ARTICLES

CRITICAL IMMIGRATION LEGAL THEORY

BY KATHLEEN KIM,* KEVIN LAPP** & JENNIFER J. LEE***

ABSTRACT

U.S. immigration law has always been a place for Americans to enact their many prejudices. Often, it edifies norms that exclude and subordinate noncitizens due to their race, gender, or socioeconomic status. As a result, immigration law and policy create great human suffering through actions such as separating families, excluding refugees, and detaining noncitizens.

In response, scholars are engaging in a distinctive method of interrogating immigration law. We call this analytic method Critical Immigration Legal Theory ("CILT"). Derived from critical race theory and other similar theories, CILT critiques facially colorblind immigration laws to expose their subordination of immigrants based on race and other historically oppressed identities, while challenging the fixed legal categories of alienage and citizenship by defining new ways of belonging. It also uses anti-essentialism to contest the negative stereotypes of immigrants as undesirable outsiders as well as the positive stereotypes of deserving immigrants and "model minorities" that encourage respectability politics. Further, CILT has a central praxis dimension that aspires to transform immigration law and its treatment of noncitizens by aligning with immigrant rights movements that are mobilizing for social change and legal transformation.

Our goal is to recognize the trend of CILT methodology within immigration law scholarship as a means of contestation, resistance, and praxis. CILT has emerged out of the growing cadre and diversity of immigration law scholars and the increasingly blurred lines between law scholar, lawyer, and activist. Their lived experiences—personal and professional—inform their perspectives on the

* Professor of Law and Co-Director of the Loyola Anti-Racism Center at LMU Loyola Law School Los Angeles.

** Associate Dean for Faculty and Professor of Law at LMU Loyola Law School Los Angeles.

*** Associate Professor of Law at the Sheller Center for Social Justice, Temple Law School. The authors are grateful for helpful feedback from attendees at the 2022 Immigration Law Teachers & Scholars Workshop as well as Raquel Aldana, Jane Baron, Ming Hsu Chen, Tristin Green, Laila Hlass, Kevin Johnson, Eric Miller, Priscilla Ocen, Katherine Pérez, Jaya Ramji-Nogales, Carrie Rosenbaum, and Peter Spiro. Special thanks to Temple Law Librarian Noa Kaumeheiwa and research assistants Woayorm Kumazah and Livia Luan.

systems of power that subjugate the noncitizens with whom they collaborate. By describing current CILT approaches, we hope to begin a conversation for others to connect, weigh in, and build on our description. We conclude by considering the implications of CILT, from the potential for backlash to how it changes the way that immigration law scholars teach and work with students, clients, and communities.

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INTRODUCTION

U.S. immigration law and policy consists of complex systems derived from divergent perspectives on who belongs in this nation and for what purposes. This contested policy space includes advocates of open borders, immigration restrictionists wary of outsiders, supporters of temporary worker programs to fill short-term labor needs, and those who embrace integrating long-term immigrants as future citizens of our nation. Immigration law and policy, emblematic of other U.S. legal regimes, also reflect the law's relationship to systemic inequality. Often, U.S. immigration law and policy edify norms that exclude and subordinate noncitizens due to their race, gender, sexual orientation, and/or socioeconomic status. Indeed, immigration law has always been a place for Americans to enact their many prejudices.[1]

Until the late twentieth century, few legal scholars explored these complexities of immigration law. In the twenty-first century, however, the scholarly field of immigration law has flourished. Among the many rich strains of immigration law scholarship, a distinctive method of interrogating immigration law and policy has emerged. We call this analytic method Critical Immigration Legal Theory ("CILT").[2] CILT responds to the vast human suffering caused by U.S. immigration law while exposing the systems of power and prejudice at work in the U.S. immigration regime. It utilizes critiques of colorblindness, essentialism, and fixed legal categories, while drawing from movement lawyering as a methodological framework to elucidate the role of immigration law in subordinating noncitizens and reifying white patriarchy.[3] Like other critical legal theories, CILT also has a central praxis dimension that aspires to transform the immigration law system and its treatment of noncitizens.[4]

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[1] *See* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925, at 4 (2002).

[2] We are not the first to consider critical theories in immigration law scholarship. *See, e.g.*, MING HSU CHEN, PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA 179 n.13 (2020) (referencing "critical immigration scholars" more generally as those who seek to "decouple belonging from status"). The LatCrit Biennial Conference 2021 convened two panel discussions on the intersection of critical race, other critical theories, and immigration: "Toward a Critical Immigration Studies" and "Critical Perspectives on Immigration." *LatCrit 2021-Begins Fri 10/8/21*, IMMIGRATIONPROF BLOG (Oct. 7, 2021), https://lawprofessors.typepad.com/immigration/2021/10/latcrit-2021-begins-fri-10821.html.

[3] While this Article often uses the terms "immigrant" and "noncitizen" interchangeably, it also recognizes that these terms are distinct. We use the term "immigrant" to refer broadly to foreign-born individuals who immigrate to the United States with or without legal immigration status, including those who may or may not gain U.S. citizenship. We use the term "noncitizen" to refer to foreign-born individuals who reside in the United States without U.S. citizenship.

[4] *See, e.g.*, Marc Tizoc Gonzalez, Saru Matambanadzo & Sheila I. Vélez Martínez, *Latina and Latino Critical Legal Theory: LatCrit Theory, Praxis and Community*, 12 REV. DIREITO

Rather than simply claim CILT as a term, our goal in this Article is to invoke and embrace it as a unifying thread across scholarship that grapples with immigration law as a site of contestation, resistance, and praxis. Derived from the influential fields of critical legal studies,[5] critical race theory,[6] feminist jurisprudence,[7] and other similar analytic frameworks,[8] this Article is inspired by our work on *Feminist Judgments: Immigration Law Opinions Rewritten*.[9] In that volume, contributing authors re-envisioned foundational immigration law jurisprudence through a broadly conceived feminist lens that incorporated insights from critical race theory, critical race feminism, and other intersectional modes of analysis. What emerged was a scholarly conversation among authors utilizing CILT approaches to contest immigration law's presumptions about who belongs in our national community.

The visibility of CILT in mainstream immigration law scholarship has risen over the last fifteen years. The growing cadre and diversity of immigration law scholars and the increasingly blurred lines between immigration law scholar, lawyer, and activist have made a difference. This cadre's lived experiences—personal and professional—inform its astute perspectives on the systems of power that subjugate the noncitizens it represents and with whom it collaborates.

By highlighting CILT methods in immigration law scholarship, we hope to generate further conversations and connections between scholars, lawyers,

E PRÁXIS 1316, 1319 (2021) (affirming LatCrit seeks to "sharpen the social relevance of critical theorizing" and "to promote theory as a catalyst for lasting social transformation").

[5] *See generally* Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 674 (1983).

[6] *See generally* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995).

[7] *See generally* NANCY LEVIT & ROBERT R. M. VERCHICK, FEMINIST LEGAL THEORY: A PRIMER 8 (2006).

[8] *See, e.g.*, Tizoc Gonzalez et al., *supra* note 4, at 1318 (explaining LatCrit as critical theory centered on experiences of Latinas and Latinos in United States and how they suffer under U.S. law); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1314 (1993) (focusing on legal scholarship highlighting an "Asian American Moment"). In various substantive areas of law, scholars have examined the application of critical theories. *See, e.g.*, RUBEN J. GARCIA, CRITICAL WAGE THEORY: WHY WAGE JUSTICE IS RACIAL JUSTICE 5 (2024); Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2244 (2017) (challenging assumption that evidence law applies equally to all persons and provides everyone with equal voice in court); John Tehranian, *Towards a Critical IP Theory: Copyright, Consecration, and Control*, 2012 BYU L. REV. 1237, 1237 (arguing copyright "shap[es] social structures and regulat[es] individual behavior as part of a larger hegemonic project"); CRITICAL TAX THEORY: AN INTRODUCTION 107 (Anthony C. Infanti & Bridget J. Crawford eds., 2009) (exploring impact of tax laws on historically disempowered groups).

[9] FEMINIST JUDGMENTS: IMMIGRATION LAW OPINIONS REWRITTEN 2 (Kathleen Kim, Kevin Lapp & Jennifer J. Lee eds., 2023) (envisioning feminist approach to immigration law to foster diversity and dignity).

community advocates, and immigrants who apply aspects of this analytic framework. This Article attempts to identify the main trends that constitute CILT. One trend is the critique of facially colorblind immigration laws to expose their subordination of immigrants based on race and other historically oppressed identities, such as gender, sexual orientation, and socioeconomic status. Another is the use of anti-essentialism to contest negative stereotypes of immigrants as undesirable outsiders as well as so-called positive stereotypes of deserving immigrants and "model minorities" that propagandize respectability politics. Others have also challenged the reductive categories of alienage and citizenship by showing how immigrants, through their own political action, often at the local level, have redefined belonging. A final approach seeks to align with immigrant rights movements to mobilize for social change and legal transformation.

This last approach supports CILT's praxis dimension. Many immigration law scholars have become intimately familiar with their clients' entanglements with the immigration law system. As a methodology, CILT can inform advocacy for immigrant rights through direct legal representation, movement building, and policy reform. By amplifying CILT, our hope is to highlight how such scholarship envisions bringing this country's immigration system in harmony with an equitable and inclusive democracy.

A few caveats are in order. We do not intend to imply that CILT is the only approach within immigration law scholarship that has the goal of reforming the immigration law system. In fact, there are many valuable methods of immigration law scholarship that effectively critique the current legal regime[10] and similarly come from a place of praxis.[11] Further, our discussion focuses on

[10] For example, some authors have used empirical methods to contest the current immigration law regime. *See, e.g.*, Emily Ryo & Reed Humphrey, *Beyond Legal Deserts: Access to Counsel for Immigrants Facing Removal*, 101 N.C. L. REV. 787, 809-14 (2023) (presenting empirical study demonstrating need to consider geographic, linguistic, and social isolation barriers to address representation crisis); Huyen Pham & Pham Hoang Van, *Subfederal Immigration Regulation and the Trump Effect*, 94 N.Y.U. L. REV. 125, 153 (2019) (tracking how cities, counties, and states increased enforcement after Trump's immigration policies); Michael Kagan, Rebecca Gill & Fatma Marouf, *Invisible Adjudication in the U.S. Courts of Appeals*, 106 GEO. L.J. 683, 696-99 (2018) (drawing from study of immigration appeals demonstrating that large number of decisions are unavailable and mostly invisible to public); Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 54-56 (2015) (presenting data on lack of representation in deportation cases decided between 2007 and 2012); ANDREW I. SCHOENHOLTZ, PHILIP G. SCHRAG & JAYA RAMJI-NOGALES, LIVES IN THE BALANCE: ASYLUM ADJUDICATION BY THE DEPARTMENT OF HOMELAND SECURITY 3-4 (2014) (analyzing asylum adjudication data to address influence of external, non-merit based factors).

[11] Others have used the lens of their clinical practice to provide insight on problems within immigration law. *See generally* Fatma Marouf, *Immigration Detention and Illusory Alternatives to Habeas*, 12 U.C. IRVINE L. REV. 973 (2022); Nancy Morawetz, *Representing Noncitizens in the Context of Legal Instability and Adverse Detention Precedent*, 92

scholars writing about U.S. immigration law, although rich literature about migration from an international law perspective also exists.[12] Finally, we realize that the collection, labeling, and categorization of scholarship risks the possibility of overlooking or mislabeling work, or worse, the inadvertent creation of a hierarchy in immigration scholarship by suggesting criteria for inclusion in the "canon" of CILT. With these concerns in mind, this Article is not an exhaustive attempt to catalog all immigration law scholarship associated with CILT. Rather, it is a starting point to explore and elucidate the breadth and depth of current CILT methodologies. We encourage others to weigh in, contest, and build upon the CILT methods we examine in this Article. In doing so, we hope to foster an iterative process among immigration scholars and stakeholders which will inform and influence CILT's potential to morph over time in response to the ever-changing immigration law system.

Our Article proceeds in four parts. We first trace the development of immigration law scholarship over the last one hundred years, culminating today in a diverse community of immigration scholars, educators, practitioners, and activists. Part II provides context for CILT's emergence by explaining how immigration law and policy has functioned as a tool of subordination, from the earliest federal legislation to modern immigration enforcement practices. This review includes a brief discussion of the influence of immigrant rights movements. Against this backdrop, Part III identifies the modern approach to interrogating immigration law and policy that we call CILT. We highlight CILT's salient features and prominent approaches taken by scholars deploying this critical lens. In Part IV, we address the implications of CILT for immigration law and legal scholarship going forward.

I. IMMIGRATION LAW SCHOLARS

The emergence of CILT followed several important developments in the legal academy in recent decades. This Part briefly recounts the development of immigration law scholarship, the increase in immigration scholars and teachers in U.S. law schools in both number and diversity, and the organizing efforts among immigration law professors that have fostered a vibrant, critical community.

FORDHAM L. REV. 873 (2023); Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181 (2017).

[12] *See, e.g.*, Jaya Ramji-Nogales & Peter J. Spiro, *Introduction to Symposium on Framing Global Migration Law – Part II*, 111 AJIL UNBOUND 134 (July 17, 2017), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/E8235D1A0F697A4664A14FB92FA522FD/S2398772317000411a.pdf/introduction-to-symposium-on-framing-global-migration-law-part-ii.pdf [https://perma.cc/9Z3P-NCUY] (aiming to situate global migration within theoretical dimensions).

Immigration law as a scholarly endeavor was not mainstream until the last several decades.[13] Before that, legal scholarship about immigration law was more likely to be in the form of commentary on immigration cases[14] or new developments in immigration law,[15] rather than U.S. scholars devoting their careers to its exploration. Much of the academic literature that delved more deeply into immigration law was written by scholars in other fields, including historians, political scientists, and sociologists.[16]

In the 1920s, for example, a handful of legal scholars focused primarily on immigration legislation and court decisions and often supported the prevailing restrictive immigration regime.[17] One piece of immigration law scholarship, published in 1926 in the *Yale Law Journal*, provided a largely favorable analysis of the 1924 Immigration Act.[18] This Act instituted a national origins quota system that prioritized White immigrants from western European countries and prohibited immigrants of color from across Asia.[19] The author, Columbia Law School Professor Phillip Jessup, endorsed the Act as "one of the most humanitarian systems of restricted immigration ever devised."[20] More notable to modern readers is the way Jessup bookended the piece. In the first line of the article, he announced that "[i]t is not the purpose of this article to enter upon a discussion of the fundamental principles of restrictive immigration, nor to

[13] A HeinOnline search in the Law Journal Library with the topic "Immigration Law" showed a sharp increase in articles beginning in 1980. For example, compare the following decades: 1960-1969 (335 articles); 1970-1979 (646 articles); 1980-1989 (1,698 articles); 1990-1999 (3,076 articles); 2000-2010 (6,532 articles).

[14] *See, e.g.*, *Case Notes: Administrative Law—Deportation Proceedings—Administrative Procedure Act—Judicial Review—Declaratory Judgments*, 28 S. CAL. L. REV. 407, 407 (1955) (reviewing Shaughnessy v. Pedreiro, 349 U.S. 48 (1955)).

[15] *See, e.g.*, Elmer Fried, *Immigration and Nationality Law*, 36 N.Y.U. L. REV. 679, 679 (1961).

[16] *See, e.g.*, HIGHAM, *supra* note 1; E. P. HUTCHINSON, IMMIGRANTS AND THEIR CHILDREN, 1850-1950 (1956); JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870 (1978).

[17] According to a 1999 review of immigration law scholarship written by historians, "[s]cholars began to consider the issue of immigration policy in the 1920s, but most of the resulting work tended to be heavily biased and served the goals of nativists in the debate over immigration during those years." Erika Lee, *Immigrants and Immigration Law: A State of the Field Assessment*, 18 J. AM. ETHNIC HIST. 85, 95 (1999).

[18] Philip C. Jessup, *Some Phases of the Administrative and Judicial Interpretation of the Immigration Act of 1924*, 35 YALE L.J. 705, 724 (1926) ("[The Act] has on the whole been sensibly interpreted and administered.").

[19] One of the Act's proponents, U.S. Representative Albert Johnson, was a leading proponent of eugenics and proclaimed the Act was a bulwark against "a stream of alien blood." CARL N. DEGLER, OUT OF OUR PAST: THE FORCES THAT SHAPED MODERN AMERICA 301 (rev. ed. 1970).

[20] Jessup, *supra* note 18, at 724.

speculate upon the pleasing possibility of Nordic supremacy."[21] He concluded by asserting that amendments to the 1924 Act were unlikely because of a "legitimate fear that the sleeping Pacific Coast dog might resume his inhospitable barking," using a dehumanizing reference to describe concerns about Japanese aggression.[22]

Such explicit nativism and white supremacy—in the flagship journal of the country's leading law school and by a respected Ivy League professor—reflected the prevailing white worldview of immigration law. Cast as the inferior other, immigrants were relegated to limited benevolence from White Americans.

Nevertheless, critical voices could be found in early legal scholarship. In 1939, for example, an article in the *Yale Law Journal* written by a former student and practicing attorney, Leo M. Alpert, decried the vagueness of who could be excluded from the United States based on being "likely to become a public charge."[23] The author summarized the regime as one of "draconic, literal, and unplanned enforcement of irrational immigration measures."[24] Looking beyond the statutory language to the decisions of immigration officials interpreting and applying the public charge clauses, Alpert concluded that "the motto of the Immigration Service, in these cases, has seemed to be revenge."[25]

Over the ensuing decades, the modest amount of legal scholarship on immigration issues began to increase. By the 1980s, with nearly triple the number of articles from the preceding decade, immigration law began to emerge as a coherent field of legal scholarly inquiry.[26] This growth occurred alongside, and likely in response to, the influx of the largest and most diverse set of immigrants to the United States since the turn of the century[27] and a flurry of

[21] *Id.* at 705.

[22] *Id.* at 724.

[23] Leo M. Alpert, *The Alien and the Public Charge Clauses*, 49 YALE L.J. 18, 38 (1939). Alpert wrote six law review pieces. This was the only one that touched on immigration issues.

[24] *Id.*

[25] *Id.*

[26] According to Peter Schuck, "[t]he legal academy's new interest in immigration law and policy was reflected in, and facilitated by, two developments: the establishment in 1984 of an Immigration Law Section in the Association of American Law Schools and the publication of several immigration law casebooks." Peter H. Schuck, *Introduction: Immigration Law and Policy in the 1990s*, 7 YALE L. & POL'Y REV. 1, 3 n.16 (1989).

