LAW AND SOCIAL MOVEMENTS:

REIMAGINING THE PROGRESSIVE CANON

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INTRODUCTION

This Article examines the "progressive legal canon"—iconic legal campaigns to advance progressive causes—and explores the implications of canon construction and critique for the study of lawyers and social movements. Looking backward, it reflects on why specific cases, like *Brown v. Board of Education* and *Roe v. Wade*, have become fundamental to progressive understandings of the role that lawyers play in social movements and how those cases have come to stand for a set of warnings about lawyer and court overreach. It then explores what might be gained from constructing a contemporary progressive legal canon and under what criteria one would select cases for inclusion. A core contribution of the Article is to synthesize examples of significant contemporary campaigns that respond to

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original canon concerns and complicate notions of lawyering in current movements of social import around labor, the War on Terror, LGBT rights, immigrant rights, and racial justice.

The comparison of old canon to new yields an important insight. Although the *form* of legal mobilization is generally quite different in contemporary campaigns, with greater emphasis on constituent accountability and integrated advocacy, the *outcome* is often quite familiar: legal success and positive change alongside weak implementation, countermobilization, and intra-movement dissent. Although the comparison is not systematic, it points toward a potentially significant conclusion: that the progressive critique of old canon lawyering is misplaced. What stymied old canon campaigns was not an overreliance on law or top-down planning, but rather the inevitable pushback by more powerful forces, causing gains to slide back or be undercut in the enforcement stage and aggravating internal movement debates over goals and strategies.

I. THE OLD CANON

Across fields, the process of "canonization" invites controversy. What criteria matter for deciding what counts as "foundational texts that exemplify, guide, and constitute a discipline,"[1] and who gets to decide? The debate has been most acrimonious within literary theory, where scholars have clashed over whether the inclusion and exclusion of texts reflect a core set of knowledge or cultural imperialism shaped by ethnocentrism and other bias.[2]

Legal scholars are constantly engaged in processes of canonization whether we think of it that way or not. The production of case books is the most obvious example, in which editors exercise discretion about which cases deserve recognition as exemplifying a principle, while also choosing which commentary aptly describes or challenges the majority rule. Discussions of canonization have been most prominent within constitutional law, in which Jack Balkin and Sanford Levinson have noted that forces changing the demography and intellectual structure of American law schools—with the rise of interdisciplinary, outsider, and global scholarship—have generated debates similar to those in the

1. Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 826 (2004); *see also* Francis J. Mootz III, *Legal Classics: After Deconstructing the Legal Canon*, 72 N.C. L. REV. 977, 982–83 (1994).

2. *See* HAROLD BLOOM, THE WESTERN CANON: THE BOOKS AND SCHOOL OF THE AGES (1994); HENRY LOUIS GATES, JR., LOOSE CANONS: NOTES ON THE CULTURE WARS (1992).

liberal arts over whether there is a connective tissue that binds legal thought together.[3] Following on this idea, legal scholars have sought to construct and deconstruct canons in various fields,[4] and have criticized the method and even the entire project. Whenever one purports, explicitly or not, to create a definitive set of texts that claim to capture essential knowledge and lessons of a field, it immediately invites concerns about hubris or ideological bias.[5] And yet an intrinsic part of creating a "field" of intellectual thought is to define its parameters in relation to a set of texts about which there is some level of agreement on their importance to understanding core issues at stake.[6] Whether intentional or not, by focusing energy and attention on certain types of cases and interpretations, and not others, scholars endow those cases with importance that shapes fundamental attitudes about how to understand legal principles and the possibility of challenging them. Overall, the assembly of cases is designed to tell a story: to outline an arc of intellectual development in which arguments are made and lessons are learned.

For those in the field now taking shape around the study of "law and social movements," there are particular legal campaigns and scholarly accounts of them that are used as examples of both the highest aspirations and serious limitations of progressive legal reform.[7] These

3. J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 968 (1998); *see also* J.M. Balkin & Sanford Levinson, *Legal Canons: An Introduction*, *in* LEGAL CANONS 3, 3–4 (J.M. Balkin & Sanford Levinson eds., 2000).

4. *See*, *e.g.*, Randall Kennedy, *Race Relations Law in the Canon of Legal Academia*, 68 FORDHAM L. REV. 1985 (2000). The "law stories" series is another example of defining canons within fields, such as legal ethics, *see* LEGAL ETHICS STORIES (Deborah L. Rhode & David J. Luban eds., 2006), civil rights, *see* CIVIL RIGHTS STORIES (Myriam E. Gilles & Risa L. Goluboff eds., 2008), and *see* RACE LAW STORIES, (Rachel F. Moran & Devon Wayne Carbado eds., 2008). *See also* LAW STORIES (Gary Bellow & Martha Minow eds., 1998).

5. *See* Rakefet Sela-Sheffy, *Canon Formation Revisited: Canon and Cultural Production*, NEOHELICON, Sept. 2002, at 141, 142–43.

6. *See*, *e.g.*, David Fontana, *A Case for the Twenty-First Century Constitutional Canon:* Schneiderman v. United States, 35 CONN. L. REV. 35 (2002).

7. *See*, *e.g.*, Anthony V. Alfieri, *Inner-City Anti-Poverty Campaigns*, 64 UCLA L. REV. 1374 (2017); Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464 (2017); Jack M. Balkin, Brown, *Social Movements, and Social Change*, *in* CHOOSING EQUALITY: ESSAYS AND NARRATIVES ON THE DESEGREGATION EXPERIENCE 246 (Robert L. Hayman, Jr. & Leland Ware eds., 2009); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005); Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 1 (2009); William N. Eskridge, Jr., *Channeling: Identity-Based Social*

campaigns are all rooted in the past, coming out of the high water period of progressive reform from the New Deal to the Civil Rights Era.[8] I have argued elsewhere that scholarly analysis of these cases has coalesced around a critical vision of law in social movements that is one of the most persistent legacies of progressive legal scholarship.[9] This "legal liberal" critique—that law was ineffective in producing social change and lawyers were unaccountable to the very constituencies they purported to serve—has continued to powerfully shape debate over the relation of law to social movements, even as legal historians have sought to contest the underlying basis of the legal liberal account.[10] By presenting the legal liberal critique, I do not wish to accept a simplified version of a complex history, but rather to suggest the dominant meaning of that history within progressive legal thought—what Orly Lobel has called "critical legal consciousness."[11] Toward that end, I outline legal campaigns at the center of progressive debate about what lawyers do, for better and worse, to social movements.[12] Because there is no synthetic "law and social movement" reader or casebook, I identify campaigns based on their relation to foundational progressive social movements that remain at the center of legal scholarship as measured by their salience in law and sociolegal periodicals. In so doing, I fully recognize the importance of right-wing social movements and their historical and contemporary success mobilizing law for

Movements and Public Law, 150 U. PA. L. REV. 419 (2001); Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028 (2011); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740 (2014); Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011); Veryl Pow, *Rebellious Social Movement Lawyering Against Traffic Court Debt*, 64 UCLA L. REV. 1770 (2017); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006).

8. Scott L. Cummings, *The Puzzle of Social Movements in American Legal Theory*, 64 UCLA L. REV. 1554, 1632 (2017).

9. *Id.* at 1644–46.

10. *See generally* SUSAN D. CARLE, DEFINING THE STRUGGLE: NATIONAL ORGANIZING FOR RACIAL JUSTICE, 1880–1915 (2013); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L.J. 256, 258 (2005).

11. Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007).

12 Austin Sarat & Stuart Scheingold, *What Cause Lawyers Do* For*, and* To*, Social Movements: An Introduction*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS 1 (Austin Sarat & Stuart A. Scheingold eds., 2006).

political change[13]; however, because I am interested in probing the power of critical visions of legal liberalism within progressive legal thought, I limit my old canon construction to progressive campaigns, even though there are certainly important insights to be gained from comparison with their conservative counterparts.

The campaigns in the old progressive canon were shaped by the time in which they were produced: a time of robust progressive social movement activism interacting with strong opportunities for legal redress through courts generally and the Supreme Court in particular.[14] Courts are therefore at the heart of the canonical stories. I will briefly summarize these stories of legal mobilization in relation to seminal twentieth century progressive social movements: labor, civil rights (focused on *Brown v. Board of Education*[15]), women's rights (focused on *Roe v. Wade*[16]), and the antipoverty movement (focused on *Goldberg v. Kelly*[17] and welfare rights). My goal, again, is to present a stylized version of a complicated history in order to illuminate the dominant legal liberal critiques for which the campaigns have come to stand.

The labor movement story is one of political mobilization resulting in national legislation that is then neutered through doctrinal revision and administrative undermining. The effective use of courts against labor organizing in the late nineteenth and early twentieth centuries, through substantive due process challenges to state labor legislation and breach of contract injunctions against union strikes, channeled the labor movement toward federal legislation to codify collective bargaining rights, achieved in the 1935 Wagner Act.[18] Yet, as Chris Tomlins has argued, embedded in the act's legal framework were the seeds of its own undoing.[19] Rather than embracing a strong commitment to unions

13. *See*, *e.g.*, ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE MOVEMENT (2008); STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191 (2008).

14. Scholars have often referred to this period as "legal liberalism." *See* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 2 (1996); Mack, *supra* note 10, at 258.

15. 347 U.S. 483 (1954).

16. 410 U.S. 113 (1973).

17. 397 U.S. 254 (1970).

18. WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 118–25 (1991).

19. CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960, at 102 (1985).

as "entities with rights," the National Labor Relations Act (NLRA) instead empowered the federal labor board to define the scope of union representation, indicating "that the decisive role in constructing the United States's modern industrial relations system belonged to the new liberal bureaucratic-administrative state."[20] In addition, by adopting a contractualist vision of labor peace, the act avoided a substantive commitment to industrial justice. This procedural stance, as Karl Klare has argued, permitted courts interpreting the NLRA to graft upon it legal doctrines that allowed employers to circumvent bargaining, for example, by permanently replacing economic strikers.[21] As politics changed, bureaucratic undermining combined with a growing focus within the labor movement on individual rights enforcement through courts, which "eclipsed" the commitment to collective rights won through grassroots struggle.[22] The labor movement lost energy and power, contributing to the dramatic decline of unionization rates: from nearly one-third of all private sector workers in the 1960s to barely over ten percent in 2017.[23]

The NAACP's drive for school desegregation, culminating in *Brown v. Board of Education*, represents the iconic twentieth century progressive legal campaign. Crafted against all odds by a newly minted black professional elite, the campaign set the template for the incremental, precedent-setting test case approach.[24] Yet, perhaps because of its grandeur, *Brown* and the implementation campaign that followed have become a lightning rod for debate over the inadequacy of legal enforcement, on the one hand, and lawyer overreaching, on the other. The now-famous reading of *Brown* by political scientist Gerald Rosenberg argued that the 1954 decision itself failed to produce any meaningful change in school desegregation, which was effectively resisted by Southern school boards until the 1964 Civil Rights Act included a provision threatening to cut off federal funding to schools

20. *Id.*

21. Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 319 (1977). *See also* Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1521–23 (1981).

22. NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 178 (2002).

23. GERALD MAYER, CONG. RESEARCH SERV., RI32553, UNION MEMBERSHIP TRENDS IN THE UNITED STATES 22 (2004); U.S. DEP'T OF LABOR STATISTICS, UNION MEMBERS – 2017 (2018), [https://perma.cc/KS9Q-5SYK].

24. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976).

that discriminated on the basis of race.[25] Derrick Bell, addressing post-*Brown* enforcement actions in Northern school districts that focused on racial balance as a remedy, asserted that NAACP lawyers attempting to carry forward *Brown*'s legacy were doing so by trammeling on the interests of the very constituents they purported to represent: black school children and their families, who preferred quality education over what seemed an increasingly quixotic quest for integration.[26] Michael Klarman's reading of *Brown* introduces a third element: backlash. In his account, the immediate result of *Brown* was to galvanize political opposition, resulting in increased violence against blacks and a rise in political support for white segregationist politicians in the South, culminating in official and mob violence against peaceful black protesters that repelled the nation and motivated legislative action resulting in the Civil Rights Act of 1964 and the Voting Rights Act a year later.[27]

Backlash is also the frame commonly associated with the seminal women's rights case of the civil rights period, *Roe v. Wade*, which upheld a woman's constitutional right to seek an abortion during the first two trimesters of pregnancy.[28] In the dominant narrative, that decision, predicated on a woman's due process right to privacy, overturned anti-abortion laws in forty-six states, touching off a ferocious conservative counter-attack, led by the Christian Right.[29] Mary Ziegler summarizes the backlash view "that *Roe* helped to entrench the ideological positions held by those on either side of the issue . . . . [spilling] over into other legal conflicts about gender . . . to energize the New Right and the Religious Right, and to put off potentially promising alliances in support of caretaking."[30] In this frame, *Roe* not only brought funding and energy to anti-abortion social movements, it helped to fundamentally reorient U.S. politics by enabling the Republican Party to aggressively court conservative religious voters, particularly in the South, away from their traditional

25. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 46–54 (1991).

26. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471–72 (1976).

27. Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 82–83 (1994).

28. 410 U.S. at 164.

29. ROSENBERG, *supra* note 25, at 175; Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007); Mary Ziegler, *Beyond Backlash: Legal History, Polarization, and* Roe v. Wade, 71 WASH. & LEE L. REV. 969, 1005–08 (2014).

30. Ziegler, *supra* note 29, at 971.

Democratic base.[31] This larger political transformation occurred as conservative activists grew newly empowered, able to defeat the Equal Rights Amendment, and the pro-life movement was radicalized.[32] Even Justice Ruth Bader Ginsburg, who made her mark as a lawyer by starting the ACLU's Women's Rights Project, suggested that *Roe* "stopped the momentum that was on the side of change."[33] Some have argued that the *Roe* court overreached by addressing the merits of an issue that was not yet ripe for judicial resolution, while others have suggested that the holding could have been less rigid (not based on the trimester approach) or premised on a different legal theory (like equal protection).[34] The lawyers who brought the case—Sarah Weddington, who was working at the University of Texas on challenges to abortion laws, and Linda Coffee, who was a member of a women's employment rights organization—have also been accused of overreaching by Norma McCorvey (aka Jane Roe), who repudiated the decision.[35] Despite *Roe*'s affirmation of the right to abortion, abortion access is now more difficult than at any time since *Roe*, with a variety of state-based restrictions—including mandatory counseling, waiting periods, gestational limits, parental consent, and targeted regulation of abortion providers (TRAP) laws—that in some states, like Texas, have made it virtually impossible to get an abortion.[36]

The welfare rights story, as comprehensively told by Martha Davis, also highlights the risks of top-down legal planning disconnected from political mobilization, as well as the "channeling" problem of

31. *Id.* at 1006–08.

32. *Id.* at 977 (citing WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 242 (2010); Eskridge, *supra* note *7*, at 520; and Cass Sunstein, *Three Civil Rights Fallacies*, 79 CALIF. L. REV. 751, 766 (1991)).

33. Emily Bazelon, *Backlash Whiplash: Is Justice Ginsburg Right that* Roe v. Wade *Should Make the Court Cautious about Gay Marriage?*, SLATE (May 14, 2013, 3:08 PM), [https://perma.cc/T4BZ-BSFP?type=image].

34. *See* WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION (Jack M. Balkin ed., 2005). *See also* William N. Eskridge, Jr., *Pluralism and Distrust, How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1312–13 (2005).

35. *See* NORMA MCCORVEY, WON BY LOVE (1997).

36. Masuma Ahuja & Emily Chow, *Abortion Laws by State,* WASH. POST (July 3, 2013), [https://perma.cc/HD6D-3RRW]; Matt Ford, *An Undue Burden in Texas*, ATLANTIC (June 27, 2016), [https://perma.cc/G4UZ-S99M]; Guttmacher Inst., *Last Five Years Account for More Than One-quarter of All Abortion Restrictions Enacted Since Roe* (Jan. 13, 2016), [https://perma.cc/4K22-YJNU].

legal rights strategies[37]—redirecting energy and resources from organizing toward litigation, which ultimately runs into the limits of an unsympathetic Supreme Court.[38] In this account, early movement success coordinating legal and organizing strategies gave way to an inexorable focus on the Supreme Court. A 1967 "crisis" campaign that distributed information on eligibility for "special grants" to potential welfare recipients overwhelmed the New York City welfare agency, won cash for needy residents, and "built a cohesive organization of recipients . . . willing to support, and even join" the National Welfare Rights Organization (NWRO).[39] However, after pioneering welfare rights lawyer Ed Sparer left the Center on Social Welfare Policy and Law, tensions emerged between legal staff and NWRO over priorities. The Center's new leadership focused on groundbreaking "test cases" in the *Brown* mold to increase welfare eligibility, while NWRO wanted to expand welfare grants and maintain the Center's role as outside counsel to the movement.[40] With *Goldberg v. Kelly*,[41] lawyers from the Center and Mobilization for Youth pursued procedural reform that succeeded in constitutionalizing due process protections for recipients faced with losing benefits, which critics believed provided the veneer of legal legitimacy to a process that continued to be structurally unfair—and did not solidify the underlying substantive right to welfare or guarantee an amount sufficient to meet basic needs.[42] Movement success in expanding access to welfare provoked political backlash, as states began systemically cutting back benefits. New York's imposition of a flat grant precipitated protests by NWRO and a lawsuit by Center lawyers that would squarely present the legal issue that the movement had long desired: whether the Constitution guaranteed the right to a minimum standard of benefits. However, when the Supreme Court addressed that issue in *Dandridge v. Williams*,[43] its decision was "an unmitigated loss," upholding family maximum grants irrespective of need.[44] Not

37. *See generally* Eskridge, *supra* note 7.

38. MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973 (1993).

39. *Id.* at 51.

40. *Id.* at 72–75.

41. 397 U.S. 254 (1970).

42. *See, e.g.*, William H. Simon, *The Rule of Law and the Two Realms of Welfare Administration*, 56 BROOK. L. REV. 777, 787 (1990); Mark V. Tushnet, *Dia-Tribe*, 78 MICH. L. REV. 964, 708–09 (1980) (reviewing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978)).

43. 397 U.S. 471 (1970).

44. DAVIS, *supra* note 38, at 132.

only was the legal campaign for a constitutional "right to live" dead, the idea of welfare as an entitlement fueled conservative backlash, captured in President Ronald Reagan's famous invocation of the "welfare queen," and culminating in the end of "welfare as we know it" under President Bill Clinton.[45] Whereas eighty-two percent of poor families received welfare benefits in 1979, only twenty-seven percent did in 2010.[46]

Overall, these old canon accounts of progressive legal campaigns are backward-looking, expressing frustration with what was not achieved at the midcentury apex of progressive political power. In each of them, law plays a causal role in movement decline: a blunt tool wielded with good intentions but to disappointing ends. Taken together, these old canon accounts have coalesced around a critical vision of law and lawyers in social movements that centers on foundational problems of *efficacy* and *accountability*.[47]

The efficacy problem emphasizes the limits of litigation and courts in producing sustained change over time. This problem is linked to constraints on judicial enforcement. Old canon stories stress the limited power of Supreme Court rulings—like *Brown*—to change behavior on the ground and highlight the perils of overreliance on legal oversight of bureaucratic procedures, like collective bargaining and welfare administration, which are not susceptible to judicial monitoring and invite regressive judicial interpretations of underlying legal principles. The efficacy problem also informs old canon concerns about the displacement of politics by legal strategies—echoed in the story of welfare rights lawyers drifting away from NWRO toward the Supreme Court and in Justice Ginsburg's comments about *Roe* stopping the political momentum of the pro-choice movement. Deradicalization is also a powerful theme in the labor movement shift toward technocratic bargaining and rights enforcement. In all of the old canon campaigns, success is followed by strong adversary countermobilization; political backlash against perceived judicial overreaching is most strongly associated with *Brown* and *Roe*.

45. Alma Carten, *The Racist Roots of Welfare Reform*, NEW REPUBLIC (Aug. 22, 2016), [https://perma.cc/6CB5-9EHF].

46. Danilo Trisi & Landonna Pavetti, *TANF Weakening as a Safety Net for Poor Families*, CTR. ON BUDGET & POL'Y PRIORITIES 3 (Mar. 13, 2012), [https://perma.cc/TN5P-J88A].

47. Scott L. Cummings, *The Social Movement Turn in Law*, 43 L. & SOC. INQUIRY (forthcoming 2018), https://onlinelibrary.wiley.com/doi/epdf/10.1111/lsi.12308.

The accountability problem focuses on the costs of top-down lawyer planning disconnected from social movement stakeholders and goals—concerns at the heart of Bell's critique of the NAACP and running through the abortion and welfare rights stories. The accountability problem ultimately centers on the challenge of representing diverse factions within social movement constituencies—that is, managing intramovement dissent. Old canon accounts of progressive lawyers suggest that they often made choices that suppressed marginalized voices and promoted incremental reform. From this perspective, the failure of lawyer leadership in progressive movements contributed directly to the movements' political shortcomings and ultimate demise. In short, it was the *form* of legal mobilization—lawyer-driven, elite-oriented, and court-centered—that shaped negative movement *outcomes*—weak implementation, countermobilization, and intramovement dissent.

II. TOWARD A NEW CANON

What are the iconic contemporary stories of progressive social movement lawyering and what do they teach us about the role of lawyers and the power of law in producing sustainable transformation for marginalized groups? How do these stories get generated and what does their identification as models illustrate about contemporary concerns? This Part highlights notable differences between old canon and new. The new canon stories focus on legal institutions outside of court; they are primarily concerned with the interaction between law and politics; they portray lawyers as sensitive to movement dynamics and the potential for overreaching; and they focus on the consequences of legal campaigns for social movement mobilization, both direct and indirect.

In this Part, I have selected five stories to retell, not in full, but in their essential outlines in order to capture narratives of resistance and to distill themes about the shape and impact of contemporary lawyering in relation to social movements. My choices are not systematic, but neither are they entirely idiosyncratic. I have chosen major campaigns in areas that meet the following criteria: (1) they have achieved widespread public notoriety and prominence within academic and practice-based discussions; (2) they transcend their particularities in that they have become associated with broader themes and lessons about legal mobilization; (3) they are continuous with the progressive social movement issue areas of the old canon; and (4) they demonstrate sustained legal and political engagement over time. Built from other accounts, my goal is to re-present examples of progressive lawyering as

an experiment in contemporary canonization. These examples center on campaigns to contest worker abuse in garment sweatshops, detention and torture in the War on Terror, the exclusion of same-sex couples from the right to marry, the disenfranchisement of undocumented immigrants, and overpolicing of communities of color. The examples are presented to highlight how the form of legal advocacy relates to the challenges of implementation, countermobilization, and intramovement dissent.

A. When a Lawsuit Sparks a Movement: The Antisweatshop Campaign

If one judges the impact of a social movement by the legacy it leaves about the power of resistance, the antisweatshop campaign that riveted Los Angeles beginning in the mid-1990s should be counted among the most influential of the last quarter-century.[48] The campaign was led by an upstart group of scrappy lawyers, perhaps too naïve to be daunted by the enormity of their attack on a system that fueled profits for some of the most powerful companies in the world. And yet they were not naïve when it came to designing and implementing their challenge to the Los Angeles garment industry, weaving together legal and political strategies across different competencies: litigation, organizing and coalition-building, policy design and advocacy, and public relations.

The antisweatshop campaign emerged to challenge the structure of economic power in the nation's largest garment industry. In the early 1990s, Los Angeles was home to nearly 100,000 garment workers,[49] nearly all of whom worked for subcontractors—garment production shops—where they toiled in exploitative conditions. Beginning in the 1970s, the industry shifted from New York, where it was predominantly unionized, to Los Angeles, where garment production grew on an almost completely nonunionized basis, with a workforce that was eighty-five percent immigrant (and two-thirds female) in 1990.[50] Federal labor law authorized a "joint employership" system, under which the International Ladies Garment Workers Union (ILGWU) in New York was able to strike and negotiate directly with

48. *See* Cummings, *supra* note 7.

49. *Labor Market Information for the State of California (Statewide Summary)*, EMP. DEV. DEP'T (2017), [https://perma.cc/CXA2-7S4C].

50. EDNA BONACICH & RICHARD P. APPELBAUM, BEHIND THE LABEL: INEQUALITY IN THE LOS ANGELES APPAREL INDUSTRY 169–73 (2000).

manufacturers to ensure that they sourced work to large unionized contract shops. However, the shift to Los Angeles undercut ILGWU power.[51] The Los Angeles garment industry was built on a model of very small contractors, to which manufacturers could spread small orders and cancel at the first signs of union activity; and those small shops themselves could easily go out of business and reorganize to avoid unionization.[52] This structure thwarted joint employership, as did the growing power of retailers and the diminished power of manufacturers in the new global garment industry. The size of contract shops (typically less than ten workers) and their basic economic model (built upon short-term orders from multiple manufacturers) meant that they were generally forced to accept pricing ultimately dictated by what powerful retailers like Wal-Mart or Target at the top of the garment industry pyramid wished to pay for clothing.[53] By the mid-1990s, there were roughly 4,500 contract shops in Los Angeles, most of them with records of employment law violations, forming the backbone of an industry characterized by the systematic disregard of workers' rights.[54] The sweatshop, a remnant of Gilded Age labor exploitation, had returned as the norm.

The antisweatshop campaign sought to challenge this norm by reconstituting the system of joint employership that had defined the mid-century New York garment industry.[55] The goal was to make economic responsibility follow economic power by assigning liability for contract shop employment abuse to actors that benefited most: manufacturers and, more so than at midcentury, retailers. This could not be achieved by traditional labor organizing without first creating a legal foundation for treating garment shops as part of an integrated unit with retailers and manufacturers. The Union of Needletrades, Industrial and Textile Employees (UNITE, which had been created through a merger of the ILGWU and Amalgamated Clothing and Textile Workers Union), mounted a last-ditch effort to organize in Los Angeles, developing a plan to strike Los Angeles's largest garment manufacturer, Guess, which had a high-profile brand and 3,500 workers employed mostly through contractors in the Los Angeles area.[56] The union organized unfair labor practice strikes at contract

51. Cummings, *supra* note 7, at 10–11.
52. *Id.* at 15.
53. *Id.*
54. *Id.* at 17.
55. *Id.* at 10, 17.
56. *Id.* at 28.

shops, launched a media campaign, and filed a class action lawsuit against sixteen Guess contractors.[57] Yet the campaign was thwarted by Guess's decision to move a significant portion of its production to Mexico—a move sanctioned by the National Labor Relations Board, which held that the move was not retaliatory.[58]

It was in this context that a legal challenge to Los Angeles sweatshops emerged—targeting the sweatshop problem with different tools. It was a challenge designed to achieve an ambitious result: re-regulating an industry rooted in a specific urban space and creating an opportunity for enhanced labor conditions and empowerment for garment workers. This challenge was defined by several important features.

Although the antisweatshop campaign was never exclusively court-centered, litigation was an important feature from the beginning—sparking the broader movement that would follow. While the groundwork had already been laid—the Coalition to Eliminate Sweatshop Conditions had formed in the early 1990s to press for statewide joint employer laws—the movement would not take off until the El Monte Thai worker case in 1995.[59] This case was led by Julie Su, a 1994 Harvard Law School graduate on the first year of a Skadden Fellowship at the Asian Pacific American Legal Center (APALC).[60] Her fellowship project was disrupted by a catalytic event: the discovery of seventy-two imprisoned Thai garment workers on August 2, 1995, after state and federal agents raided a compound in El Monte encased in barbed wire.[61] The discovery received an avalanche of publicity and sparked a complex set of legal proceedings that included criminal charges against the shop owners and, perversely, immigration detention of the Thai workers, who were undocumented.

At the center of these proceedings was a civil lawsuit to recover unpaid wages and overtime from the owners of the El Monte shop and the manufacturers contracting with it—which included the high-profile companies Mervyn's, Montgomery Ward, and B.U.M. International—under a joint employer theory.[62] The legal team litigating this case was led by Su, who co-counseled with lawyers from the ACLU and Asian

57. *Id.* at 28–38.

58. Stuart Silverstein, *Guess to Rehire Laid-Off Workers, Pay Back Wages*, L.A. TIMES, Apr. 22, 1998, at D2.

59. Cummings, *supra* note 7, at 20–23.

60. *Id.* at 19–20.

61. George White, *Workers Held in Near-Slavery, Officials Say*, L.A. TIMES, Aug. 3, 1995, at Al.

62. Cummings, *supra* note 7, at 23.

Law Caucus, as well as boutique labor law and civil rights firm lawyers who specialized in litigation.[63] The key legal argument was that because manufacturers set contract prices at levels they knew or should have known were too low to compensate workers at legal minimum rates, they should be liable as joint employers under the Fair Labor Standards Act (FLSA) "economic realities" test.[64] On March 21, 1996, district court judge Audrey Collins, a former legal aid lawyer appointed to the bench by President Clinton, issued a critical ruling denying defendants' motion to dismiss in a case titled *Bureerong v. Uvawas*.[65] Despite the fact that the defendant manufacturers were "clearly removed from the actual garment manufacturing process that transpired in the El Monte facility" and that there was "no 'traditional' employment relationship," Judge Collins pointed to allegations that the manufacturers contracted out to avoid liability and set unfairly low prices in concluding that the plaintiffs had sufficiently stated a claim of manufacturer "control" over the sweatshop employees.[66] It was a ruling that would transcend the time and place.[67] Speaking at the Central District of California's 50th anniversary conference commemorating the district's seminal cases, Judge Collins reflected that "Julie was a young dynamo who came into my court and just entranced everyone with how hard working she was, how on-top-of-it she was, and how creative her team was. . . . [She was] their light to the world."[68]

In the first sign that Su's team saw in the El Monte case the potential for a broader attack on the industry, the plaintiffs amended their complaint to add back pay claims for Latina garment workers employed by the same shop owners in a "front store" in downtown Los Angeles.[69] Although these workers were not forced to suffer the same conditions as their Thai counterparts, the legal team wanted to illustrate through the amendment that although the Thai workers' plight was egregious, the underlying conditions of exploitation were widespread and bound together Asian and Latina workers in cross-racial labor solidarity.[70] With a 1997 settlement by the manufacturer defendants of

63. *Id.* at 24.

64. *Id.* at 25–26.

65. 922 F.Supp. 1450 (C.D. Cal. 1996).

66. *Id.* at 1468–69.

67. The *Bureerong* case has been cited by other courts 704 times on Westlaw.

68. Gowri Ramachandran, Audrey B. Collins, Julie Su, Scott Cummings & Muneer Ahmad, *Panel Discussion: The El Monte Sweatshop Slavery Cases*, 23 SW. J. INT'L L. 279, 288 (2017).

69. Cummings, *supra* note 7, at 26.

70. *Id.*

over two million dollars, the fight for economic justice in the Los Angeles garment industry had officially begun.[71]

In the phase that followed, APALC lawyers were central architects of an ambitious strategy that sought to leverage legal success to build power outside of law. Toward this end, the lawyers designed an impact litigation template that mobilized the *Bureerong* precedent against other significant manufacturing and retailing targets with the aim of gaining settlements and prospective employment changes that would force other industry actors to follow suit—because they saw that it would be more cost-effective to treat workers fairly than continue to litigate violations.[72] This was combined with a media campaign in which lawsuits were timed with press conferences and media stories to pressure settlement. The end goal was not simply to restore the baseline of minimum wage and overtime compliance. Rather, the campaign sought to achieve stability and accountability in the system in order to begin organizing workers once again to gain labor recognition from retailers and manufacturers—restoring a new version of the old labor order built on different types of collectives outside of traditional unions.

In the immediate wake of *Bureerong*, APALC went on the attack, winning a string of favorable settlements on behalf of workers against manufacturers including City Girl, BCBG, and XOXO.[73] In the XOXO case, a federal suit was filed in connection with a press conference featuring actress Sara Jessica Parker (from the hit television show *Sex in the City*) expressing support for the workers; in November 2000, two weeks after the case was filed, XOXO settled with twelve workers for $62,000.[74]

In a key move, APALC lawyers made the crucial strategic decision not to rely on litigation alone and instead to build an advocacy infrastructure that would complement and bolster law. Toward that end, in 1995, Su and colleagues at other immigrant rights and labor groups reconstituted the original Coalition to Eliminate Sweatshop Conditions as Sweatshop Watch "to be the media advocacy and public policy arm

71. In total, workers in the El Monte case recovered $4.5 million—$10,000 to $80,000 per worker based on employment length—which came from the 1997 settlement with Mervyn's, Montgomery Ward, B.U.M. International, and LF Sportswear; prior and subsequent settlements with other defendants; and a $1 million award to workers from the California Department of Labor Standards Enforcement, which distributed the money from assets it seized from the sweatshop owners. *Id.* at 23, 27–28.

72. *Id.* at 40.

73. *Id.* at 41–42.

