CRIM-IMM LAWYERING

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INTRODUCTION

Lawyers seeking social change experience firsthand the significant overlap between criminal and immigration law. Today, a young criminal defense attorney will represent noncitizens charged with criminal offenses; determining immigration consequences for these offenses is a complex endeavor.[1] That same lawyer may also confront mass prosecutions for immigration violations that force her to make immediate decisions about seeking release on bond,[2] litigate motion practice, and enter into a plea agreement.[3] If that lawyer chooses to work at an immigrant rights organization, she will likely advocate for limits on information sharing between criminal and immigration law enforcement agencies.[4] The young lawyer will also develop immigration relief campaigns that require crafting a media strategy to support the campaign or choosing who to exclude from the benefits of any immigration relief legislation.[5]

This young lawyer went to law school, as many law students do, determined to use the law for social change.[6] For decades, lawyering

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1. "Adjectives invoked to describe the categorical approach [the test largely used to determine immigration consequences of criminal convictions] include 'perplexing,' 'counterintuitive,' and 'extremely complicated.'" Rebecca Sharpless, *Finally, A True Elements Test:* Mathis v. United States *and the Categorical Approach*, 82 BROOK. L. REV. 1275, 1277 (2017).

2. Involvement with the criminal legal system—even when an individual is released pending criminal proceedings—can lead to immediate immigration detention and removal proceedings, both because the U.S. Immigration and Customs Enforcement agency (ICE) seeks to detain people with pending criminal proceedings and because ICE increasingly engages in the practice of arresting released individuals at courthouses. *See* United States v. Veloz-Alonso, 910 F.3d 266, 269–70 (6th Cir. 2018) (holding that under the Immigration and Naturalization Act, ICE may detain a person "pending trial or sentencing regardless of a [Bail Reform Act] release determination"); United States v. Trujillo-Alvarez, 900 F. Supp. 2d 1167, 1170–73 (D. Or. 2012) (describing the federal government's attempt to maintain a criminal prosecution of an individual released on bond whom ICE had immediately detained); *see also* Daniel Tepfer, *Protesters Demand State Keep ICE Agents Out of Courthouse*, CT POST (Sept. 17, 2019), https://www.ctpost.com/policereports/article/Protesters-demand-state-keep-ICE-agents-out-of-14446931.php.

3. *See* Eleanor Acer, *Criminal Prosecutions and Illegal Entry: A Deeper Dive*, JUST SECURITY (July 18, 2019), https://www.justsecurity.org/64963/criminal-prosecutions-and-illegal-entry-a-deeper-dive/.

4. *See generally* Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247 (2012) (describing "sanctuary" ordinances, or policies that limit the use of information flowing from the criminal system to the immigration system).

5. *See infra* Section III.A.4.

6. *See* Kathryn Rubino, *The Number of People Applying to Law School Is Up Again This Year, Proving the 'Trump Bump' Is More Than Just a Fleeting Trend*, ABOVE THE LAW (Aug. 5, 2019), https://

theory[7] has guided lawyers and law students in analyzing the legal field, how lawyers practice, and how they may improve their practices.[8] Importantly, it provides roadmaps for lawyers to assess how to effectuate social change through the practice of law.[9] Lawyering theory has made significant contributions to the profession and to clinical legal education, where law students are first exposed to lawyering models. But current lawyering theory has failed to keep up with the changing landscape of how criminal and immigration law interact. It treats immigration and criminal legal practice as two distinct forms of lawyering subject to a civil and criminal divide, thus failing to account for how inextricably interwoven these two systems of law enforcement now are.

The civil-criminal distinction in lawyering theory needs revisiting. Crim-imm lawyering, the practice of law at the intersection of the fields of criminal and immigration law, is increasingly common, and the unresolved questions it raises for social change lawyering demand attention. Social movements recognize the overlap between the two systems and organize accordingly. For instance, the Movement for Black Lives not only challenges police brutality but also seeks the end of mass detention and deportation. Community bail funds, organizations designed to assist individuals detained due to their inability to pay bail, operate in both fields of law. Immigrant rights groups challenge the use of detainers, whereby immigration officials ask criminal law enforcement agencies to detain individuals suspected of an immigration violation. These collective efforts show that the two fields are not wholly distinct, and lawyering theory should not treat them as such.

Today, crim-imm lawyering appears not just in criminal and immigration courtrooms, but also in less obvious places. Two examples illustrate the need for lawyering theory to delve deeply into the crim-imm arena: the family separation crisis and advocacy for Dreamers, or undocumented immigrant youth. The family separation crisis clearly presents a crim-imm issue, as the federal government utilized a criminal prosecutorial policy in order to deter and further criminalize migration.[10] Dreamers' advocacy, while not on its face

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abovethelaw.com/2019/08/the-number-of-people-applying-to-law-school-is-up-again-this-year-proving-the-trump-bump-is-more-than-just-a-fleeting-trend/?rf=1.

7. Ascanio Piomelli captures the work done by lawyering theory in terms of the vision it provides for lawyers:

> "As lawyers, every day that we practice, we consult — sometimes consciously, often unconsciously — our own answers to certain foundational questions in order to decide how to act in specific situations. Our standard or theory of good lawyering — by which I mean both effective and responsible lawyering – requires a vision of our ultimate goals and central activities. That vision tells us what we are trying to accomplish and how we are most likely to do so. It guides us in determining with whom we should work, in what settings we should act, and how we should decide these issues."

Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427, 430–31 (2000).

8. *See generally* Richard K. Sherwin, *Lawyering Theory: An Overview: What We Talk About When We Talk About Law*, 37 N.Y.L. SCH. L. REV. 9 (1992).

9. *See infra* Section III.

10. *See infra* Section III.B.1.

located at the intersection of criminal and civil law, nevertheless raises important crim-imm questions. Under the executive policy of Deferred Action for Childhood Arrivals (DACA), and in every piece of legislation aimed at providing immigration relief to Dreamers, a set of immigrant youth who have criminal legal system contact are excluded from protection.[11] Thus, even in seemingly immigration-only legal work, the crim-imm convergence appears.