[27] After four decades of a shrinking immigrant population in the United States, the immigrant population sharply increased in the 1970s and continued to grow in the 1980s. *See U.S. Immigrant Population Change by Decade, 1850-2022*, MIGRATION POL'Y INST., https://www.migrationpolicy.org/programs/data-hub/charts/immigrant-population-change-decade [https://perma.cc/6RL4-GUGQ] (last visited Oct. 4, 2024). For the first time, immigrants who were coming to the U.S. in the 1980s were more likely to come from Central and South America and Asia than they were to come from Europe. *Chapter 3: The Changing Characteristics of Recent Immigrant Arrivals Since 1970*, PEW RSCH. CTR. (Sept. 28, 2015), https://www.pewresearch.org/race-and-ethnicity/2015/09/28/chapter-3-the-changing-characteristics-of-recent-immigrant-arrivals-since-1970/ [https://perma.cc/VMQ7-AB3T].

federal immigration legislation.[28] A new batch of legal scholars moved beyond histories of nativism and restriction to uncover defining principles and enduring themes in U.S. immigration law and policy.[29] They assessed immigration court decisions, asylum procedures, and citizenship rules.[30] During this decade, sufficient interest existed to justify a new law school journal focused exclusively on immigration law, the *Georgetown Journal of Immigration Law*.[31] For the first time, there were immigration law casebooks.[32] Faculty began to teach immigration law survey courses and seminars,[33] and some launched and directed the earliest immigration-related law school clinics.[34]

[28] For example, during the 1980s, Congress passed the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102; the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (introducing civil and criminal penalties for employing unauthorized workers, providing path to legal immigration status for millions of unauthorized immigrants, and increasing border enforcement resources); and the Immigration Marriage Fraud Amendments of 1986, Pub. L. 99-639, 100 Stat. 3537 (codified as amended at 8 U.S.C. § 1325(c)).

[29] Among the leading immigration law scholars in the 1980s were David A. Martin, T. Alexander Aleinikoff, Stephen H. Legomsky, Gerald L. Neuman, and Peter H. Schuck.

[30] *See, e.g.*, David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 171 (1983); T. Alexander Aleinikoff, *Good Aliens, Bad Aliens and the Supreme Court*, 9 DEF. ALIEN 46, 46-50 (1986); Stephen H. Legomsky, *Political Asylum and the Theory of Judicial Review*, 73 MINN. L. REV. 1205, 1208 (1989) (identifying features of asylum cases relevant to conceptual foundations of judicial review); Gerald L. Neuman, *Immigration and Judicial Review in the Federal Republic of Germany*, 23 N.Y.U. J. INT'L L. & POL. 35, 36 (1990); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 4 (1984) (exploring immigration law's divergence from fundamental norms of constitutional right, administrative procedure, and judicial role).

[31] The first issue of the *Georgetown Immigration Law Journal* was published in 1985. *See* Charles Gordon, *Foreword: The Need for Statutes of Limitations in the Immigration Laws*, 1 GEO. IMMIGR. L.J. 1 (1985). From 1978 to 2003, the Center for Migration Studies also published *In Defense of the Alien*, a collection of articles for its annual legal conference, written by the leading experts in the field. *In Defense of the Alien*, JSTOR, https://www.jstor.org/journal/indefensealien# (last visited Oct. 4, 2024).

[32] There are two early immigration law casebooks: RICHARD A. BOSWELL, IMMIGRATION AND NATIONALITY LAW: CASES AND MATERIALS (1st ed. 1987) and ARNOLD H. LEIBOWITZ, IMMIGRATION LAW AND REFUGEE POLICY (1983). T.A. Aleinikoff and D.A. Martin soon thereafter published their immigration law casebook, IMMIGRATION: PROCESS AND POLICY, in 1985. *See* Hiroshi Motomura, Book Review, 21 INT'L LAW. 261, 261 (1987) (reviewing T.A. ALEINIKOFF & D.A. MARTIN, IMMIGRATION: PROCESS AND POLICY (1985)).

[33] *See* DAVID WEISSBRODT, LAURA DANIELSON, HOWARD S. (SAM) MYERS III, SARAH K. PETERSON & SARAH BRENES, IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL, at XI (8th ed. 2023) (noting that "[w]hen the first edition of this Nutshell was written [in 1984] . . . . only a few law schools considered immigration law worthy of a course").

[34] Some of the earliest immigration law clinics were started at Harvard Law School (1984) and University of California, Davis School of Law (1981). *See History & Mission*, HARV. IMMIGR. & REFUGEE CLINICAL PROGRAM, https://harvardimmigrationclinic.org/history-

While scholarly work on immigration increasingly appeared in print, the bulk of it was authored by White men.[35] In the 1990s, immigration policy debates took center stage with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") and Antiterrorism and Effective Death Penalty Act ("AEDPA").[36] As they did, more diverse voices joined the legal academy and conversation.[37]

Today, the field of immigration law is robust. Over half of ABA-accredited law schools have at least one full-time faculty member listed as having immigration law expertise.[38] There are also over one hundred immigration-related law school clinics, which focus on a broad range of issues, including providing direct representation to clients in deportation proceedings, engaging in federal impact litigation, and working on collaborative policymaking efforts in support of community groups.[39] Collectively, immigration law faculty are a diverse lot along multiple axes, such as race, gender, sexual orientation, and immigration status.[40] Before joining the legal academy, many immigration law professors worked as lawyers serving immigrant communities. As faculty, they continue to actively participate in ongoing litigation or other work in collaboration with immigrant communities.

mission/ [https://perma.cc/GGR7-QRFN] (last visited Oct. 4, 2024); *James F. Smith*, U.C. DAVIS SCH. OF L., https://law.ucdavis.edu/people/james-smith [https://perma.cc/X9WZ-WQ38] (last visited Oct. 4, 2024) (describing Smith's work as founder and director of Immigration Law Clinic since 1981).

[35] *See supra* note 29. *But see, e.g.*, Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615 (1981); Richard A. Boswell, *Rethinking Exclusion—The Rights of Cuban Refugees Facing Indefinite Detention in the United States*, 17 VAND. J. TRANSNAT'L L. 925 (1984).

[36] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

[37] *See, e.g.*, Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy over Immigration*, 71 N.C. L. REV. 413 (1993); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990); Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CALIF. L. REV. 863 (1993); Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555 (1996); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); Michael A. Olivas, *Storytelling Out of School: Undocumented College Residency, Race, and Reaction*, 22 HASTINGS CONST. L.Q. 1019 (1995).

[38] List of Full-Time Faculty with Immigration Expertise at U.S. Law Schools (Jan. 30, 2024) (on file with authors).

[39] List of U.S. Law School Immigration-Related Clinics (Jan. 30, 2024) (on file with authors).

[40] Survey on Immigration Law Professors at U.S. Law Schools (Aug. 5, 2024) (on file with authors).

This new cadre of immigration law scholars has increased scrutiny of the injustices that the U.S. immigration system perpetrates against certain noncitizens. These scholars share concern for the real-life stories of immigrants and their communities, and they have pushed for the fair treatment of and expanded rights for noncitizens. They join a dynamic lawyering community of immigration law experts, many of whom teach immigration courses as adjunct faculty across the country.[41]

Immigration legal scholarship exists within a cohesive and inclusive community. The first Immigration Law Teachers and Scholars Workshop ("ILTSW") convened in 1994, with eight full-time law professors who had established immigration law curricula at their institutions.[42] This workshop has continued to meet biannually since, attracting registrants from a cross section of senior, mid-career, and newly-appointed immigration law professors who teach clinics and podium courses, as well as immigrant rights practitioners and organizers.[43] It is known and loved today as much for its musical jam sessions as its intellectual vitality. In 2022, in the midst of a COVID-19 surge, over one hundred immigration law teachers convened for ILTSW. The 2022 workshop raised pivotal discussions of the historical and contemporary relationship of immigration law with systemic inequality—in particular, the role of immigration law in constructing and sustaining the subordination of noncitizens due to their race, gender, socioeconomic status, and other marginalized identities.[44] It brought together immigration law scholars and advocates who had transitioned from "crisis response" to resistance strategies, such as state and local sanctuary policies, cross-border and transnational advocacy, and the mobilization of movements that challenge the legitimacy of immigration enforcement. The

[41] At Temple Law School, for example, two immigration law courses—Asylum at the U.S.-Mexico Border: "Resistance and the Rule of Law" and "Crimes and Immigration"—are taught by adjuncts who are immigration experts at Al Otro Lado, Nationalities Service Center, and Legal Services of New Jersey. *See Fall 2023 Course Offerings*, TEMP. UNIV. SCH. OF L., https://www4.law.temple.edu/courses/Bulletin/List/Fall-2023 [https://perma.cc/LN78-7KNP] (last visited Oct. 4, 2024).

[42] The ILTSW 2022 program included a tribute to Michael Olivas, who Hiroshi Motomura credited with convening the first ILTSW. "Beyond Resistance," ILTSW Program Materials from 2022 (on file with authors).

[43] ILTSW Conference Program Materials from 2022, 2018, 2016, 2014, 2012, and 2010 (on file with authors). Conceived at ILTSW, the Emerging Immigration Teachers & Scholars Workshop ("Emerging") launched in 2011 and is also held biannually in between ILTSW convenings. Emerging Program Materials from 2019, 2017, 2015, and 2013 (on file with authors). Much like ILTSW, Emerging has rapidly grown in attendance. Its culture welcomes and supports those new to the legal academy and draws mid-career and senior immigration law faculty who are eager to mentor and cultivate new cohorts of immigration law teachers and scholars.

[44] "Beyond Resistance," ILSTW Program Materials from 2022 (on file with authors).

workshop catalyzed conversations on critical approaches to immigration law and the future of immigration law and policy.[45]

Today's immigration law scholars traverse the lines between activist, lawyer, scholar, and educator. They promote telling outsider stories of immigrants to subvert the dominant ideology that makes the current legal regime seem fair and natural.[46] Being immigrants, or children of immigrants, or living and working within immigrant communities helps to shape the lens through which some immigration scholars view the world.[47] Their lived experiences inform their scholarly voices.[48] So too do the experiences of scholars engaged in on-the-ground lawyering—whether as clinicians, lawyers, or activists.[49] Immigration law scholars who direct or collaborate with clinics are uniquely positioned to formulate critiques of the legal system based on firsthand experiences with clients entangled in multiple enforcement systems.[50] Their work with clients and communities informs and influences their views about the law.

A perusal of recent court cases addressing the deportability of immigrants with criminal convictions,[51] mandatory detention,[52] and the Muslim travel ban[53] shows immigration scholars leading and supporting amicus briefs on behalf of immigrants. In addition to litigation, many scholars work within communities conducting outreach and education to empower noncitizens or provide strategic guidance to immigrant communities organizing resistance efforts.[54] Some of

[45] *Id.*

[46] *See* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1989).

[47] For those scholars who identify as outsiders themselves, Delgado also notes the personal psychic benefit of telling stories, explaining it can "lead to healing, liberation, mental health." *Id.* at 2437.

[48] Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971, 983-84 (1991) (arguing invoking one's own experiences establishes interest and authority).

[49] Wendy A. Bach & Sameer M. Ashar, *Critical Theory and Clinical Stance*, 26 CLINICAL L. REV. 81, 91 (2019) (acknowledging clinical scholars' "stance" and critical engagement with legal system based on their familiarity with lived experiences of their clients).

[50] *Id.*

[51] Brief for Immigration Law Scholars as Amici Curiae Supporting Respondent at 3, *In re* Amicus Invitation (B.I.A. Dec. 1, 2021) (No. 21-30-09).

[52] Brief for Constitutional and Immigration Law Professors as Amici Curiae Supporting Respondents at 1, Nielsen v. Preap, 586 U.S. 392 (2019) (No. 16-1363), 2018 WL 3870174, at *1.

[53] Brief for Immigration Law Scholars on the Text and Structure of the Immigration and Nationality Act as Amici Curiae Supporting Respondents, Trump v. Hawaii, 585 U.S. 667 (2018) (No. 17-965).

[54] *See, e.g.*, *Immigrant Rights Clinic*, DUKE L., https://law.duke.edu/immigrantrights [https://perma.cc/NT6L-5T2L] (last visited Oct. 4, 2024) (listing education, outreach, and partnership with grassroots organizations serving immigrant communities as core clinic activities); *Immigrant Rights Clinic*, N.Y.U. L.,

these scholars work alongside movement activists and organizers to develop leaders and mobilize the power of social movements.[55] Sameer Ashar has described these lawyers working within immigrant rights movements "as facilitators, enablers, and defenders," who help to develop critical ideas and organizational infrastructure as well as generate resources for organizing, such as accompanying activists as they engage in the public sphere.[56] Part of their strength comes from their ability to situate themselves "within and outside of the [legal] system" with a shared vision of how power is exercised vis-à-vis organizers and communities.[57]

As explored further in Part III, this diversity and breadth of engagement produces scholarship and teaching that rejects the hegemony of the current immigration law regime and traditional avenues for reform. Upon a closer examination of the historical, social, and political context surrounding the experiences of noncitizens, the presumed logic of the law unravels. Fortified by such experiences, some scholars wholesale reject the legitimacy of the U.S. immigration legal system because of its role in perpetuating human suffering. Other immigration law scholars contribute scholarship as a form of activism for harm reduction. Most do not subscribe to the convention that those within the academy can or must separate out their activist identities from their teaching or scholarship. Rather, these scholars, driven by authenticity and humanitarian concerns, undertake CILT approaches to dismantle the hierarchies sustained by immigration law and seek social transformation.

II. IMMIGRATION LAW AS A TOOL OF SUBORDINATION

Before delving deeper into CILT scholarship, this Part briefly outlines the context for its emergence. That context includes over a century of immigration law jurisprudence and legislation whose foundation—the plenary power doctrine—grants nearly unfettered discretion to the federal government to determine who may enter and remain in the United States. While not exhaustive of the many ways in which the U.S. immigration legal regime inflicts harm against noncitizens, this Part shows how U.S. immigration law has not only actively shaped the racial makeup of the United States but also contributed to the subordination of historically oppressed groups as a form of racial capitalism.

https://www.law.nyu.edu/academics/clinics/immigrantrights [https://perma.cc/7W48-W5RA] (last visited Oct. 4, 2024) (supporting advocacy efforts and organizations through representation and public education).

[55] Jennifer Lee Koh, *Reflections on Elitism After the Closing of a Clinic: Pedagogy, Justice, and Scholarship*, 26 CLINICAL L. REV. 263, 272 (2019) ("Law school clinics have long exercised leadership in the immigrants' rights movement locally and nationally.").

[56] Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464, 1467 (2017).

[57] Christine Cimini & Doug Smith, *An Innovative Approach to Movement Lawyering: An Immigrant Rights Case Study*, 35 GEO. IMMIGR. L.J. 431, 507 (2021).

In addition, this Part notes the recent rise in social movements in the immigration space as additional context for the emergence and flourishing of CILT.

A. *Plenary Power, Exclusion, and Subordination*

Immigration law is governed by the plenary power, which confers nearly unrestrained discretion to the political branches of the federal government to regulate a noncitizen's ability to enter and remain in the United States. Somewhat curiously, the ultimate source of legal authority in the United States—the Constitution—does not explicitly grant the federal government power to regulate immigration, nor does it reserve that power for the states.[58]

Lacking constitutional guidance, both state governments and Congress began to enact restrictive immigration laws in 1875 that excluded certain noncitizens based on their race, gender, and socioeconomic status.[59] The occurrence of this country's first exclusionary immigration laws alongside the end of Reconstruction[60] was no coincidence. This sociohistorical context highlights white supremacy's stronghold, which not only curtailed advancements gained by newly freed enslaved people, but also catalyzed xenophobic attacks against Chinese migrants, other Asian migrants, and Mexican migrants.[61] In 1875, for example, California passed a law that denied entry to Asian immigrants arriving at the San Francisco port authority who were suspected of criminality, prostitution, and other vices.[62] The same year, Congress enacted the Page Act, which barred convicts, unfree laborers, and Asian women brought for immoral

[58] The Constitution merely directs to Congress the power to make rules regarding the acquisition of citizenship. U.S. CONST. art. I, § 8, cl. 4 (providing Congress with power "[t]o establish an uniform Rule of Naturalization . . . throughout the United States"). Beyond this, the Constitution has only one provision referencing immigration—the so-called Migration or Importation clause. U.S. CONST. art. I, § 9, cl. 1. Yet, in this clause, "migration" served as a euphemism to ensure the legality of slave importation until at least 1808 without using the word "slavery" in the Constitution. *See, e.g.*, Letter from James Madison to Robert Walsh Jr. (Nov. 27, 1819), https://founders.archives.gov/documents/Madison/04-01-02-0504 [https://perma.cc/R3FZ-TT3W] (noting "the descriptive phrase 'migration or importation of persons'" was due to "scruples against admitting the term 'Slaves' into the Instrument").

[59] Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353, 1354 (2009) ("Most histories of immigration law are histories of restriction."); *see also* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1841 (1993) (documenting state immigration restrictions).

[60] To compare timelines, see C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION, at xi (1966) (describing mid-1870s as time of Southern resistance to Second Reconstruction after First Reconstruction ended).

[61] ERIKA LEE, AMERICA FOR AMERICANS: A HISTORY OF XENOPHOBIA IN THE UNITED STATES 74, 76, 136 (2019).

[62] Chy Lung v. Freeman, 92 U.S. 275, 280 (1875) (voiding California statute and holding federal government had exclusive authority to regulate immigration).

purposes from admission to the United States.[63] In 1882, Congress passed more comprehensive immigration regulations, prohibiting first the entry of "lunatic[s]," "idiot[s]," and those likely to become a public charge,[64] and then the entry of all Chinese laborers.[65]

Chinese plaintiffs injured by these statutes challenged their constitutionality. The Supreme Court's adjudication of these cases established the plenary power doctrine, designating the political branches of the federal government—the Legislative and the Executive—as having exclusive authority over immigration.[66] Neither the judiciary nor the states could interfere with this power, which the Court found inherent to a nation's sovereign interest in protecting its borders.[67] The Court further held that the federal government's exclusive control over immigration matters permitted the constitutionality of immigration restrictions explicitly based on race.[68]

Anti-immigrant sentiment persisted into the 1920s. During that decade, Congress enacted an immigration quota system designed to favor white immigrants while restricting the admission of immigrants of color.[69] In addition, the Supreme Court denied citizenship to Asian immigrants on the basis that they could not readily amalgamate with Europeans to be considered "free white persons" under the Naturalization Act.[70]

Immigration laws sought to preserve a white majority population, while also exploiting labor extraction from immigrant workers of color. Like the infamous Chinese Exclusion Act of 1882, xenophobic hostility against subsequent waves of immigrant workers of color urged further policy measures that prevented their long-term integration in the United States. For example, the Undesirable Aliens Act of 1929 criminalized illegal reentry for the purpose of expelling Mexican agricultural workers in the United States after the growing season and harvest.[71] From 1942 to 1964, the U.S. government sponsored the Bracero program,

[63] Page Act of 1875, ch. 141, 18 Stat. 477, 477-78 (repealed 1974).

[64] Immigration Act of 1882, ch. 376, 22 Stat. 214, 214 (repealed 1943).

[65] Chinese Exclusion Act, ch. 126, 22 Stat. 58, 58 (1882) (repealed 1943).