74. *Id.* at 42.

of the antisweatshop movement."[75] Sweatshop Watch's first and most important success was advancing a sweeping statewide law, known as Assembly Bill (or A.B.) 633, which achieved the codification of joint employer status for garment manufacturers that the movement had long sought.[76] In the wake of the El Monte litigation, advocates were able to capitalize on the opportunity created by increased public attention to the issue (and state government leadership more receptive to change) to help push through A.B. 633. The new bill stated that any company "engaged in garment manufacturing . . . shall guarantee payment of the applicable minimum wage and overtime compensation, as required by law, that are due" from its contractors.[77] The law allowed workers to enforce this wage guarantee through an expedited administrative process within the California Department of Labor Standards Enforcement (DLSE) and to collect damages against manufacturers, as well as attorney's fees.

Supporting workers in the wage claims process became a focal point for another new organization, the Garment Worker Center (GWC). The GWC was created in 2000 with support from APALC, Sweatshop Watch, and other immigrant worker organizational partners to be "the Los Angeles antisweatshop movement's organizing arm to target labor abuse in the garment industry—one of the first 'multiracial, multilingual garment workers' centers in the country.'"[78] It was this trio of legal, policy, and organizing groups—APALC, Sweatshop Watch, and GWC—that spearheaded the most ambitious phase of the legal campaign built around two complex and contested cases.

The first case brought by APALC was against the young women's fashion powerhouse Forever 21, targeted as a high-profile retailer with its own labor force based in Los Angeles, where nine-five percent of its production was done.[79] The second case was filed against women's retailer, Bebe.[80] Each case faltered in the face of bitter industry opposition and legal retrenchment. In Bebe, a case brought under FLSA, the campaign ran afoul of a formalistic legal ruling by a district court judge who refused to find "joint employer status" on the ground that the contractor "controlled the working conditions of its

75. *Id.* at 43.

76. *Id.* at 42–46.

77. *Id.* at 46.

78. *Id.* at 48.

79. JANICE FINE, WORKERS CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM 104 (2006).

80. Cummings, *supra* note 7, at 51.

employees,"[81] despite that fact that Bebe quality control managers maintained an office at the shop.[82] The parties entered a confidential settlement in March 2004.[83]

In the Forever 21 case, the campaign confronted defendants' scorched earth tactics—while pursuing an untested legal theory that did not gain traction in court. APALC framed the case around state unfair business practice law, seeking to avoid the murky joint employer test by asserting that Forever 21 was gaining an illegal business advantage by selling goods produced at sweatshop wages.[84] To bolster that claim, GWC launched a boycott of Forever 21 stores, provoking SLAPP lawsuits from Forever 21 against workers, GWC, Sweatshop Watch, and a host of other organizations and individuals, alleging their protest activity defamed the company and interfered with its business.[85] The ACLU and pro bono counsel defended against the SLAAP suits, ultimately getting them dismissed, but not before significant damage to the organizing was done.[86] Although the legal team was able to fend off an effort to dismiss its state law claims, a December 2004 confidential settlement brought an end to the nationwide boycott—and the antisweatshop litigation campaign.[87] Ultimately, both the Bebe and Forever 21 cases achieved benefits for aggrieved workers, but the legal momentum that had defined the three years after *Bureerong* dissipated, with Su opining that "the tide had turned" against the extension of joint employer liability.[88]

In addition, the Forever 21 mobilization exposed cracks in the integrated advocacy format. At the grassroots level, the length and complexity of the case frustrated some GWC organizers, who decided to break away from APALC's litigation strategy, instead promoting worker self-help in the A.B. 633 wage claim process and supporting organizing and empowerment through the worker center.[89] However, the A.B. 633 process, which limited workers to individual enforcement without a mechanism for collecting judgments from manufacturers, had

81. *Zhao v. Bebe Stores, Inc.*, 247 F. Supp. 2d 1154, 1155 (C.D. Cal. 2003).

82. *Id.* at 1160.

83. Cummings, *supra* note 7, at 54.

84. Appellants' Opening Brief at 5–6, 23, *Castro v. Fashion 21, Inc.*, 88 Fed. Appx. 987 (9th Cir. 2004) (No. 02-55629).

85. Cummings, *supra* note 7, at 54–55. SLAAP stands for Strategic Litigation Against Public Participation.

86. *Id.* at 55–56.

87. *Id.* at 57.

88. *Id.* at 53.

89. *Id.* at 64.

mixed success. A 2005 report by the Garment Workers Collective found that "poor implementation of A.B. 633 by the DLSE and flagrant disregard of the law by many apparel companies effectively strip A.B. 633 of its power."[90] Although the number of claimants was high and average worker awards exceeded $1,000, contractors were settling claims for only thirty percent of their value while most manufacturers refused to pay anything, essentially forcing workers to come after them to collect judgments—a strategy that few workers could afford to pursue.[91]

In the end, despite its success in moving legal reform from court to the legislature, the antisweatshop movement ran up against the familiar challenge of implementation in the face of industry resistance. Yet the campaign's limits in this regard were primarily a product of the deeply unequal playing field on which it progressed. The power of the movement made it possible for the lawyers and their allies to use litigation as a club to create deterrence, raise the public profile of injustice, change the public dialogue and political opportunity structure, and create a durable legislative change that promoted industry restructuring.[92] However, in the inevitable push and pull of movement struggle, the more powerful actors consolidated forces and reformulated in ways that undercut the movement's boldest aims. This is a consistent feature of progressive social movement mobilization, particularly against corporate adversaries: countermobilization is unavoidable and consistently succeeds in scaling back movement success. This does not mean that the movements fail, just that they achieve less than they seek and have to continuously fight against backsliding.

Intramovement dissent was also a feature of the antisweatshop campaign. One fault line cut through race versus class-based conceptions of economic justice. APALC, as an identity-based organization whose work had focused on combatting discrimination against Asian Americans, was thrust into the center of a struggle over workers' rights that often pitted them against Asian American garment shop owners (like those in Forever 21) on behalf of the largely Latina

90. CHRISTINA CHUNG ET AL., REINFORCING THE SEAMS: GUARANTEEING THE PROMISE OF CALIFORNIA'S LANDMARK ANTI-SWEATSHOP LAW AN EVALUATION OF ASSEMBLY BILL 633 SIX YEARS LATER 37 (2005).

91. *See id.* at 20, 22–25.

92. In this vein, see generally JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978); MICHAEL MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994).

garment workforce.[93] In addition, despite the lawyers' commitment to leveraging law to build power, strains over strategy and tactics occurred with the very groups that APALC's litigation success had empowered, as the GWC's reaction to the Forever 21 litigation highlighted.[94] In short, grassroots activists grew frustrated that law had displaced political mobilization and deradicalized the movement.

Despite these fissures, the results of the decade-long campaign were significant. In addition to several million dollars collected on behalf of garment workers between 1995 and 2005, there were industry-wide changes and movement-specific gains.[95] Chief among them were visible efforts by manufacturers to police their contract shops: hiring monitoring firms and in some cases negotiating prospective changes to ensure enhanced labor conditions.[96] Giant retailers, like Wal-Mart, incorporated "codes of conduct" into their supply contracts and some companies, like American Apparel, attempted to capitalize on consumer appetite for "sweat-free" products.[97] Federal and state antisweatshop enforcement efforts strengthened, while the city of Los Angeles enacted a local antisweatshop ordinance requiring city garment contractors to pay workers a "procurement living wage" and hired the Worker Rights Consortium to monitor compliance.[98] Finally, and perhaps most significantly, the campaign strengthened an advocacy infrastructure that would come to define the workers' rights movement in Los Angeles for the decade that followed, launching the Coalition for Immigrant Worker Advocates, the Multi-Ethnic Workers Organizing Network, and the Wage Justice Center.[99]

B. Challenging Executive Overreach: Litigating Human Rights in the War on Terror

The attacks of 9/11 transformed the legal landscape for civil liberties and racial justice in the United States. In their wake, public support for retaliatory action, both inside the "homeland" against suspected terrorists and through military intervention to disrupt

93. Cummings, *supra* note 7, at 58.
94. *Id.* at 58, 63–64.
95. *Id.* at 65–66.
96. *Id.* at 67.
97. *Id.* at 67–68.
98. *Id.* at 68.
99. *Id.* at 69–70.

networks abroad, reached a fever pitch. Although there were large protests against the 2001 Afghanistan invasion, primarily organized by the A.N.S.W.E.R. (Act Now to Stop War and End Racism) coalition, these did not build into a sustainable opposition movement to the "War on Terror."[100] The rush to pass the Patriot Act, which curtailed basic civil liberties—through, among other features, the indefinite detention of immigrants and vastly expanded domestic surveillance—won with overwhelming bipartisan support just over one month after the attack.[101] There were political efforts to challenge the Patriot Act and other protests against the wars in Afghanistan and, later, Iraq. Yet the president's claimed plenary authority to prosecute military and domestic enforcement actions in a time of war, buttressed by the 2001 congressional passage of the Authorization for the Use of Military Force (AUMF) justifying the Afghanistan invasion, limited the power of organized dissent.

Lawyers thus turned to courts to perform their traditional function: upholding the rule of law and asserting limits on the executive's claimed authority to override individual rights in the name of national security.[102] This was familiar territory for judicial oversight, although the Supreme Court had not always balanced the equities in favor of protecting the vulnerable amid the hysteria of war, as the ignominious precedent of Japanese internment underscored.[103] Yet, precisely because of the structural barriers to political action challenging the president's authority to prosecute the War on Terror, litigation became an essential, and often the only, tool of protecting basic freedoms.

From the very beginning, unlawful detention was a central issue. Within months after the 9/11 attack, over 1,000 men claimed to fit the 9/11 attackers' "profile"—for the most part, men whose only crime appeared being Muslim and Arab—were rounded up in a massive

100. *10 Years of ANSWER Coalition*, ANSWER COALITION (Dec. 19, 2011), [https://perma.cc/R82V-3B4K].

101. *See* USA Patriot Act, Pub. Law 107–56, 115 Stat. 272 (2001). There were efforts to pass local resolutions opposing the Patriot Act and the ACLU sued for documents on its implementation under the Freedom of Information Act.

102. *See* Richard L. Abel, *Contesting Legality in the United States After September 11*, *in* FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM 361 (Terence C. Halliday et al. eds., 2007); Laurel E. Fletcher et al., *Defending the Rule of Law: Reconceptualizing Guantánamo Habeas Attorneys*, 44 CONN. L. REV. 617, 646 (2012).

103. *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding executive order authorizing the internment of Japanese Americans during World War II).

dragnet and held for months, often without charge.[104] This was in addition to the more than 5,000 young men who were interrogated and thousands of others put on watch lists and forced into "special registration."[105] In response to the detentions, a coalition of Arab-American and human rights groups, led by the ACLU, filed a Freedom of Information Act (FOIA) lawsuit against the F.B.I. to ascertain the identity of those who continued to be held in secret.[106] Although a district judge ordered the release of information, her order was reversed on appeal and the Supreme Court denied certiorari.[107]

In the meantime, public interest and pro bono lawyers represented detainees who could be identified in order to get them released and protect them from deportation—fighting against stonewalling by federal law enforcement officials and the Immigration and Naturalization Service (INS), while contesting the presumption that detainees were guilty until proven innocent.[108] According to Human Rights Watch, immigrants were detained on trumped up charges, or sometimes no charges at all, denied access to counsel, interrogated in coercive conditions, and at times deported.[109] Ultimately, the Center for Constitutional Rights (CCR), alongside pro bono attorneys, filed a class action lawsuit, *Turkmen v. Ashcroft*[110] (later changed to *Ziglar v. Abbasi*[111]), which charged high-level Bush Administration officials with authorizing racial and religious profiling, and coordinating with prison officials to violate detainee rights by permitting various forms of abuse, including sleep deprivation, solitary confinement, and torture. The profiling claims settled and, over fifteen years later, the U.S. Supreme Court held that plaintiffs had no monetary remedy for their detention.[112]

Transparency and fair process were also at the center of challenges by legal groups to the indefinite detention of so-called "enemy combatants," who the government claimed did not have legal

104. Jodi Wilgoren, *Swept Up in a Dragnet, Hundreds Sit in Custody and Ask, 'Why?'*, N.Y. TIMES (Nov. 25, 2001), http://www.nytimes.com/2001/11/25/national/swept-up-in-a-dragnet-hundreds-sit-in-custody-and-ask-why.html.

105. ACLU, SANCTIONED BIAS: RACIAL PROFILING SINCE 9/11, 5–6 (Feb. 2004), [https://perma.cc/RL2Z-GEMM].

106. *Ctr. Nat. Sec. Studies v. U.S. Dept. Justice*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004).

107. *Id.*

108. HUMAN RIGHTS WATCH, PRESUMPTION OF GUILT: HUMAN RIGHTS ABUSES OF POST-SEPTEMBER 11 DETAINEES (2002), [https://perma.cc/52CX-GNGA].

109. *Id.* at 4–5.

110. 915 F. Supp. 2d 314 (E.D.N.Y. 2013).

111. 137 S. Ct. 1843 (2017).

112. *Id.*

protections accorded to prisoners of war under the Geneva Conventions.[113] In the wake of 9/11, lawyers in the executive branch authorized a sweeping assertion of executive power to justify overriding basic human rights protections through executive action. The Office of Legal Counsel (OLC) issued legal opinions that authorized the trial of suspected terrorists outside the U.S. legal system, in military commissions where constitutional protections, such as the right to see and challenge evidence, did not apply.[114] Lawyers in the OLC also authorized the use of torture, including waterboarding, in interrogations of detainees, asserting that its use was not precluded by international or federal law.[115]

Initial legal challenges focused on the detention of U.S. citizens accused of terrorism and tested the right of habeas corpus in U.S. courts. Jose Padilla was arrested at Chicago O'Hare airport, upon disembarking a flight from Pakistan, and held as a "material witness" in the 9/11 attacks.[116] After being transferred to a military brig in South Carolina, his lawyer filed a habeas petition challenging Padilla's detention as an enemy combatant.[117] The case reached the Supreme Court, which rejected it on technical grounds, asserting that the petition named the wrong defendant (Secretary of Defense Donald Rumsfeld rather than the brig commander).[118] Throughout, the government insisted that Guantanamo detainees, many of whom asserted cases of mistaken identity, were entitled to no process to determine the validity of their status as enemy combatants.[119]

In *Hamdi v. Rumsfeld*,[120] Yaser Hamdi, an American citizen, also challenged his indefinite detention through habeas corpus. Hamdi was seized in 2001, by Northern Alliance forces in Afghanistan, where he was turned over to the U.S. military, which transferred him to the Naval Base in Guantanamo Bay, Cuba on the ground that he had taken

113. *See* Omar Akbar, *Losing Geneva in Guantanamo Bay*, 89 IOWA L. REV. 195 (2003).

114. JONATHAN MAHLER, THE CHALLENGE: *HAMDAN V. RUMSFELD* AND THE FIGHT OVER PRESIDENTIAL POWER 29 (2008). *See also* JESS BRAVIN, THE TERROR COURTS: ROUGH JUSTICE AT GUANTANAMO BAY 92 (2013).

115. Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002).

116. *Rumsfeld v. Padilla*, 542 U.S. 426, 430–31 (2004).

117. *Id.* at 432.

118. *Id.* at 442, 451.

119. David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981, 1987 (2008).

120. 542 U.S. 507 (2004).

up arms with the Taliban.[121] When it was discovered Hamdi was a U.S. citizen, he was transferred to a naval prison in South Carolina, prompting his father to file a habeas petition on his behalf.[122] Assigned federal public defenders, Hamdi challenged his designation as an enemy combatant and his indefinite detention without due process under that label.[123] On appeal to the Supreme Court, Hamdi's case was bolstered by a formidable team of legal groups, including the American Bar Association and ACLU, which filed amicus briefs in support of granting Hamdi due process rights to challenge his detention through habeas.[124]

The Supreme Court, in a fractured opinion, issued a mixed ruling. It held that the AUMF authorized the detention of a U.S. citizen as an enemy combatant.[125] In opposition to the lower court, however, the Supreme Court held that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker"—due process rights that Hamdi had been denied.[126] The Court made it clear, however, that enemy-combatant proceedings could have a lower level of process—permitting, for example, hearsay evidence—in recognition of the "exigencies" of "ongoing military conflict."[127] In so holding, the Court "necessarily reject[ed]" the executive's claim that the courts should play a "heavily circumscribed role" in the War on Terror.[128] Hamdi was released in 2004, deported to Saudi Arabia in exchange for travel restrictions and a promise not to sue. He renounced his U.S. citizenship.

A trio of Supreme Court cases, all litigated by CCR, challenged the detention of enemy combatants, all foreign nationals, at Guantanamo Bay.[129] The central issue throughout was whether detainees

121. *Id.* at 510.

