDU6].

understood why it was important to stand with immigrants who were most vulnerable to criminal and immigration enforcement.

As S-Comm spread in jurisdictions across the country, activists began to call out the Obama Administration, while established advocacy organizations remained focused on collaborations with the White House to move CIR in Congress.²⁰³ Movement lawyers sought to originate legal and political tactics against the use of local law enforcement agencies to enforce immigration law, informed and animated by the day laborer battles of the preceding decades, as well as the twin threat posed to immigrants in Arizona by SB 1070 and Sheriff Joe Arpaio.²⁰⁴ Movement actors with roots in local communities understood that they could not hold in abeyance opposition to Obama-era immigration enforcement on the frayed thread of a hope that CIR would be revived and passed.²⁰⁵ Building on the solidaristic narrative described above, activists and lawyers chose not to run away from immigrants in the gun sights of ICE and instead found ways to criticize and slow the implementation of S-Comm.²⁰⁶ This was a consequence both of critical ideation and common organizational relationships being built between activists and lawyers in Arizona and elsewhere.

Finally, when the stand-alone DREAM Act failed in Congress in late 2010, activists like Neidi Dominguez began to focus on the possibility of an executive exercise of categorical discretion.²⁰⁷ Some were opposed because of the effect on any remaining chance of moving CIR, while others thought that the idea was legally deficient or insufficiently protective.²⁰⁸ Lawyers provided support for movement leaders to make the case for categorical executive discretion in negotiations with the White House. Once again, movement actors participated in a mutually reinforcing process of critical ideation. Together, they “ultimately restructured the politics of the possible” and worked to persuade policymakers outside of the movement.²⁰⁹ Lawyers provided sources of authority, such as precedents from immigration legal history, for the critical ideas being advanced by activists in a context of skepticism, if not outright hostility.

Movement actors in each of these instances collaborated to advance initiatives that were outside of the ideational repertoire in the issue area generally in society, but perhaps more importantly, outside of the ideational repertoire of established advocacy organizations and allied policymakers in the field. For

203. *See supra* Sections I.B.–I.D.

204. *See supra* Sections I.B.–I.D.

205. *See supra* Section I.B.

206. *See supra* Section I.C.

207. *See supra* Section I.D.

208. *See supra* Section I.D.

209. Guinier & Torres, *supra* note 182, at 2797, 2798–99.

dissenters to move ideas from the margins to the center, they needed to access sources of authority found in law, as well as material organizational resources to which lawyers have more direct access. Further, in each of the instances noted above, movement actors advanced ideas that they hoped would shift culture and not just rules on the books.²¹⁰ In taking on both policy opponents and putative allies, movement actors challenged how advocacy incumbents constrained the bounds of political possibility and suppressed the power of new entrants.²¹¹ In the course of this wave of challenges to advocacy incumbents, they were nourished by and helped build community institutions.²¹²

B. Resource Generation

Lawyers in social justice struggles are expected to bring litigation to the table as a key resource.²¹³ The 2009–2012 mobilization is especially interesting for two reasons. First, there were already leading legal organizations—ACLU-IRP and NILC—litigating in Arizona against Arpaio and SB 1070 with a long track record of effective advocacy and deeper pockets than the more movement-centered legal and organizing groups on the ground.²¹⁴ Second, immigration law was and is not especially conducive to litigation campaigns due to the plenary power doctrine²¹⁵ and the provisions of the 1996 Immigration & Nationality Act amendments that strip judges of discretion, move cases from the agency directly to federal appellate

210. See Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 978 (1997) (“‘Culture-shifting’ laws, by contrast, alter basic principles, and alter them in ways that are inescapable—indeed, transformational. They remake culture.”).

211. Building on Thomas Stoddard’s observation: “How a new rule comes about [and *the standpoint of those who advance that rule*] may be as important as what it says.” *Id.* at 991.

212. Francesca Polletta, “Free Spaces” in *Collective Action*, THEORY & SOC’Y, Feb. 1999, at 1, 4 (“Counterhegemonic frames come not from a disembodied oppositional consciousness or pipeline to an extra-systemic emancipatory truth, but from longstanding community institutions.”).

213. Brisbin noted: “The incentive to engage in collective litigation as an act of resistance lies in its relatively low cost and its ability to provide judgments that change the law or convey a message about the legal identity and rights of disadvantaged groups.” Brisbin, *supra* note 156, at 33; see also E. Tammy Kim, *Lawyers as Resource Allies in Workers’ Struggles for Social Change*, 13 N.Y. CITY L. REV. 213, 215–17 (2009) (discussing how lawyers develop litigation that can be nested in multi-pronged campaigns for social change).