[66] *Chy Lung*, 92 U.S. at 280; Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 604 (1889) (holding federal power to exclude noncitizens is incident of national sovereignty); Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893) (holding plenary power over immigration includes power to deport noncitizens).

[67] *Chae Chan Ping*, 130 U.S. at 606 (noting government's powers are "exercised for protection and security," such that its determination is "necessarily conclusive").

[68] *Id.*

[69] The Immigration Act of 1924, ch. 190, 43 Stat. 153, 153 (repealed 1952).

[70] United States v. Bhagat Singh Thind, 261 U.S. 204, 214-15 (1923).

[71] Undesirable Aliens Act of 1929, Pub. L. No. 70-1018, 45 Stat. 1551 (1929); MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 70-71 (updated ed. 2014); Benjamin Gonzalez O'Brien, *"A Very Great Penalty": Mexican Immigration, Race, and 8 U.S.C. § 1326*, 37 MD. J. INT'L L. 39, 42-44 (2022) ("The Undesirable Aliens Act of 1929 was the culmination of a push to restrict Mexican immigration that began in earnest after the passage of the Johnson-Reed Act in 1924." (footnote omitted)).

intended to fill labor shortages from World War II with Mexican workers.[72] In the postwar years, hundreds of thousands of Mexicans continued to come, some within and some outside of the Bracero program.[73] Extreme backlash against these migrants culminated with Operation Wetback, the largest immigration enforcement action in U.S. history.[74] Implemented in 1954, Operation Wetback involved Immigration and Naturalization Service ("INS") deporting over one million individuals profiled as Mexican nationals to rural areas in Mexico to ensure their inability to return to the United States.[75]

The H-2 guestworker program eventually replaced the Bracero program. Originally enacted by the Immigration and Nationality Act of 1952 and amended by the Immigration Reform and Control Act of 1986 ("IRCA"), the H-2 guestworker program created two classes of guest worker visas: H-2A visas for noncitizen agricultural workers and H-2B visas for noncitizen, nonagricultural workers.[76] The temporary nature of these visas along with their lack of job portability have subjected guestworkers to extreme labor exploitation, including forced labor.[77] The programs also are notable for allowing employers to discriminate based on gender and age, such that the H-2 workforce in the United States is overwhelmingly male and young.[78]

Except for immigration laws enacted to meet temporary labor demands and the War Brides Act, which permitted the admission of foreign wives of U.S.

[72] Jessie Kratz, *The Bracero Program: Prelude to Cesar Chavez and the Farm Worker Movement*, NAT'L ARCHIVES (Sept. 27, 2023), https://prologue.blogs.archives.gov/2023/09/27/the-bracero-program-prelude-to-cesar-chavez-and-the-farm-worker-movement/ [https://perma.cc/L6BG-SHME] (describing history of Bracero program and its lasting legacy even after program officially ended).

[73] ADAM GOODMAN, THE DEPORTATION MACHINE: AMERICA'S LONG HISTORY OF EXPELLING IMMIGRANTS 48 (2020).

[74] Erin Blakemore, *The Largest Mass Deportation in American History*, HISTORY, https://www.history.com/news/operation-wetback-eisenhower-1954-deportation [https://perma.cc/ZD9E-R46Y] (last updated Aug. 20, 2024).

[75] KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. 54 (1992); KELLY LYTLE HERNÁNDEZ, MIGRA!: A HISTORY OF THE U.S. BORDER PATROL 169 (2010).

[76] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163; Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

[77] S. POVERTY L. CTR., CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES 1 (2013), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf [https://perma.cc/Z39C-R9RQ]; Maria L. Ontiveros, *Noncitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs*, 38 U. TOL. L. REV. 923, 937-38 (2007).

[78] Jennifer J. Lee & Rachel Micah-Jones, *Delegating Discrimination in the Temporary Worker Visa Programs*, *in* RACE, GENDER AND CONTEMPORARY INTERNATIONAL LABOR MIGRATION REGIMES 63, 66 (Leticia Saucedo & Robin Magalit Rodriguez eds., 2022).

veterans of World War II,[79] U.S. borders largely denied the entry and long-term residence of noncitizens of color until the passage of the 1965 Immigration and Nationality Act.[80] This Act, along with several other civil rights statutes,[81] repealed some of the most overtly racist immigration exclusions.[82]

In 1968, the United States became a signatory to the 1967 United Nations High Commissioner for Refugees ("UNHCR") Refugee Protocol, allowing those who were fleeing persecution in their home country to obtain asylum or refugee status.[83] In 1980, Congress enacted the Refugee Act, which incorporated the definition of refugee from the U.S. 1951 Convention and 1967 Protocol.[84] Yet in the following years, the United States continued to prefer certain immigrants over others for refugee or asylee status. In the 1980s, for example, the abysmal grant rates of asylum for Salvadoran and Guatemalan refugees[85] were dictated by U.S. foreign policy that supported the repressive regimes they were fleeing.[86] During this period, the United States mandatorily detained

[79] Rose Cuison Villazor, *The Other* Loving*: Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361, 1405 (2011); *see also* Nancy K. Ota, *Private Matters: Family and Race and the Post-World-War-II Translation of "American*,*"* 46 INT'L REV. SOC. HIST. 209, 211-12 (2001) (examining role of private bills permitting admission of otherwise inadmissible noncitizens due to long-standing racial restrictions after World War II).

[80] Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

[81] *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.).

[82] The 1965 Hart-Cellar Act abolished the national-origins quota system which had favored immigrants from Western Europe. The Act eliminated the discriminatory quota system with a race-neutral approach to immigration. In particular, it repealed the long history of Asian exclusion in immigration policy. *See generally* Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273 (1996).

[83] Prior to this time, Congress enacted several specific programs for refugees, such as the Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009, the first refugee-specific act passed by Congress, which aimed to address the displacement of nearly seven million persons in Europe as a result of World War II.

[84] Refugee Act of 1980, Pub. L. No. 96-212, tit. II, § 201, 94 Stat. 102, 102-06 (codified as amended in scattered sections of 8 U.S.C.).

[85] Ann Aita, *What About Us? NACARA's Legacy and the Need to Provide Equal Protection to Guatemalan, Nicaraguan, Salvadoran, and Honduran Residency-Seekers in the United States*, 32 RUTGERS L.J. 341, 350 (2000) (noting only one Salvadoran was granted asylum in 1981, and from 1984-1988, INS approved only 2.5% of Salvadoran asylum applications, with similar approval rates for Guatemalan and Honduran nationals from 1982-1990).

[86] *See, e.g.*, Am. Baptist Churches v. Thornburgh, 760 F. Supp. 796, 799 (N.D. Cal. 1991) (approving settlement based on systemic challenge to processing of asylum claims filed by Salvadorans and Guatemalans pursuant to Refugee Act of 1980). The settlement agreement

Haitians fleeing the Duvalier regime and subjected them to unconscionable abuses.[87]

At the same time, federal immigration law increasingly criminalized migration by prohibiting the employment of undocumented workers, expanding the grounds for deporting long-standing lawful permanent residents ("green card" holders), and creating mandatory detention for certain immigrants subject to removal.[88] In 1986, Congress prohibited employers from hiring undocumented immigrants and subjected employers to monetary and criminal sanctions for violations.[89] This prohibition, which further sent undocumented workers to underground labor markets, made them even more vulnerable to abuse and exploitation while constraining their rights to remedy their own exploitation.[90] In 1996, a number of tough-on-crime laws—IIRIRA and AEDPA—expanded the categories of noncitizens who could be penalized for being mixed up with the criminal legal system.[91] These laws were part and parcel of the already growing punitive immigration enforcement regime through border militarization, expansion of immigration detention, and issuance of formal deportation orders.[92]

Meanwhile, U.S. Supreme Court jurisprudence has continuously upheld this enforcement regime over the rights of immigrant children, families, and workers.[93] And while the Supreme Court has recognized some limited constitutional rights for noncitizens, the impact of those decisions has been largely limited to the circumstances under which they arose.[94] Today, the

explained that whether the U.S. government has favorable relations with the country of origin of the applicant is not relevant to a determination of a well-founded fear of persecution.

[87] *See* MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS 54-57 (2004) (describing detention centers with overcrowding, physical abuse, and illness caused by fecal bacteria in water).

[88] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended at 18 U.S.C.); *see also* sources cited *supra* note 36.

[89] 8 U.S.C. § 1324(a).

[90] Jennifer J. Lee, *Legalizing Undocumented Work*, 42 CARDOZO L. REV. 1893, 1904-06 (2021). As a subclass, these workers experience wage suppression and exploitation, such as wage theft, sexual harassment, or hazardous working conditions. *Id.*

[91] *See* sources cited *supra* note 36.

[92] GOODMAN, *supra* note 73, at 167-68.

[93] *See, e.g.*, Jean v. Nelson, 472 U.S. 846, 855-56 (1985) (holding government's revocation of parole for Haitians to be non-discriminatory because applicable regulations facially precluded officials from considering race and national origin); Reno v. Flores, 507 U.S. 292, 304-05 (1993) (holding government's detention of Central American children fleeing persecution was constitutional); Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 151-52 (2002) (holding immigration enforcement goals superseded labor compensation rights of undocumented workers under National Labor Relations Act).

[94] *See, e.g.*, Landon v. Plasencia, 459 U.S. 21, 36-37 (1982) (holding longtime lawful permanent residents are entitled to procedural due process rights); Plyler v. Doe, 457 U.S.

plenary power doctrine is alive and well in U.S. Supreme Court decisions that address immigration matters. And it continues to be deployed to enable exclusion and subordination. For example, in the 2018 case *Trump v. Hawaii*,[95] the Court recited the plenary power doctrine in upholding the constitutionality of the Trump administration's third attempt at an Executive Order, which had been initially premised on prohibiting the entry of immigrants from Muslim-majority countries.[96] Despite the overt discriminatory intent of the Executive Order to ban noncitizens based on their race, national origin, and religion, the Court reiterated that "the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'"[97] The Court's avoidance of addressing the racialized ways in which federal immigration law discriminates against people of color is emblematic of its treatment of immigration matters.[98]

Born out of race-based immigration restrictions, today's immigration law regime continues to maintain a racialized hierarchy that determines who gets in and is allowed to remain. During the pandemic, the Centers for Disease Control and Prevention ("CDC") Order under Title 42 allowed the federal government to immediately turn away and expel people arriving at the border seeking asylum protection.[99] By all accounts, it blocked primarily Black, Brown, and Indigenous people, as well as those who identify as LGBTQ, from seeking asylum at ports of entry.[100]

At the same time, the federal government operates an immigration enforcement system that is devastating for noncitizens. The federal government

202, 230 (1982) (finding law prohibiting undocumented children from receiving K-12 education is unconstitutional); Zadvydas v. Davis, 533 U.S. 678, 696-97 (2001) (holding indefinite detention of immigrant with deportation order but no prospect of physical removal raises due process problems); Padilla v. Kentucky, 559 U.S. 356, 374 (2010) (holding Sixth Amendment guarantees that criminal noncitizen defendants receive effective assistance of counsel, which includes guidance on immigration consequences of their plea deals).

[95] 585 U.S. 667 (2018)

[96] *Id.* at 705-06.

[97] *Id.* at 702 (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)).

[98] Likewise, the Supreme Court rejected plaintiffs' claims of discrimination with respect to the Trump administration's rescission of the Deferred Action for Childhood Arrivals ("DACA") program, which provided deportation relief for hundreds of thousands of young immigrants brought to the United States as children. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 12-13 (2020). The Court reinstated the program on procedural grounds but refused to find that plaintiffs alleged a plausible equal protection claim based on the evidence of explicit racial animus by the Trump administration. *Id.* at 27.

[99] Order by the Centers for Disease Control and Prevention (Mar. 20, 2020) (citing 42 U.S.C. §§ 265, 268 and 42 C.F.R. § 71.40).

[100] *See, e.g.*, JULA NEUSNER & KENNJI KIZUKA, HUM. RTS. FIRST, EXTENDING TITLE 42 WOULD ESCALATE DANGERS, EXACERBATE DISORDER, AND MAGNIFY DISCRIMINATION 2 (2022), https://humanrightsfirst.org/wp-content/uploads/2022/09/ExtendingTitle42.pdf [https://perma.cc/R9GT-BQ9Z].

polices the southern border as if it were a war zone,[101] separates families at the border,[102] and charges tens of thousands of immigrants criminally for acts that used to be civil immigration law violations.[103] The federal government incarcerates noncitizens in immigration detention facilities[104] and places them into deportation proceedings with little or no process,[105] including no right to appointed counsel.[106] In addition, Immigration and Customs Enforcement ("ICE") has actively sought and obtained both the formal and informal cooperation of local law enforcement agencies across the country.[107] States and

[101] From 1986 to 2022, Customs and Border Protection budget went from $151 million to more than $16.2 billion, with more officers licensed to carry weapons than any other branch of the federal government except for the military. GOODMAN, *supra* note 73, at 175; U.S. DEP'T OF HOMELAND SEC., FY 2022 BUDGET IN BRIEF 23 (2022).

[102] Letter from Monika Y. Langarica, Senior Staff Att'y, UCLA Ctr. for Immigr. L. & Pol'y et al., to Off. for C.R. & C.L., Dep't of Homeland Sec. (Dec. 14, 2023), https://law.ucla.edu/sites/default/files/PDFs/Center_for_Immigration_Law_and_Policy/CRCL_Complaint_Street%20Releases.pdf [https://perma.cc/T6FC-XKDS].

[103] Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1281-82 (2010) (describing record rates of prosecution of noncitizens which represent over half of all federal prosecutions); AM. IMMIGR. COUNCIL, PROSECUTING PEOPLE FOR COMING TO THE UNITED STATES 2 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/prosecuting_people_for_coming_to_the_united_states.pdf [https://perma.cc/W3CV-T959].

[104] As of July 14, 2024, over 37,000 immigrants were in immigration detention. *Immigration Detention Quick Facts*, TRAC IMMIGR., https://trac.syr.edu/immigration/quickfacts/ [https://perma.cc/B7CP-GV4P] (last visited Oct. 4, 2024). The conditions in immigration detention are bleak. *See, e.g.*, ACLU, JUSTICE-FREE ZONES: U.S. IMMIGRATION DETENTION UNDER THE TRUMP ADMINISTRATION 31 (2020) (describing numerous individual cases of death while detained). Detention takes a grave psychological toll on immigrants, who face social isolation and debilitating uncertainty. *See* Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L.J. 363, 368 (2014) (describing detention conditions leading to helplessness and hopelessness, and eventually depression and anxiety); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 46 (2010) (describing social, economic, and psychological harm that comes from being detained).

[105] 8 U.S.C. § 1225(b)(1) (describing process of expedited removal without further hearing or review for certain inadmissible immigrants).

[106] With limited exceptions, immigrants do not have a right to appointed counsel in deportation proceedings. Examining twenty years of data, TRAC found that 44% of those appearing in immigration court were represented by counsel, with huge variances depending on where the immigrant was located. Many immigrants who are detained in remote locations have a harder time accessing counsel. Emily Creighton & Jennifer Whitlock, *What Does Legal Representation Look Like in Immigration Courts Across the Country?*, IMMIGR. IMPACT (Aug. 23, 2022), https://immigrationimpact.com/2022/08/23/legal-representation-immigration-courts-across-country/ [https://perma.cc/DKF3-93HL].

[107] *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/identify-and-arrest/287g [https://perma.cc/D28S-HSET] (last visited Oct. 4, 2024) (explaining how, under memoranda

localities, too, have attempted to police immigration by putting up razor wire fences at the border or empowering local law enforcement to arrest migrants for immigration violations.[108]

Further, federal law has excluded noncitizens from social benefit programs. In 1996, the government not only barred undocumented immigrants from federal benefits, such as Supplemental Nutrition Assistance, Medicaid, Temporary Assistance for Needy Families, and Section 8, but also banned certain immigrants with lawful status from receiving such benefits for five years.[109] Undocumented workers are also denied the significant cash assistance provided to working families through the earned income tax credit.[110] Most recently, undocumented workers and their families were excluded from the federal tax rebate provided by the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act").[111]

In sum, this politicized immigration law system has been legitimized by the Court's invention of the nearly unrestrained federal plenary power over immigration. Today, it manifests as a legal regime that enables the othering of noncitizens while inflicting harm through its exclusionary enforcement tactics.

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of agreement, different levels of government cooperate with ICE through systematic information sharing in both formal and informal practices); *see, e.g.*, SHELLER CTR. FOR SOC. JUST., INTERLOCKING SYSTEMS: HOW PENNSYLVANIA COUNTIES AND LOCAL POLICE ARE ASSISTING ICE TO DEPORT IMMIGRANTS 5 (2019), https://law.temple.edu/csj/wp-content/uploads/sites/3/2019/06/Interlocking-Systems.pdf [https://perma.cc/7KLT-FGL4] (describing how counties and local police collaborated with ICE to enforce immigration law).

[108] James Bickerton, *Texas Military Put Up Razor Wire on Private Property at Border*, NEWSWEEK, https://www.newsweek.com/texas-military-razor-wire-migrant-crisis-greg-abbott-1878647 [https://perma.cc/8G3W-UTEZ] (last updated Mar. 13, 2024, 5:35 PM) (reporting Texas military personnel and Florida National Guard constructed razor wire obstacles on private property to stop migrants from entering United States); S.B. 4, 88th Leg., 4th Spec. Sess. (Tex. 2023). The Supreme Court has held that a state's attempt to enforce federal immigration law is impermissible through regulation or statute. *See, e.g.*, Arizona v. United States, 567 U.S. 387, 401 (2012).

[109] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 401-404, 411-412, 110 Stat. 2105 (defining categories of immigrants and outlining benefits for each).

[110] *Who Qualifies for the Earned Income Tax Credit (EITC)*, IRS, https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/who-qualifies-for-the-earned-income-tax-credit-eitc [https://perma.cc/Q6JR-9H7U] (last updated Oct. 3, 2024).

[111] *Mixed-Status Families Ineligible for CARES Act Federal Pandemic Stimulus Checks*, MIGRATION POL'Y INST. (May 2020), https://www.migrationpolicy.org/content/mixed-status-families-ineligible-pandemic-stimulus-checks [https://perma.cc/6TWV-BVB3] (outlining benefits and eligible beneficiaries, which exclude those with IRS-issued Individual Tax Identification Numbers).

B. *Immigrant Social Movements Respond*

Resistance is not absent from this bleak story about the U.S. immigration law regime. In fact, many foundational immigration law cases in the 1890s were the result of organized activism in the Chinese immigrant community.[112] In 1919, seventy-three immigrants, labeled as the "Ellis Island Reds," went on hunger strike while awaiting deportation to protest the screens placed between immigrants and their families in the visiting room.[113] In 1948, labor organizers detained at Ellis Island engaged in hunger strikes to request their right to bail while the government reviewed their cases.[114] In the 1980s, activists in the religious-based Sanctuary Movement sheltered refugees from El Salvador and Guatemala fleeing violence back home.[115] Over the ensuing decades, immigrant rights movements have increased in size, sophistication, and diversity to protest the U.S. immigration enforcement system. Immigrants have built their capacities as political agents while creating new spaces of contestation to be publicly viewed and heard.