122. *Id.* at 510–11.

123. *Id.*

124. Brief for the ACLU et al. as Amici Curiae Supporting Petitioners, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696), 2004 WL 354185.

125. *Hamdi*, 542 U.S. at 523.

126. *Id.* at 533.

127. *Id.* at 533–34.

128. *Id.* at 535. However, the Court permitted the U.S. government to unilaterally make the enemy combatant decision, only requiring a modicum of process in challenging such determinations after the fact.

129. JONATHAN HAFETZ, HABEAS CORPUS AFTER 9/11: CONFRONTING AMERICA'S NEW GLOBAL DETENTION SYSTEM 117–19 (2011).

were entitled to federal court habeas review or had to accept outcomes of the reviews provided by military commissions. In *Rasul v. Bush*,[130] twelve Kuwaitis and two Australians captured in Afghanistan challenged their detention as enemy combatants at Guantanamo Bay.[131] The case was brought by a team of lawyers headed by Michael Ratner and Barbara Olshansky of CCR, who co-counseled with death penalty lawyer, Joseph Margulies, and lawyers from the MacArthur Justice Center and the New Jersey civil rights firm, Gibbons, Del Deo, Dolan, Griffinger & Vecchhione.[132] Rejecting the government's position, the Supreme Court held that U.S. courts had jurisdiction to review habeas challenges by foreign nationals detained by the military outside the United States.[133]

That jurisdiction was then tested in *Hamdan v. Rumsfeld*,[134] a habeas action brought by a Judge Advocate General (JAG) lawyer, Charles Swift, on behalf of his client, Yemeni Salim Ahmed Hamdan, who had been Osama Bin Laden's personal driver.[135] Swift had been assigned as counsel to Hamdan before he underwent review in front of the Combatant Status Review Tribunal, established to comply with *Hamdi*, which Swift believed was a sham; from the beginning, Swift teamed up with Georgetown Law Professor Neal Katyal, who argued Hamdan's case on appeal.[136] The case challenged the legality of the military commissions set up to try enemy combatants—in which the attorney-client privilege did not apply, detainees had no right to see evidence against them, and inculpatory evidence gained through torture as well as hearsay were admissible.[137] The Supreme Court, in a 5–3 decision, invalidated the commissions, holding that they complied neither with the U.S. Military Code of Justice nor the Geneva Conventions, both of which applied despite the government's argument that the AUMF and 2005 Detainee Treatment Act authorized the commissions as constituted.[138] In response, Congress passed the Military Commissions Act of 2006 (MCA), which sought to provide the authorization the *Hamdan* court found lacking. The MCA explicitly

130. 542 U.S. 466 (2004).

131. *Id.* at 466.

132. *Id.* at 468. *See also* Luban, *supra* note 119, at 1988–89.

133. *Rasul*, 542 U.S. at 484.

134. 548 U.S. 557 (2006).

135. *Id.* at 570.

136. Alexandra D. Lahav, *Portraits of Resistance: Lawyer Responses to Unjust Proceedings*, 57 UCLA L. REV. 725, 741–42 (2010).

137. *Hamdan*, 548 U.S. at 614.

138. *Id*. at 567.

permitted troubling features of the prior commissions, including the admission of hearsay evidence, the prohibition on permitting detainees from seeing classified information used against them, and the admission of evidence gained from torture.[139] The MCA further abrogated detainees' rights to habeas corpus, stripping courts of jurisdiction to hear habeas cases pending when the MCA became law.

The jurisdiction stripping provision was challenged, this time by a massive legal team for various petitioners that included Ratner and Margulies from the *Rasul* case, joined by pro bono lawyers from elite law firms Wilmer Cutler Pickering and Covington & Burling, as well as former Solicitor General Walter Dellinger from O'Melveny & Meyers on behalf of Omar Khadr.[140] In *Boumediene v. Bush*,[141] the Supreme Court, in a 5–4 decision, once again rejected the government's attempt to eliminate habeas, holding that the Suspension Clause applied to protect the writ for Guantanamo detainees, and that the procedures established by the government for determining enemy combatant status did not provide an adequate and effective substitute, rendering the MCA an unconstitutional suspension of the writ.[142]

These Supreme Court decisions fueled Guantanamo habeas challenges, but ultimately yielded limited results. After *Rasul*, detainees increasingly filed habeas actions. Some cases, including that of *Al Odah v. United States* (joined with *Boumediene*),[143] had been filed before *Rasul*, but it was not until a Guantanamo-based JAG lawyer mailed a CD with the names of detainees to CCR that lawyers were able to identify all the detainees and thus file habeas petitions on their behalf.[144] A network of habeas lawyers was coordinated through CCR, which included many pro bono lawyers from elite firms. According to a review by Laurel Fletcher, "[s]ince 2002, over 900 attorneys . . . joined the network sponsored by CCR, filing individual habeas petitions for approximately 430 detainees."[145] Big firm lawyers took a strong stand in favor of detainee representation under the basic principles of access to justice and due process after Charles "Cully" Stimson, Deputy Assistant Secretary of Defense for Detainee Affairs, called on the corporate clients of pro bono law firms to "make those law firms

139. Military Commissions Act, 10 U.S.C. §§ 948–49 (2006).

140. *Boumediene v. Bush*, 553 U.S. 723, 731 (2008) (consolidated with *Al Odah v. United States*, brought by CCR and Sherman & Sterling).

141. *Id.*

142. *Id.* at 795, 815.

143. 551 U.S. 1161 (2007).

144. Luban, *supra* note 119, at 1989.

145. Fletcher et al., *supra* note 102, at 648.

choose between representing terrorists or representing reputable firms."[146] In addition to these pro bono attorneys, the Guantanamo habeas lawyers included law school clinicians, public interest lawyers, one solo lawyer, and a federal public defender.[147] On top of bringing habeas claims, lawyers represented Guantanamo detainees before military commissions. Some of these lawyers were civilians, including from law school clinics.[148] Others were JAG lawyers assigned to represent detainees before the commissions and many, like Hamdan lawyer Charles Swift, were committed to the principle of zealous defense.[149]

In the two years after *Boumediene*, Guantanamo detainees won twenty-two out of thirty-seven habeas challenges in district court.[150] Success, however, was short-lived. After a 2010 D.C. Circuit opinion, *Latif v. Obama*,[151] ruled that federal judges were to give presumptive deference to government evidence against detainees,[152] district courts denied ten Guantanamo habeas petitions and the D.C. Circuit disallowed habeas in nineteen appeals.[153]

In 2009, President Barack Obama signed a new military commissions law that strengthened some due process provisions, for example, making it harder (though not impossible) to admit hearsay and torture-derived evidence.[154] Yet changes to the commissions have not facilitated trials. According to a Human Rights Watch list of thirty Guantanamo detainees in 2014, nine had been convicted; seven had been referred to commissions (including Khaled Sheik Mohammed (KSM) and other alleged 9/11 plotters), while several others remained in legal limbo.[155] CCR reported in 2015 that of forty-one men who

146. *Guantanamo Bay: Five Year Later* (Federal News Radio broadcast Jan. 11, 2007). Stimson resigned under pressure three weeks later.

147. Fletcher et al., *supra* note 102, at 649.

148. Muneer I. Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683, 1690–91 (2009).

149. Luban, *supra* note 119, at 2005.

150. Editorial, *Reneging on Justice at Guantanamo*, N.Y. TIMES, Nov. 19, 2011, at 10.

151. 666 F.3d 746 (D.C. Cir. 2011).

152. *Id.* at 751–52.

153. Editorial, *The Court Retreats on Habeas*, N.Y. TIMES, June 12, 2012, at 32.

154. Military Commissions Act, 10 U.S.C. § 949 (2009).

155. *The Guantanamo Trials*, HUMAN RIGHTS WATCH (2018), [https://perma.cc/B6C4-5NGD].

remain detained, ten had active cases, and only three had been convicted.[156]

In addition to mobilizing law in court, lawyers challenging illegal detention engaged in what Peter Margulies has called "crossover advocacy": "mobilization strategies devised by lawyers outside appellate courts' exalted realm," with targets including "the media, foreign governments and their constituents, and international forums such as the United Nations and Inter-American Commission on Human Rights."[157] Margulies provides examples of crossover human rights advocacy in relation to the War on Terror: a damages suit filed by a victim of extraordinary rendition alleging human rights violations in U.S. court, CCR's effort to invoke universal jurisdiction to prosecute Donald Rumsfeld for war crimes in France and Germany, and proceedings in front of the Inter-American Commission on Human Rights and UN on behalf of Omar Khadr, who was a minor when first detained.[158] The ACLU also filed a complaint with the UN Working Group on Arbitrary Detention in 2004 on behalf of immigrants detained and deported after 9/11,[159] and challenged U.S.-sanctioned torture in the UN Human Rights Commission.[160]

Domestic legal action against the government's use of torture, including waterboarding,[161] was sparked by the revelation of the Torture Memos, authored by OLC lawyers John Yoo and Jay Bybee.[162] A team of human rights attorneys representing Jose Padilla filed civil suit against Yoo for authorizing Padilla's torture, but it was rejected by the Ninth Circuit on the ground that Yoo had qualified immunity.[163] The ACLU sued the psychologists who directed the military's Survival, Evasion, Resistance and Escape (SERE) program, which was originally

156. *Guantánamo by the Numbers*, CTR. FOR CONST. RTS. (Nov. 14, 2015), [https://perma.cc/KDH4-BDS6].

157. Peter Margulies, *The Detainees' Dilemma: The Virtues and Vices of Advocacy Strategies in the War on Terror*, 57 BUFF. L. REV. 347, 348 (2009).

158. *Id.* at 366–67.

159. Wendy Patten, *The Impact of September 11 and the Struggle Against Terrorism on the U.S. Domestic Human Rights Movement*, *in* BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES 153, 167 (Cynthia Soohoo, Catherine Albisa & Martha F. Davis eds., 2008).

160. Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 894 n.6 (2008).

161. This process had been described as "water torture" in *United States. v. Lee*, 744 F.2d 1124 (5th Cir. 1984).

162. *See* THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE (David Cole ed., 2009).

163. *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012).

designed to train U.S. military personnel to resist torture if captured, but reverse-engineered to teach U.S. interrogators how to torture detainees at Guantanamo and elsewhere. That suit settled last year.[164]

The ACLU led the way in contesting other forms of post-9/11 government abuse. The group made a number of FOIA requests seeking information on the scope of government surveillance and use of watch lists.[165] It filed an amicus brief on appeal from a Foreign Intelligence Surveillance Act court ruling expanding the reach of domestic surveillance and challenged Patriot Act Section 215's authorization of warrantless searches.[166] ACLU lawyers brought a range of religious, racial, and national origin discrimination suits on behalf of Muslim and Arab people barred from flying, while also engaging in litigation efforts to protect the right to protest against the War on Terror.[167]

Overall, the portrait of lawyering that emerged from the War on Terror was one of using the tools at hand, limited as they might be, to resist the massive power of the military state. Particularly in the area of detention, this campaign enlisted courts, and even a deeply divided Supreme Court, to stand up for basic rule of law values in the face of executive overreach, while insisting on fair process in individual cases in an overall context of structural unfairness. Whether legal resistance did any good has been the source of much debate. Critics point to the Obama Administration's decision to back out of his campaign promise to "close Gitmo" and the fact that there are even now, nearly twenty years after 9/11, still roughly fifty detainees in Guantanamo, including KSM, with no end to their detention in sight. Jack Goldsmith, a former Bush defense department official and Harvard Law School professor, has argued that all of the litigation around detention and military commissions served to legitimize the practice of long-term preventive

164. *Salim v. Mitchell*, 183 F. Supp. 3d 1121, 1133 (E.D. Wash. 2016).

165. *See Gordon v. FBI*, 388 F. Supp. 2d 1028, 1033 (N.D. Cal. 2005) (no fly list); Am. Civil Liberties Union, *Matrix: Myths and Reality*, ACLU (2018), [https://perma.cc/JQ4X-DAFZ] (Multistate Anti-Terrorism Information Exchange).

166. *Muslim Cmty. Ass'n v. Ashcroft*, 459 F. Supp. 2d 592, 595 (E.D. Mich. 2006).

167. *See* Am. Civil Liberties Union, *The ACLU in the Courts Since 9/11*, ACLU (Oct. 2006), [https://perma.cc/LQH8-JEWF]. The ACLU also filed suit challenging the Obama Administration policy of targeted killings, which the D.C. District Court dismissed for lack of jurisdiction in 2010. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 8–9 (D.D.C. 2010).

detention—an extraordinary expansion in government power.[168] In a similar vein, Jules Lobel, reflecting on the campaign, notes that the major cases won by CCR—*Rasul* and *Boumediene*—while embracing broad habeas jurisdiction, never addressed detainees' substantive claims,[169] allowing lower courts, particularly the D.C. Circuit, to issue pro-government rulings that have deprived remaining Guantanamo detainees of rights and remedies.[170] Thus, with respect to the major aims of lawyers challenging the War on Terror—release of the unlawfully detained, fair hearings for terror suspects, and accountability for torture—limited progress has been made, leading Lobel to conclude that there has been "victory without success."[171]

C. Backlash Avoidance: The March Toward Marriage Equality

Perhaps no single legal campaign has hewn as closely to the classical test case model pioneered by the NAACP in *Brown v. Board of Education* as the march to marriage equality, which culminated in the 2016 Supreme Court decision in *Obergefell v. Hodges*.[172] But while marriage equality carried forward the legacy of test case litigation, it also reshaped it. Unlike *Brown*, the marriage campaign proceeded through a diverse set of institutions under legal conditions that did not obviously favor a Supreme Court resolution—at least at the beginning. Thus, in contrast to the *Brown* campaign, there was less effort spent on the type of incremental precedent-building victories that occupied Thurgood Marshall and his NAACP Legal Defense Fund colleagues: the early efforts to challenge school systems for unequal funding, the pivot toward higher education and professional school discrimination, and the effort to select and consolidate public elementary school challenges leading to *Brown*. Rather, the strategy ultimately adopted by LGBT movement lawyers focused on two related goals: (1) achieving state-by-state wins, from domestic partnership to marriage; and (2) investing deeply in what Suzanne Goldberg calls "hearts and minds" strategies—media and grassroots organizing efforts to change public

168. Jack Goldsmith, *The Great Legal Paradox of Our Time: How Civil Libertarians Strengthened the National Security State*, NEW REPUBLIC (Mar. 16, 2012), [https://perma.cc/4XBC-WHAD].

169. Jules Lobel, *Victory Without Success?—The Guantanamo Litigation, Permanent Preventative Detention, and Resisting Injustice*, 14 J.L. SOC'Y 125 (2013).

170. *Id.* at 126–27. *See also* Kim Lane Scheppele, *The New Judicial Deference*, 92 B.U. L. REV. 89, 91–92 (2012).

171. Lobel, *supra* note 169, at 121.

172. 135 S. Ct. 2584 (2015).

opinion in support of same-sex marriage.[173] In this way, the campaign culminating in *Obergefell* has emerged as an anti-*Roe* account of careful planning to avoid backlash through culture-shifting efforts laying the groundwork for legal reform. It thus has become a symbol of the need to change public opinion to produce sustainable social change, implicitly accepting empirical claims of the "constrained court."[174]

From the beginning, lawyers occupied key leadership positions in the movement for LGBT equality. By the early 1990s, a trio of pioneering LGBT rights groups had been formed—Lambda Legal (1973), the National Center for Lesbian Rights (NCLR) (1977), and Gay & Lesbian Advocates and Defenders (GLAD) (1978)—focusing initial legal efforts on defensive projects like protecting gays and lesbians from criminalization and abuse.[175] After the devastating loss in *Bowers v. Hardwick*,[176] which upheld the constitutionality of state antisodomy laws, the ACLU LGBT Project was created, and all four legal groups shifted their efforts toward state level advocacy on the theory that the Supreme Court was a hostile force to be avoided.[177] These groups had some success invalidating sodomy statutes on state constitutional grounds and building precedent for same-sex partners to win increasing parental rights.[178] As the nascent LGBT movement lacked strong political organizations during this early period, lawyers assumed leadership positions in the national conversation on agenda-setting and strategy formulation.

As many have documented, marriage was not a primary focus of the LGBT movement in its early phase and when it began to gain attention, it was controversial. After the famous debate between Lambda Legal's Executive Director, Tom Stoddard, and Legal Director, Paula Ettlebrick,[179] marriage became more of a focal point through a combination of early success, making marriage possible,

173. Suzanne B. Goldberg, Obergefell *at the Intersection of Civil Rights and Social Movements*, 6 CALIF. L. REV. CIRCUIT 157, 163 (2017), [https://perma.cc/9TNC-R7ZV].