214. See *supra* Section I.B.

215. See Adam Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 373, 378–81 (2004) (describing the plenary power doctrine’s limits on constitutional challenges to wide-ranging immigration policy); see also LEILA KAWAR, *CONTESTING IMMIGRATION POLICY IN COURT: LEGAL ACTIVISM AND ITS RADIATING EFFECTS IN THE UNITED STATES AND FRANCE* 164 (2015) (arguing that “there is no red herring of assertive constitutional review in immigration matters,” and that lawyers and activists have to “look[] beyond compliance with official case dispositions”).

courts, and prohibit class actions.²¹⁶ It is possible to raise constitutional concerns in affirmative class action cases, but the space for institutional reform litigation is narrow relative to other areas of the law.

Even if one could effectively litigate systemic immigration legal issues, public interest lawyers would still face longstanding critiques of the use of litigation as a core social change tactic.²¹⁷ The critiques are variations on the argument that litigation demobilizes otherwise activated constituents:

[L]itigators too often use state power in service of a principle rather than using principle in service of resistance to state power or other concentrations of power that undermine democracy. Causes are adjudicated into grievances; constituencies of accountability are demobilized.²¹⁸

Nevertheless, when the Obama Administration continued the roll-out of S-Comm, immigrant rights activists and lawyers felt thwarted. There was no obvious legal theory with which to mount a frontal attack due to the interstitial nature of the program. S-Comm was not a legislative enactment requiring hearings and votes or even an agency regulation necessitating a rulemaking process. Instead, it consisted of incremental adjustments to the ways in which frontline immigration bureaucrats and professionals worked with other actors in law enforcement.²¹⁹

Because a direct attack on S-Comm was difficult, alternative strategies were necessary. Working with CCR and the Cardozo clinic, NDLOM hit on a creative litigation strategy that generated a rich trove of organizing resources: the

216. Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1443–65 (1997) (setting out jurisdictional limits).

217. See, e.g., Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 82–83 (1994) (arguing that backlash to *Brown v. Board of Education*, 347 U.S. 483 (1954), set back the civil rights movement); see also, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 338–39 (1991) (contending that courts do not effect social change); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 91, 214 (2d ed. Univ. of Mich. Press 2004) (1974) (positing that the pursuit of rights-based remedies individualizes social problems and legitimates the political system).

218. Guinier & Torres, *supra* note 182, at 2756 n.49.

219. Inés Valdez et al., *Missing in Action: Practice, Paralegality, and the Nature of Immigration Enforcement*, 21 CITIZENSHIP STUD. 547, 560 (2017). As Inés Valdez, Mat Coleman, and Amna Akbar note:

The way that § 287(g) and Secure Communities emerged as constitutive elements of the contemporary U.S. immigration enforcement regime has very little to do with formal lawmaking and court decision-making, and a lot to do with incremental adjustments and re-framing on the terrain of frontline immigration bureaucrats and professionals, which result from contentious encounters between differently located actors including the courts, DHS leadership, ICE rank-and-file, and civil society actors.

Id.

*National Day Laborers Organizing Network v. United States Immigration and Customs Enforcement Agency*²²⁰ FOIA case. The litigation provided potent resources to advance local organizing—data about arrest and deportations stemming from the program, information about the implementation of S-Comm, and state and local responses—tied together by a strong national critique of immigration enforcement as practiced on the ground.²²¹ These resources strengthened organizing at the grassroots level and aimed local interventions “directly at the level of enforcement.” N. ^#

²²² The litigation also exposed the diffuseness of the interior immigration enforcement strategy and its inaccurate targeting of community members, refuting the central premise of the program that it made communities safer. NDLO served as lead plaintiff in the FOIA litigation. The CCR and Cardozo clinic lawyers were not interacting with community leaders and youth activists as they achieved a succession of victories in federal court.²²³ NDLO was the conduit by which critical understanding came to shape a legal case that ultimately was handled by what one participant on the team called “mercenary lawyers.”²²⁴ Movement lawyering in this case drew opportunistically on available legal resources. In addition, the relative instability of the field of immigration advocacy in this period and the legislative paralysis in Washington, D.C. opened space for movement-centered organizations to focus on ground-level enforcement in public advocacy.²²⁵

While the campaign against S-Comm came to be relatively decentralized, with opt-out campaigns occurring in sub-federal jurisdictions in which there was immigrant political power that could be developed and harnessed by organizers, NDLO remained an organizational center of opposition to the program. It brought inconsistencies between administration rhetoric and the operations and effects of the program to the attention of elected officials in Congress, who could demand internal audits and a degree of accountability to the public. NDLO’s work against the deputation of local law enforcement also led it to become a leading force with youth activist groups for the passage of the TRUST Act in the

220. 811 F. Supp. 2d 713 (S.D.N.Y. 2011).