Lawyering theory misses opportunities to provide crucial guidance to lawyers involved in crim-imm lawyering issues. With special attention to lawyering in family separation and Dreamer advocacy, this article makes the claim that lawyering theory's treatment of criminal and immigration law as wholly distinct is untenable in light of the systems' intertwined existences. The article reveals the disconnect between lawyering theory—which places criminal and immigration law in separate buckets—and increased social mobilization and lawyering practice which defies traditional boundaries between the two fields. Although family separations and Dreamer advocacy represent just two examples of lawyering practice at the intersection of criminal and immigration law, they provide an opportunity to examine crim-imm lawyering at work. Further, they illuminate missed opportunities in lawyering today, such as where lawyering could be closer aligned to social movements and those movements' goals in the crim-imm arena. In analyzing crim-imm lawyering, this article identifies gaps in lawyering theory more broadly that merit further exploration.

The article proceeds as follows. Part I provides a brief summary of how criminal and immigration law have grown increasingly intertwined, underscoring why it is no longer possible to ignore crim-imm as a field. Part II maps developments in lawyering literature in immigration and criminal law. It draws out themes that exist in both, while highlighting the way lawyering theory in each of the fields has developed in parallel to and separate from the other. Part III argues that there is a need for lawyering theory at the intersection of the two fields, as social movement activity and lawyering practice are increasingly erasing the strict boundaries that may have once existed between the two systems. This Part also looks at the family separation crisis stemming from the federal government's Zero Tolerance policy and Dream Act advocacy as case studies of how crim-imm lawyering can play out. Part IV identifies three areas for further exploration in crim-imm lawyering, and lawyering more broadly, and offers some suggestions for the direction of crim-imm lawyering theory.

I. THE RISE OF CRIM-IMM

The line distinguishing criminal and immigration law is hard to draw. Even as advocates strive to limit their entanglement, the two systems remain

11. *See infra* Section III.B.2.

closely enmeshed.[12] Tracking the full history of the rapidly changing relationship between criminal and immigration law enforcement is beyond the scope of this article, and a body of scholarship already does that.[13] For this reason, this part provides a brief overview of the growing convergence in criminal and immigration law, which this article calls "crim-imm."[14] In doing so, this part seeks to illustrate the importance of lawyering and legal education at the intersection of the two systems.

Crim-imm has risen rapidly over the past four decades.[15] On the legislative front, Congress has increased immigration penalties for criminal legal system involvement, providing expansive grounds for which the federal government can seek to deport even long-term lawful residents of the country.[16] Some criminal convictions now automatically render someone subject to no-bond detention during removal proceedings[17] and exclude that person from almost all forms of relief from removal, regardless of whether the person has significant ties to or lawfully lived in the United States for a long period of time.[18] While laws criminalizing unauthorized entry into the United States have been on the books for almost a century,[19] the government barely exercised this prosecutorial power until fifteen years ago, when reliance on them

12. *See infra* Section III.

13. The blurred distinction between substantive criminal law and immigration law is discussed in a body of legal scholarship on "crimmigration." César Cuauhtémoc García Hernández, *Deconstructing Crimmigration*, 52 U.C. DAVIS L. REV. 197, 208–10 (2018). Although there is a significant amount of scholarship on "crimmigration," *see infra* note 138, it has focused on substantive law or procedural aspects of the two systems of law enforcement. *See* Emma Kaufman, *Segregation by Citizenship*, 132 HARV. L. REV. 1379, 1381 (2019) ("[T]hose who study the intersection of criminal and immigration law tend to focus on the front end of the justice system — on legislatures, police, prosecutors, and courts."). This article focuses on the lawyering that occurs in the two fields and, more specifically, at their intersection.

14. For an in-depth treatment of how these two systems have converged over numerous decades, *see* Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 108 (2012).

15. César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1459 (2013) (explaining the convergence of criminal and immigration law enforcement as tied to the post-civil rights era shift of using criminal law as an "outlet" for "facially neutral rhetoric" designed to "deri[de] people of color").

16. In 1988, Congress expanded the federal government's ability to detain noncitizens involved in the criminal legal system. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7343(a)(4), 102 Stat. 4181, 4470 (1988) (amending 8 U.S.C. § 1252(a)(2)). In 1996, through two federal laws, Congress added dozens of grounds of removability for criminal legal system involvement. *See* Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996); *see also* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1672 (2011) (describing the expansion of immigration penalties for criminal system involvement that occurred in 1996 and how it "not only trigger[ed] the possibility of deportation but also eliminate[d] the possibility of any exercise of agency discretion").

17. 8 U.S.C. § 1226(c) (2018); *see also* Nielsen v. Preap, 139 S. Ct. 954, 959–60 (2019).

18. 8 U.S.C. § 1101(a)(43) (2018) (defining the term aggravated felony); 8 U.S.C. § 1227(a)(2)(A)(iii) (2018) (listing an aggravated felony as a ground of removability); KATHY BRADY, IMMIGRANT LEGAL RES. CTR., PRACTICE ADVISORY: AGGRAVATED FELONIES 1 (2017), *available at* https://www.ilrc.org/sites/default/files/resources/aggravated_felonies_4_17_final.pdf (noting that aggravated felonies are "the most dangerous type[s] of convictions for a noncitizen").

19. *See* Act of Mar. 4, 1929, ch. 690, 45 Stat. 1551 (1929).

skyrocketed.[20] Simultaneously, Congress has dramatically increased appropriations to the Executive for the purposes of immigration law enforcement,[21] while immigration authorities have expanded the methods used for immigration law enforcement through criminal legal systems at the state and local levels.[22]

Crim-imm is not new, but the consequences of this convergence are more acute than ever. President Trump, just a few days into his administration, issued an Executive Order detailing the prioritization of immigration enforcement, much through the criminal legal system.[23] This included use of local law enforcement to make immigration arrests and increase information-sharing between state and local criminal law enforcement agencies and federal immigration authorities.[24] The Trump Administration has also conditioned some federal grants on localities' willingness to share information about immigrants with the federal government, and the Department of Justice has even sued states and cities that have refused to comply with the specified conditions.[25] In 2019, the number of individuals in immigration detention reached unprecedented levels.[26] Mass raids conducted for alleged immigration violations terrify communities and exert significant strain on advocates'

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20. *See* AM. IMMIGRATION COUNCIL, PROSECUTING PEOPLE FOR COMING TO THE UNITED STATES (2020), *available at* https://www.americanimmigrationcouncil.org/research/immigration-prosecutions (noting a surge of migration-related prosecutions beginning in 2007); Donald Kerwin & Kristen McCabe, *Arrested on Entry: Operation Streamline and the Prosecution of Immigration Crimes*, MIGRATION POLICY INST. (Apr. 29, 2010), https://www.migrationpolicy.org/article/arrested-entry-operation-streamline-and-prosecution-immigration-crimes (providing an overview of Operation Streamline, the federal government policy that led to the exponential growth of criminal prosecution over migration).