174. ROSENBERG, *supra* note 25, at 35–36.

175. Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1248 (2010). In 2016, GLAD changed its name to GLBTQ Legal Advocates & Defenders.

176. 478 U.S. 186 (1986).

177. Cummings & NeJaime, *supra* 175, at 1249.

178. Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1198 (2016).

179. *See* Paula L. Ettlebrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989, at 14; Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK, Fall 1989, at 9.

followed by virulent countermobilization, which prompted outrage and redoubled movement efforts to fight for the right to marry.[180] As the fight wore on, leadership coalesced around idea that a "hearts and minds" strategy of changing public opinion had to precede legal change and the litigation decisions by movement lawyers sought to defer any final legal reckoning until the cultural signs pointed decisively to success.

The march toward *Obergefell* may be divided into two distinctive halves. In the first, roughly from 1993 to 2003, the movement was stymied by initial reliance on litigation.[181] This error was embodied in the Hawaii case, *Baehr v. Lewin*,[182] which was brought not by movement lawyers, who declined to take the case out of concern for setting bad precedent, but by private lawyer Dan Foley. The *Baehr* suit achieved immediate success followed by dramatic reversal—and a string of anti-marriage reforms that led many observers to point to *Baehr* as the trigger of a profound anti-marriage backlash.[183] After the Hawaii Supreme Court held that marriage classifications based on sexual orientation were subject to strict scrutiny and, on remand, the trial court invalidated the state's law banning same-sex couples from marriage, Hawaii voters passed via initiative a state constitutional amendment reserving the definition of marriage to the legislature, which had already prohibited same-sex couples from marrying.[184] Although Hawaii subsequently passed a limited relationship recognition law for same-sex couples, the first of its kind in the nation, it was the same-sex marriage ban that was imitated around the country.

The now well-known litany of anti-marriage policy included, at the federal level, the passage of the Defense of Marriage Act (DOMA) in 1996, signed into law by President Clinton, thereby outlawing the provision of federal benefits to same-sex partners—even those who could be legally married under state law.[185] Unfortunately, the number

180. Michael C. Dorf & Sidney Tarrow, *Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena*, 39 L. & SOC. INQUIRY 449, 450 (2014).

181. Nan Hunter complicates this picture by suggesting that the Vermont and Massachusetts litigation victories were supported, in part, by "technologies of electoral politics, especially polling and voter canvassing." Nan D. Hunter, *Varieties of Constitutional Experience: Direct Democracy and the Marriage Equality Campaign*, 64 UCLA L. REV. 1662, 1682 (2017).

182. 852 P.2d 44 (Haw. 1993).

183. *See* ROSENBERG, *supra* note 25, at 362.

184. Cummings & NeJaime, *supra* note 175, at 1250.

185. SUSAN GLUCK MEZEY, GAY FAMILIES AND THE COURTS: THE QUEST FOR EQUAL RIGHTS 85 (2009).

of states where that was possible decreased dramatically after *Baehr*, which sparked forty-five states to outlaw marriage either by constitutional amendment or legislative enactment.[186] Thus, by the mid-2000s, prominent scholars began to identify the marriage equality movement as a contemporary example of the age-old problem of lawyers seduced by the "myth of rights,"[187] turning to court to solve social problems in ways that not only were ineffective but produced a powerful social backlash that caused movement retrogression. In his revised edition of *The Hollow Hope*, Gerald Rosenberg spotlighted this retrogression to argue that, for the LGBT movement, "succumbing to the 'lure of litigation' appears to have been the wrong move."[188] Michael Klarman, in his book-length treatment of the marriage movement, argued that *Baehr*, the 1999 case *Baker v. Vermont*,[189] and Massachusetts's 2003 *Goodridge v. Department of Health* decision "generated political backlash," though also producing some positive effects by forcing the marriage issue into the public sphere and creating facts on the ground in the form of actual married same-sex couples.[190]

One immediate and unforeseen outcome of *Goodridge* in Massachusetts was to set in motion events in California that pushed forward a full legal assault on marriage exclusion. Before the *Goodridge* case was decided, California had passed a domestic partnership law that made that status equal to "marriage in all but name."[191] In 2004, after the San Francisco mayor invoked *Goodridge* as grounds justifying the city's issuance of marriage licenses to same-sex couples, lawsuits by Christian Right groups to prohibit the unions ultimately led to the California Supreme Court decision in *In re Marriage Cases*.[192] In that decision, the court pointed to the separate-but-equal status of domestic partnership in holding that same-sex couples' exclusion from marriage was based on discriminatory animus, thereby establishing the right of same-sex couples to marry under state constitutional law.[193] It was this ruling that was overturned by

186. ROSENBERG, *supra* note 25, at 368.

187. STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 5 (1974).

188. ROSENBERG, *supra* note 25, at 419.

189. *Baker v. State*, 744 A.2d 864 (Vt. 1999).

190. MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTER: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE xi (2013).

191. Cummings & NeJaime, *supra* note 175, at 1256, 1267–68, 1274.

192. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

193. *Id.* at 402.

Proposition 8, a statewide voter initiative that narrowly passed in 2008, which amended the state constitution to ban same-sex marriage.

After Proposition 8, movement lawyers spent five years laying the groundwork for a nationwide legal attack on marriage bans, which developed along two central tracks. The first focused on advocating to limit the scope of the non-movement lawyer-initiated challenge to Proposition 8, ultimately called *Hollingsworth v. Perry*.[194] That case was brought by Ted Olson and David Boies on behalf of an upstart organization, the American Foundation for Equal Rights (AFER), which broke with movement orthodoxy counseling forbearance to file suit in 2009.[195] As that case moved up the appellate ladder, crafted as an equal protection challenge to squarely present the constitutional right to marry to the Supreme Court, advocates worked to reframe the doctrinal question to focus on whether a state, California, could rescind marriage after according it through court ruling.[196] That reframing, which succeeded in carrying the day at the Ninth Circuit,[197] rested on a distinctive legal theory, premised on *Romer v. Evans*,[198] and applied to a handful of states that like California had rescinded pre-existing marriage rights.[199] Movement lawyers advanced the same argument as amici in the Supreme Court, asserting that Proposition 8 was "unique" in that it was "a response to the California Supreme Court's ruling" invalidating the state's marriage ban, effectively "amending its charter to explicitly provide gay people less protection against discrimination

194. 570 U.S. 693 (2013).

195. DAVID BOIES & THEODORE B. OLSON, REDEEMING THE DREAM: THE CASE FOR MARRIAGE EQUALITY 28, 31 (2014). *See also Perry v. Schwarzenegger*, 704 F. Supp. 2d, 921, 928 (N.D. Cal. 2010).

196. Brief of Amici Curiae Lambda Legal Defense and Education Fund, Inc. and Gay & Lesbian Advocates & Defenders in Support of Respondents 3–4, *Hollingsworth v. Perry*, No. 12-144 (9th Cir. filed Feb. 28, 2013).

197. *See Perry v. Brown*, 671 F.3d 1052 (2012).

198. 517 U.S. 620 (1996).

199. On petition for certiorari to the United States Supreme Court, movement lawyers did not file an amici brief, instead leaving that work to law professors William Eskridge, Bruce Ackerman, and Dan Farber. The professors' brief in opposition to certiorari charted the history of social movement contention over other equality issues (antimiscegenation and antisodomy laws), concluding that the time was not ripe for the Court to weigh in on same-sex marriage and suggesting that "the Court's mature decision of important constitutional issues surrounding marriage equality would benefit from further lower court litigation." Brief of Amici Curiae William N. Eskridge Jr. et al. at 3, 6–16, *Perry*, 568 U.S. 1066 (No. 12-144).

than anyone else."[200] Accordingly, movement lawyers argued that the Court, if it chose to rule on the merits, limit its ruling to the unique Proposition 8 facts.[201] This argument dovetailed with that of the main parties, who argued that the initiative failed under either strict scrutiny or rational basis review, as it was "enacted solely for the purpose of making gay men and lesbians unequal to everyone else."[202] In June 2013, the Court sidestepped the merits, dismissing the case on the ground that the initiative's proponents, who were defending Proposition 8 after the California Attorney General declined to do so, lacked standing under Article III.[203]

In the second phase of the campaign, from *Goodridge* on, lawyers and activists adopted an approach in which legal strategies were subordinated to political strategies in an effort to shift public opinion in pro-equality directions. This effort, led by a leadership team of lawyers that included Mary Bonauto from GLAD, Lambda's Jennifer Pizer and Jon Davidson, ACLU's Matt Coles, and Freedom to Marry's Evan Wolfson, tracked state-by-state polling data and identified states in which legislative or legal reform could be pursued without fearing voter reprisal.[204] This team met in June 2005, to draft a document, *Winning Marriage: What We Need to Do*, which charted the state strategy, suggesting support could be built over a fifteen to twenty-five year period.[205] Wolfson recalled basing his analysis on the success in *Loving*, in which negative overall public opinion against interracial marriage was overcome by state-by-state change permitting the practice.[206] After Proposition 8 passed in California, movement leaders also launched the Marriage Research Consortium, which analyzed polling and other data, and used it to begin changing the marriage equality narrative away from a negative framing—same-sex couples' denial of the right to be treated the same as heterosexual couples—to a positive framing around the right to love the person of one's own choosing.[207] Those arguments became central in *Obergefell*.

200. Brief of Amici Curiae Lambda Legal Defense and Education Fund, Inc. and Gay & Lesbian Advocates & Defenders in Support of Respondents at 6, 8, *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (No. 12-144).

201. *Id.* at 5–6.

202. Brief for Respondents at 15–16, *Perry*, 570 U.S. 693 (No. 12-144).

203. *Perry*, 570 U.S. at 715.

204. *See* Molly Ball, *How Gay Marriage Became a Constitutional Right*, ATLANTIC, (July 1, 2015), [https://perma.cc/E93C-MHCM].

205. *Id. See also* Hunter, *supra* note 181, at 1688.

206. Ball, *supra* note 204.

207. Hunter, *supra* note 181, at 1695–99.

This strategy succeeded in building a steady progression of state victories after Proposition 8. In April 2009, the Vermont legislature legalized same-sex marriage, while the Iowa Supreme Court struck down its state's marriage ban.[208] In 2012, the campaign used a sophisticated ground game to win marriage in statewide voter initiatives in Maine, Maryland, Minnesota, and Washington.[209] In February 2011, President Obama took the unprecedented step of declaring DOMA to be unconstitutional and directing his Justice Department to stop defending it from legal challenge.[210] That prompted a movement legal challenge by the ACLU and pro bono law firm, Paul, Weiss, Rifkind, Wharton & Garrison.[211] In 2013, the Supreme Court in *Windsor v. United States*[212] ruled that DOMA "violates basic due process and equal protection principles applicable to the Federal Government."[213] By the end of 2013, eighteen states had established the right of same-sex couples to marry, eight by legislative enactment, six by court ruling, and three by voter initiative.[214] After *Windsor*, federal courts struck down marriage bans in other states, bringing the total number of states permitting same-sex marriage to thirty-seven prior to *Obergefell*.[215]

Thus, by the time that the Supreme Court weighed in on the right of same-sex couples to marry, it could claim the role of consolidating public opinion rather than trying to shape it. In so doing, the Court accepted the movement frame of respecting an individual's right to choose a partner to love. Ruling over twenty years after the movement had begun, the Court in *Obergefell* upheld the right of same-sex couples to marry on due process and equal protection grounds. Justice Anthony Kennedy, writing for the majority, ended by endorsing the movement's plea for inclusion:

208. Richard Wolf, *Timeline: Same-Sex Marriage through the Years*, USA TODAY (June 24, 2015, 12:57 PM ET), [https://perma.cc/7WUP-6WTN].

209. Ball, *supra* note 204.

210. Charlie Savage & Sheryl Gay Stolberg, *In Shift, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES (Feb. 23, 2011), http://www.nytimes.com/2011/02/24/us/24marriage.html?mtrref=.

211. Windsor v. United States, ACLU (Apr. 15, 2015), [https://perma.cc/UY6N-WPGB].

212. 133 S. Ct. 2675 (2013).

213. *Id.* at 2681.

214. *Same-Sex Marriage, State by State*, PEW RES. CTR. (June 26, 2015), [https://perma.cc/EX42-LZGT].

215. Adam Liptak, *Supreme Court Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES (June 26, 2015), https://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html.

> In forming a marital union, two people become something greater than they once were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. . . . They ask for equal dignity in the eyes of the law. The Constitution grants them that right.[216]

The outcome prompted analysis of what caused such a dramatic change in law over the span of a generation. As one commentator put it, what changed "wasn't the Constitution—it was the country. And what changed the country was a movement."[217]

Unlike other new canon campaigns, the legal success in the marriage equality movement, at least thus far, has met with less resistance. This is, in part, because of the nature of the right to marry, which removes state barriers to private action rather than requiring significant state resources to enforce. In addition, permitting marriage by same-sex couples does not impose zero-sum costs on opponents, who object to the impact of including same-sex couples on marriage as an institution but adduce no evidence that marriage, or society, suffers as a result. Accordingly, the picture since *Obergefell* has been one of notable progress and limited—though still real—resistance.

On the positive side, the rate of marriage by same-sex couples has increased.[218] And legal recognition has strengthened broader cultural recognition, while freeing up the LGBT rights movement to invest in other battles. Although the victory has not produced an entirely smooth transition to same-sex marriage nationwide, the backlash has been minimal compared to the massive resistance after *Brown*. For instance, the refusal by local officials to issue licenses in Alabama was quickly squelched.[219] There are looming challenges, the most significant of

216. 135 S. Ct. 2584, 2608 (2015).

217. Ball, *supra* note 204.

218. Marina Koren, *Gay Marriage in the U.S., after* Obergefell v. Hodges, ATLANTIC (June 22, 2016), [https://perma.cc/X4ZG-4GZP].

219. Roy Moore, the Alabama Supreme Court justice who openly defied the U.S. Supreme Court by directing probate judges to continue enforcing the state's same-sex marriage ban, won a special primary election to take the Senate seat vacated by Jeff Sessions; Moore was narrowly defeated in the general election by Democrat Doug Jones, marking the first time in twenty-five years that Alabama had sent a Democrat to the Senate. Jenny Jarvie, *Doug Jones Certified as Alabama's First Democratic Senator*

which is the battle over so-called religious opt outs, in which business owners claim a free exercise right to refuse service to gay and lesbian couples—an issue now pending in the Supreme Court.[220] Voices of dissent within the LGBT community continue to critique the centrality of marriage within the broader movement and the image of marriage advanced by *Obergefell* itself.[221] With respect to the latter, Cynthia Bledsoe has argued that the case succeeded, in part, by selecting plaintiffs that diverged significantly from the overall gay and lesbian population: more affluent and white, and deliberately "asexual"—either parents or widows, "so the focus is not on the couple alone."[222] How the movement responds to ongoing intra-community conflict over the priority to place on assimilative goals like marriage, the dramatic regional variation in cultural acceptance of same-sex couples, and continued pushback by the Christian Right, will define its next phase.

D. Contesting Illegal Status: Immigrant Rights under Siege

The movement to protect and ultimately legalize the status of undocumented immigrants in the United States had its roots in the mass migration of the 1990s. The unprecedented surge in immigration generally, and unauthorized immigration in particular, primarily from Mexico, was spurred by the disruptive force of market integration. Prior to this period, a main focus of immigrant rights advocacy was on legalizing the status of Central American refugees who had come during the 1980s as victims of mass violence caused by U.S. backed civil wars.[223] The shift toward advocacy for undocumented workers flowed from the paradox at the heart of post-Cold War U.S. policy, which pressed vigorously toward the free flow of trade and capital, while erecting barriers to labor mobility. Thus, while NAFTA lured U.S. businesses across the border and undercut the Mexican agricultural industry–resulting in employment dislocation–for many Mexican immigrants who wanted to come to the United States for jobs, the only option was to cross illegally. This was true, though to a lesser

in 25 Years, L.A. TIMES (Dec. 28, 2017), http://www.latimes.com/nation/la-na-roy-moore-lawsuit-20171228-story.html.

220. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, No. 16-111 (U.S. argued Dec. 5, 2017).

221. *See*, *e.g.*, NANCY POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008).