221. See Francesca Polletta, *The Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961–1966*, 34 L. & SOC’Y REV. 367, 402 (2000) (“In this movement [referring to SNCC], as in others, it was the syncretism of local protest traditions and such ‘master frames’ as rights that proved so potent.” (citations omitted)).

222. Valdez et al., *supra* note 219, at 562.

223. Telephone Interview with Peter Markowitz, *supra* note 82.

224. *Id.*

225. See Edelman et al., *supra* note 152, at 672 (“When field rules are uncertain, actors tend to be more receptive to new perspectives and to engage in search processes to identify alternatives. Proximate fields are a readily available and a trusted source for new ideas and practices.”).

California state legislature in 2012 (when it was vetoed by Governor Jerry Brown) and 2013 (when it was successfully enacted). The TRUST Act and AB 60, which provided driver's licenses to undocumented residents,²²⁶ were legislative campaigns around which movement groups could organize, particularly in light of legislative paralysis at the federal level.²²⁷ Groups participated in media campaigns, visited legislative offices, and assisted with implementation and community education after both measures were signed by the governor in 2013.

Lawyers made significant contributions in this period and co-generated organizing resources with movement leaders and activists. These resources were on a register between the realm of critical ideation and that of material organizational assets that could be used to strengthen fledgling activist formations. The resources were legal-conceptual and translated into a federal court complaint and bill drafts for legislative allies. The lawyers at NDLO, MALDEF, and the UCLA Labor Center were engaged in ongoing discussions with immigrant organizers and activists. They understood the enforcement challenges facing immigrant communities and were looking for opportunities to turn state power against federal immigration enforcement.²²⁸ They found a few such opportunities in these years and shared what they uncovered with their movement partners.

C. Accompaniment and Transformation

During a period of escalating immigration enforcement and of strategic and organizational instability in the immigrant rights advocacy sector, movement lawyers accompanied leaders, activists, and constituents, as they "came out" into the public sphere and asserted their agency.²²⁹ At their best, movement lawyers

226. Assemb. B. 60, 2013–14 Leg., Reg. Sess. (Cal. 2013) (codified at CAL. VEH. CODE §§ 1653.5, 12800, 12801–12801.11 (West 2015 & Supp. 2017)).

227. Sameer M. Ashar et al., *Navigating Liminal Legalities Along Pathways to Citizenship: Immigrant Vulnerability and the Role of Mediating Institutions* 25–27 (Criminal Justice, Borders and Citizenship, Research Paper No. 2733860), <http://ssrn.com/abstract=2733860>.

228. See PENDA D. HAIR, *LOUDER THAN WORDS: LAWYERS, COMMUNITIES AND THE STRUGGLE FOR JUSTICE* 144 (2001). As Penda Hair explained:

[L]awyers were most effective when they functioned as part of a broader problem-solving process, working to mediate between the role of the law and the goals of organized and cohesive community members. This is particularly important when community aspirations are not easily translated with the existing paradigms of justice. In this role, lawyers continuously ask how the law can be interpreted and applied to advance community goals.

Id.

229. Cf. Rose Cuison Villazor, *The Undocumented Closet*, 92 N.C. L. REV. 1, 49–66 (2013) (arguing that public exposure of undocumented status constitutes an act of resistance).

“held space” for activists.²³⁰ Lawyers make choices about which individuals and groups to represent or accompany. In a roiling advocacy sector, the lawyers in this mobilization narrative chose to ally with youth activists, as they asserted agency and rejected the benevolent direction of incumbent policy advocates in the immigrant rights field. When the situation in Arizona came to a head with the passage of SB 1070 and the continuing terror spread by Sheriff Joe Arpaio, movement lawyers recommitted to supporting new immigrant community formations such as Puente. When RIFA began to break apart in the middle Obama years, movement lawyers built common cause with movement activists around anti-enforcement messaging, local opt-outs from S-Comm, and categorical discretion proposals. And when activists met with White House staffers in 2012 before the announcement of DACA, they were accompanied by their movement lawyers. Lawyers chose activists and activists chose lawyers in these instances, under difficult circumstances when former allies were pitted against one another.²³¹ This accompaniment in the midst of conflict laid the foundation for a series of successful collaborations between lawyers and movement actors.