In 2006, millions of immigrants, in over one hundred cities, protested a federal proposal that would criminalize undocumented immigrants.[116] Since the 2000s, immigrant youth have also been demanding a pathway to citizenship.[117] In response, the Obama administration created the Deferred Action for Childhood Arrivals ("DACA") program in 2012, and the Deferred Action for

[112] Gabriel J. Chin & Daniel K. Tu, *Comprehensive Immigration Reform in the Jim Crow Era: Chinese Exclusion and the McCreary Act of 1893*, 23 ASIAN AM. L.J. 39, 44-45 (2016) (illustrating how Chinese Six Companies protested discriminatory laws and retained counsel to fight for due process rights).

[113] *Ellis Island Reds on Hunger Strike: Seventy-three Refuse Food and Send "Ultimatum" to Congressional Committee*, N.Y. TIMES, Nov. 26, 1919, at 1, 2 (describing group called "The First Socialist Community of America" and their ultimatum, which placed responsibility on administration for any harm done).

[114] Brianna Nofil, *Ellis Island's Forgotten Final Act as a Cold War Detention Center*, ATLAS OBSCURA (Feb. 2, 2016), https://www.atlasobscura.com/articles/ellis-islands-for gotten-final-act-as-a-cold-war-detention-center [https://perma.cc/5N58-TLFH] (describing protestors' commitment to drinking only water for six days, eventually pressuring court to relent after media attention).

[115] Susan Bibler Coutin, *Enacting Law Through Social Practice: Sanctuary as a Form of Resistance*, *in* CONTESTED STATES: LAW, HEGEMONY AND RESISTANCE 282, 282 (Mindie Lazarus-Black & Susan F. Hirsch eds., 1994).

[116] Eunice Hyunhye Cho, *Beyond the Day Without an Immigrant: Immigrant Communities Building a Sustainable Movement*, *in* IMMIGRANT RIGHTS IN THE SHADOWS OF CITIZENSHIP 94, 94-100 (Rachel Ida Buff ed., 2008) (noting these massive protests over Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 "set records as the largest immigrant rights demonstrations in U.S. history" up to that point in time).

[117] *See* WALTER J. NICHOLLS, THE DREAMERS: HOW THE UNDOCUMENTED YOUTH MOVEMENT TRANSFORMED THE IMMIGRANT RIGHTS DEBATE 1-7 (2013).

Parents of Americans ("DAPA") program in 2014.[118] The courts subsequently enjoined DAPA,[119] which was to provide relief to an estimated 3.6 million parents.[120]

Frustrated by the federal limitations and continued devastation wreaked by immigration enforcement, immigrant rights movements turned to states and localities to advocate for "sanctuary" policies to protect immigrants.[121] Some localities declared their refusal to cooperate with federal immigration enforcement.[122] Other states and localities sought to accommodate undocumented immigrants by providing them municipal IDs or access to in-state tuition, regardless of immigration status.[123] Activists have supported localities, such as Philadelphia, Chicago, and San Francisco, in defining themselves as

[118] Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigr. Servs. & John Morton, Dir., U.S. Immigr. & Customs Enf't (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/95D8-LV58]; Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf't, R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot., Leon Rodriguez, Dir., U.S. Citizenship and Immigr. Servs. & Alan D. Bersin, Acting Assistant Sec'y for Pol'y (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion%281%29.pdf [https://perma.cc/XXN8-HFHT]. While DACA provided temporary immigration relief for over 500,000 immigrant youth, it ultimately failed to provide a pathway to citizenship. *Deferred Action for Childhood Arrivals (DACA) Data Tools*, MIGRATION POL'Y INST., https://www.migrationpolicy.org/programs/data-hub/deferred-action-childhood-arrivals-daca-profiles [https://perma.cc/64HH-PQFP] (last visited Oct. 4, 2024).

[119] Texas v. United States, 809 F.3d 134, 188 (5th Cir. 2015), *aff'd*, 579 U.S. 547 (2016).

[120] RANDY CAPPS ET AL., URBAN INST. & MIGRATION POL'Y INST., DEFERRED ACTION FOR UNAUTHORIZED IMMIGRANT PARENTS: ANALYSIS OF DAPA'S POTENTIAL EFFECTS ON FAMILIES AND CHILDREN 21 (2016).

[121] Rose Cuison Villazor & Pratheepan Gulasekaram, *Sanctuary Networks*, 103 MINN. L. REV. 1209, 1210-12 (2019) (describing how local organizations, like churches, universities, and community groups, became involved in establishing sanctuary policies).

[122] *See, e.g.*, S.F., CAL., ADMIN. CODE § 12I.3. (prohibiting law enforcement from honoring federal detainer requests, except in some limited situations); *Executive Order No. 5-16: Policy Regarding US Immigration and Customs Enforcement Agency Detainer Requests*, CITY OF PHILA. (Jan. 4, 2016), https://www.phila.gov/media/20210602144908/executive-order-2016-05.pdf [https://perma.cc/5Z2L-9D32] (requiring Philadelphia jails not honor ICE detainer and release date requests, except in some limited situations).

[123] NAT'L IMMIGR. L. CTR., INCLUSIVE POLICIES ADVANCE DRAMATICALLY IN THE STATES: IMMIGRANTS' ACCESS TO DRIVER'S LICENSES, HIGHER EDUCATION, WORKERS' RIGHTS, AND COMMUNITY POLICING 1-6 (2013), https://www.nilc.org/wp-content/uploads/2016/02/inclusive-policies-advance-in-states-2013-10-28.pdf [https://perma.cc/5H7Q-WNQA].

inclusive of undocumented immigrants in direct resistance to how federal immigration law defines illegality.[124]

Coalitions of immigrant rights organizations have also filed litigation against anti-immigrant efforts and sometimes used litigation strategically to strengthen publicity and organizing.[125] Groups like the National Day Laborer Organizing Network ("NDLON") have filed Freedom of Information Act ("FOIA") litigation against Department of Homeland Security ("DHS"), ICE, and the FBI, not only to uncover the truth about immigration enforcement programs, but also to organize, protest, and garner publicity.[126] Other immigrant rights groups filed a lawsuit on First Amendment grounds against ICE for targeting outspoken immigrant rights activists and creating a chilling effect on immigrant communities.[127]

Further, immigrant rights movements have engaged in more strident tactics of immigration disobedience in response to the continued deportation and detention of community members. For example, immigrant rights activists have blockaded streets as part of the Not1More Deportation Campaign, engaged in hunger strikes for release from immigration detention, and defied deportation orders by seeking church sanctuary.[128]

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[124] *See, e.g.*, City Council Res. No. 110536 (Phila. June 23, 2011), https://phila.legistar.com/View.ashx?M=F&ID=2202091&GUID=5F93AB44-8041-4B05-8249-138D2B879B68 [https://perma.cc/8ADR-LGDF] (stating all residents, regardless of immigration status, "have the right to remain in their neighborhoods with their communities and their families"); CHI., ILL., MUN. CODE § 2-173-005 (finding "the cooperation of all persons," including those without documentation, "is essential to achiev[ing] the City's goals of protecting life and property, preventing crime and resolving problems"); S.F., CAL., ADMIN. CODE § 12H.1. (1989) (declaring San Francisco as a "City and County of Refuge"); *see also* Angélica Cházaro, *Beyond Respectability: Dismantling the Harms of "Illegality*,*"* 52 HARV. J. ON LEGIS. 355, 357-58 (2015) (arguing need for advocates to confront construction of "illegality" created by federal immigration framework).

[125] *See, e.g.*, Ashar, *supra* note 56, at 1480-82 (describing how activists used FOIA litigation to gather and disseminate information that "fueled . . . local opposition strategies"); *Ramos v. Nielsen*, ACLU S. CAL., https://www.aclusocal.org/en/cases/ramos-v-nielsen [https://perma.cc/LK6S-QEEG] (last visited Oct. 4, 2024) (describing one such coalition of immigrant rights organizations that filed litigation to defend Temporary Protected Status ("TPS"), with plaintiffs including members of the National TPS Alliance, CARECEN-Los Angeles, the International Union of Painters and Allied Trades ("IUPAT"), UNITE-HERE, and African Communities Together, among others).

[126] Cimini & Smith, *supra* note 57, at 472.

[127] *See* Complaint at 5, Ragbir v. Homan, No. 18-cv-01159 (S.D.N.Y. Feb. 9, 2018) (arguing that under the First Amendment, "[t]he Government cannot silence critics of its immigration laws and policies by deporting them").

[128] Jennifer J. Lee, *Immigration Disobedience*, 111 CALIF. L. REV. 71, 83-85, 90 (2023).

Over the past few decades, immigrant rights movements have helped to move the needle on what the agenda for reform should look like.[129] While many continue to advocate for legalization programs, there is a growing recognition of the limitations of such proposals, as they marginalize members who deviate from the requisite criteria for inclusion. There is also a growing suspicion of procedural improvements that offer a way for the government to reinforce rather than dismantle the existing system.[130] Recognizing these limitations, many movements have shifted their critique of the law to consider how to redefine citizenship, end the use of carceral facilities, and abolish surveillance of noncitizen communities. They have also brought attention to how the immigration law system perpetuates structural racial and economic inequality.[131] Activists have focused on racially discriminatory treatment within detention,[132] unjust detention of asylum seekers by ICE,[133] and the concept of ethnic cleansing.[134] They highlight how private industry reaps profits not only from

[129] *See id.* at 116-17 (noting "[t]he political demands of the immigrant rights movement have markedly changed over the past decade," as they originally centered around legalization but today go further to include defunding ICE and ending immigration detention, among other demands).

[130] Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040, 1093 (2021) (describing need to recognize connections between immigrant justice, racial justice, and abolition of carceral state).

[131] Kevin R. Johnson, *Immigration and Civil Rights: Is the "New" Birmingham the Same as the "Old" Birmingham?*, 21 WM. & MARY BILL RTS. J. 367, 369 (2012) (identifying "parallels between the state immigration enforcement laws and the racial caste system of the Jim Crow South"); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 37-38 (2020) (Sotomayor, J., concurring in part and dissenting in part).

[132] *See, e.g.*, Katie Jane Fernelius, *"Someone Needs to Listen to Us": Why African Asylum Seekers Went on Hunger Strike*, IN THESE TIMES (Oct. 7, 2020), https://inthesetimes.com/article/african-migrants-hunger-strike-ice-cameroon-racism [https://perma.cc/SG4R-GRL9] (describing how forty-five African asylum seekers went on hunger strike "to bring attention to their experiences of racism" while being held in ICE detention). The modern incarnation of the immigration law system pivots between ostensibly race-neutral principles and explicitly racist language disparaging Mexicans, Haitians, and other Black and Brown immigrants. Johnson, *supra* note 131, at 380 ("Racially charged terminology is common to the debate over immigration in the United States."); *Regents of the Univ. of Cal.*, 591 U.S. at 37 (Sotomayor, J., concurring in part and dissenting in part).

[133] *See, e.g.*, *Occupy ICE Shuts Down ICE in Los Angeles*, INT'L ACTION CTR. (Sept. 17, 2018), https://iacenter.org/2018/09/18/occupy-ice-shuts-down-ice-in-los-angeles [https://perma.cc/HHC2-42E9] (describing protest where demonstrators blocked all entrances to ICE detention center to protest treatment of migrants and asylum seekers).

[134] Bill Gallegos, *Ethnic Cleansing and the War on Immigrants: A Program of Resistance*, LIBERATION RD., https://roadtoliberation.org/ethnic-cleansing-and-the-war-on-immigrants-a-program-of-resistance/ [https://perma.cc/UT56-TS3E] (last visited Oct. 4, 2024) (describing Trump Administration's treatment of immigrants as "an ethnic cleansing campaign").

ICE's enforcement machinery but also from a readily exploitable workforce that is largely Latinx.[135]

This critique of the law is ultimately powered by noncitizens, who are often at the forefront of the movement and have a personal and sophisticated understanding of the law's dysfunction. Through the growth of immigrant rights movements, noncitizens and their allies have worked within and without the legal system, taken on leadership for the movement, and set the political demands for reform.[136] These movements have helped influence immigration law scholars to think in more expansive ways.

III. CRITICAL IMMIGRATION LEGAL THEORY

Critical scholars examine the "law's role in the construction and maintenance of social domination and subordination."[137] At the turn of the twentieth century, some scholars urged immigration law scholars to incorporate these critical approaches.[138] As this Article explains, these approaches have become a prevalent trend within immigration law scholarship today. Critical Immigration Legal Theory ("CILT") responds to the vast human suffering caused by the current U.S. immigration system. Its methodology rigorously interrogates the basic assumptions of immigration law through modes of critique that expose its underlying systems of power and prejudice. In alliance with immigrants affected by this regime, CILT also has a praxis dimension that activates possibilities for radical change.

CILT embraces, imports, relies upon, draws from, and overlaps with well-established critical theories, such as Critical Race Theory ("CRT"), feminist

[135] *See, e.g.*, César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 285-86 (2017) (reporting migrants wage of thirteen cents per hour, despite making hundreds of millions of dollars in revenue for private prison corporations).

[136] Leah Montange, *Hunger Strikes, Detainee Protest, and the Relationality of Political Subjectivization*, 21 CITIZENSHIP STUD. 509, 513 (2017).

[137] Cornel West, *Foreword* to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xi, xi (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995); *see also* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986).

[138] Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 527 ("I hope to convince mainstream immigration scholars focused on legal doctrine to consider racial critiques of the law, including Critical Race Theory, Critical Latino/a Theory, and Asian American legal scholarship."); Jennifer Gordon & R. A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 FORDHAM L. REV. 2493, 2497 (2007) (noting that "for the most part, mainstream legal scholars in the fields of immigration and Critical Race Theory have generally explored the topic of citizenship in inexplicably separate ways," despite fields being "closely related"); *see also* Stephen Shie-Wei Fan, Note, *Immigration Law and the Promise of Critical Race Theory: Opening the Academy to the Voices of Aliens and Immigrants*, 97 COLUM. L. REV. 1202, 1204 (1997) (arguing critical race theory and focus on outsider voices can ameliorate limitations of immigration scholarship).

jurisprudence, LatCrit, and Asian American Legal Scholarship,[139] as well as with related frameworks that intersect with the study of marginalized identities, such as queer theory or critical race feminism.[140] In these areas, scholars share a "subversive" approach to the traditional understandings of the law.[141] They critique the law's role in denigrating historically oppressed groups and reifying these inequities, and counter this denigration by valuing the counternarratives of immigrants as outsiders.[142] And since certain groups in society should not "have subordinated status because of their lack of power in society as a whole,"[143] these critical theories are focused on social justice transformation as "part of a long tradition of human resistance and liberation."[144]

CILT also overlaps and has been in conversation with critical migration studies ("CMS"), a broad ranging field in the social sciences.[145] CMS similarly challenges the alleged aims of the immigration law system by scrutinizing migrant "illegality" and the ways that it is "socially produced and legitimized"

[139] *See supra* notes 5-8.

[140] *See, e.g.*, Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588 (1990); Martha Albertson Fineman, *Introduction* to FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS 1, 1-2 (Martha Albertson Fineman, Jack E. Jackson & Adam P. Romero eds., 2009).

[141] Fineman, *supra* note 140, at 1.

[142] *See* Abrams, *supra* note 48, at 983-84 (showing authority of sexual assault survivor's perspective and personal experience in analyzing legal practices).

[143] Colker, *supra* note 137, at 1007.

[144] West, *supra* note 137, at xi.

[145] For a review of critical migration studies, see generally Basia D. Ellis, Roberto G. Gonzales & Sarah A. Rendón García, *The Power of Inclusion: Theorizing "Abjectivity" and Agency Under DACA*, 19 CULTURAL STUD. CRITICAL METHODOLOGIES 161 (2019). Since critical migration studies emerged two decades ago, it has become the focus of an academic journal, *Journal for Critical Migration and Border Regime Studies*, and part of formal programs at universities, such as the University of Toronto Scarborough, the University of California San Diego, and the University of California Santa Cruz. *Minor Program in Critical Migration Studies (Arts)*, UNIV. OF TORONTO SCARBOROUGH, https://utsc.calendar.utoronto.ca/search-programs?keyword=critical+migration&field_program_area_value=All&type=All [https://perma.cc/QQT6-SSNA] (last visited Oct. 4, 2024) (listing details about minor program in CMS); Yen Le Espiritu, *Critical Immigration and Refugee Studies*, U.C. SAN DIEGO, https://courses.ucsd.edu/syllabi/WI14/794580.pdf [https://perma.cc/EZR6-NWK2] (last visited Oct. 4, 2024) (listing course syllabus information for class based on CMS); *Critical Migration Studies*, U.C. SANTA CRUZ, https://cres.ucsc.edu/courses/index.php/course/2228-11331/migration-studies [https://perma.cc/3H2B-66P5] (last visited Oct. 4, 2024). Despite these developments, critical migration studies "has not been codified or formalized extensively," so many critical scholars do not use the term in their work. William McCorkle, *Introducing Students to Critical Border and Migration Theories in an Era of Xenophobia*, 11 CRITICAL QUESTIONS EDUC. 57, 60 (2020), https://academyforeducationalstudies.org/wp-content/uploads/2020/02/mccorkle final.pdf [https://perma.cc/6V78-Q8PR].

by certain historical contexts,[146] such as national and international security.[147] CMS scholars have discussed the lived experiences of immigrants, including the concept of "liminal legality," or the precarity of uncertain legal status.[148] Another CMS concept—"legal consciousness"—helps to explain how an immigrant's sense of the law can take varying forms based on their own background and social context.[149] Other CMS scholars have deconstructed the meaning of citizenship, including its maintenance of hierarchy and boundaries,[150] and the ways in which immigrants can claim the rights associated with citizenship.[151]

Despite these overlaps and shared conversations, we argue that CILT can be recognized as a distinct methodology within academic scholarship. While the social sciences cover some of the same subjects and frameworks, their methodologies tend to describe social phenomena, the causes of such phenomena, and some contingent prescriptions.[152] In contrast, legal scholarship analyzes the tensions and controversies raised by law and policy by generally drawing from theoretical frameworks. Legal scholarship can be descriptive as well, yet its recommendations derive from the author's vision of an alternative reality.[153] In this way, legal scholarship seeks to directly engage by prescribing solutions.[154] CILT embraces this real-world impact—whether in the form of

[146] Ellis et al., *supra* note 145, at 163.

[147] Didier Bigo, *Security and Immigration: Toward a Critique of the Governmentality of Unease*, 27 ALTS. 63, 63 (2002).

[148] Cecilia Menjívar, *Liminal Legality: Salvadoran and Guatemalan Immigrants' Lives in the United States*, 111 AM. J. SOCIO. 999, 1000 (2006).