21. AM. IMMIGRATION COUNCIL, THE COST OF IMMIGRATION ENFORCEMENT AND BORDER SECURITY, at 2 (2019), *available at* https://www.americanimmigrationcouncil.org/sites/default/files/research/the_cost_of_immigration_enforcement_and_border_security.pdf.

22. Apart from increasing the use of criminal prosecutorial power over migration-related offenses, other efforts include the use of local law enforcement for immigration-related arrests, requests to state and local law enforcement to detain noncitizens in order to facilitate immigration arrests from criminal custody, and sharing of information between state and local law enforcement agencies and federal immigration authorities. *See Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION AND CUSTOMS ENF'T, https://www.ice.gov/287g (last visited Apr. 12, 2020); *Detainers*, U.S. IMMIGRATION AND CUSTOMS ENF'T, https://www.ice.gov/detainers (last visited Apr. 12, 2020); *Secure Communities*, U.S. IMMIGRATION AND CUSTOMS ENF'T, https://www.ice.gov/secure-communities (last visited Apr. 12, 2020).

23. Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

24. *Id.*

25. Katie Benner, *Justice Dept. Sues Over Sanctuary Laws in California, N.J. and Seattle*, N.Y. TIMES (Feb. 11, 2020), https://www.nytimes.com/2020/02/10/us/politics/justice-department-sanctuary-law.html. Whether the government has the authority to condition certain grants on immigration-enforcement cooperation is debated, and at the time of this writing the circuits have split on the issue. *Compare* New York v. U.S. Dep't of Justice, 951 F.3d 84 (2d Cir. 2020) (upholding the legality of Byrne grant funding restrictions), *with San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018) (holding that the federal government lacked the authority to set Byrne grant funding restrictions based on sanctuary city policy). *See also* City of Los Angeles v. Barr, 929 F.3d 1163, 1195–96 (9th Cir. 2019) (upholding the legality of COPS grant restrictions).

26. Isabela Dias, *ICE Is Detaining More People Than Ever—And for Longer*, PACIFIC STANDARD (Aug. 1, 2019), https://psmag.com/news/ice-is-detaining-more-people-than-ever-and-for-longer; *see also Detention Management*, *Detention Statistics*, U.S. IMMIGRATION AND CUSTOMS ENF'T, https://perma.cc/25L2-JPRK (last reviewed/updated Oct. 30, 2019) (providing detention statistics of the nearly 50,000 individuals in immigration detention in October 2019).

resources.[27] Under the Trump Administration, crim-imm is pervasive. The government's Zero Tolerance policy in the summer of 2018, and the resulting family separation crisis, reflects how the criminal system is used by the federal government to enforce the goals of immigration law enforcement. Mass criminal prosecutions of federal misdemeanor charges became the purported justification for radical immigration enforcement by the federal government. This led to federal agents forcibly separating children from the children's parents, offering no system for reunification after the conclusion of criminal prosecution.[28]

But crim-imm also appears in less obvious places not traditionally thought of as crim-imm. Advocacy around immigration relief for Dreamers may appear, at first blush, to be a purely immigration issue. Yet crim-imm concerns often influence the contours of Dreamer-related legislation. To date, every bill proposed in Congress to provide immigration relief to Dreamers excludes from relief a set of undocumented immigrant youth based on involvement in the criminal system.[29]

As the following parts of this article demonstrate, there is a disconnect between lawyering theory and what happens on the ground at the intersection of criminal and immigration law. Crim-imm lawyering is common, with expertise of immigration law in criminal defense now constitutionally required[30] and immigration lawyers increasingly well-versed in criminal law principles. Lawyering theory, however, treats these two areas as completely distinct, leading to lawyering models that fail to account for the challenges presented by crim-imm lawyering.

II. LAWYERING THEORY IN CRIMINAL AND IMMIGRATION LAW

Lawyers seeking to create social change through their practice are often well-versed in lawyering models. For decades, lawyering models, and relatedly, critiques of lawyering models, have provided practitioners and aspiring

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27. Elizabeth Nolan Brown, *Children Left Crying in Streets After ICE Arrests Parents in Massive Mississippi Raid*, REASON (Aug. 8, 2019), https://reason.com/2019/08/08/children-left-crying-in-streets-after-ice-arrests-parents-in-massive-mississippi-raid/; Debbie Elliot, *Families Affected by Mississippi ICE Raids Scramble to Find Support*, NPR (Aug. 13, 2019), https://www.npr.org/2019/08/13/750442128/families-affected-by-mississippi-ice-raids-scramble-to-find-support; Miriam Jordan, *ICE Arrests Hundreds in Mississippi Raids Targeting Immigrant Workers*, N.Y. TIMES (Aug. 7, 2019), https://www.nytimes.com/2019/08/07/us/ice-raids-mississippi.html.

28. *See infra* Section III.B.

29. The most recent iteration of an immigration relief bill for Dreamers, H.R. 6, the American Dream and Promise Act of 2019, bars from relief individuals with felony convictions, some misdemeanor convictions, and some adjudications stemming from involvement in juvenile delinquency systems. *See* JOSE MAGAÑA-SALGADO ET AL., IMMIGRANT LEGAL RES. CTR., COMPARISON OF CRIMINAL AND INADMISSIBILITY GROUNDS FOR AMERICAN DREAM AND PROMISE ACT OF 2019, DACA, AND TPS (2019), *available at* https://www.ilrc.org/sites/default/files/resources/2019-09_comparison_of_criminal_and_inadmissibility_grounds_for_american_dream_and_promise_act_of_2019_daca_and_tps_final.pdf.