222. Cynthia Godsoe, *Perfect Plaintiffs*, YALE L.J.F., 136, 145–48 (2015).

223. Cummings, *supra* note 160, at 909.

extent, for immigrants from Central America and Asia, where rigid quotas capped legal migration.[224]

Overall, per-decade immigration to the United States increased from ten million to sixteen million between the 1980s and 2000s, with the yearly peak coming in 1999–2000; undocumented immigrants were forty percent of the total that year.[225] Immigrants from Mexico constituted the largest share of overall immigrants, with more than 500,000 coming in 2000 alone, closely tracking the U.S. employment rate.[226] Other Latin American and Asian immigrants roughly split as the next two biggest groups in 2000.[227] That year, the majority of undocumented immigrants were from Mexico.[228] By the Great Recession of 2008, there were nearly twelve million undocumented immigrants in the United States.[229] Of these, roughly 1.5 million were under the age of 18—immigrant youth who became known as Dreamers.[230] Although the Supreme Court in *Plyler v. Doe*[231] gave undocumented youth the right to education, they remained "barred from full political or labor market participation."[232] For lawyers and activists defining the meaning of immigrant rights during this time, the goal was to assert rights on behalf of people defined by their illegality.[233]

The early phase of immigrant rights advocacy focused on building organizational capacity, which was initially erected on the backbone of refugee-oriented groups, like the Immigrant Legal Resource Center and

224. *Unauthorized Immigrant Population Trends for States, Birth Countries and Regions*, PEW RES. CTR. (Nov. 3, 2016), [https://perma.cc/S8FL-YL2J] (showing that Central America and Asia each roughly one million unauthorized immigrants in the United States in 2000).

225. JEFFREY S. PASSEL & ROBERT SURO, PEW HISPANIC CTR., RISE, PEAK, AND DECLINE: TRENDS IN U.S. IMMIGRATION 1992–2004, at 2 (2005).

226. *Id.* at 10.

227. *Id.* at 32.

228. Jeffrey S. Passel & D'Vera Cohn, *As Mexican Share Declined, U.S. Immigrant Population Fell in 2015 below Recession Level*, PEW RES. CTR. (Apr. 25, 2017), [https://perma.cc/QHL6-84SW] (showing that there were 4.5 million unauthorized Mexican immigrants in the United States in 2000, compared to 4.1 million from all other countries combined).

229. JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES i (2009).

230. *Id.* at ii.

231. 457 U.S. 202 (1982).

232. Caitlin Patler, *"Citizens but for Papers:" Undocumented Youth Organizations, Anti-Deportation Campaigns, and the Reframing of Citizenship*, 65 SOC. PROBS. 96, 98 (2017).

233. *See* HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW (2014).

the ACLU Immigrant Rights Project, as well as first-wave law school immigration clinical programs.[234] Passage of the Immigration Reform and Control Act (IRCA) in 1986 granted amnesty to those undocumented immigrants already in the United States, while simultaneously strengthening border security and threatening penalties against employers who hired undocumented immigrants.[235] Heightened security made crossing from the Mexican border more difficult and undocumented immigrants who came were forced to stay, taking on long-term jobs.[236] Employers skirting IRCA exploited undocumented workers, who were often scared to protest mistreatment for fear of exposure and deportation. Immigrant rights advocacy developed in response to the problems undocumented immigrants faced in this context.

Anti-immigrant sentiment exploded in California, the center of undocumented immigration, culminating in the 1994 passage of Proposition 187, a statewide initiative that barred undocumented immigrants from social services, schools, and healthcare.[237] Yet, as the apotheosis of nativism, Proposition 187 had the unintended effect of galvanizing the newly empowered immigrant rights bar. Important first-wave organizations—including the ACLU, National Immigration Law Center (NILC), Mexican American Legal Defense and Educational Fund (MALDEF), and APALC—successfully challenged Proposition 187, resulting in its effective rescission in 1999.[238] Philanthropic funding poured into legal aid groups to help immigrants naturalize and gain access to public benefits, which had been cut in President Clinton's 1996 welfare reform bill.[239]

Lawyers and activists during this period sought to protect immigrants made vulnerable by their undocumented status. An important fight in this regard was the effort to protect the most visible immigrant workers: day laborers, who could be seen on street corners, often next to home improvement stores, where they would solicit short-term employment.[240] Buoyed by a rising economy and robust construction, the number of day laborers expanded through the 1990s.

234. Cummings, *supra* note 160, at 910–11.

235. *Id.* at 913–14.

236. WALTER NICHOLLS, THE DREAMERS: HOW THE UNDOCUMENTED YOUTH MOVEMENT TRANSFORMED THE IMMIGRANT RIGHTS DEBATE 27 (2013).

237. Cummings, *supra* note 160, at 923–24.

238. *Id.*

239. *Id.* at 924–25.

240. Scott L. Cummings, *Litigation at Work: Day Labor in Los Angeles*, 58 UCLA L. REV. 1617, 1619 (2011).

By the early 2000s, a seminal study found that there were over 100,000 day laborers either looking for or performing work each day throughout the United States, nearly half of whom were on the west coast; most were young men from Mexico and three-quarters were undocumented.[241]

In response, municipalities around Los Angeles (followed by those with large immigrant populations nationwide) began passing antisolicitation ordinances that outlawed day laborers from seeking work on public streets and sidewalks. Hiding the animus against immigrants behind these restrictions, antisolicitation ordinances cast day laborers as a public nuisance, creating traffic congestion and physical blight, which proponents claimed required the exercise of local land use authority to bar day laborers from the streets. Over a twenty-year span, beginning in 1987 with Redondo Beach, forty-four cities in the Greater Los Angeles area passed antisolicitation ordinances, most of which imposed a complete citywide ban on all solicitation from public right-of-ways, including sidewalks.[242]

Legal rights groups, led by MALDEF, developed an alliance with the emergent National Day Labor Organizing Network (NDLON), founded by Pablo Alvarado in 2001, to challenge these ordinances. In an early legal victory that paved the way for this alliance, a federal district court judge struck down Los Angeles County's ordinance as an unreasonable time, place, and manner restriction on day laborer speech.[243] After this win, MALDEF and NDLON devised a strategy combining litigation and site-specific organizing to invalidate ordinances city-by-city—building toward the goal of securing legal precedent protecting day laborers' First Amendment right to solicit work. At enforcement hot spots, NDLON organized committees of workers that served as organizational plaintiffs in litigation brought by MALDEF asserting facial constitutional challenges on First Amendment grounds.[244]

After favorable settlements rescinding or modifying ordinances in Rancho Cucamonga and Glendale, MALDEF filed suit against the city with the oldest ordinance, Redondo Beach, after it launched a month-long crackdown against day laborers in 2004.[245] The suit would wind its

241. ABEL VALENZUELA, JR. ET AL., ON THE CORNER: DAY LABOR IN THE UNITED STATES iii (2006).

242. Cummings, *supra* note 240, at 1694–96.

243. *Coal. for Humane Immigrant Rights of L.A. v. Burke* (*CHIRLA II*), No. CV-98-4863-GHK(CTX), 2000 WL 1481467, at *2 (C.D. Cal. Sept. 12, 2000).

244. Cummings, *supra* note 240, at 1651–52.

245. *Id.* at 1660–61.

way to the full *en banc* panel of the Ninth Circuit Court of Appeals, which on September 16, 2011, gave a stunning victory to the day laborers, holding that Redondo Beach's ordinance, although content neutral, was not narrowly tailored and thus violated the First Amendment.[246] Because the city had less restrictive means available to address traffic concerns—such as enforcing existing laws against jaywalking, parking at red curbs, and standing in the street—the court concluded that the ordinance failed to pass the First Amendment test.[247] At the time of *Redondo Beach*, thirty-two of forty Los Angeles-area ordinances (eighty percent) were still crafted as complete citywide bans. After the Ninth Circuit ruling, these thirty-two bans were no longer valid, opening up wider regional space for day labor solicitation and leaving a patchwork of less intrusive ordinances.

Although the *Redondo Beach* case resulted in an unalloyed litigation win for immigrant rights groups, lawyers remained skeptical of courts, which were viewed as unreliable. One of the most painful legal setbacks for the movement came in the Supreme Court's 2002 decision in *Hoffman Plastics v. NLRB*,[248] which signaled the death knell of union attempts to organize undocumented workers by holding that federal labor law did not protect such workers from retaliation and deportation in response to organizing since immigration law's enforcement goals were deemed to take precedence over the protection of labor rights.[249]

The 1996 passage of punitive laws under President Clinton, including the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), fueled criminalization by permitting the detention of asylum seekers and children, imposing criminal sanctions on illegal entrants, and forcing the mandatory deportation of legal permanent residents convicted of an expanded range of crimes, many nonviolent.[250] This strained enforcement capacity and generated calls from INS officials to prioritize resources.[251] Sensing an opening, some immigrant rights advocates, led by NILC, proposed to exempt undocumented youth from the enforcement net by creating a path to legalization, codified in a proposal that came to be known as the

246. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach,* 657 F.3d 936, 940–41 (9th Cir. 2014).

247. *Id.* at 946.

248. 535 U.S. 137 (2002).

249. *Id.* at 140.

250. ALEJANDRA RINCÓN, UNDOCUMENTED IMMIGRANTS AND HIGHER EDUCATION: SÍ SE PUEDE! 20 (2008).

251. NICHOLLS, *supra* note 236, at 31.

Development, Relief and Education for Alien Minors, or DREAM, Act in 2001.[252] Despite initial optimism that the Bush Administration might pass the DREAM Act, 9/11 ignited a new paroxysm of anti-immigrant sentiment that—although focused primarily on South Asians, Muslims, and Arabs—killed any opportunity for immigration policy reform in President George W. Bush's first term.

In Walter Nicholls' account of the Dreamers, immigration reform emerged as a priority in the second Bush term for two reasons.[253] One was the sense among immigration enforcement officials, now housed in the newly created Immigration and Customs Enforcement (ICE) division of the Department of Homeland Security (DHS), that prioritizing enforcement resources to target suspected terrorists required reducing efforts elsewhere—and permitting the legalization of undocumented youth would alleviate pressure.[254] Second, a strong faction within the Republican Party believed that Republicans could achieve "permanent majority" status by making a deal on Dreamers that would shore up Latino voter support.[255]

Yet with Democrats and moderate Republicans unable to coalesce, the political opening was quickly filled with a House bill proposed by Jim Sensenbrenner that layered on additional criminal penalties to illegal entry, further beefed up border security, and proposed a guest worker program. The Sensenbrenner Bill galvanized immigrant rights activists, now aligned with labor movement leaders who viewed any guest worker program as an existential threat, reversing the anti-immigrant position that motivated union support for IRCA.[256] With this combined power, immigrant rights and labor groups organized massive protests against the Sensenbrenner Bill,[257] mobilizing one million people in Los Angeles alone in a May Day protest entitled "A Day Without Immigrants." [258] The stage was thus set for a push on comprehensive immigration reform (CIR), which would create a pathway to citizenship for all immigrants in the United States without authorization. Although

252. *Id.*

253. *Id.* at 35.

254. *Id.*

255. *Id.*

256. The AFL-CIO officially reversed its anti-immigration policy to support legalization in 2000. *See Resolution 26: Immigration*, AFL-CIO (July 25, 2005), [https://perma.cc/4NFD-QVE4].

257. Ashar, *supra* note 7, at 1471.

258. Juliane Hing, *Monday's May Day Marches Could Be the Biggest in Years*, NATION (Apr. 28, 2017), [https://perma.cc/T9TG-V796].

CIR passed in the Senate, it stalled in the House, leaving immigration reform unfinished as the Bush presidency came to an end.[259]

The legacies of that failure were twofold. First, in an effort to mollify hardline anti-immigrant Republicans, the Bush Administration via executive action initiated the Secured Communities program, or S-Comm as it came to be known.[260] S-Comm authorized local cooperation with ICE, primarily through law enforcement participation in a biometric technology program through which fingerprints of those in jail or prison were shared with ICE and cross-checked against a database of non-citizens, with matches triggering ICE enforcement action.[261] Second, the expression of moderate Republican support for CIR fueled more extreme backlash at the local level, promoting the rise of controversial anti-immigrant law enforcement officials like Sheriff Joe Arpaio in Maricopa County, Arizona, who in 2005 began seeking to enforce immigration laws by conducting sweeps in Latino neighborhoods[262]—setting up a fundamental conflict between federal and local immigration control.

President Obama's election, with the support of two-thirds of Latino voters,[263] signaled the best hope for CIR. However, the choice to first pursue health care reform triggered backlash that resulted in the Democrats losing their filibuster-proof control of Congress and thus the opportunity passed for a sweeping fix to the problem of undocumented immigration on a party-line vote.[264] Nonetheless, the hope that moderate Republicans in states with growing Latino voting power would agree to a compromise bill caused mainstream advocacy groups to forge ahead with CIR.[265] This decision, and Obama's response to it, created divisions within the movement. In an effort to shore up his border security credentials to create political space for CIR, Obama

259. Ashar, *supra* note 7, at 1471.

260. *Secure Communities: Fact Sheet*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Sept. 1, 2009), [https://perma.cc/8S9U-YGU6]; *Secure Communities ("S-Comm")*, ACLU (2018), [https://perma.cc/J5T4-9XET].

261. Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 93–95 (2013).

262. Mary Romero, *Are Your Papers in Order?: Racial Profiling, Vigilantes, and "America's Toughest Sheriff,"* 14 HARV. LATINO L. REV. 337, 334–347 (2011).

263. MARJORIE S. ZATZ & NANCY RODRIGUEZ, DREAMS AND NIGHTMARES: IMMIGRATION POLICY, YOUTH, AND FAMILIES 4 (2015).

264. Thomas B. Edsall, *Is Obamacare Destroying the Democratic Party?*, N.Y. TIMES (Dec. 2, 2014), https://www.nytimes.com/2014/12/03/opinion/is-obamacare-destroying-the-democratic-party.html.

265. On the internal movement politics of CIR, see NICHOLLS, *supra* note 236, at 76–92.

expanded S-Comm, while offering assurances that enforcement was targeting border crossers and those with serious criminal backgrounds. Although some immigrant rights activists called Obama "Deporter in Chief," movement groups disagreed over whether the Obama approach was helpful political cover for moderates, carefully crafted to avoid disrupting families, or a betrayal of his campaign commitment to immigrants,[266] resulting in the deportation of non-serious criminal offenders and unaccompanied minors.[267] In response, lawyers volunteered in detention facilities and communities to provide individual services to immigrants facing deportation, both asylum seekers at the border and Dreamers and others in the interior with equities in their favor.[268]

In the crux of this debate, Sameer Ashar describes the tension between CIR advocates, primarily groups in the mainstream immigrant rights community—including NILC, the ACLU, and the Coalition for Humane Immigrant Rights of Los Angeles—and those organizations like NDLON, which became increasingly disaffected with the costs of the Obama approach,[269] launching the Not1More campaign.[270] In Ashar's account, the rising tide of direct activism by Dreamers, which included outing themselves, created energy for a free-standing DREAM Act. When it became clear that the politics did not line up, Dreamer advocates pressured the president to make clear that ICE prosecutors

266. Critics of Obama noted that formal removals during his tenure were more than for either Bush or Clinton; defenders argued that this was because Obama instituted formal removal proceedings (as opposed to permitting voluntary departures) against more border crossers in an effort to deter subsequent crossings. Tallies for removals plus returns show that Obama deportation totals were roughly half of those of the Bush Administration. *See* Muzaffar Chishti, Sarah Pierce & Jessica Bolter, *The Obama Record on Deportations: Deporter in Chief or Not?*, MIGRATION POLICY INST. (Jan. 26, 2017), [https://perma.cc/ATJ5-HND8]. Data also showed that in FY 2015 and 2016, more than 99% of removals fell within the Department of Homeland Security priority areas of national security threats, noncitizens with significant criminal histories, and those already subject to removal orders. *Id.* NDLON and CCR brought a FOIA action to get the enforcement data. *NDLON v. ICE*, 811 F. Supp. 2d. 713, 729–30 (S.D.N.Y. 2011).

267. *See* ZATZ & RODRIGUEZ, *supra* note 263, at 4–8.

268. *See, e.g.*, Rina Raphael, *This RV Full of Lawyers Is Touring America to Save Young Immigrants from Deportation*, FAST CO. (June 29, 2017), [https://perma.cc/9MYW-K2N2].

269. Ashar, *supra* note 7, at 1478–80. *See also* Susan Bibler Coutin et al., *Deferred Action and the Discretionary State*, 8 CITIZENSHIP STUDS. 951 (2017).