[149] Leisy J. Abrego, *Legal Consciousness of Undocumented Latinos: Fear and Stigma as Barriers to Claims-Making for First- and 1.5-Generation Immigrants*, 45 LAW & SOC'Y REV. 337, 338-39 (2011) (contrasting behavior of undocumented youth and adults, demonstrating experiences of "different subgroups of undocumented immigrants is anything but monolithic"); *see also* Leisy J. Abrego, *Latino Immigrants' Diverse Experiences of "Illegality," in* CONSTRUCTING IMMIGRANT "ILLEGALITY": CRITIQUES, EXPERIENCES, AND RESPONSES 139, 140 (Cecilia Menjívar & Daniel Kanstroom eds., 2014).

[150] SANDRO MEZZADRA & BRETT NEILSON, BORDER AS METHOD, OR, THE MULTIPLICATION OF LABOR 257 (2013) (noting "the concept of citizenship must always be broached in relation to the question of borders," as it remarks on existence of hierarchies, boundaries, and political struggles of subjects in relation to them).

[151] Peter Nyers, *Forms of Irregular Citizenship*, *in* THE CONTESTED POLITICS OF MOBILITY: BORDERZONES AND IRREGULARITY 184, 186 (Vicki Squire ed., 2011) (stating struggles over citizenship may involve not only "exclusion, exception, and racialization" but also "equality, mobility, and solidarity").

[152] *See* Edward L. Rubin, *Law and the Methodology of Law*, 1997 WIS. L. REV. 521, 537-38.

[153] *See id.* at 542 (describing legal scholar's recommendations as normatively "derived from her vision of reality itself").

[154] *See id.* at 542-43 (noting "[t]he defining feature of standard legal scholarship is its prescriptive voice," which distinguishes it from social science).

proposing an overhaul of existing legal or institutional systems or suggesting new lawyering approaches—underlining its distinct methodological approach.

The next Sections identify four prevalent CILT approaches within immigration law scholarship. The first approach seeks to expose the subordination of immigrants based on race and other intersectional identities, such as class, gender, and sexual orientation, by scrutinizing the operation of the allegedly colorblind immigration law system. The second approach rejects the immigration system's essentialism of noncitizens that maintains the punitive and remedial aspects of immigration laws. Scholars contest not only the negative stereotypes of immigrants as undesirable outsiders but also the positive stereotypes of deserving immigrants and model minorities that encourage respectability politics. The third approach argues that the fixed legal categories of alienage and citizenship obscure the myriad ways that immigrants participate in and influence society. This challenge includes redefining who belongs in our nation by examining the effects of sub-federal immigration regulations and discussing how immigrants, through their own political action, have claimed citizenship. The final approach amplifies the power of immigrant rights movements in mobilizing for social change and legal transformation. This discussion highlights CILT's praxis dimension by urging alternatives to traditional lawyering practices that better align with movement building.

Our exploration of these categories strives to elucidate the breadth and depth of CILT approaches to immigration law scholarship. As mentioned above, our exploration is a starting point for this discussion. It is not by any means a comprehensive nor exclusive discussion about CILT approaches. Further, by characterizing certain scholarship as using CILT methodology, we do not intend to apply a monolithic label that the authors of these works may understandably resist. We recognize, for example, the trending effect of labels that can minimize the significance of scholarly interventions, especially those that draw from CRT.[155] Instead, we simply wish to recognize, embrace, and encourage CILT's proliferation as a methodology that grapples with the ways in which immigration law subordinates and marginalizes noncitizens, with the ultimate goal of anti-subordination.

A. *Critiquing the Colorblind Immigration Law Regime*

The U.S. immigration legal system originated as a method of border control that explicitly preferred or excluded immigrants based on their race, gender, and class. Social progress during the civil rights era facilitated the passage of the Immigration and Nationality Act of 1965 ("INA"),[156] which replaced the

[155] *See generally CRT Forward*, CRT FORWARD TRACKING PROJECT, https://crtforward.law.ucla.edu/ [https://perma.cc/B7LH-R647] (last visited Oct. 4, 2024) (compiling thorough database of anti-CRT measures throughout country which has tracked 861 anti-CRT measures introduced by 247 government entities in United States since 2020).

[156] Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

existing racist quota system with race- and gender-neutral criteria for admitting and excluding immigrants.[157]

For CRT scholars, a "color-blind" approach to law and policy[158] exhibits the entrenchment of white supremacy in legal structures that perpetuate the societal subordination of Black people and other people of color.[159] Critical feminist scholars also identify underlying sexist, racist, classist, or other repugnant motivations that wield oppression in both laws and daily interactions.[160] Kimberlé Crenshaw coined the term "intersectionality" to deepen the analysis of racist and sexist laws by recognizing the unique interaction of coexisting identities experienced by Black women.[161] Additional scholars have drawn from this concept to understand the law's effects on other intersectional identities, including disability and sexual orientation.[162]

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[157] *See* Chin, *supra* note 82, at 275-76.

[158] *See* Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind*,*"* 44 STAN. L. REV. 1, 2 (1991) (arguing Supreme Court's use of colorblind constitutionalism "fosters white racial domination").

[159] For some examples of entrenchment and its effects, see generally Derrick A. Bell, Jr., Bakke*, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3 (1979); DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); Derrick A. Bell, *Who's Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893; Derrick A. Bell, Jr., *After We're Gone: Prudent Speculations on America in a Post-Racial Epoch*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE 2, 2 (Richard Delgado & Jean Stefancic eds., 2d ed. 2000) (highlighting "dismal demographics" of poverty, unemployment, and income support Black people experience in United States); Richard Delgado, *Rodrigo's Seventh Chronicle: Race, Democracy, and the State*, 41 UCLA L. REV. 721 (1994); and CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION 29-31 (1997).

[160] *See, e.g.*, Nancy K. Ota, *Flying Buttresses*, 49 DEPAUL L. REV. 693, 696 (2000) (probing root of disparate conditions when regulation purportedly treats race, gender, nationality, and class as neutral); Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER, RACE & JUST. 177, 181-85 (1997); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1267 (1991).

[161] Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (arguing feminist theory and antiracist policy discourse "are predicated on a discrete set of experiences that often does not accurately reflect the interaction of race and gender"); *see also* Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, l AM. U. J. GENDER & L. 1, 3 (1993) (exploring "how racism and patriarchy interact in the social construction of motherhood"); Joan R. Tarpley, *Blackwomen, Sexual Myth, and Jurisprudence*, 69 TEMP. L. REV. 1343, 1347 (1996).

[162] For examples of how other fields have applied the concept of intersectionality, see generally Adrienne Asch, *Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity*, 62 OHIO ST. L.J. 391 (2001); Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415 (2007);

Mainstream immigration law scholarship, however, remained largely distant from the insights raised by critical race, feminist, and intersectional scholars. So much so that in 2000, Kevin Johnson pressed scholars to address the relationship between race and immigration law to deepen their work.[163] He stated that immigration scholarship focused on doctrinal issues that overlooked race, with some exceptions, such as the work of Bill Ong Hing[164] and Jack Chin.[165] Johnson's own work contended, for example, with how the practice of immigration law enforcement amounted to the racial profiling of those with Latin American ancestry.[166] Johnson looked forward to the day when "the consensus will be that race is central, not peripheral, to a full understanding of modern immigration and nationality law and policy."[167]

We believe that day has arrived. Race *is* a central focus of immigration law scholarship. Despite the purported colorblindness of the current immigration law regime, CILT approaches debunk this myth by scrutinizing how immigration

Beth Ribet, *Surfacing Disability Through a Critical Race Theoretical Paradigm*, 2 GEO. J.L. & MOD. CRITICAL RACE PERSPS. 209 (2010); Jasmine E. Harris, *Reckoning with Race and Disability*, 130 YALE L.J.F. 916 (June 30, 2021), https://www.yalelawjournal.org/pdf/HarrisEssay_a4tipb29.pdf [https://perma.cc/76VC-XC8D]; Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 1 (1995); Darren Rosenblum, *Queer Intersectionality and the Failure of Recent Lesbian and Gay "Victories*,*"* 4 LAW & SEXUALITY 83 (1994); and Sumi Cho, *Post-Intersectionality: The Curious Reception of Intersectionality in Legal Scholarship*, 10 DU BOIS REV. 385 (2013).

[163] Johnson, *supra* note 138, at 527.

[164] Hing, *supra* note 37, at 872-74.

[165] Chin, *supra* note 37, at 3-4 (discussing how, "[i]n immigration law alone, racial classifications are still routinely permitted").

[166] Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 717 (2000).

[167] Johnson, *supra* note 138, at 556. Johnson and others have also written about the racial dimensions of state level immigration policies. *See, e.g.*, Kevin R. Johnson, *Systemic Racism in the U.S. Immigration Laws*, 97 IND. L.J. 1455, 1460 (2022); Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 650-58 (1995) (analyzing anti-Mexican, not just anti-"illegal alien," element to Proposition 187 campaign); Ruben J. Garcia, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 120 (1995) (arguing Proposition 187 was "propelled by fears" of increasing diversity in California and United States); George A. Martínez, *Arizona, Immigration, and Latinos: The Epistemology of Whiteness, the Geography of Race, Interest Convergence, and the View from the Perspective of Critical Theory*, 44 ARIZ. ST. L.J. 175, 179 (2012) (arguing Arizona's S.B. 1070 works to "transform Arizona into a white geographical landscape"); Johnson, *supra* note 131, at 368-69 (explaining how anti-immigration legislation in Alabama (H.B. 56), which policed immigrants and restricted their access to education, resembled the racial caste system of Jim Crow South).

enforcement is racialized and targets noncitizens of color.[168] In *Constructing Crimmigration*,[169] Yolanda Vázquez challenges the race-neutral laws that comprise immigration enforcement.[170] She details how the 1960s saw an increase in unauthorized Mexican migration stemming from the termination of the Bracero program, the INA's new caps on Mexican migration, and the limitations placed on unskilled migrant labor.[171] In the following decades, more migrants came from other Latin American nations, due in part to the economic and social upheaval in their home countries created by U.S. destabilization of the region.[172] Responsive to this influx of Latinxs in the United States, immigration law and policy turned toward enforcing immigration violations as a way to ostensibly fight crime and protect American communities and borders.[173] Despite these race-neutral justifications, Vázquez argues that such law and policy only resulted in "legitimat[ing] the exclusion and exploitation of Latinos, thereby, ensuring their subordination and marginal status."[174]

The policing and mass incarceration of Black communities further inform CILT approaches. There are lessons to be learned from the responses and resistance to government abuses of power against Black persons, which have resulted in their stigmatization, marginalization, and othering.[175] The "War on Terror" post 9/11, for example, mimicked the racial profiling undertaken during the "War on Drugs," as immigration enforcement practices profiled those who appeared Middle Eastern, Arab, or Muslim.[176] Immigration detention, too,

[168] *See, e.g.*, Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 2009-10 (2013) (noting how immigration enforcement defines citizenship and how immigrants "racially marked as foreign" are denied membership rights); Eisha Jain, *Policing the Polity*, 131 YALE L.J. 1794, 1813 (2022) (reviewing how courts adopt "framework that permits race- and class-based proxies about 'who belongs' to justify surveillance and detention").

[169] Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76 OHIO ST. L.J. 599 (2015).

[170] *Id.*; *see infra* text accompanying note 214 (describing creation of term "crimmigration").

[171] *Id.* at 629-31.

[172] *See id.* at 633-34.

[173] *Id.* at 650.

[174] *Id.* As a result, Latinxs comprise more than 90% of those detained, removed, and deported for criminal violations. *Id.* at 654; *see also infra* text accompanying note 216 (describing construction of "criminal alien" through white fear of Latinos).

[175] *See, e.g.*, Jain, *supra* note 168, at 1799-1800 (discussing race-based surveillance, such as racialized police stops); *see also* Lolita K. Buckner Inniss, *Tricky Magic: Blacks as Immigrants and the Paradox of Foreignness*, 49 DEPAUL L. REV. 85, 86 (1999) (describing Black American experience as "*unremitting* immigrant experience—an experience of continued exclusion").

[176] Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185, 1193-96 (2002); Leti Volpp,

replicates the consequences of mass incarceration by marginalizing people racialized as nonwhite.[177] In *Abolishing Immigration Prisons*, César Cuauhtémoc García Hernández argues that immigration detention amounts to "a thorough denial of the inherent worth of certain humans, largely based on how they are racialized."[178] He explains how immigration detention is a rather recent phenomenon in migration control.[179] Its rise coincided with the "broken windows theory" of criminal policing, when "the regulation of migrants and migration took a punitive bent" in the 1980s and 1990s.[180] These legislative changes facilitated immigration imprisonment, resulting in "immigration prisons . . . filled with Mexicans and Central Americans."[181] He argues that filling prisons with Latinx persons convicted of certain crimes represents an extension of "racialized fears of criminality by people of color."[182]

CILT approaches also look to uncover the lasting effects of explicitly racist historic immigration laws that permeate today's facially neutral immigration law regime.[183] In *Inclusive Immigrant Justice*, Alina Das examines how the modern system of crime-based immigration enforcement has historical antecedents in immigration law and policy from the late 1800s and early 1900s.[184] The Page Act of 1875, for example, conflated Asian immigrants with criminality (i.e., those who were "prostitutes" or had felony convictions) to justify their exclusion.[185] In another example, she explains how the 1929 criminalization of illegal entry and reentry was connected to the desire to reduce Mexican migration to the United States.[186] She reclaims this history both to demonstrate

The Citizen and the Terrorist, 49 UCLA L. REV. 1575, 1598 (2002); *see also* Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 355 (2002) (discussing how stereotyping of Arabs and Muslims has impacted immigration law policy); Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists*,*"* 8 ASIAN L.J. 1, 15 (2001) (comparing "racing" of Japanese during World War II incarceration to post-9/11 policies against Arab Americans and Muslims).

[177] *See* García Hernández, *supra* note 135, at 246-47.

[178] *Id.* at 274.

[179] *Id.* at 275 ("Confinement has not always been a major part of the nation's regulation of migration. It is today because, to paraphrase Raphael and Stoll, we have chosen to make it so." (footnote omitted)).

[180] *Id.* at 279-80.

[181] *Id.* at 282-83.

[182] *Id.* at 284.

[183] *See, e.g.*, Ahilan T. Arulanantham, *Reversing Racist Precedent*, 112 GEO. L.J. 439, 444 (2024); Fatma Marouf, *Immigration Law's Missing Presumption*, 111 GEO. L.J. 983, 991 (2023).

[184] Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171, 190 (2018) (detailing how early history of crime-based grounds of deportation "is seldom discussed").

[185] *Id.* at 184-85.

[186] *Id.* at 193.

how the racialized outcomes of the current immigration law regime are no accident of history and that "the targeting of immigrants with criminal records" need not be "an inevitable aspect of immigration regulation."[187]

In addition to race, CILT approaches also examine, often through an intersectional lens, how other historically oppressed groups fare under the current colorblind immigration law regime. They focus on gender,[188] class,[189] and sexual orientation.[190] In *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, for example, Kevin Johnson notes the intertwined relationship between race and class in the immigration law regime.[191] He discusses the regime's continuing exclusion of poor people of color from the United States, through policies such as the public charge exclusion, per-country ceilings, and limited employment visas skewed toward high-skilled workers.[192] Further, he notes how the brunt of immigration

[187] *Id.* at 176. Two recent district court opinions have contended with the racist origins of the unlawful reentry statute, with differing results. Karla McKanders, *Deconstructing Race in Immigration Law's Origin Stories*, 37 MD. J. INT'L L. 18, 34-36 (2022).

[188] *See, e.g.*, Mariela Olivares, *Unreformed: Towards Gender Equality in Immigration Law*, 18 CHAP. L. REV. 419, 433 (2015) (arguing immigration reform proposals ultimately disadvantage immigrant women through failing to address gender-specific economic, employment, and educational needs); *see also* Shirley Lin, *"And Ain't I a Woman?": Feminism, Immigrant Caregivers, and New Frontiers for Equality*, 39 HARV. J.L. & GENDER 67, 70 (2016) ("[F]eminist and other critical legal theories can address the profound inequalities that immigrant workers face."). An earlier strain of scholars recognized the ways in which immigration law "disregard[s] . . . adverse gender-specific effects." Joan Fitzpatrick, *The Gender Dimension of U.S. Immigration Policy*, 9 YALE J.L. & FEMINISM 23, 48 (1997). Around this time, scholars were arguing for better recognition of gender-based asylum claims and better protections for battered immigrant women. *See, e.g.*, Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593, 620 (1991) (arguing policymakers must confront spousal domination in immigration laws); Pamela Goldberg, *Anyplace but Home: Asylum in the United States for Women Fleeing Intimate Violence*, 26 CORNELL INT'L L.J. 565, 569 (1993) (discussing need for U.S. asylum law to recognize claims of battered women); Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665, 696 (1998).

[189] *See, e.g.*, Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law Enforcement*, 72 LAW & CONTEMP. PROBS. 1, 4 (2009) (detailing exclusion of poor and working people of color as potential citizens in U.S. immigration law and enforcement).

[190] Rachel E. Rosenbloom, *Policing Sex, Policing Immigrants: What Crimmigration's Past Can Tell Us About Its Present and Its Future*, 104 CALIF. L. REV. 149, 196-97 (2016) (highlighting policing of gender identity as key part of criminal and immigration enforcement).

[191] Johnson, *supra* note 189, at 4-5.

[192] *Id.* at 8.

enforcement, like workplace raids, has been shouldered by poor and working noncitizens of color.[193]

Some CILT approaches analyze the racialization of the immigration law regime through a settler-colonialism lens.[194] Just as economic growth in the United States relied on the dispossession of Indigenous peoples' lands[195] and the transatlantic slave trade,[196] the labor exploitation of immigrants of color has been an integral part of this history.[197] In *Mexicans, Immigrants, Cultural Narratives, and National Origin*,[198] Leticia Saucedo considers the effects of colonialism on creating the idea of the "Mexican worker." She discusses how immigration status intertwines with cultural narratives (i.e., racial constructions) of Mexican workers as "peons" to sustain a caste system that relegates these workers to "unskilled" labor categories, unequal pay, and forms of servitude.[199] Saucedo contends that the "culture of empire" helped to characterize Mexico as "backward" to validate a takeover of the country's valuable resources, both

[193] *Id.* at 30 ("These raids have had racial and class impacts on particular subgroups of immigrant workers, namely low-skilled Hispanic immigrants.").

[194] Carrie L. Rosenbaum, *Crimmigration—Structural Tools of Settler Colonialism*, 16 OHIO ST. J. CRIM. L. 9, 45 (2018) ("Settler colonialism is partially defined by the settler class' 'civilizing mission' to erase existing identities and define others in the vision and mold of the settler class."). Leti Volpp argues that there is a lack of recognition in immigration law scholarship of settler colonialism, given that the "nation of immigrants" trope already assumes resolution of the fundamental conflict between indigeneity and settler colonialism. Leti Volpp, *The Indigenous as Alien*, 5 U.C. IRVINE L. REV. 289, 292 (2015).