30. In 2010, the Supreme Court recognized that the Sixth Amendment's right to effective representation includes noncitizen defendants' right to receive advice of potential immigration consequences of criminal charges. Padilla v. Kentucky, 559 U.S. 356, 373–74 (2010).

lawyers paradigms through which to analyze their own practice.[31] In both criminal and immigration law, lawyering models prescribe particular relationships—between attorneys and clients—and practices aimed at improving the provision of legal services.

This part maps out developments in lawyering theory, from early work that continues to influence lawyering scholars and practitioners today to the current state of criminal and immigration lawyering theories. It makes two arguments. First, it asserts that lawyering models matter to practitioners, clinical law professors, and law students. Lawyering theory concretizes social justice goals into lawyering activities and practices,[32] thereby providing both practicing lawyers and law professors frameworks with which to employ self-reflection and intentionality in their practice and their pedagogy.[33] Second, it contends that lawyering theory in criminal and immigration law has developed in separate silos, treating them as wholly distinct areas of law, despite significant overlap or similarities in practice.

A. *Why Lawyering Models Matter*

Social change lawyering theory seeks to elucidate practices that increase the effectiveness of lawyering and illuminate potentially unanticipated consequences of lawyering practice. In this way, lawyering theory helps lawyers identify blind spots in their practice and can provide guiding principles for new lawyering models and practices.[34] Clinical legal educators play an important role in lawyering model development. They are ideally situated for critical analysis of lawyering practices,[35] and clinics can serve as laboratories for emerging and competing lawyering theories.[36]

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31. Piomelli, *supra* note 7, at 431–32.

32. Anthony V. Alfieri, *Rebellious Pedagogy and Practice*, 23 CLINICAL L. REV. 5, 14–15 (2016) [hereinafter Alfieri, *Rebellious Pedagogy and Practice*] (describing how rebellious lawyering "urges multiple, experimental forms of lawyer, client, and community collaboration, inclusion, intervention, enforcement, evaluation, and innovation").

33. *Id.* at 6 (discussing how rebellious lawyering introduces new pathways for practitioners and scholars to "understand and to strengthen" their own work). Because clinical legal education is often a space for experimenting with lawyering models and techniques, law students also stand to benefit from developments in lawyering theory.

34. Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355, 389 (2008) [hereinafter Ashar, *Law Clinics and Collective Mobilization*] (arguing that absent an affirmative lawyering model, "even self-conscious practitioners reproduce the status quo" and law school clinics that fail to develop an explicit lawyering vision "conceal their implicit vision").

35. Phyllis Goldfarb, *Beyond Cut Flowers: Developing A Clinical Perspective on Critical Legal Theory*, 43 HASTINGS L.J. 717, 720 (1992); Carrie Menkel-Meadow, *The Legacy of Clinical Education: Theories About Lawyering*, 29 CLEV. ST. L. REV. 555, 556 (1980).

36. *See generally* Nisha Agarwal & Jocelyn Simonson, *Thinking Like A Public Interest Lawyer: Theory, Practice, and Pedagogy*, 34 N.Y.U. REV. L. & SOC. CHANGE 455 (2010) (calling for legal education to engage law students in integrating theory and public interest practice and discussing areas, such as clinics, where this occurs).

1. *Early Social Change Lawyering Scholarship*

This section provides a brief overview of public interest lawyering theory, which is important to understand insofar as modern scholarship on lawyering utilizes principles from this body of work. A field of "public interest law" was articulated as such by the 1960s, when lawyers seeking to effectuate social change made careers out of litigating on behalf of clients through impact litigation and direct legal services.[37] Relatedly, clinical legal education was also popularized in the 1960s,[38] and soon thereafter, scholars started lodging critiques of the assumptions present in public interest lawyering practice and the methods employed by many who sought to enact social change through lawyering.[39]

By the 1980s and 90s, critical legal scholars[40] had begun to engage with questions around the effectiveness of and the power dynamics present in traditional public interest lawyering.[41] These scholars forcefully argued that lawyers seeking to create social change must go beyond taking cases affecting social injustice by employing practices and behaviors that seek to redress social hierarchies between attorneys and clients.[42] In doing so, these scholars asked lawyers to employ intentional practices related to social change goals and to engage in self-reflection on whether one's own practice aligned with such social justice goals.

A number of scholars from this era have had lasting impact on lawyering theory. One such scholar is Gerald López. In *Rebellious Lawyering*,[43] López provided a critique of lawyers who identified as seeking to create progressive social change but behaved in regressive ways that kept their client—a person

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37. ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE 3–7 (2013); *see also* Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 209 (1976). I use the term public interest law here to refer to liberal social change law and recognize that public interest law can encompass both conservative and liberal social change lawyering. Indeed, social change lawyering, and concepts discussed in this article such as movement lawyering, frequently occur in conservative lawyering, and scholarly attention to the commonalities and differences between these forms of lawyering is needed.

38. Charles E. Ares, *Legal Education and the Problem of the Poor*, 17 J. LEGAL EDUC. 307 (1965); Panel Discussion, *Clinical Legal Education: Reflections on the Past Fifteen Years and Aspirations for the Future*, 36 CATH. U. L. REV. 337, 340 (1987) (remarks of Dean Hill Rivkin).

39. *See, e.g.*, Richard Abel, *Socializing the Legal Profession: Can Redistributing Lawyers' Services Achieve Social Justice?*, 1 LAW & POL'Y Q. 5 (1979); Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); Gary Bellow, *Turning Solutions Into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 119 (1977); Rabin, *supra* note 37, at 209; Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970).

40. Goldfarb, *supra* note 35, at 722 (discussing how, much like critical legal studies, clinical legal theory "seek[s] to illuminate the assumptions, biases, values, and norms embedded in law's workings in order to heighten awareness of the political and moral choices made by lawyers and the legal system").