270. Kathryn Abrams, *Contentious Citizenship*, 26 BERKELEY LA RAZA L.J. 46 (2016). *See also* Kevin Escudero, *Organizing While Undocumented: The Law as a "Double Edged Sword" in the Movement to Pass the DREAM Act*, 6 IDAHO CRITICAL LEGAL STUD. J. 30 (2013), [https://perma.cc/N2H6-MW23].

had discretion not to seek deportation and to ultimately grant relief to Dreamers through executive action.[271] Tensions within the movement flared in 2010, when Arizona passed S.B. 1070, which deputized local law enforcement agents to stop and detain people suspected of being undocumented, and to turn them over to ICE.[272] S.B. 1070 was challenged by NILC and the ACLU, which succeeded in winning a 2012 Supreme Court ruling striking down portions of the law on federal preemption grounds, though letting stand the centerpiece "show me your papers" provision.[273]

As the Republicans responded to President Obama's second term with a strategy of total intransigence, Dreamers and their organizational allies placed significant pressure on the administration to do something to protect undocumented immigrants. In 2012, Obama acceded by issuing an executive order establishing Deferred Action for Childhood Arrivals, or DACA, which provided temporary relief to the Dreamers.[274] While DACA was intended to create facts on the ground that would motivate Latino voters and be politically difficult to rescind, immigrant rights groups were not prepared for the election of Donald Trump. After a virulently anti-immigrant and anti-Muslim campaign, Trump upon taking office immediately issued a Muslim Ban, which provoked mass legal mobilization at airports around the country,[275] with nonprofit and big firm lawyers from white-shoe Wall Street firms providing pro bono assistance at Dulles and other airports to immigrants (many legal residents) who were detained and barred from

271. Ashar, *supra* note 7, at 1483–90. *See also* William Flores, *Undocumented and Unafraid: The Emergence of an Undocumented Movement and Its Impact on Immigration Policy, the DREAM Act, DACA, DAPA, and Family Unification*, 16 J. FAM. STRENGTHS 1, Sept. 2016, at 6, [https://perma.cc/83KC-RETU]; Michael Olivas, *Dreams Deferred*: *Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL RTS. J. 463, 492–96 (2012).

272. Kristina M. Campbell, *The Road to S.B. 1070: How Arizona Became Ground Zero for the Immigrants' Rights Movement and the Continuing Struggle for Latino Civil Rights in America*, 14 HARV. LATINO L. REV. 1, 1 (2011).

273. *Arizona v. United States*, 567 U.S. 387, 411, 414–16 (2012).

274. Flores, *supra* note 271. Obama's effort to expand DACA to family members was met with litigation by a number of states and blocked by courts. *See* Adam Liptak & Michael D. Shear, *Supreme Court Tie Blocks Obama Immigration Plan*, N.Y. TIMES (June 23, 2016), https://www.nytimes.com/2016/06/24/us/supreme-court-immigration-obama-dapa.html.

275. *See* Jonah Engel Bromwich, *Lawyers Mobilize at Nation's Airports After Trump's Order*, N.Y. TIMES (Jan. 29, 2017), https://www.nytimes.com/2017/01/29/us/lawyers-trump-muslim-ban-immigration.html.

entry.[276] In September 2017, President Donald Trump rescinded DACA—a move blocked by federal court—while using the 800,000 Dreamers as a bargaining chip to extract concessions from Democrats on funding for a border wall and the elimination of family-based admission.[277] Progressive cities have sought to provide a safe haven, with a number creating Sanctuary Cities, which refuse cooperation with federal immigration authorities.[278] This has set up a cycle of federal-local conflict, with cities like San Francisco and Santa Clara suing the Trump Administration for threatening to withhold federal law enforcement funds in retaliation for Sanctuary City policies.[279] The movement for a solution to the problem of millions of immigrants living the shadows, once tantalizingly close, has receded to the furthest edges of political possibility.

E. Building Power: The Movement for Black Lives

Black Lives Matter (BLM), hailed by some as the "new civil rights movement,"[280] responds to what Michelle Alexander calls the "New Jim Crow"[281]: an interlocking set of laws pulling African Americans into the criminal justice system, where they are consigned to the status of subordinated caste, often unable to find work or participate in the most basic democratic process, voting.[282] This re-subordination through criminalization, buttressed by the growing strength of white supremacist movements,[283] has interacted with local fiscal imperatives,

276. *See* Casey Sullivan & Stephanie Russell-Kraft, *Big Law Responds to Trump's Immigration Executive Order*, BIG L. BUS. (Jan. 30, 2017), [https://perma.cc/6QYU-QQ33].

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

278. *See* Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245, 248–49 nn.14–15 (2016). *See also* Illinois DREAM Act, 110 ILL. COMP. STAT. 947/67 (2018).

279. *See City of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 507 (N.D. Cal. 2017).

280. *See* Elizabeth Day, *#BlackLivesMatter: The Birth of a New Civil Rights Movement*, GUARDIAN (Jul. 19, 2015, 5:00 EDT), [https://perma.cc/DA6H-7Y6K].

281. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 11 (2010).

282. *Id.* at 17.

283. *See* Arjun Singh Sethi, *Attacks Like Portland's Will Keep Happening Unless We All Fight White Supremacy,* WASH. POST (May 29, 2017),

as cities starved of funding by anti-tax forces have sought to balance budgets through the imposition of fines and fees for petty offenses, placing police in the position of double agents of law enforcement and revenue collection.[284] From this perspective, the law enforcement system degrades and disregards the lives of those it serves, treating community members as inputs to be factored into a city budget spreadsheet and creating conditions under which resistance to police authority is met with violent reprisal.[285] Anger at this system built after high-profile police killings of unarmed black men, and exploded after the death of Michael Brown in Ferguson, Missouri.[286]

Beth Colgan's account of the Ferguson municipal court system paints a devastating picture, drawn from the Department of Justice (DOJ) report in the aftermath of Brown's death, of a system of justice that came to be defined by structural injustice: a law enforcement and adjudicative scheme distorted through a combination of revenue-seeking and discrimination to produce pervasive unconstitutional conduct.[287] The portrait of Ferguson before the killing was one in which city leaders conspired to extract revenue from the most marginalized and least powerful communities—specifically the city's low-income black population. Officials did so by engaging in a deliberate plan to overpolice city residents, arresting them for low-level misdemeanor crimes—like having grass too high—and then charging disproportionate

fines that could not be paid, pushing those punished into debt collection and often jail, where fines and fees continued to mount.[288] In 2013, the city of Ferguson netted two million dollars from such fees (out of a total city budget of approximately ten million).[289] It was the

https://www.washingtonpost.com/posteverything/wp/2017/05/29/attacks-like-portlands-will-keep-happening-unless-we-all-fight-white-supremacy/?utm_term=.6d049423f5c8.

284. *See* NOAH ZATZ ET AL., UCLA INST. FOR RESEARCH ON LABOR & EMP'T, GET TO WORK OR GO TO JAIL: WORKPLACE RIGHTS UNDER THREAT 6–7 (2016), [https://perma.cc/PEZ5-6NPE].

285. *See*, *e.g.*, Devon Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment*, 105 CALIF. L. REV. 125, 149–50 (2016).

286. Darran Simon, *Trayvon Martin's Death Sparked a Movement That Lives on Five Years Later*, CNN (Feb. 26, 2017, 10:13 PM ET), [https://perma.cc/N5UN-8G76].

287. Beth A. Colgan, *Lesson from Ferguson on Individual Defense Representation as a Tool of Systemic Reform*, 58 WM. & MARY L. REV. 1171, 1185–92 (2017).

288. *Id.* at 1175–76.

289. *Id.* at 1186.

day-to-day experience of this oppressive regime that fueled the anger erupting after Michael Brown's death.[290]

The unconstitutional conduct began at the very top with a set of decisions about system design that were fraught with conflicts of interests, which deprived those prosecuted and convicted of low-level misdemeanor crimes of due process under law. Ferguson's city manager, responsible for balancing the city budget, supervised the police chief, who oversaw the municipal courts and the law enforcement agency.[291] The city manager also selected municipal court judges, who had to be approved by city council, and prosecutors, many of whom knew that they would be judged, in part, by how much revenue they generated through fines.[292] As Colgan points out, this system design, on its own, likely violated the Constitution's Due Process Clause, which prohibits "governmental self-dealing"—essentially, giving those charged with law enforcement and adjudication a personal financial stake in the outcome of cases before them.[293] Because judges, prosecutors, and police officers knew (in some cases, because they were explicitly instructed) that their pay and perquisites depended on generating sufficient fine revenue from misdemeanor cases, the conflict of interest standard was met.

Police officers were on the front line of implementing this system: the first point of contact with the community generating the city's pool of cases. Many of the arrests documented in the DOJ report were for offenses that would be almost laughable but for their discriminatory targeting and severe consequences: offenses like having "High Grass and Weeds" in one's yard, excessive noise, walking along a roadway in the wrong "manner," and sitting in a parked car without a seatbelt.[294] Although probable cause is required for arrest and reasonable suspicion for a stop, all pretense of either was cast aside in many instances. The most egregious example of this was the ubiquity of arrests for "failure to comply"—when police would order a stop for no reason, failure to stop would be bootstrapped into an independent failure-to-comply violation triggering arrest, and thereby setting in motion the fine-

290. Jesse Washington, *Lessons From Ferguson: Why Are People So Angry?*, DETROIT FREE PRESS (Nov. 26, 2014, 9:57 AM), [https://perma.cc/2NMY-AF63].

291. Colgan, *supra* note 287, at 1187.

292. *Id.* at 1187–88.

293. *Id.* at 1185 (citing *Ward v. Village of Monroeville*, 409 U.S. 57, 58 (1972)).

294. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEP'T 3, 7 (2015).

making and carceral machine.[295] In this way, the process of generating a pool of defendants to feed the revenue system was built on structural Fourth Amendment violations.

Unconstitutionality did not stop there. Arrests were then handed to prosecutors, whose financial incentive to convict was so strong that one remarked that "arrest was tantamount to guilt."[296] During prosecution, misdemeanor defendants were not afforded the right to counsel, even though it was arguable that they were entitled to counsel under the Sixth Amendment. Although *Gideon v. Wainwright*[297] extends the right to counsel only to felony cases in which a defendant's liberty interest is a stake,[298] the Supreme Court has left open the question of whether the right applies in situations where failure to pay fines results in incarceration.[299] And yet, in Ferguson, not only were defendants denied counsel, when they managed to obtain volunteer counsel on their own, cases were quickly dismissed to avoid constitutional challenge and mitigate the cost of investing significant prosecutorial resources in protracted legal battles.[300] Those without counsel—the vast majority—received no such dispensation; to the contrary, they were convicted in summary fashion at astonishingly high rates.[301]

Judges then imposed economic fines in sentencing without regard to defendants' ability to pay: in violation of the Eight Amendment's Excessive Fines Clause.[302] Unable to pay, those convicted then had their rights violated one final and devastating time: they were put in jail.[303] Here, too, Supreme Court precedent seemed on the side of the incarcerated, prohibiting incarceration for failure to pay without a hearing to determine ability to pay and explore alternatives if the debtor lacked sufficient means.[304]

It was into this system that lawyers intervened—seeking to expose structural illegality and reclaim the system for justice rather than revenue. In this project, different types of lawyers, on the inside and

295. Colgan, *supra* note 287, at 1194.

296. *Id.*

297. 372 U.S. 335 (1963).

298. *Id.* at 343.

299. Colgan, *supra* note 287, at 1177 (citing *Alabama v Shelton*, 535 U.S. 652, 672–74 (2002)).

300. Colgan, *supra* note 287, at 1184.

301. *Id.*

302. *Id.* at 1196.

303. *Id.* at 1184.

304. *Id.* at 1199–20 (citing *Bearden v. Georgia*, 461 U.S. 660, 668–69 (1983)).

outside of the movement, played four essential roles. First, lawyers played a critical information gathering and dissemination role, shaping the public debate, advocating local reforms, and educating affected communities.[305] In Ferguson, the ArchCity Defenders—a nonprofit focused on housing and homelessness that began providing free defense to housing clients trapped by failure-to-pay warrants—initiated a court watch program that provided important documentation of the systemic nature of Ferguson's rights violations.[306] That group's White Paper, issued the week after Brown's death, galvanized BLM activists who demanded immediate municipal reform and won, in short order, the rescission of some fees and the city's loathsome failure-to-comply ordinance.[307] The ArchCity White Paper also provided much of the documentary evidence of law enforcement and prosecutorial abuse that formed the backbone of the Ferguson DOJ report. Outside of Ferguson, lawyers associated with BLM, particularly Law for Black Lives and the Black Movement Law Project, hosted a series of discussions to publicize and dissect inequalities in the criminal justice system.[308]

Second, in the wake of the uprising, lawyers from progressive organizations defended activists and protestors. National Lawyers Guild (NLG) attorneys acted as legal observers, provided rights training, and offered representation for jailed protestors in Ferguson and other cities.[309] A coalition of fifty organizations, including BLM and the National Conference of Black Lawyers, filed a lawsuit against the FBI and DHS challenging the surveillance of BLM activists.[310] In addition, lawyers from the ACLU filed suit against the police department in Baton Rouge, Louisiana and the NLG sued the city of Berkeley, California for the use of excessive force in responding to BLM protesters.[311]

305. *See* Colgan, *supra* note 287, at 1206–07.

306. *Id.* at 1206.

307. *Id.* at 1207–08.

308. Purvi Shah et al., *RadTalks: What Could Be Possible if the Law Really Stood for Black Lives?*, 19 CUNY L. REV. 91 (2015).

309. *Chapter Members Provide Legal Support in Ferguson*, NAT'L LAWYERS GUILD S.F. BAY AREA CHAPTER, [https://perma.cc/4WXZ-D9G4].

310. Andrew Blake, *FBI and DHS Sued Over Black Lives Matter Surveillance*, WASH. TIMES (Oct. 21, 2016), [https://perma.cc/G2DQ-PLMC].

311. Aiden Quigley, *ACLU Sues Baton Rouge over 'Excessive Physical Force' in Protests*, CHRISTIAN SCI. MONITOR (July 14, 2016), [https://perma.cc/MA2C-DE2Q].

Third, the Obama DOJ launched a series of investigations against police departments in cities with records of abuse.[312] In September 2014, the DOJ launched an investigation into the Ferguson Police Department that resulted in the 2015 Ferguson report and a "pattern and practices" lawsuit leading to a consent decree under which the city now operates.[313] In 2015, again responding to police killings of unarmed black men, the DOJ initiated investigations of the police departments in Baltimore (which entered a consent decree) and Chicago (which did not); by the beginning of 2017, the DOJ was enforcing twenty police department consent decrees and had four ongoing investigations.[314] However, in March 2017, Attorney General Jeff Sessions ordered a sweeping review of twenty police department consent decrees, calling into question their future.[315]

Fourth, private lawyers brought individual lawsuits on behalf of the families of victims of police violence. The family of Michael Brown entered a settlement with Ferguson for three million dollars—the limits of the department's insurance policy.[316] The Brown family was represented by Florida-based Benjamin Crump, a private civil rights attorney who had also represented the family of Trayvon Martin.[317] The family of Eric Garner retained Jonathan C. Moore, who negotiated a settlement with the city of New York for nearly six million without filing a lawsuit.[318] These private suits have been buttressed by DOJ investigations. For example, in Ferguson, although the DOJ did not conclude that the police acted illegally in shooting Michael Brown, the

312. Sunita Patel, *Toward Democratic Police Reform: A Vision for "Community Engagement" Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 793–95 (2016).

313. *Id.* at 861–64.

314. Kyle Bentle, *DOJ Investigations: 20 Departments Under Enforcement Agreements*, CHI. TRIBUNE (Jan. 13, 2017), [https://perma.cc/Q5J6-XGGD?type=image].

315. Memorandum from the Office of the Attorney Gen. to the Heads of Dep't Components & U.S. Attorneys, Supporting Fed., State, Local & Tribal Law Enf't (Mar. 31, 2017), [https://perma.cc/5UX3-MH5A].

316. John Eligon, *Family of Michael Brown Settles Lawsuit Against City of Ferguson*, N.Y. TIMES (June 20, 2017), https://www.nytimes.com/2017/06/20/us/family-of-michael-brown-settles-lawsuit-against-city-of-ferguson.html.

317. Natalie DiBlasio, *Who Is Brown Family Lawyer Benjamin Crump?*, USA TODAY (Aug. 19, 2018, 10:29 AM ET), [https://perma.cc/VC6B-NXJL].