[195] *See generally* ANDRÉS RESÉNDEZ, THE OTHER SLAVERY: THE UNCOVERED STORY OF INDIAN ENSLAVEMENT IN AMERICA (2016); CLAUDIO SAUNT, UNWORTHY REPUBLIC: THE DISPOSSESSION OF NATIVE AMERICANS AND THE ROAD TO INDIAN TERRITORY (2020); ROXANNE DUNBAR-ORTIZ, NOT "A NATION OF IMMIGRANTS": SETTLER COLONIALISM, WHITE SUPREMACY, AND A HISTORY OF ERASURE AND EXCLUSION (2021).

[196] *See generally* EDWARD E. BAPTIST, THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM (2014); WALTER JOHNSON, SOUL BY SOUL: LIFE INSIDE THE ANTEBELLUM SLAVE MARKET (1999).

[197] Racist ideologies dehumanized and commodified noncitizens of color to engineer a flourishing economy that benefitted whiteness by subordinating non-whiteness. *See, e.g.*, Maria L. Ontiveros, *Is Modern Day Slavery a Private Act or a Public System of Oppression?*, 39 SEATTLE U. L. REV. 665, 683-84 (2016) (arguing immigration law regime creates "modern day plantation" of immigrant workers, amounting to modern-day slavery); Kathleen Kim, *The Thirteenth Amendment and Human Trafficking: Lessons & Limitations*, 36 GA. ST. U. L. REV. 1005, 1022-23 (2020) (calling for Thirteenth Amendment approach to overhauling immigration system's race-based economic subordination that extracts forced labor and services from people of color).

[198] Leticia M. Saucedo, *Mexicans, Immigrants, Cultural Narratives, and National Origin*, 44 ARIZ. ST. L.J. 305 (2012).

[199] *Id.* at 335 (describing how racialized narratives "supported social structures that included segregated social relations," including "a hierarchical employment system . . . and a virtual caste system").

economic and human—so that a "backward population" could be "saved by instilling in them an American work ethic and way of life."[200]

Further, CILT considers the connection between race and capital in the immigration enforcement regime.[201] Several scholars have written about the continued accumulation of capital in private business conglomerates that support racialized immigration detention and enforcement.[202] There are massive profits to be made from immigration enforcement and detention.[203] Further, through the threat of immigration enforcement and imprisonment, noncitizens are "surveilled, confined, and counted in the service of an economic regime," whether in captivity or while toiling for global capitalism as "janitors, pieceworkers in the garment industry, cooks, nannies, gardeners, and day laborers."[204] Thus, racialized migration management of immigration surveillance and detention is the "latest iteration of a deeply entrenched, extractive system of racial capitalism."[205]

As the above discussion shows, the overt racism of this country's early immigration laws has persisted despite so-called colorblind reforms. CILT approaches identify and examine the multifaceted discriminatory effects of immigration law and policy, even as the U.S. immigration system operates to obscure its subordination of immigrants from historically oppressed groups by

[200] *Id.* at 308.

[201] For related scholarship analyzing race and capital, see CEDRIC J. ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION, at xiii (1983). Cedric Robinson's theory is that capitalism and racism evolved to "produce a modern world system of 'racial capitalism' dependent on slavery, violence, imperialism, and genocide." Robin D. G. Kelley, *Introduction*, BOS. REV. 5, 7 (2017); *see also* Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2172 (2013); WILLIAM S. KISER, BORDERLANDS OF SLAVERY: THE STRUGGLE OVER CAPTIVITY AND PEONAGE IN THE AMERICAN SOUTHWEST 18 (2017).

[202] *See, e.g.*, Mariela Olivares, *Intersectionality at the Intersection of Profiteering & Immigration Detention*, 94 NEB. L. REV. 963, 1015 (2016) (describing "[t]he profit motives of corporate-run immigrant detention centers" which "reap the benefits" of racialized subordination); CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS 125-27 (2019); *cf.* MICHAEL A. HALLETT, PRIVATE PRISONS IN AMERICA: A CRITICAL RACE PERSPECTIVE 9 (2006) (detailing rise of for-profit imprisonment targeting African American men).

[203] Eunice Hyunhye Cho, *Unchecked Growth: Private Prison Corporations and Immigration Detention, Three Years into the Biden Administration*, ACLU (Aug. 7, 2023), https://www.aclu.org/news/immigrants-rights/unchecked-growth-private-prison-corporations-and-immigration-detention-three-years-into-the-biden-administration [https://perma.cc/HH5Y-RKKB] ("Contracts with ICE continue to make up a significant amount of revenue for private prison corporations like the GEO Group and CoreCivic.").

[204] García Hernández, *supra* note 135, at 291.

[205] Jennifer Chacón, *Same as It Ever Was? Race, Capital, and Privatised Immigration Enforcement*, *in* PRIVATISING BORDER CONTROL: LAW AT THE LIMITS OF THE SOVEREIGN STATE 17, 19 (Mary Bosworth & Lucia Zedner eds., 2022).

using traditional justifications of crime control, border control, and national security.

B. *Rejecting the Essentialism of Immigrants*

Another dimension of CILT problematizes the essentialism of immigrants, pervasive throughout immigration law and politics. Essentializing stereotypes that categorize immigrants as either criminals, invaders, and pillagers, or idealized victims, youth, and workers abound in immigration law.[206] CILT scholars have revealed the immigration consequences of these stereotypes which influence either the imposition of punitive enforcement measures or the granting of immigration benefits. Moreover, the stereotyping of immigrants further interacts with the essentializing propensities of the criminal system, which has a double down effect on immigrants considered either "criminal aliens"[207] or "innocent victims."[208] Similar stereotyping occurs within legislative proposals for a pathway to citizenship for immigrants deemed meritorious, such as undocumented youth, farmworkers, or those who could otherwise work to earn their status.[209]

CILT methodologies contest these stereotypes, which essentialize immigrants into the reductive and morally questionable categories of "good" or "bad." According to critical feminist theory, the notion that "there is a fixed and identifiable 'essence' that characterizes a certain set of human beings, such as women," is inconsistent with the complex factors that make up individuals.[210] Anti-essentialism gives value to the unique qualities of difference that empower individual self-determination.[211] Human beings cannot be relegated to foreordained definitions, universal prescriptions, or generalizations. Anti-

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[206] *See* LEO R. CHAVEZ, THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION 25-27 (2d ed. 2013).

[207] *See* sources cited *supra* note 88 (using term "criminal alien" in Anti-Drug Abuse Act).

[208] Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1466 (carving out protections for trafficking victims, especially female victims of sex trafficking).

[209] *See, e.g.*, Dream Act, S. 365, 118th Cong. (2023) (carving out specific exemptions for people under eighteen); Farm Workforce Modernization Act, H.R. 4319, 118th Cong. (2023) (carving out exemptions for farmworkers); DIGNIDAD (Dignity) Act, H.R. 3599, 118th Cong. (2023).

[210] Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford, *Introduction* to FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT 3, 21 (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016).

[211] *See* Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1052 (1996) (remarking on how gender role stereotypes harm both men and women).

essentialism, therefore, requires attention to the lived realities of individuals within specific contexts.[212]

One prevalent CILT approach challenges the "criminal alien" paradigm entrenched in immigration law, which presumes the exclusion of immigrants entangled with the criminal system.[213] In 2006, Juliet Stumpf coined the term "crimmigration" to describe the rising convergence of immigration and criminal law, where the state can expel those deemed to be "criminally alien."[214] Since then, scholars have examined how immigration law ascribes criminal status to immigrants as a means of controlling migration.[215] The government's use of the term "criminal alien" refers to a "dangerous class" waiting "for an opportunity to wreak havoc on United States communities."[216]

In *Unsecured Borders*, Jennifer Chacón notes how the belief that immigrants are more likely to commit crimes has gained currency in public debates.[217] She argues that the 1996 immigration laws—the Illegal Immigration Reform and Immigrant Responsibility Act and Antiterrorism and Effective Death Penalty[218]—were not only a product of this worldview but also operated to reinforce "the links between all immigrants and criminality."[219] These laws

[212] RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY 10 (3d ed. 2017) ("Closely related to differential racialization—the idea that each race has its own origins and ever-evolving history—is the notion of intersectionality and anti-essentialism. No person has a single, easily stated, unitary identity."); Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 851 (1990).

[213] Much of this Section is indebted to the fantastic discussion of the construction of criminality by Annie Lai and Chris Lasch. For further information, see Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539, 565-72 (2017).

[214] Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376-78 (2006); *see also* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 469 (2007) (detailing trend "to import criminal justice norms into a domain built upon a theory of civil regulation," skewing both discourse and outcomes). Early on, Bill Ong Hing recognized the demonization of immigrants as criminals. Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 HASTINGS WOMEN'S L.J. 79, 81 (1998).

[215] *See, e.g.*, Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1140 (2013) (explaining that the term "criminal alien" represents how "the immigration law's traditional fixation on immigration status has been eclipsed by the criminal law's allocation of criminal status"); Annie Lai, *Confronting Proxy Criminalization*, 92 DENV. U. L. REV. 879, 882-83 (2015) (describing state-level conduct crimes targeting undocumented immigrants, such as driving without license).

[216] César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1507.

[217] Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1839-40 (2007).

[218] *See* sources cited *supra* note 36.

[219] Chacón, *supra* note 217, at 1843.

expanded the category of "criminal aliens" by making many more noncitizens deportable based on criminal history and requiring certain noncitizens to be mandatorily detained.[220] She observes how the federal government has stepped up its prosecution of immigration offenses,[221] such as unauthorized entry after removal, which further fuels the concept of the "fugitive alien" or other dangerous classes of aliens.[222] Ultimately, she concludes that this modern myth of immigrant criminality "logically presents immigration control as a means of controlling crime."[223]

Other scholars argue that the "criminal alien" serves as a tool of racial subordination.[224] In *Sanctuary Cities and Dog-Whistle Politics*, Chris Lasch proposes that centering the narrative on immigrant criminal conduct "seed[s] racial fears without directly referencing race."[225] He argues that the immigration system, like the criminal system, has shifted from "explicit racism to institutional racism."[226] He explains that "the currency of discourse, once backed by racial epithets, has likewise morphed to a colorblind discourse backed by law and order rhetoric."[227] As with mass incarceration, "dog-whistle politics" link white fear of Latinxs with increased immigration enforcement policies that contribute to racial subordination.[228]

In contrast, positive stereotypes of immigrants include the iconic victim, idealized youth, hard worker, or model minority—to name a few.[229] Those who

[220] *Id.* at 1844-46.

[221] In fiscal year 2021, immigration-related prosecutions made up 34% of all federal prosecutions, making it the most charged category of federal crimes. *Fact Sheet: Immigration Prosecutions by the Numbers*, NAT'L IMMIGR. JUST. CTR. (Nov. 14, 2022), https://immigrantjustice.org/staff/blog/fact-sheet-immigration-prosecutions-numbers# [https://perma.cc/5GT6-YP58].

[222] Chacón, *supra* note 217, at 1847.

[223] *Id.* at 1850.

[224] *See, e.g.*, García Hernández, *supra* note 216, at 1514 (explaining "in the age of metaphorical wars against crime and drugs, undesirability became pegged to criminality," which in turn, "became tied, implicitly, to race"); Angélica Cházaro, *Challenging the "Criminal Alien" Paradigm*, 63 UCLA L. REV. 594, 659-60 (2016) (showing "criminal alien" classification targets primarily poor migrants of color from Global South).

[225] Christopher N. Lasch, *Sanctuary Cities and Dog-Whistle Politics*, 42 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 159, 190 (2016) (quoting IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS 122-23 (2014)).

[226] *Id.* at 163.

[227] *Id.* (footnotes omitted).

[228] *See id.* at 162 (describing how racial appeals in political messages help promote racial subordination).

[229] 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, 221 (2012) (highlighting "good immigrant" narratives, including stories of immigrants who "support the U.S. economy by taking jobs no one else will take").

"fit" within these stereotypes may gain access to immigration status or discretionary relief. Unsurprisingly, these are categories for which interest convergence exists between the government and immigrants.[230] In exchange for providing immigration relief, the government benefits economically and reputationally.[231] In *Beyond Saints and Sinner*s, Elizabeth Keyes observes the influence of the "good immigrant" and "bad immigrant" stereotypes in the course of advocacy for noncitizen clients.[232] She suggests how these stereotypes define the legal framework for providing discretionary immigration relief.[233] Those who can be categorized as victims, such as victims of domestic violence, human trafficking, or serious crimes, become eligible to remain lawfully, even with prior criminal histories.[234] Others, who start out as "bad immigrants," have criminal histories that create hurdles to obtaining lawful immigration status as a matter of discretionary immigration relief.[235] She challenges this simplified heuristic that overlooks how immigrants, even those with considerable flaws, are still worthy of membership in our society.[236]

CILT approaches also contend that "positive" stereotyping of immigrants reproduces respectability politics that reinforce the concept of "illegality."[237] In *Respectability and the Quest for Citizenship*, Angela Banks details the problems

[230] *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524-25 (1980).

[231] The economic contributions of DACA recipients, for example, is widely touted. Nicole Svajlenka & Trinh Q. Troung, *The Demographics and Economic Impacts of DACA Recipients: Fall 2021 Edition*, CAP20 (Nov. 24, 2021), https://www.americanprogress.org/article/the-demographic-and-economic-impacts-of-daca-recipients-fall-2021-edition/ [https://perma.cc/GC3A-7839] ("DACA has enabled recipients to pursue higher education, become homeowners, and earn higher wages. And, alongside that, with higher earnings comes more tax revenue and economic contributions that are felt in their communities and nationwide.").

[232] Keyes, *supra* note 229, at 221.

[233] *Id.* at 226-27 ("Which box—'good immigrant' or 'bad immigrant'—the individual starts in greatly affects the ultimate result.").

[234] *Id.* However, the "good immigrant" category can be illusory as immigrants from marginalized communities are often considered at baseline unworthy of relief. Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3022-23 (2006) (discussing immigration law's narrow conception of human trafficking victim which has left many immigrant workers unprotected from workplace abuses); Kathleen Kim, *Beyond Coercion*, 62 UCLA L. REV. 1558, 1583 (2015) (exploring narrow protections provided only to undocumented workers considered trafficked victims, even though others experience labor exploitation). Kim further suggests that immigration workplace restrictions create both individual and structurally coercive workplaces for undocumented workers, antithetical to the free labor principles derived from the Thirteenth Amendment. Kim, *supra*, at 1584.

[235] Keyes, *supra* note 229, at 234.

[236] *Id.* at 222.

[237] *See* Lai & Lasch, *supra* note 213, at 569-70.

that respectability narratives have for immigrants who are seeking to remedy their legal and social exclusion.[238] First, they promote the idea that only certain immigrants deserve membership in American society.[239] Second, they reinforce the concept that the values, norms, and practices of immigrants do not conform to mainstream America.[240] Finally, they focus on the individual behavior of immigrants, absolving the federal government of its responsibility for structural or institutional inequality.[241] These respectability narratives, however, help drive various immigration reform proposals that would provide "idealized" immigrants with a pathway to earn citizenship.[242] Yet such reform proposals leave behind many noncitizens who are ineligible to earn citizenship.[243] They also simultaneously help to justify immigration enforcement with punitive consequences for those who are deemed unworthy for inclusion.[244]

Still, the context, intent, and messenger of the stereotype matters.[245] Social justice movements that advance immigrant rights arguably essentialize immigrants as well. These grassroots narratives, however, are distinct from the essentializing immigrant tropes leveraged by government actors to distinguish immigration beneficiaries from enforcement priorities.[246] Grassroots efforts are more likely to balance inclusivity with compelling storytelling to maximize

[238] Angela M. Banks, *Respectability & the Quest for Citizenship*, 83 BROOK. L. REV. 1, 5 (2017) ("The use of respectability narratives to fight against exclusion reinforces the idea that only certain immigrants are respectable and worthy of legal protection.").

[239] *Id.* at 8.

[240] *Id.*

[241] *See id.* at 48; *see also* Muneer I. Ahmad, *Beyond Earned Citizenship*, 52 HARV. C.R.-C.L. L. REV. 257, 278, 288 (2017) (describing earned citizenship as reinforcing individual culpability and need to demonstrate moral worthiness).

[242] Ahmad, *supra* note 241, at 278 ("[E]arned citizenship not only shifts the political framing of the legalization debate, but premises legalization on a normative conception of the idealized citizen.").

[243] Those left out of earned citizenship become the "super undocumented." Elizabeth Keyes, *Race and Immigration, Then and Now: How the Shift to "Worthiness" Undermines the 1965 Immigration Law's Civil Rights Goals*, 57 HOW. L.J. 899, 914-16 (2014) (discussing "dramatic numbers of people left out of reform").

[244] *See, e.g.*, Rebecca Sharpless, *"Immigrants Are Not Criminals": Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. 691, 764-65 (2016) (maintaining that excluding noncitizens with convictions from immigration reform legitimizes and perpetuates "the crime control agenda and attendant harms of hyperincarceration"); Cházaro, *supra* note 124, at 417 (noting that narrative of "ideal" immigrant—a mythical person without criminal entanglements—obscures actual harms inflicted by immigration system's enforcement-heavy methods of deploying penalties).

[245] *See* Sharpless, *supra* note 244, at 760 (highlighting nuanced reality and "fluid boundaries" of immigrant experiences).

[246] *See id.* at 711 (describing how tropes legitimize targets for enforcement).

support for a movement's goals.[247] Critical race theorists, like Angela Harris and Marlee Kline, have grappled with similar tensions in social justice movements that seek to elevate the concerns of one identity group over another.[248] Yet movements that further social justice gains for one group or cause are not monolithic. Advocates must, therefore, find ways to acknowledge the diverse lived experiences of those the movement aims to uplift.

CILT approaches appreciate the unique individuality of immigrants and challenge immigration law's construction of essentializing tropes of immigrants. They recognize that immigration law utilizes stereotypes of immigrants to simplify the conferral or denial of immigration benefits. In doing so, CILT exposes these stereotypes as illusory myths that fail to capture the real-life experiences of immigrants.

C. *Challenging the Legal Categories of Citizenship/Alienage*

Another dimension of CILT contests alienage and citizenship as fixed legal categories constructed and controlled by the federal immigration law regime.[249] These reductive categories oppress noncitizens, particularly noncitizens of color, by constraining their ability to enter, remain, and become full political members of the United States. CRT scholars have long challenged the structure of law and legal categories—referred to sometimes as structural determinism—because of the way they maintain the status quo and are ill equipped to redress wrongs.[250] By unpacking these doctrines, categories, and tools, CILT methodology similarly pushes us to think outside of dominant frameworks to consider new pathways to fight oppression.[251]

In the 1990s, Linda Bosniak urged scholars to envision an immigration status that transcended the legal conventions of alienage and citizenship.[252] Bosniak discussed an alternative conception of citizenship that embodied the many ways noncitizens might have a psychological sense of members as active participants

[247] KATHRYN ABRAMS, OPEN HAND, CLOSED FIST: PRACTICES OF UNDOCUMENTED ORGANIZING IN A HOSTILE STATE 167-68 (2022) (describing adaptability of activists based on new political landscapes and unmet needs within their communities).