41. *See* Anthony V. Alfieri, *Inner-City Anti-Poverty Campaigns*, 64 UCLA L. REV. 1374, 1415–18 (2017) [hereinafter Alfieri, *Inner-City Anti-Poverty Campaigns*] (describing waves of anti-poverty scholars, with the first wave encompassing Wexler, among others, and the second wave encompassing scholars such as López, White, and others writing in the 1990s).

42. *See supra* note 39.

43. GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992).

lacking in economic, political, and social power—disempowered in society. López termed this prototypical lawyer the "regnant" lawyer.[44] He theorized that lawyers should orient their practice towards enhancing client agency and dignity, and coined the term "rebellious" lawyer to signify a lawyer who employs client-empowerment practices.[45] López's fundamental argument, from which his vision of rebellious lawyering and his critique of regnant lawyers emerged, was that "lawyering itself had to be remade as part of any effort to transform the world."[46] While not unrelated to ethical obligations, López's theory represents a normative approach to lawyering that is tethered to social change and a rejection of a model of lawyering that focuses on the provision of legal services for discrete legal problems.

2. *Intentionality and Self-Reflection*

Early social change lawyering theorists articulated two norms that are still prevalent in lawyering theory today: intentionality and self-reflection.[47] A key lesson from early social change lawyering theory is that the way lawyers engage in practice is not a foregone conclusion. Further, intentionality and self-reflection can have effects in the micro—the attorney-client relationship—and the macro—the pursuit of social change that improves oppressed peoples' lives.[48] In addition to calling for intentionality and self-reflection in law practice, lawyering theorists have defined the measures by which practitioners can assess their own success at reaching social change goals and social justice values.

As the following parts discuss, lawyering models propose intentional, external accountability as integral to social change lawyering. Lawyering scholars also argue that, in order to effect social change, lawyers must be intentional about who they serve as clients, what cases they take on, and how they make decisions. In one conception of the lawyering model, social change lawyering may imply that one should cease engaging in the traditional work of asserting rights on behalf of clients.[49] At the very least, it requires choosing one's methods—litigation, policy, non-legal actions—and one's clients—individuals, groups—with intentionality.

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44. Alfieri, *Inner-City Anti-Poverty Campaigns*, *supra* note 41, at 1420–22 (discussing López's "repudiation of conventional or 'regnant' styles of lawyering").

45. *Id*. at 1418.

46. LÓPEZ, *supra* note 43, at 3.

47. Other lawyering scholars have made similar claims to those made by López, arguing in the early 1990s that traditional public interest lawyering was ineffective in achieving a goal of empowerment for poor people. Like López, they employed a critique of lawyering that pointed out how lawyers identifying as progressive could be (and in fact were) regressive. *See, e.g.*, Anthony V. Alfieri, *Impoverished Practices*, 81 GEO. L.J. 2567, 2598–99 (1993); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 27–29 (1990).

48. *See* Alfieri, *Inner-City Anti-Poverty Campaigns*, *supra* note 41, at 1415–18; Piomelli, *supra* note 7, at 431–32 (describing the aims of lawyering theorists as "not simply to describe practice but to improve it"); *see also* Carolyn Grose, *Beyond Skills Training, Revisited: The Clinical Education Spiral*, 19 CLINICAL L. REV. 489, 493–97 (2013) (describing the role of intentionality in clinical pedagogy).

49. *See, e.g.*, Wexler, *supra* note 39, at 1049–55.

It naturally follows that any intentionality in legal practice, to succeed, must accompany practices of self-reflection. Early lawyering theorists, such as López, argued precisely that public interest lawyers should reflect on how lawyers' own practices may replicate regressive hierarchical relationships between lawyer and client.[50] Self-reflection in lawyering practice requires constant reassessment of whether the methods of accountability, the processes of decision-making, and the exercise of power in case and client selection further the values and goals the lawyer seeks to accomplish.

As designers of clinical legal courses and, in many cases, as lawyering scholars, clinical law faculty benefit from lawyering theory developments, as those developments translate into pedagogical tools in legal education, thereby enhancing clinical course design and clinical education goals.[51] And for law students who at most gain experience in lawyering models over two summers through summer internships, lawyering theory provides a frame through which to engage with principles for making career decisions.

Importantly, in the absence of continuing development of lawyering theory, we can and should expect that unintentional and unreflective lawyering will predominate in practice. For lawyers seeking to embark on social justice careers, this is consequential. Models of lawyering can help guide lawyers in decision-making, relational patterns, and behavior modification. Such models can animate choice of legal arguments based on their potential impact on the social movement the lawyer seeks to support beyond a particular case. Indeed, intentionality and self-reflection matter not just as abstract goals of social justice lawyering, but also in practical terms of reaching social justice goals and effectuating social justice values. Simply stated, lawyering models matter.[52]

B. *Lawyering Theory in Immigration Law*

Early lawyering scholars focused their critiques and normative arguments on public interest law generally, and lawyering theory in immigration law reflects scholarly trends in public interest lawyering more broadly. However, several models of lawyering have captured the attention of immigration lawyering scholars. Broadly speaking, after rebellious lawyering became praxis for clinical educators and emerging public interest lawyers, lawyering theory turned to explore the relationship between lawyers and organized

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50. Alfieri, *Rebellious Pedagogy and Practice*, *supra* note 32, at 14 ("[R]ebellious lawyering reconceives [] standard subject-object roles and hierarchical dominant-subordinate relationships.").

51. As Alfieri argues, scholars and practitioners should view lawyering theories—such as rebellious lawyering—as evolving ideas that call for continued revision of their application to practice. *See id.* at 7.

52. Although I contend here that lawyering models, and lawyering practice, are consequential, it is worth acknowledging that lawyering is often carried out collaboratively with non-lawyers, and thus the practices of non-lawyers would similarly be of import to effectuating social change goals. In addition, lawyers regularly engage in activities that are not strictly legally-oriented, such as legislative or media advocacy, and there is nothing particular about the profession that should limit the conversation of social-change-seeking practices to only lawyers.

communities. This type of lawyering, which grew in popularity in immigration lawyering practice, is typically referred to as law and organizing.[53]

Since the early 1990s, lawyering scholars writing about immigration lawyering have delved into two models of lawyering: community lawyering and movement lawyering. The immigrant worker center led scholars and practitioners to explore community lawyering, a model exemplified by a lawyer who seeks to work collaboratively with communities,[54] as opposed to one that focuses simply on providing legal services to a receiving set of individuals. The movement lawyering model shares much in common with community lawyering but reflects the practices that emerge when working across geographical boundaries and with multiple community groups. Both models share tenets of accountability to the community as opposed to only individuals, priority-setting by non-lawyers, and case selection that is influenced by outside mobilized groups.