As demonstrated in *NDLON v. ICE*, accountability to relatively powerless clients does not necessitate a particular kind of thick lawyer-client relationship; rather, it requires an internalized commitment on the part of lawyers to accept clients’ methods and goals and a corresponding trust and openness on the part of activists toward their lawyer-collaborators. *NDLON* had established a commitment to youth activists through its narrative and material support of their work, as well as the physical presence of staff lawyers and organizers on the ground in Arizona. In the open records case, as both plaintiff and, informally, co-counsel, it was a critical conduit ensuring accountability of the legal team to movement actors.

Lawyers were present as conditions changed rapidly and were close observers of the fast-developing agency of undocumented youth. Everyday resisters, in the

230. As Chaumtoli Huq explains:

I come back to the idea of being present for each other, holding space for individuals and communities that need that at this moment in my own effort to make sense of the present socio-political realities. For me, this practice of listening, and holding space, allows for compassion and empathy that will be essential for any social justice path.

Chaumtoli Huq, *Calling All Movement Lawyers: We Need to Organize Our Legal Support*, L. MARGINS (Nov. 10, 2016), <http://lawatthemargins.com/calling-movement-lawyers-need-organize-legal-support> [https://perma.cc/8MAA-L4M5]; see also Bernard Loomer, *Two Conceptions of Power*, 6 PROCESS STUD. 5, 24 (1976) (“Presence means that both knowing and being known are functions of the creativity of both the speaking and the listening.”).

231. See BROWN-NAGIN, *supra* note 11, at 175–87 (describing the eventual SNCC-NLG alliance in spite of a long campaign of red-baiting against the Guild).

narratives of Ewick and Sibley²³² and Lucie White²³³ challenge legal forms and legal scripts and are themselves changed in some way; in this period, lawyers were moved by their work with resisters.²³⁴ The foundational commitment of youth activists to a critique of criminalization and mass incarceration—across categories of immigration status and race—shaped strategy decisions with regard to CIR and S-Comm and broadened the focus of movement organizations.²³⁵ Lawyers help diffuse dissenting ideas and strategies through networks to multiple organizations, including incumbent policy advocates.²³⁶ The commitment of activists to intersectional identities, as demonstrated by the vibrant presence of LGBT immigrants in movement leadership, bound constituencies and taught lawyers to refrain from submerging or obscuring issues and experiences that departed from a singular narrative manufactured for the consumption of conservative Americans.

Finally, to the extent that lawyers facilitated activists' resistance and reconstruction of law, they also participated in a consolidation of identity. Ian Haney-López writes about the development of Chicano identity in Los Angeles following the prosecution of movement activists and Oscar Acosta's defense of those activists.²³⁷ Acosta put the white establishment on trial in his defense cases.²³⁸ Lawyers have a role in identity consolidation, in the way that they construct harms and causalities in advocacy. In this narrative, activism fueled the creative construction of complex, intersectional identities and the need for a greater degree of critical consciousness about identity development and community solidarity in legal advocacy. It is incumbent on lawyers to be aware of that feature of movement work and to assure that legal advocacy leaves space for such creative

232. See, e.g., Ewick & Sibley, *Conformity*, *supra* note 5; Ewick & Sibley, *Narrating*, *supra* note 5.

233. See, e.g., White *supra* note 8.

234. See Corey S. Shdaimah, *Lawyers and the Power of Community: The Story of South Ardmore*, 42 J. MARSHALL L. REV. 595, 626 (2009) ("We should not underestimate what community groups can do for lawyers. Lawyers who envision their work as part of some greater good derive sustenance and inspiration from their work with community organizations or social movements, even dormant or nascent ones.").

235. See Edelman et al., *supra* note 152, at 660 ("[S]ocial movement ideals permeate organizations indirectly by altering organizations' institutional environments.").

236. *Id.* at 673. As Edelman et al. noted:

Diffusion occurs largely through the work of field actors, especially those who work across the boundaries of fields, such as . . . lawyers who work within or advise social movements. These actors may play central roles in helping shifts in meaning within one field seep into other fields. When consciousness begins to shift, professional networks become a primary means by which new ideas spread both within and across field boundaries.

Id.

237. IAN F. HANEY LÓPEZ, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE 205–29 (2003).

238. *Id.* at 45–55.

construction, rather than squeezing people into the pre-existing categories that are intuitive to those in power.