[248] *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 596 (1990) (describing how "ideology of beauty concerns not only gender but race"); *see also* Marlee Kline, *Race, Racism and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115, 123 (1989).

[249] 8 U.S.C. § 1101(a)(3); 8 U.S.C. § 1401.

[250] Peggy C. Davis, *Law as Microaggression*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE, *supra* note 159, at 141 (discussing microaggressions inherent in legal practice).

[251] *See id.* at 149.

[252] Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1055 (1994); *cf.* López, *supra* note 35, at 618 ("[C]itizenship or residency should not provide the only access route to legal entitlements.").

in the life of the political community.[253] During this time, a sizeable population of undocumented immigrants in the United States began to swell as the southern border became increasingly militarized.[254] By increasing the costs of going back and forth, the undocumented population hunkered down in the United States, swelling during the 1990s and 2000s.[255] Meanwhile, various aspects of federal, state, and local laws began to encourage the participation and contributions of undocumented immigrants in society.[256] Against this backdrop, Hiroshi Motomura questioned the "superficially paradoxical concept" of citizenship defined by immigration laws, given their inconsistency with more recent laws that integrate undocumented immigrants in the communities where they live and work.[257]

CILT approaches seek to further delineate how to reconceive the legal categories of alienage and citizenship. One approach highlights how local "sanctuary" acts disrupt the federal citizenship construct by promoting a sense of belonging for immigrants.[258] Immigrant rights movements in the 2010s focused their efforts on the promotion of sanctuary, whether at the institutional, city, county, or state level.[259] These movements used various sanctuary tactics—barring cooperation with federal immigration enforcement, declaring sanctuary spaces, or providing municipal IDs to all city residents—in an attempt to prioritize the well-being of undocumented residents in their localities.[260] Scholars have argued that these tactics create a de facto form of local citizenship.[261] In *Undocumented No More*, Peter Markowitz takes on this very

[253] LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 19-20 (2006) (explaining how citizenship conveys sense of psychological membership alongside legal and behavioral elements).

[254] Douglas S. Massey & Karen A. Pren, *Unintended Consequences of US Immigration Policy: Explaining the Post-1965 Surge from Latin America*, 38 POPULATION & DEV. REV. 1, 22-23 (2012).

[255] *Id.*

[256] *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 217 (1982) (underscoring importance of civic participation in state elections as fundamental).

[257] HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 146 (2014) ("[V]arious aspects of federal, state, and local law recognize the integration of unauthorized migrants into small-scale communities by affording them some legal rights in spite of their unlawful status.").

[258] Villazor & Gulasekarem, *supra* note 121, at 1215.

[259] *See supra* notes 121-24 and accompanying text (summarizing evolution of state and local adoption of sanctuary polices to gain protections for immigrants).

[260] *See supra* notes 121-24 and accompanying text (detailing how these strategies supported immigrants).

[261] *See, e.g.*, Peter J. Spiro, *Formalizing Local Citizenship*, 37 FORDHAM URB. L.J. 559, 563-64 (2010) (showing sub-federal forms of state or local citizenship for immigrants that recognize immigrants as community members); Rose Cuison Villazor, *"Sanctuary Cities" and Local Citizenship*, 37 FORDHAM URB. L.J. 573, 590 (2010) (examining ways in which battle over San Francisco's non-cooperation policy with federal immigration enforcement

concept by examining whether states could grant citizenship to undocumented immigrants.[262] His idea was inspired by his work on the New York Is Home Act, a proposal to give undocumented immigrants the right to vote in local and state elections.[263] After reviewing the constitutional foundation for state citizenship, he argues that states have the power to grant state citizenship to undocumented immigrants without infringing on the federal government's power.[264] Markowitz concludes that state citizenship is normatively desirable in integrating immigrants and reorienting our national immigration discourse around more productive themes of democracy, family, and economic vitality.[265]

Another approach looks to redefine the rules of immigration law citizenship by reconceptualizing a citizenship identity different from the current construct.[266] The identity that noncitizens have as workers, for example, is one that can be considered as distinct from their lawful immigration status.[267] In *Transnational Labor Citizenship*, Jennifer Gordon describes "labor citizenship,"

signaled local citizenship as form of status). *But see* Stella Burch Elias, *Immigrant Covering*, 58 WM. & MARY L. REV. 765, 855-56 (2017) (warning that state and local incorporation of immigrants provides "vehicle that allows the majority to disattend to the realities of the everyday struggles of unauthorized immigrants").

[262] Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 STAN. L. REV. 869, 880 (2015).

[263] *Id.* at 906.

[264] *Id.* at 889.

[265] *Id.* at 876.

[266] *See, e.g.*, D. Carolina Núñez, *Mapping Citizenship: Status, Membership, and the Path in Between*, 2016 UTAH L. REV. 477, 482 (reconceptualizing citizenship by distinguishing "formal citizenship," the government-issued legal status, from "substantive citizenship," a more holistic paradigm of membership and belonging); Carrie L. Rosenbaum, *Anti-Democratic Immigration Law*, 97 DENV. L. REV. 797, 845-46 (2020) (advocating for disaggregation of immigration status in favor of framework that allocates "personhood-based conception of rights," permitting participation in political community); *see also* Jennifer J. Lee, *Redefining the Legality of Undocumented Work*, 106 CALIF. L. REV. 1617, 1619 (2018) (exploring how states and localities can act to legitimize undocumented workers separate and apart from what is permitted by alienage-citizenship construct within federal immigration system). *But see* Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 481 (2005) (raising skepticism about validity of legal citizenship, finding that it mistakenly assumes "that there can be an ever expanding circle of membership," when reality is there will always be exclusions in "the name of abstract citizenship").

[267] Ruben J. Garcia, *Across the Borders: Immigrant Status and Identity in Law and LatCrit Theory*, 55 FLA. L. REV. 511, 536 (2003) (examining how immigrant identity, particularly among workers organizing for collective action, exists independently from their legal recognition); *see also* Lee, *supra* note 90, at 1894 (recommending legalization of work for undocumented workers separate and apart from immigration status).

as a concept distinct from immigration law citizenship.[268] Labor citizenship includes "the *status* of membership in a workers' organization," "the *act* of participation in the decisionmaking processes of that organization, with the *goal* of improving wages, working conditions, and the dignity of work," and ultimately standing in solidarity "with fellow 'labor citizens.'"[269] She sees potential for how the extension of labor citizenship—whether to undocumented workers already living in the United States or to migrants coming to work—can help to establish a "genuine floor on working conditions."[270] As a result, Gordon proposes a new form of citizenship that merges these labor and immigration law categories together: transnational citizenship rights for migrant workers coming to work in the United States created by bilateral agreements.[271]

A final CILT approach is one that pays close attention to the power that immigrants themselves exercise to disrupt the conventional construct of citizenship.[272] Political activism, particularly among immigrant youth, has energized immigrant rights movements to achieve dramatic gains for immigrants, particularly in local and state politics.[273] Those undocumented youth who came out of the shadows to publicly announce that they were undocumented managed to transform "the boundaries of citizenship" by "blurring the lines between those who belong and do not belong."[274] Kathryn Abrams explains how activists associated with the undocumented youth movement reclaimed citizenship "[b]y speaking directly and candidly to the public and petitioning the government for redress of grievances."[275] Even without the formal guarantees of citizenship, she argues they "embrace the paradigmatic example of citizens vindicating their rights" as a "way of modeling the citizenship that they hope to attain."[276] By using their own expertise and setting the agenda for reform, immigrant activists subvert prevailing

[268] Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 505 (2007) (describing labor citizenship as a "lens for understanding the challenges unions face in taking the leap to an open attitude toward the future flow of migrants").

[269] *Id.* at 510-511.

[270] *Id.* at 565.

[271] *Id.* at 563 (explaining that transnational labor citizenship "would entitle the holder to come and go freely between the sending country and the United States, and to work in the United States without restriction").

[272] *See* Jennifer M. Chacón, *Citizenship Matters: Conceptualizing Belonging in an Era of Fragile Inclusions*, 52 U.C. DAVIS L. REV. 1, 78-79 (2018).

[273] Ashar, *supra* note 56, at 1486-87 (highlighting power of immigrant youth-led organizing efforts to mobilize broad support for protective immigrant policies).

[274] Rose Cuison Villazor, *The Undocumented Closet*, 92 N.C. L. REV. 1, 54-55 (2013).

[275] Kathryn Abrams, *Performative Citizenship in the Civil Rights and Immigrant Rights Movements*, *in* A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT 50, at 1, 6 (Ellen D. Katz & Samuel R. Bagenstos eds., 2015).

[276] *Id.* at 16.

assumptions about political belonging and participation defined by formal citizenship.[277]

Informed by the lived reality of immigrants, as well as by the bold strategies of immigrant rights movements, these CILT approaches contemplate and promote a rethinking of immigration law categories that is inclusive of all immigrants.

D. *Listening to Impacted Voices*

Finally, CILT has a dimension deeply connected to immigrants actively pursuing the transformation of the immigration law system. CRT scholars, such as Mari Matsuda, have long recommended "[t]he method of looking to the bottom" to provide "concepts of law radically different from those generated at the top."[278] Likewise, critical feminist legal theory underscores the significance of knowledge based on experiential lessons.[279] The voices of those impacted by the system are best positioned to reimagine how change might happen. More recently, Amna Akbar, Sameer Ashar, and Jocelyn Simonson have described a "movement law" approach to legal scholarship, which focuses on "law, justice, and social change as work done in solidarity with social movements" given its "attempts to engage, celebrate, and participate in disruption from the grassroots."[280] Instead of the narrow ways in which the mainstay of legal scholarship often envisions reform, everyday people are far more capable to radically shift the existing discourse about legal reform.[281]

The lived experiences of immigrants inform much of immigration law scholarship. CILT approaches also take direct guidance from immigrant activists and organizers to make their scholarly contributions align with, facilitate, or advance immigrant rights agendas. Scholars have focused on grassroots movements to not only demonstrate the pushback against the seemingly

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[277] Lee, *supra* note 128, at 107.

[278] Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 326 (1987) (urging methodology to analyze efficacy of laws that prioritizes experiences of individuals and groups subjected to such laws); *see also* DELGADO & STEFANCIC, *supra* note 212, at 45-46 (describing how legal storytelling from people of color can open a window into ignored or alternative realities).

[279] Abrams, *supra* note 48, at 983-84 (emphasizing consideration of lived experiences in critical analysis of law and policy).

[280] Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 826, 829 (2021) (supporting allyships with social movements to disrupt status quo and create change).

[281] Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 414 (2018) (explaining that "[s]ocial change happens on the streets and in formal and informal domains"); Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 270 (2019) (referencing community justice adjudication reforms in which the public places pressure on police and prosecutors to become more responsive to community needs).

indiscriminate abuses of the federal immigration system,[282] but also be inspired for more transformative visions of what might be possible for legal reform.[283] In *The End of Deportation*, Angélica Cházaro argues that the abolition of immigration law's enforcement machinery, if taken seriously, would be a far more effective and reasonable approach to reconstructing an equitable society.[284] Informed by the policy platforms of social movement organizations, like Mijente, Cházaro suggests the need for scholarship and advocacy to question the "common sense" of deportation.[285] These activists understand immigration law's deeply rooted racist history and its abuse of carceral power to sustain white supremacy. As she explains, the immigration enforcement system perpetrates ongoing violence committed by the swelling or expansion of "indefensible and illegitimate uses of state force" against people of color.[286] Recognition of these inherent aspects of the immigration legal regime delegitimizes its utility in a purportedly multiracial and multicultural democracy. As a result, she questions the value of various procedural efforts related to making immigration proceedings fairer that ultimately fail to question the legitimacy of deportation.[287] Like other scholars who write in solidarity with immigrant activists affected by the harms of the immigration system,[288] she

[282] *See, e.g.*, Villazor & Gulasekaram, *supra* note 121, at 1215 (revealing how sanctuary networks set forth "an alternative paradigm that competes with the federal government's vision of how undocumented immigrants ought to be treated"); Jason A. Cade, *Sanctuaries as Equitable Delegation in an Era of Mass Immigration Enforcement*, 113 NW. U. L. REV. 433, 479-81 (2018) (considering sanctuary advocacy as community-based strategic intervention to replace indiscriminate abuses by the federal immigration system with humanitarian and equitable norms and practices).

[283] *See, e.g.*, Lai & Lasch, *supra* note 213, at 604-07 (highlighting local movements that rejected respectability politics villainizing "criminal alien" carve-outs for immigrants with more serious criminal records in favor of "transformative vision of sanctuary").

[284] Cházaro, *supra* note 130, at 1049.

[285] *Id.* at 1045-48. César Cuauhtémoc García Hernández has similarly argued against immigration detention being a normal component of immigration enforcement. César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449, 1513 (2015).

[286] Cházaro, *supra* note 130, at 1046.

[287] *Id.* at 1119 (explaining that proportionality reforms simply reinforce procedures focused on undefined equities of a person); *see also* Daniel I. Morales, *Dissent in Immigration*, 16 LAW, CULTURE & HUMANITIES 250, 265 (2020) (discouraging legal scholars from following legal reform status quo through bureaucratic tinkering, such as expansion of guest worker visas, and instead shifting to recentering abolition).

[288] *See, e.g.*, Peter L. Markowitz, *Abolish ICE . . . and Then What?*, 129 YALE L.J.F. 130 (Nov. 7, 2019), https://www.yalelawjournal.org/pdf/Markowitz_AbolishICEandThen What_p1ypp1i9.pdf [https://perma.cc/LJ5E-NZUJ] (calling for paradigm shift in immigration enforcement that "does not rely on detention, mass deportation, or any dedicated agency of immigration police but is nevertheless realistic and effective at increasing compliance with immigration law"); Lee, *supra* note 128, at 75-76 (highlighting type of immigrant activism,

urges moving toward the wholesale rejection of the system by calling for deportation abolition.[289]

Further, CILT approaches consider lawyering alongside affected persons, communities, and movements, to achieve shared goals or to reimagine an altogether different system. Previous accounts of lawyering for social change in collaboration with clients and communities include Gerald López's pivotal book *Rebellious Lawyering*[290] and Lucie White's writing on community-based poverty lawyering.[291] These scholars shed light on the importance of the everyday lives of people and their communities—clients and their real-life problems—and what lawyers must do to serve them effectively. Undoing the lawyer-to-client hierarchy, typical in the 1980s and 1990s, López, White, and other critical theorists in conversation with them, emphasized client and community agency, and urged lawyers to discern client interests through collaboration, empathy, critical self-reflection, and cultural awareness. Fast forward to present times, Scott Cummings' work on movement lawyering traces its origins and evolution to elucidate its current resurgence as the optimal strategy for progressive change.[292] Current movement lawyers, however, offer something new: "a sign of ambition among a generation of lawyers eager to strengthen alliances with marginalized communities in the pursuit of a transformative social vision."[293] Today's movement lawyering also contends with the complexities inherent in the practice, such as competing interests within the movement and deference to movement leaders on choosing key strategies.[294]

CILT approaches reexamine lawyering and its alliance with immigrant rights movements to work toward transformative social change. In solidarity with such movements, scholars offer ideas about how movement lawyers should think,

called "immigration disobedience," which foregrounds responsibilities of legal scholars and lawyers to keep pace with today's immigrant social movements that are seeking transformative change).

[289] Cházaro, *supra* note 130, at 1045 ("By introducing deportation abolition as a possible horizon for immigrant scholarship and advocacy, this Article pushes legal scholarship to focus on what might be required to end deportation.").

[290] *See generally* GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 1-2 (1992) (framing strategies of progressive, activist lawyers as those who defy conventional lawyering practices).

[291] *See generally* Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 21-32 (1990) (providing account of legal aid representation of client, Mrs. G, to show interpersonal complexities of poverty lawyering).

[292] *See generally* Scott L. Cummings, *Movement Lawyering,* 2017 U. ILL. L. REV. 1645, 1651 (connecting insights from critical theorists on movement lawyering with current perspectives from legal scholars and social movement scholars).

[293] *Id.* at 1654.

[294] *Id.* at 1653-54 (showcasing many different considerations progressive lawyers must account for in their work).

work, and act.[295] In *Movement Lawyers and the Fight for Immigrant Rights*, Sameer Ashar draws on media, scholarly, and first-person accounts to describe the complicated role that lawyers have played in the immigrant rights campaigns under the Bush and Obama administrations "as facilitators, enablers, and defenders."[296] He seeks to extend public interest lawyering literature to offer a glimpse of how the collaborations between movement actors and lawyers work to advance campaigns for social change.[297] His thick description centers on how movement lawyers use both conventional legal tools and activities that nurture critical visions to resist and reconstruct the law.[298] He describes their work as helping to develop critical ideas and organizational infrastructure, generating resources for organizing, accompanying activists as they engage in the public sphere, and, at their best, holding "space" for activists.[299] And though his focus is on what lawyers have done for these various immigrant rights campaigns, he emphasizes that these activities were "co-generated in the context of formal and informal relationships marked by equality and mutuality" between activists and lawyers.[300]

CILT approaches, therefore, take seriously the idea of listening to impacted voices as the basis for legal scholarship. And as a praxis point, CILT seeks to advance the current resurgence of movement lawyering as a powerful tool for working toward justice transformation through collaboration alongside movement actors.

IV. THE IMPLICATIONS OF CILT

In this last Section, we address various implications and potential controversies raised by CILT. First, we discuss how educating law students about CILT approaches in immigration law incorporates lessons on diversity,

[295] *See, e.g.*, Jayesh Rathod, *Transformative Immigration Lawyering*, 132 YALE L.J.F. 633-34 (Nov. 18, 2022), https://www.yalelawjournal.org/pdf/F7.RathodFinalDraftWEB_fxo75j3t.pdf [https://perma.cc/EC5F-HKJ6] (calling on immigration law clinics to listen to perspectives of affected communities to guide their goal-setting process and proposals for transformative change); Laila L. Hlass, *Lawyering from a Deportation Abolition Ethic*, 110 CALIF. L. REV. 1597, 1602, 1652 (2022) (proposing that lawyers can practice with a "deportation abolition ethic" by engaging in antiracist lawyering, building power with clients and client communities, and cautiously critiquing reforms that merely tinker with the system).

[296] Ashar, *supra* note 56, at 1467.

[297] *Id.* at 1468 (supporting allyships between lawyers and movement actors to reconstruct law itself).

[298] *Id.* at 1495.

[299] *Id.* at 1497, 1500, 1503-04 (quoting Chaumtoli Huq, *Calling All Movement Lawyers: We Need to Organize Our Legal Support*, LAW AT THE MARGINS (Nov. 10, 2016), https://lawatthemargins.com/calling-movement-lawyers-need-organize-legal-support/ [https://perma.cc/PCB5-B5BM]); *see also* Cimini & Smith, *supra* note 57, at 511.