1. *Community Lawyering*

Community lawyering arose in the 1990s as a model of lawyering that deliberately prioritized community empowerment over lawyer-driven goal setting.[55] One of the preeminent examples of the community lawyering model is the Workplace Project, a legal organization founded by Jennifer Gordon that provided legal assistance to Latinx immigrant workers in New York. The Workplace Project diversified previously existing methods lawyers used to advance social change in the law.[56] Instead of simply delivering legal assistance, the Workplace Project asked potential clients to take a

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53. Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 447 (2001); Michael Grinthal, *Power With: Practice Models for Social Justice Lawyering*, 15 U. PA. J.L. & SOC. CHANGE 25, 33 (2011) ("[L]awyers who seek to build countervailing power must work with people who are in the process of transforming themselves from atomized and dispersed to organized and powerful."). Cummings and Eagly describe the birth of law and organizing as a "revitalized approach to progressive legal practice" after the critique of litigation-focused lawyering in the 1980s.

54. Of course, a 'community' is indeterminate, and it will often be lawyers who decide who is included in the community the lawyer strives to work with or serve. In this way, despite models of lawyering that seek to alter power dynamics between lawyers and clients, a lawyer retains an immense amount of power in determining who is the 'community' that she seeks to serve and therefore will benefit from that lawyer's resources.

55. Scott L. Cummings & Ingrid V. Eagly, *After Public Interest Law*, 100 NW. U. L. REV. 1251, 1268 (2006) [hereinafter Cummings & Eagly, *After Public Interest Law*] (describing public interest lawyering, from which community lawyering diverged, as "advanc[ing] a lawyer-defined reform agenda using impact lawsuits to build legal precedent"); *see also* Gemma Donofrio, *Exploring the Role of Lawyers in Supporting the Reproductive Justice Movement*, 42 N.Y.U. REV. L. & SOC. CHANGE 221, 239–40 (2018).

56. *See* Cummings & Eagly, *After Public Interest Law*, *supra* note 55, at 1257–59 (2006) (describing the "central focus" of the organization as "the promotion of organizing by immigrant workers themselves"); *see generally* Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407 (1995). Cummings and Eagly describe the Workplace Project as the second wave of worker centers, the first wave arising in the 1970s and 1980s when immigrant workers turned to worker centers as a result of being shut out of the labor movement. Cummings & Eagly, *After Public Interest Law*, *supra* note 55, at 1267.

course on workers' rights.[57] Rather than offering standard know-your-rights sessions through lectures, staff at the Workplace Project organized discussions between workers aimed at contextualizing individual work problems within a broader context.[58] By instilling a norm that clients actively participate in the course of representation, designed to empower them to advocate for themselves, the Workplace Project employed a vision of lawyering for social change meant to, over time, place lawyering in a subordinate role.[59] This model of lawyering is not unique to workers' rights, and immigrant rights organizations have employed it as well outside of the labor and employment context.[60]

A defining aspect of community lawyering is case selection that prioritizes community over individual. To this end, the Workplace Project made legal assistance contingent on community participation on workers' rights issues. Clinical law professors began forming clinics that, based on this model of lawyering, sought to represent community organizations with the goal of advancing their agendas.[61] Clinics such the New York University Immigrant Rights Clinic and the City University of New York Immigrant and Refugee Rights Clinic used this model, working with worker centers to seek improved working conditions for immigrant worker communities.[62] These two clinics, among others, supported organizing efforts of Restaurant Opportunities Center of New York (ROC-NY), a community organization devoted to improving conditions for restaurant workers.[63]

Community lawyering introduced an approach to case selection that deviates from traditional legal services or impact litigation models. By engaging in policy advocacy or supporting organizing outside of asserting legal claims in court, community lawyering distinguished itself from traditional lawyering. Public interest litigation for decades had relied more on litigation to achieve reforms to the law.[64] By contrast, community-focused lawyering sought to enact social change outside of litigation. This type of community-

57. Gordon, *supra* note 56, at 434, 440–43. For the Workplace Project, the prioritization of providing legal services for participants in programming stemmed from its view of social change, including its critique of traditional legal services. *See id*.

58. *Id*. at 435–36; *see also* Cummings & Eagly, *After Public Interest Law*, *supra* note 55, at 1267.

59. Cummings & Eagly, *After Public Interest Law*, *supra* note 55 at 1258–59.

60. For example, two notable organizations using the community lawyering model and for which the scope of work expands beyond immigrant worker issues to immigrant rights more broadly are Make the Road New York and the National Day Labor Organizing Network. *See* MAKE THE ROAD NEW YORK, https://maketheroadny.org/ (last visited Apr. 12, 2020); NAT'L DAY LABORER ORG. NETWORK, https://www.ndlon.org (last visited Apr. 12, 2020).

61. Ashar illustrates how law clinics may be designed with goals of community lawyering in mind. Ashar, *Law Clinics and Collective Mobilization*, supra note 34, at 356 ("The clinic would both support the project of organizing the unorganized and condition the provision of services to communities on the establishment of collectives.").

62. Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879, 1893, 1897–98 (2007) [hereinafter Ashar, *Resistance Movements*].

63. *Id*. at 1897–98; *see generally Mission*, RESTAURANT OPPORTUNITIES CTRS. UNITED, https://rocunited.org/mission/ (last visited Apr. 3, 2020).