CONCLUSION

“At the end of the day we have no choice but to fight.”²³⁹

In this first year of the Trump Administration, anti-immigrant animus drives a successful campaign intended to evoke fear in communities.²⁴⁰ Sheriff Joe Arpaio has been pardoned after his conviction for noncompliance with federal court orders prohibiting racial profiling.²⁴¹ The Trump Administration has terminated DACA.²⁴² Movement actors understood that white supremacy underlay Arpaio’s regime of racial profiling and systematic dehumanization in Arizona. White supremacy now drives federal immigration enforcement, without shame or constraint.²⁴³ The trajectory of the immigrant rights movement after 2012 will

239. Jennifer Medina, *A Defender of the Constitution, With No Legal Right to Live Here*, N.Y. TIMES (July 17, 2017), <https://www.nytimes.com/2017/07/17/us/undocumented-immigrants-illegal-citizen-ship.html> (quoting immigration lawyer Lizbeth Mateo).

240. Adam Goodman, *The Core of Donald Trump’s Immigration Policy? Fear.*, WASH. POST (Aug. 24, 2017), https://www.washingtonpost.com/news/made-by-history/wp/2017/08/24/the-core-of-donald-trumps-immigration-policy-fear/?utm_term=.ca4713063287 [<https://perma.cc/3DNY-XGAS>].

241. Julie Hirschfeld Davis & Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigration*, N.Y. TIMES (Aug. 25, 2017), <https://www.nytimes.com/2017/08/25/us/politics/joe-arpaio-trump-pardon-sheriff-arizona.html>.

242. Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html>.

243. See Cristina Jiménez, *Fighting for Our Lives: Immigrants Rising Up Against White Supremacy*, MEDIUM (Aug. 24, 2017), <https://medium.com/@UNITEDWEDREAM/fighting-for-our-lives-immigrants-rising-up-against-white-supremacy-820f8887e5d7> [<https://perma.cc/8G4D-JLK2>]. Jiménez notes:

The push to enact the Muslim ban, the effort to win Congressional funding for the border wall, the building of more detention camps, the laughing about police brutality, the hiring of more ICE agents to go to schools, churches, and homes to round up immigrant youth and families for detention and deportation: all of this is white supremacy in action.

Id.; see also *Who’s Behind the Plot Against DACA*, CTR. NEW COMMUNITY, <https://www.plotagainstdaca.com/> [<https://perma.cc/QD8L-DFVA>]. The Center for New Community stated:

Anti-immigrant organizations like FAIR, CIS, NumbersUSA, and IRLI, all of which have ties to white nationalists, have long taken a hardline stance that the federal government should dramatically restrict immigration and make life as difficult as possible for undocumented immigrants already living here. . . . They are also at the center of the latest assaults on young immigrants.

Id.; cf. SASHA POLAKOW-SURANSKY, *GO BACK TO WHERE YOU CAME FROM: THE BACKLASH AGAINST IMMIGRATION AND THE FATE OF WESTERN DEMOCRACY* 280–83 (2017). Sasha Polakow-Suransky explains:

be the subject of future scholarship. However, the positive portrayal of movement actors and allied lawyers in this Article raises the question of how their assertion of agency and development of critical infrastructure gave way to an ascendant white supremacist immigration restrictionism.

It would be a mistake to truncate immigration legal history into a four- or six-year period, when we know that cycles of nativism and the resort to forms of white supremacy in immigration policy have been with us from the time that the first settler-colonialists took the land from Indigenous Peoples and forced Africans into slavery to work that land. In the first decade of the twenty-first century, the immigration legal system was in a state of paralysis with a large population of undocumented people vulnerable to state violence, intensified after 9/11. The legislative strategy pursued by liberal and moderate politicians for a decade had not worked. Instead, youth activists pushed for more contingent but also more immediate remedies as they rose in the immigrant rights advocacy field. They did so with the essential assistance of movement lawyers.

As we confront the dire need for resistance and reconstruction, this Article is an offering: an examination of how the collaborations between movement actors and lawyers worked in a brief period of ascension. This Article describes the role of lawyers in a process of resistance to legality and the collaborative reconstruction of law and social discourse and it aims to inform and enrich movement lawyering over the long arc of struggle and liberation.

The mainstreaming of xenophobic views and policies could eventually undermine the liberal democratic model of government in countries that we today regard as progressive and tolerant. The result would be a watered-down form of democracy that deprives immigrants and ethnic and religious minorities of basic rights. And, at worst, it would mean a resurgence of the ugliest national ideologies that marred the history of the twentieth century.
Id. at 292.