[300] Ashar, *supra* note 56, at 1497.

equity, and inclusion. The importance of these values in the practice of law within a country characterized by consistently changing demographics and increasing multiculturalism cannot be overstated. Immigration law, as a course subject, exposes students to the interaction of law and politics with society and the relationship between law and the systemic subordination of historically oppressed groups. Next, we address the association of CILT with Critical Race Theory ("CRT"), which this Article has expressly sought to highlight as a significant normative advancement in immigration scholarship. However, we recognize that naming CILT runs the risk of exposing scholars to the recent backlash to shut down all critical discourse on race and gender. This backlash is evidenced by recent assaults against the teaching of CRT and its presumably related topics of diversity, equity, and inclusion ("DEI").[301] Finally, we touch on the ways in which CILT methodology engages with immigrants as its subject matter, including the attendant risks of recreating the very hierarchies that critical approaches intend to dismantle.

Virtually all accredited law schools have adopted education on DEI into their curricula.[302] The American Bar Association ("ABA") enacted Standard 303(c), which requires law schools to educate law students on "bias, cross-cultural competency, and racism."[303] These developments emerged from this country's reckoning with deeply entrenched racial injustice in the summer of 2020, prompted by George Floyd's murder by a police officer and numerous other casualties suffered by Black persons perpetrated by law enforcement or civilians acting under the color of law. Summer 2020 also catalyzed Black Lives Matter

[301] *Education: Anti-Critical Race Theory Issue Brief*, NAACP, https://naacp.org/resources/education-anti-critical-race-theory-issue-brief# [https://perma.cc/C5F4-LSJZ] (last visited Oct. 4, 2024) (showcasing exponential increase of anti-CRT measures by local and state governments).

[302] *Law Deans Antiracist Clearinghouse*, ASS'N OF AM. L. SCHS., https://www.aals.org/antiracist-clearinghouse/ [https://perma.cc/7EMZ-3WVV] (last visited Oct. 4, 2024) (illustrating many initiatives and policies law schools have adopted to better implement DEI).

[303] AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2023-2024, at 18 (2023), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2023-2024/23-24-standards-ch3.pdf [https://perma.cc/6PK5-GT8N]. The ABA's interpretive guidance for Standard 303(c) states that it may be satisfied by "(1) Orientation sessions for incoming students; (2) Lectures on these topics; (3) Courses incorporating these topics; or (4) Other educational experiences incorporating these topics." The guidance further states that:

> While law schools need not add a required upper-division course to satisfy this requirement, law schools must demonstrate that all law students are required to participate in a substantial activity designed to reinforce the skill of cultural competency and their obligation as future lawyers to work to eliminate racism in the legal profession.

Id. at 19-20.

as the largest social movement in U.S. history.[304] Law students, especially student leaders of the Black Law Students Association ("BLSA"), made demands of their law schools that the study of law contend with the ways in which law is complicit with systemic inequality.[305]

Law schools have undertaken different approaches to meet these demands. At LMU Loyola Law School in Los Angeles, for example, the faculty voted to adopt a learning outcome on the law's relationship to systemic inequality, which they mandated in all required courses.[306] While this structural change has the potential to be transformational, not all law professors feel equipped to teach the law's relationship to systemic inequality in their courses.[307] The values of diversity, equity, and inclusion, however, require educators to self-evaluate their teaching methods to ensure that their classrooms optimize learning for all students. This means that law school professors have a professional responsibility to cultivate inclusive and equitable classroom environments.

Scholars who teach immigration law are well situated to teach CILT, particularly to students motivated to serve noncitizens and combat the injustices of the immigration law system. Law students, as the next generation of aspiring antiracist lawyers, seek to understand how current immigration law doctrine results in the subordination of noncitizens based on their race, class, gender, or sexual orientation. In response, immigration law teachers can incorporate critical approaches to their teaching. Charles Shane Ellison and Kate Evans, for example, have written about the incorporation of critical theories in their course entitled "Race and Immigration Policy."[308] Their course serves as a prerequisite or corequisite companion course to the Immigrant Rights Clinic they teach, also

[304] Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html.

[305] Karen Sloan, *'This Is the Civil Rights Movement of My Lifetime': Black Law Students Demand Action*, LAW.COM (June 18, 2020, 3:40 PM), https://www.law.com/2020/06/18/this-is-the-civil-rights-movement-of-my-lifetime-black-law-students-demand-action/ [https://perma.cc/V8SQ-9X56] (highlighting leadership by Black law students who advocated for transformative changes at law schools to advance racial justice); Areeba Jibril, McKayla Stokes & Mariah Young, *Students Take to Twitter to Demand Racial Equality*, ABA (July 1, 2020), https://abaforlawstudents.com/2020/07/01/students-take-to-twitter-to-demand-racial-equality/ [https://perma.cc/6C6N-GGMR].

[306] *Loyola Law School First to Mandate Critical Legal Education*, LLS (Oct. 12, 2021), https://www.lls.edu/thellsdifference/facesoflls/curricularinnovationlearningoutcomes/ [https://perma.cc/UQM9-NYFM].

[307] Some faculty may resist teaching what they perceive as political ideology versus methodology. Other professors may be wary of any prescribed pedagogical methods as constraints on their academic freedom in the classroom.

[308] Charles Shane Ellison & Kate Evans, Pedagogy and Praxis: Incorporating Critical Theory into Teaching Immigration Law and Policy 6 (unpublished manuscript) (on file with authors).

infused with antiracist learning objectives in its work with clients and communities.[309]

While this Article intends to acknowledge CILT to legitimize its contributions as a critical theory, its association with CRT renders it vulnerable to attack. The ideological onslaught against CRT in recent years is politically driven and misrepresents CRT as a form of divisive and elitist brainwashing.[310] The anti-intellectual and revisionist historical propaganda against CRT has engendered an entire political movement banning the teaching of CRT from elementary schools to higher education.[311] The Kansas Board of Regents, for example, requested a review of all courses that include CRT at six universities.[312] State legislatures have moved to enact anti-CRT measures alongside anti-sanctuary policies, replicating Executive Orders banning "divisive concepts" issued by the Trump Administration.[313] The attack is a backlash against the post-George Floyd response made by much of America to rethink race and systemic racism. While those espousing anti-CRT measures appear not to grasp exactly what it is (including that it is not taught in primary schools), the damage to teaching and scholarship is all too real, particularly for those working at government-funded institutions.[314] Those using CILT approaches may similarly be vulnerable to attack, although many law professors have leveraged their positions to speak out

[309] *Id.* at 2.

[310] Brandon Tensley, *The Engineered Conservative Panic Over Critical Race Theory, Explained*, CNN, https://www.cnn.com/2021/07/08/politics/critical-race-theory-panic-race-deconstructed-newsletter/index.html [https://perma.cc/98KT-6A5P] (last updated July 8, 2021, 5:40 PM) (showcasing push by certain Republicans to stigmatize CRT for political benefits).

[311] *CRT Forward*, *supra* note 155 (tracking government action taken to undermine CRT at all education levels).

[312] Russell Contreras, *Educators Face Fines, Harassment over Critical Race Theory*, AXIOS (June 20, 2021), https://www.axios.com/2021/06/20/teachers-harassment-fines-critical-race-theory.

[313] *See* H.B. 544, 2021 Gen. Ct., Reg. Sess. (N.H. 2021) (prohibiting dissemination of certain divisive concepts relating to sex and race); H.B. 266, 2021 Gen. Ct., Reg. Sess. (N.H. 2021) (disallowing creation of sanctuary entities by local and state government entities).

[314] *See, e.g.*, Daniel C. Vock, *GOP Furor over 'Critical Race Theory' Hits College Campuses*, AZ MIRROR (July 1, 2021, 3:22 PM), https://www.azmirror.com/2021/07/01/gop-furor-over-critical-race-theory-hits-college-campuses/ [https://perma.cc/8T8Y-M6NN]; Kate McGee, *Lt. Gov. Dan Patrick Proposes Ending University Tenure to Combat Critical Race Theory Teachings*, TEX. TRIB. (Feb. 18, 2022, 12:00 PM), https://www.texastribune.org/2022/02/18/dan-patrick-texas-tenure-critical-race-theory/ [https://perma.cc/2J9D-5QHH]; Nicole Gaudiano, *A College Law Professor Who Teaches Critical Race Theory Worries That Educators Are Living Through Another 'Red Scare*,*'* BUS. INSIDER, https://www.businessinsider.com/critical-race-theory-laws-creating-chilling-effect-for-professors-teachers-2021-12 (last visited Oct. 4, 2024). Virtually all not-for-profit institutions of higher education receive some education-related government funding.

against measures that stifle their speech, distort the substance of what they teach, and discredit their scholarship.[315]

Another question worth considering is whether CILT methodology has the potential to dehumanize or subordinate immigrants who are the subjects of such scholarship. By focusing on how the structural flaws of the immigration law regime inflicts harm upon immigrants, CILT methodology can risk the telling of stock stories that objectify immigrants as individuals who lack agency. To eliminate this risk, CILT approaches must seek to ensure that the complexity of immigrant experiences and voices that inform their work are appropriately recognized and valued, rather than co-opted for mere professional gain. Participatory law scholarship ("PLS"), for example, encourages an innovative approach to scholarship through meaningful collaborations with individuals affected by the dysfunction of the legal systems that the scholarship seeks to critique. As Rachel López explains, PLS empowers nonlawyers harmed by legal systems to recognize themselves as experts in their own legal realities, and therefore, as fundamental to scholarship that furthers the democratization of the law.[316] One conversation among scholars worth continuing is considering how CILT methodology could incorporate PLS or other methods that promote the integrity and legitimacy of contributions to the scholarship from immigrants, communities, and movements.

CILT as a praxis also alleviates some of these concerns. As law teachers, immigration law scholars educate the next generation of attorneys whose professional identities include antiracist, abolitionist, and/or transformative approaches to their work with, and on behalf of, immigrant communities.[317] Those engaging in CILT methodology often work in solidarity with immigrant rights movements and immigrant activists.[318] Many immigration legal scholars traverse both the academy and the practical world. Emblematic of this dual role are clinicians who integrate practice with teaching and scholarship. While the

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[315] Cady Lang, *President Trump Has Attacked Critical Race Theory. Here's What to Know About the Intellectual Movement*, TIME (Sept. 29, 2020, 10:53 PM), https://time.com/5891138/critical-race-theory-explained/ [https://perma.cc/AUT2-XHY4] (quoting critical race and feminist scholar Priscilla Ocen who clarifies that "[c]ritical race theory . . . call[s] for a society that is egalitarian . . . just . . . inclusive, and in order to get there, we have to name the barriers"); Michael Graham, *NH Progressives Attack Arab GOP Rep. as 'Disgrace' to His Race for Opposing CRT*, NH J. (Apr. 7, 2021), https://nhjournal.com/nh-progressives-attack-arab-gop-rep-as-disgrace-to-his-race-for-opposing-crt/ [https://perma.cc/DQ5T-TZXP] (referring to Kathleen Kim, Associate Dean of Equity & Inclusion at Loyola Law School, who testified against New Hampshire's anti-CRT measure as spreading "misinformation" about biased attitudes "towards people of color").

[316] Rachel López, *Participatory Law Scholarship*, 123 COLUM. L. REV. 1795, 1810 (2023) (describing a "fundamental belief" that people harmed by systems should drive research and be empowered to transform their lives).

[317] Ellison & Evans, *supra* note 308 (manuscript at 6-7); Hlass, *supra* note 295, at 1636; Rathod, *supra* note 295, at 633.

[318] *See supra* Section III.D.

traditional lawyer assumes a lawyer-to-client, top-down hierarchy that prioritizes self-interest over those of their clients,[319] the movement lawyer serves immigrants, thereby undertaking a supportive role that values the expertise and leadership of impacted individuals.[320] CILT methodology embraces this perspective of listening to the lived experiences of immigrants, communities, and movements, and receives guidance from them as agents of resistance, change, and disruption.

In the practical world, immigration law scholars help to shape the public discourse about immigration law and policy given the privilege and power of the legal academy. Some engage as "public intellectuals"[321] on the topic of immigration law and policy.[322] Others have even occupied seats at policymaking tables.[323] CILT perspectives contribute critical voices within the public debate, significant to countering not only anti-immigrant views but also those that find the current immigration law system workable. This perspective culminates in recommendations for legal decision-makers, including advocacy for more progressive policies.

In solidarity with immigrant rights movements, CILT's focus has concomitantly shifted to more transformative and radical solutions. CILT approaches are particularly attuned to community concerns about the constraints of incremental legal reforms that leave behind segments of the community or further entrench ICE's enforcement machinery. CILT carefully unpacks the

[319] *See* Derrick A Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 512 (1976) (describing how attorneys assume tasks their clients should be taking the lead on).

[320] Anthony V. Alfieri, *Faith in Community: Representing "Colored Town*,*"* 95 CALIF. L. REV. 1829, 1854 (2007) ("[R]ebellious lawyers posit client experience as a legitimate, independent source of useful knowledge.").

[321] The term "public intellectual" not only has no singular definition but also can be fraught. Edward Said's description of himself as an intellectual is helpful in this regard: someone who cannot be readily co-opted by government or corporations, and articulates a message, view, philosophy, or opinion to the public "to advance the cause of freedom and justice." EDWARD W. SAID, REPRESENTATIONS OF THE INTELLECTUAL: THE 1993 REITH LECTURES 12 (1996).

[322] *See, e.g.*, *Center for Immigration Law and Policy*, UCLA L., https://law.ucla.edu/academics/centers/center-immigration-law-and-policy [https://perma.cc/YDC5-2TBA] (last visited Oct. 4, 2024).

[323] *See, e.g.*, Ashar, *supra* note 56, at 1489-90 (describing involvement of Hiroshi Motomura and Muneer Ahmad, along with activists and attorneys with legal nonprofits, to help negotiate DACA). Others have taken positions to serve within the government, such as Shoba Sivaprasad Wadhia, Samuel Weiss Faculty Scholar and Clinical Professor of Law at Penn State Law (serving as Officer of Civil Rights and Civil Liberties at the U.S. Department of Homeland Security), and Stephen Legomsky, John S. Lehmann University Professor Emeritus at Washington University School of Law (serving as Chief Counsel of U.S. Citizenship and Immigration Services and Senior Counselor to Secretary of Homeland Security Jeh Johnson in the Obama Administration).

ways in which non-reformist legal reforms[324] may exacerbate the subordination of classes of noncitizens and undermine immigrant advocacy toward transformative change. The acceptance of major concessions in reform proposals can fracture immigrant rights movements. Governments can diminish the power of movements by co-opting movement leaders into less disruptive forms of political behavior.[325] To the extent that reforms have an outward appearance of meeting the moral demands of the movement, those who spurn such concessions lose public support and are more easily dismissed.[326] Recognition of these policymaking traps is an essential component to unraveling the injustice of the immigration law system. While Abolish ICE or Detention first appeared as unrealistic ideals for only the most radical activists, these concepts have made their way into mainstream political thinking.[327]

A question remains as to whether the wholesale embrace of a radical vision might create further harm to immigrant communities. Incremental progress is politically possible; politicians are willing to get behind measures that have widespread support. Making the perfect the enemy of the good and an obstacle to small changes could derail needed progress. It may be wise, to choose one example, to create a pathway to citizenship for "desirable" groups of immigrants.[328] For this reason, CILT's critique of non-reformist reforms does not necessarily translate into rejecting the struggle for incremental improvements for immigrant communities. Rather, CILT acknowledges the ongoing tensions and trade-offs that accompany efforts to make progress within a broken system without being subsumed by it.[329] The potential legalization of hundreds of thousands of immigrants, for example, would be a transformative

[324] *See* Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2507 (2023) (defining non-reformist reforms as those that "aim to undermine the prevailing political, economic, social order" and redistribute power).

[325] FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED AND HOW THEY FAIL 31 (1977).

[326] *Id.* at 30-31.

[327] Establishing a Humane Immigration Enforcement System Act, H.R. 6361, 115th Cong. § 2(18) (2018) (calling for ICE to be more transparent, accountable, and better adhere to domestic and international laws); New Way Forward Act, H.R. 536, 117th Cong. (2021) (altering immigration laws on detention and detainment of immigrants); Dignity for Detained Immigrants Act of 2023, S. 1208, 118th Cong. (2023) (seeking to improve standards at immigration facilities).

[328] Nicole Narea, *Poll: Most Americans Support a Path to Citizenship for Undocumented Immigrants*, VOX (Feb. 4, 2021, 8:30 AM), https://www.vox.com/policy-and-politics/2021/2/4/22264074/poll-undocumented-immigrants-citizenship-stimulus-biden [https://perma.cc/3XAR-3J4Y] ("Piecemeal legislation to legalize at least some groups of undocumented immigrants might have a better chance at passing.").

[329] *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1385 (1988) ("The very reforms brought about by appeals to legal ideology, however, seem to undermine the ability to move forward toward a broader vision of racial equality.").

event for individuals, families, and communities. It would be difficult to deny support for this kind of policy gain.

At the same time, one must not lose the forest for the trees—that is, a broader unfinished redesign of immigrant inclusion. This goal can guide a process that remains open to changing needs over time. As Amna Akbar states, there is a "dialectical relationship between radical imagination and practical projects."[330] CILT can similarly reflect the ways in which activists strategically pivot between the reimagined and practical.[331] It is ultimately some combination of the two that will move us toward rectifying the systemic inequality that the immigration law system sustains.

CONCLUSION

If there is any single through line among the diverse contributions made by CILT, it is an acute awareness of the U.S. immigration legal regime and the continued subordination of people of color. Acts embodying this through line can be traced from the first Constitutional Congress, through Reconstruction, the 1960s Civil Rights Movement, and the 2020 Movement for Black Lives. In the decades between each of these progressive flash points in national history, the U.S. immigration regime has operated to prioritize the U.S. economy through exploiting disposable workers of color and has wielded its enforcement power to exclude a growing list of noncitizens deemed undesirable. The reach of the immigration enforcement regime, including its carceral power, seems hopelessly undefeatable. Yet, resistance efforts persist, particularly from the grassroots. CILT has embraced the call to serve and support immigrant communities and movements with innovative strategies that share a vision for an equitable and inclusive democracy.

The last decade has unraveled the illusion of functioning institutions and systems to reveal multiple assembly lines of injustice. As most immigration law scholars recognize, immigration law has rarely, if ever, appeared to be a functional system. Quite the contrary, even immigration law's most draconian activities have taken place in plain sight. CILT advances a broader public understanding of immigration law's role in sustaining an untenable democracy. To achieve its praxis goals, CILT helps the rest of us to deepen not only our knowledge of immigration law's role in facilitating the subordination of immigrants, but also our ability to envision new methods to diminish or eliminate immigration law's force in perpetuating social inequality.

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[330] Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1842 (2020); *see also* Akbar, *supra* note 281, at 412.

[331] *See* ABRAMS, *supra* note 247, at 167-68.