64. Ashar, *Resistance Movements*, *supra* note 62, at 1895–98.

focused lawyering emerged as lawyers and scholars began to critique litigation and its limits. Community lawyering holds the view that marginalized communities could themselves create social change, and thus the aim of a social change lawyer should be to empower those communities.[65]

Because community lawyering is based on a view that marginalized communities themselves should be the primary actors in effecting social change, the community lawyering model has significant implications for lawyer decision-making and accountability. In community lawyering, priority setting and decision-making happens by decentering the lawyer, instead centering the community that the lawyer seeks to serve. At the Workplace Project, that community is immigrant workers; therefore, the Workplace Project membership set the reform agenda that guided lawyers' work.[66]

Community lawyering responds to the critique of other lawyering models that lack a system of accountability to communities, reflecting López's view that the regnant lawyer fails to empower the client.[67] Proponents of the model hold the view that accountability to mobilized groups, as opposed to individuals, increases effectiveness because organizations may work with lawyers several times (as opposed to individuals who rarely do so), thereby increasing avenues for questioning of lawyers' methods.[68] As a result, lawyers are more likely to empower the clients they serve because the community is holding the lawyers accountable.

2. *Movement Lawyering*

More recently, movement lawyering has emerged in lawyering scholarship about immigration lawyering.[69] Much like community lawyering, legal scholarship on movement lawyering is not unique to immigration law.[70] Movement lawyering in many ways resembles community lawyering, and is arguably an outgrowth of the latter.[71] However, while they share some important characteristics, movement lawyering uniquely calls for lawyers to be

65. *See id*. at 1906–07.

66. *See* Cummings & Eagly, *After Public Interest Law*, *supra* note 55, at 1268.

67. *See* Sameer M. Ashar, *Law Clinics and Collective Mobilization*, *supra* note 34, at 356 (critiquing clinical legal education for lacking accountability to clients and communities and proposing clinic design that would promote accountability between law clinics and clients and communities).

68. *Id*. at 408.

69. Ashar's description of lawyering in support of ROC-NY's organizing campaign can be seen as a nascent scholarly work on movement lawyering in immigration law, although he does not use the term until later work. *See* Ashar, *Resistance Movements*, *supra* note 62, at 1880.

70. *See* Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1646–47 (2017) [hereinafter Cummings, *Movement Lawyering*] (describing the re-ignition of movement lawyering as inspired by activism in immigrant and labor rights as well as LGBT rights, economic justice, and climate change, among other issues); *see also Mission*, MOVEMENT LAW LAB, https://movementlawlab.org/mission (last visited Apr. 12, 2020) (outlining the organization's mission of supporting movement lawyers working on racial justice).

71. In addition, lawyering in practice may entail multiple models of lawyering at once, and while I describe these lawyering models separately, a lawyer's practice could be fluid and have attributes of both.

accountable to and follow the guidance of organized groups, which may include multiple community organizations.[72]

One of the markers of movement lawyering is priority setting by social movement actors, consistent with the way in which community lawyering decenters lawyers in the process of goal setting.[73] Lawyers aiming to practice movement lawyering commit to building up power in an oppressed community by helping it enhance its ability to exert influence.[74]

Movement lawyers hold themselves accountable to social movements.[75] However, according to Sameer Ashar, accountability is not uni-directional. He argues that accountability in movement lawyering "requires an internalized commitment on the part of lawyers to accept clients' methods and goals and a corresponding trust and openness on the part of activists toward their lawyer-collaborators."[76] Stated another way, accountability is a relationship requiring commitment from both legal and non-legal actors.

Movement lawyers also engage in deep reflection upon themselves and the profession in order to challenge their assumptions and better meet the needs of oppressed communities.[77] They must learn organizing methods and strategies, develop skills outside litigation, and carry a deep sense of humility in their work.[78] Movement lawyering is by definition experimental, driven by its goals but not married to a set of structures or practices.[79] Similar to community lawyering, the lawyering activities in the movement lawyering model do not strictly pertain to formulating legal arguments or courtroom or written advocacy. In the movement lawyering model, lawyers advise social movements, engage in policy advocacy, and provide community education.[80]

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72. Susan D. Carle & Scott L. Cummings, *A Reflection on the Ethics of Movement Lawyering*, 31 GEO. J. LEGAL ETHICS 447, 448–49 (2018) [hereinafter Carle & Cummings, *A Reflection on the Ethics of Movement Lawyering*].

73. Cummings, *Movement Lawyering*, *supra* note 70, at 1690 (describing movement lawyering as cause lawyering where "the cause is defined and advanced by social movement leaders"); *see also* Betty Hung, *Movement Lawyering as Rebellious Lawyering: Advocating with Humility, Love and Courage*, 23 CLINICAL L. REV. 663, 664 (2017).

74. *See* Sameer M. Ashar, *Deep Critique and Democratic Lawyering in Clinical Practice*, 104 CALIF. L. REV. 201, 223–24 (2016); Jim Freeman, *Supporting Social Movements: A Brief Guide for Lawyers and Law Students*, 12 HASTINGS RACE & POVERTY L.J. 191, 196 (2015).

75. *See* Carle & Cummings, *A Reflection on the Ethics of Movement Lawyering*, *supra* note 72, at 448–49. Others, such as Ashar and Hung, share Carle and Cummings' view that movement lawyering requires a relation of accountability. *See* Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464, 1497–98 (2017) [hereinafter Ashar, *Movement Lawyers in the Fight*] (arguing that "the theory of social change advanced by movement lawyers relies on the deployment of legal tactics that emphasize the development of grassroots and activist agency in justice campaigns"); Hung, *supra* note 73, at 664 (defining movement lawyering as "[l]awyering that supports and advances social movements, defined as the building and exercise of collective power, led by the most directly impacted, to achieve systemic institutional and cultural change").

76. Ashar, *Movement Lawyers in the Fight*, *supra* note 75, at 1504.

77. *See* Freeman, *supra* note 74, at 197–98.

78. *Id*. at 200–01; *see also* Carle & Cummings, *A Reflection on the Ethics of Movement Lawyering*, *supra* note 72, at 452 (defining movement lawyering both by the existence of accountability between lawyers and social movement groups and by the multi-faceted and at times informal approach to lawyering it generates).

79. *See* Alfieri, *Inner-City Anti-Poverty Campaigns*, *supra* note 41, at 1440.