318. J. David Goodman, *Eric Garner Case Is Settled by New York City for $5.9 Million*, N.Y. TIMES (July 13, 2015), https://www.nytimes.com/2015/07/14/nyregion/eric-garner-case-is-settled-by-new-york-city-for-5-9-million.html.

department's consent decree to address the illegal conduct described above was in place when Brown's family agreed to settle with the police department and the DOJ's account of Ferguson's illegal practices lent weight to Brown's settlement position.[319]

Finally, class actions against police departments and cities to shut down "debtors' prisons" have been brought by Equal Justice Under Law, which sued Ferguson and Jennings, Missouri, along with Jackson, Mississippi, for using "their local courts, jails, and police forces to generate millions of dollars in profit off the backs of their most impoverished residents."[320] In collaboration with legal clinics at the St. Louis University School of Law and the University of Mississippi, Equal Justice won settlements shutting down debt practices in Jackson and securing $4.7 million for class members in Jennings.[321]

Combined, these legal efforts, alongside ongoing grassroots mobilization, have achieved substantive reforms in specific localities, while protecting activists against reprisal. Some cities, like New York, have reduced the use of stop-and-frisk, while Ferguson and other cities have restructured policing practices and curtailed the imposition of low-level fines and fees. African American communities have claimed political power in places like Ferguson, while BLM has put criminal justice reform onto the national political agenda.

However, there are conflicting views of the appropriate way forward. Some voices within the growing BLM movement, which has based its analysis on intersectional injustice, are critical of how mainstream legal responses (such as the DOJ's consent decree with Ferguson) have reinforced the marginalization of already-marginalized voices within the broader movement for police accountability and undermined more fundamental criminal justice reform.[322] The Movement for Black Lives, the organizational arm of BLM that emerged after the Ferguson unrest, put out a platform expressing a deep critique of DOJ's proposals.[323] In reflecting on the Movement's

319. *See United States v. City of Ferguson*, Consent Decree, No. 4:16-cv-00180-CDP (filed Mar. 17, 2016); Derek Hawkins, *Michael Brown's Parents Settle Wrongful Death Lawsuit Against Ferguson*, WASH. POST (June 21, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/06/21/michael-browns-pa rents-settle-wrongful-death-lawsuit-against-ferguson/?utm_term=.94819c7271bd.

320. *Shutting Down Debtors' Prison*, EQUAL JUSTICE UNDER LAW (2017), [https://perma.cc/22Z6-N87S].

321. *Id.*

322. *See* Amna Akbar, *Toward a Radical Imagination of Law*, 93 NYU L. REV. (forthcoming 2018).

323. *Id.*

platform, Amna Akbar has suggested that it envisions a more radical reimagination of the relationship between black communities and the state, which offers a stronger guide to action than the more moderate approach expressed in the legalistic solutions proposed by the DOJ.[324] In particular, she argues that the DOJ report, although exposing and disrupting egregious practices, fails to go far enough in contesting them, instead adopting retraining programs rooted in existing notions of law and order, rather than advancing an "abolitionist" program to reduce investments in policing and shift resources toward proactive social programs.[325]

III. LESSONS

This Part steps back from the details of new canon stories to explore lessons they teach about the role of lawyer in contemporary social movements. It presents these lessons as a mirror to reflect back on the enduring critical visions associated with old canon accounts. Overall, the new canon campaigns to change law and social practice reveal a pattern of legal mobilization I call *integrated advocacy* in which lawyers: (1) work in collaboration with nonlawyers in coordinated efforts; (2) engage in a range of legal advocacy, inside and outside of court, to pursue movement goals; and (3) deploy legal and nonlegal strategies in pursuit of policy reform and implementation. The *form* of legal mobilization in new canon campaigns thus diverges from the old canon emphasis on lawyer control and elite planning oriented toward rights-based court challenges. Yet the *outcomes* of the new canon campaigns reveal a familiar balancing of positive gains—new laws, short-term upticks in enforcement, public attention, and grassroots mobilization—against long-term enforcement backsliding, countermobilization by opponents in the judicial and political arenas, and internecine movement disputes.

In terms of form, the new canon campaigns present lawyers attentive to the limits of litigation strategies and sensitive to accountability concerns. Although there is variation across time and context, the integrated advocacy model generally prevails over conventional rights-based litigation challenges. In this model, lawyers pursue linked legal and political strategies and seek to break down barriers between the two, while working closely with mobilized social

324. *Id.*
325. *Id.*

movement groups.[326] Litigation is often given less centrality, in part owing to the composition of the Supreme Court but also because of the commitment of advocates to sustainable reform through political and cultural change. A key point is that the way that litigation is used in campaigns depends on the strength of political alternatives to legal action, which changes over time.

Litigation is important when campaigns are getting off the ground and the resources and opportunities for political change are relatively weak. For example, in the antisweatshop campaign, litigation was initially used to spotlight egregious conduct—the enslavement of trafficked garment workers—and gain redress for the victims. Movement lawyers then deployed litigation over time for its direct and indirect movement effects. Lawsuits targeted high-profile garment companies to build public attention, send messages to bad actors to promote compliance, and create the template for statewide legislative change that strengthened joint employer liability. Specifically, litigation set legal precedent and stimulated policy advocacy resulting in statewide codification of the joint employer standard in A.B. 633.

In the absence of a political movement, litigation becomes a central tool to check government power, even though it is ultimately limited in what it can accomplish. This was evident in the War on Terror campaign, in which advocates were operating from a position of political weakness owing to public support for punitive government policy and executive control of law enforcement and military power. This campaign was the most traditionally legalized, but not because lawyers believed courts could halt preventative detention and torture, but rather because courts were the only leverage to push back against the government and galvanize public attention. In reflecting on the limited effect of legal challenges to Guantanamo detention, Jules Lobel asserts that "the contradictory legacy of *Boumediene* and *Rasul* thus far is more fundamentally the result of a deep-rooted limitation of rights-based litigation," noting that the "consensus" on preventative detention "has been challenged by human rights groups, but not by any grass roots movement of the American people."[327] This is true, but is less a condemnation of legal strategy and court efficacy than it is an indictment of political apathy.

326. In the integrated advocacy model, lawyer networks across movement and nonmovement organizations are also important. For example, in the new canon campaigns, pro bono lawyers are central to high-stakes Supreme Court litigation, while government lawyers play a critical role enforcing law (sweatshops, policing) or declining to enforce law (DOMA).

327. Lobel, *supra* note 169, at 158–59.

In new canon campaigns in which affirmative legal challenges are important, lawyers are sensitive to the interaction between litigation and political advocacy. This was most apparent in the drive for marriage equality, in which lawyers after *Goodridge* worked to develop a political campaign to change hearts and minds, and to collaborate with activists to bolster the chances of litigation success and the implementation of legal rulings over time. In this way, the legal campaign that resulted in *Obergefell* reshaped the meaning of impact litigation—using it as a tool to nudge forward and ultimately consolidate public opinion. As Nan Hunter has shown, the legal team built its strategy around insights from political campaigns of the past and viewed litigation as part of an overall state-by-state approach that also used legislative reform and ballot initiatives to codify marriage rights.[328]

The immigrant rights movement has focused enormous energy on advocating for legislative reform and executive action in a context in which there have been limited legal alternatives to help undocumented immigrants. Litigation has been useful in blocking local measures that punitively target undocumented immigrants—like the ACLU's challenge to Arizona's S.B. 1070—and forcing the disclosure of government enforcement activities through FOIA lawsuits. But the government's plenary authority over immigration has meant these litigation efforts are defensive in nature and that an ultimate solution to the plight of undocumented immigrants requires political mobilization. Channeling dissent into political action has also been the primary focus of the Black Lives Matter movement, in which legal advocacy has been used to protect protestors and defend community members against overpolicing. Lawyers aligned with BLM have also used lawsuits to gain monetary redress for victims' families and hold cities liable for policing and debt collection practices.

In terms of outcomes, there have been undeniable legal and political advances in the new canon campaigns. In the antisweatshop campaign, an important legal infrastructure was created, public agencies targeted garment workplace abuse, and the movement succeeded in passing A.B. 633. War on Terror litigation checked the most egregious instances of executive overreach, established minimal levels of due process review for Guantanamo detainees, and focused international attention on U.S. practices of preventative detention, secret rendition, and torture—which led to significant change during the Obama Administration, including an end to torture and a reduction of the Guantanamo detainee population. Despite early setbacks, the

328. *See* Hunter, *supra* note 181.

marriage equality movement won a sweeping victory establishing the right of same-sex couples to marry in *Obergefell*, which has resulted in increased unions and public recognition, despite ongoing efforts to limit gains through religious opt-out challenges and other anti-LGBT initiatives. DACA was a signal victory for Dreamers and although President Trump has moved to terminate the program, legal challenges have forced the government to continue accepting DACA renewal applications. Political reforms in the wake of BLM have brought important changes: including more civilian oversight of police forces, the installation of body cameras, and electoral victories in cities like Ferguson giving more power to overpoliced communities.

Yet, despite notable success, new canon campaigns are nonetheless confronted by the familiar problems of weak implementation, countermobilization, and intramovement dissent. First, with regard to implementation, barriers to legal enforcement operate to limit campaign success no matter whether reform happens through court decision or legislative enactment. For example, in the anti-sweatshop campaign, statewide legislative reform imposing liability for wage theft on garment manufacturers was systematically thwarted by companies willing to play the long game and force individual workers to pursue a lengthy and enervating process of collecting judgments. In the campaign against the War on Terror, efforts to move the U.S. military apparatus toward more transparency and fairness met overwhelming resistance by a national security establishment with enormous power and whose practices were often geographically remote and thus hidden from public scrutiny. This resulted, as described above, in legal victories preserving detainees' habeas rights and strengthening due process in military commission proceedings that have lent a veneer of legitimacy to a system that movement leaders still view as fundamentally unjust.

However, not all enforcement barriers are created equal. Legal rights that can be activated by individuals without significant government or third-party involvement—like the right to marriage—are more likely to be successfully implemented than rights that require significant changes by bureaucracies or powerful private actors. Put differently, movements that succeed in the essentially libertarian project of eliminating state interference with the exercise of individual rights are more likely to avoid enforcement problems. Rights that push against powerful entrenched interests and require a massive institutional commitment to bureaucratic change and ongoing oversight are much less likely to be enforced over time. In such contexts, rights play different, more indirect, roles. As Muneer Ahmad put it regarding his work on behalf of a detainee at Guantanamo, "instead of expecting

rights-based legal contest at and around Guantánamo to produce transformative results, we might better understand it as a form of resistance to dehumanization" that makes the violence "more costly."[329]

The nature of movement claims also correlates to their potential for successful resolution in court. New canon legal victories in the Supreme Court have been framed around vindication of negative liberty interests rather than affirmative claims of equality.[330] In the War on Terror habeas litigation, basic due process claims succeeded against assertions of executive power—with the Court affirming that the rule of law requires baseline protections from the state, even for enemy combatants held outside of the country. The right to marriage was ultimately framed in libertarian terms around the freedom to love someone of one's own choosing without state interference. By contrast, in equality cases in which there are perceived zero-sum outcomes—for instance, in favor of workers over employers or immigrants over native-born citizens—movement actors and their lawyers have had to do more traditional political advocacy to promote change and, in general, have settled for more localized victories.

The second feature of new canon campaigns is the inevitability and implacability of countermobilization against social movement activism. Indeed, rather than discrete events, it is perhaps more useful to look at movement campaigns as windows on long-standing conflicts in which short-term losses and gains are part of repeat-play dynamics with no clear terminus. This does not mean that movements never succeed or fail, just that the meaning of success or failure is continuously contested and revised over time. There are moments when opposition is crystallized and countereffortsproceed with new ferocity. Sometimes, these moments are triggered by litigation and court opinions, but not always. Backlash, in this sense, is best viewed as the intensification of what is otherwise a normal part of the back-and-forth of movement challenges to entrenched power.

Countermobilization is omnipresent in the new canon campaigns. In the antisweatshop campaign, garment manufacturers mobilized to limit the scope of A.B. 633, prohibiting private rights of action and class actions against manufacturers outside of the DLSE administrative wage claim process, and then undermining that process by refusing to pay claimants. In addition, as APALC pursued high-profile litigation target Forever 21, that company responded by deploying aggressive

329. Ahmad, *supra* note 148, at 1687, 1760.

330. This point may also help explain the relative success of right-wing social movements in winning legal recognition for issues like gun rights and religious liberty.

tactics that included SLAPP suits against protestors, causing significant delay that frayed solidarity between lawyers and organizers. In the War on Terror, government intransigence created a constant moving target: When the Supreme Court upheld habeas jurisdiction for noncitizen detainees in *Rasul*, the government forged ahead with trying them in military commissions; when the *Hamdan* Court struck those down as unauthorized and inadequate, the government passed the MCA, which validated the commissions' worst features and stripped courts of habeas jurisdiction; when the Court rejected that move in *Boumediene*, the government launched a legal battle of attrition in which it has largely succeeded in defeating Guantanamo detainees' habeas challenges. The marriage equality campaign was decimated by backlash after the 1993 Hawaii Supreme Court case signaled support for marriage rights; it has overcome that backlash by savvy advocacy, but conservative resistance to LGBT rights persists and is currently reformulating around religious opt outs, bans on transgender bathrooms and military service, and ongoing efforts to limit the ability of same-sex parents to foster or adopt children. Perhaps the most clear and present threat to hard-won marriage rights is the so-called First Amendment Defense Act, which would prohibit the government from forcing any individual or corporation to act contrary to a professed religious objection to same-sex marriage. Countermobilization against immigrant rights is painfully evident in the nativist resurgence that powered President Trump's victory, resulting in the rescission of DACA, a spike in immigration raids, and a generalized environment of hostility that has produced pervasive fear in the immigrant community.

The third and final lesson from the new canon campaigns is that representational conflicts are unavoidable, irrespective of the cause or the method for pursuing it. This is most apparent in the immigrant rights campaign, in which disputes over CIR versus a stand-alone Dream Act pitted more mainstream immigrant rights groups against their more radical peers. Mainstream organizations lobbying for CIR claimed representative status on behalf of the immigrant community as they counseled support for Democratic efforts to hold together a grand compromise built on Obama's enforcement-first approach. Dissident organizations advancing a stand-alone Dream Act as part of a piecemeal reform strategy challenged the mainstream coalition's standing to speak for immigrant youth, while they questioned that coalition's endorsement of enforcement actions and insider negotiations. Center-left conflict is apparent in other campaigns as well: the grassroots critique by the Garment Worker Center of APALC's legalism; the queer critique of marriage as a conservative institution endorsed by mainstream gay and lesbian groups to the exclusion of movement voices for reimagining the

meaning of romantic relationships; and the radical reform platform put forth by the Movement for Black Lives as a way of distancing it from the incrementalism of the Obama DOJ and mainstream proponents of police reforms, like body cameras, that do nothing to reduce the policing footprint in African American communities. As this suggests, it is common to see significant conflict between competing factions within a social movement constituency around goals and strategies. Radical perspectives often express frustration with movement elites who espouse mainstream goals and advance state-oriented strategies that operate through conventional legal processes and undercut grassroots power. From old canon to new, these representational conflicts persist—an expression of debate and dissent in complex political processes that defy singular approaches or unified resolutions.

CONCLUSION

Throughout U.S. history, justice has been a work in progress—the subject of intense conflict among social movements with differing views of what it means to fully realize the American democratic vision. In this conflict, lawyers have played essential roles. The failure of a progressive vision of America to firmly take root after the Civil Rights Era prompted a critical reaction against the leadership of lawyers in challenging structures of economic, racial, gender, and other forms of inequality. Implicit in this critique was the suggestion that, if lawyers had assumed a more modest role, as adjuncts to movements rather than in the lead, results might have been different.

This Article has sought to address this critique by juxtaposing the vision of lawyers emerging from the old progressive canon with contemporary stories I have suggested may be thought of as comprising a new canon. My central observation is that while new canon campaigns of legal resistance show that lawyers are sensitive to avoiding the mistakes of the past, campaign results reveal foundational problems associated with the old canon: weak enforcement of legal victories, intense countermobilization by opponents of reform, and intramovement disagreements about tactics and goals.

This observation points toward a potentially significant implication: that the old canon critique of progressive lawyering *may have less to do with the advocates and more with the nature of their adversaries*. That is, the success and sustainability of progressive movements may be affected more by structural inequality and the power of opponents to mobilize law and politics, and less by the representational choices of movement lawyers and the form of legal resistance they pursue. In short, lawyers may be less to blame for bad

movement outcomes that we commonly think. This suggestion raises more questions than it answers, but is offered as an opening for reimagining lawyering as an affirmative social movement good to be valued on par with the classic movement stalwarts of organizing and protest, rather than tolerated as a necessary evil. It is not to deny that lawyers wield power to harm social movements, but rather to suggest that—instead of focusing so much attention on harm avoidance—we should begin a conversation that affirmatively stresses the value lawyers add. In this sense, it is an invitation to further inquiry into what it would mean to define effective leadership roles for progressive lawyers in social movements and how we might train the next generation in such a vision.