80. Cummings, *Movement Lawyering*, *supra* note 70, at 1691.

Ashar provides a detailed account of movement lawyering in connection to the undocumented immigrant youth movement between 2009 and 2012. During this time, Dreamers sought both affirmative immigration relief and to halt immigration enforcement programs that further connected the criminal and immigration law systems.[81] As Dreamer activists mobilized into strong social organizations and grew dissatisfied with Congress's failure to pass the DREAM Act in 2010, they turned to other forms of advocacy and developed relationships with lawyers.[82] At the same time, Dreamers campaigned against the use of criminal law enforcement information by immigration authorities.[83]

Ashar's account of movement lawyering during this time illustrates how the rise or prominence of one lawyering model does not imply the decline of another. At the same time that Dreamers were working with movement lawyers, other lawyering organizations that also sought to advocate for immigrant communities employed different lawyering strategies. According to Ashar, non-movement lawyers working in immigrant rights at the time lacked the type of relationship to movement actors that movement lawyers had developed.[84] As such, while movement and non-movement lawyers worked simultaneously, they did not work similarly. They also did not work in parallel. The immigrant youth movement and its demands came to inform more institutional organizations, even though those organizations are not based on a movement lawyering model.[85] Specifically, Dreamers' opposition to criminalization in turn affected how institutional organizations viewed the organization's goals in broader reform advocacy.[86]

While the wide breadth of lawyering in recent years shows how lawyering in immigrant rights has not transitioned from a particular model to another one, the prevalence of community lawyering and movement lawyering today is markedly different than the situation a few decades ago. Furthermore, the presence of a strong immigrant rights movement—led by young immigrants—is indisputable. However, this raises additional questions: how are legal strategies employed, and what relationships do various legal actors involved in immigrant rights lawyering have with social movement actors?

C. *Criminal Defense Lawyering*

Similarly, lawyering theory in criminal defense has been affected by practitioners' and scholars' calls in recent decades to focus on attorney-client power dynamics. Over this time, some have called for models that are client-

81. Ashar, *Movement Lawyers in the Fight*, *supra* note 75, at 1498–99.
82. *Id*. at 1498–1502.
83. *See id*. at 1500–01.
84. *Id*. at 1497–98 (describing the simultaneous lawyering activities by movement lawyers and other immigrant rights lawyers).
85. *Id*. at 1505.
86. *Id*.

driven and seek to address underlying circumstances of behavior that contribute to criminal legal system involvement. In the past two decades, a few scholars and practitioners in criminal law have moved toward advocating a community-oriented model of lawyering. Still, the growth of community involvement in public defense has lagged behind that of other criminal system actors—prosecutors, police forces—who began touting community involvement as necessary to their functions.[87] Social movement lawyering scholarship in criminal defense is nascent[88] but is finding force in the participatory defense community organizing model. Yet, whether recent calls for greater attention to social movements in lawyering spaces will be attended to in criminal law is still unknown.[89]

The trajectory of lawyering theory in criminal law shares some characteristics with that of immigration law, but also has some meaningful differences. Since at least the 1990s, scholars in both fields have argued for increased accountability to clients, communities, and mobilized groups. Perhaps unsurprisingly, however, criminal defense lawyering theory has focused more on individual representation, and the scholarship on defense lawyering and social movements is much more recent than in immigration law or civil law generally. Some scholars have theorized that criminal defense belongs to a separate sphere from social change lawyers working with mobilized communities.[90] Moreover, others have noted the challenges of collective action in criminal defense, although this has largely focused on whether ethical considerations limit attorneys from encouraging collective action by clients in criminal proceedings.[91] The defensive nature and time constraints of criminal proceedings also make challenging the development of similar strategies to

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87. Kim Taylor-Thompson, *Taking It to the Streets*, 29 N.Y.U. REV. L. & SOC. CHANGE 153, 155 (2004).

88. Scholarship on movement lawyering within the broader criminal law context does exist, such as scholarship documenting lawyering in support of the Movement for Black Lives. *See* Justin Hansford, *Demosprudence on Trial: Ethics for Movement Lawyers, in Ferguson and Beyond*, 85 FORDHAM L. REV. 2057, 2072–79 (2017). A few organizations or networks explicitly identify as practicing a movement lawyering model in criminal legal system reform. *See About*, ABOLITIONIST LAW CTR., https://abolitionistlawcenter.org/about/ (last visited Apr. 12, 2020); *Home*, LAW FOR BLACK LIVES, http://www.law4blacklives.org/#home-section (last visited Apr. 12, 2020).

89. Amna A. Akbar likely makes the most explicit call for the legal academy to study social movements such as the Black Lives Matter movement and how these movements challenge legal systems. *See* Amna A. Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 354 (2015). More recently, Daniel Farbman uses the term "resistance" lawyering to offer suggestions rooted in slavery abolitionist lawyering to today's criminal defense attorneys, but does so without addressing whether "resistance" lawyering and movement lawyering share similarities. Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1948 (2019).

90. *See, e.g.*, Anna-Maria Marshall & Daniel Crocker Hale, *Cause Lawyering*, 10 ANN. REV. L. & SOC. SCI. 301, 308 (2014).

91. *See, e.g.*, John H. Blume, *How the "Shackles" of Individual Ethics Prevent Structural Reform in the American Criminal Justice System*, 42 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 23, 30–34 (2016); Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1196–98 (2005). *But see* Marisol Orihuela, Amici Brief, *The Ethics of Collective Action in "Zero Tolerance Prosecutions"*, OHIO ST. J. CRIM. L., Feb. 1, 2019, *available at* https://moritzlaw.osu.edu/osjcl/wp-content/uploads/sites/123/2019/03/AmiciBriefFinal19.pdf; Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012), https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-

those seen in civil community and movement lawyering, like using nontraditional forms of advocacy and employing social change strategies or choosing not to act at all.[92]

1. *Client-centered Representation and Holistic Defense*

Client-centered lawyering, adopted into legal practice from the psychology field, entered legal education by the late 1970s and became a norm in practice within a few decades.[93] Although early scholarship in client-centered lawyering applied to both civil and criminal law, much lawyering scholarship specific to criminal defense has focused on this model of lawyering.[94] In criminal defense, the move toward a client-centered model represented a critique somewhat analogous to that of López's rebellious lawyer and the regnant lawyer. Client-centered lawyering places as paramount the client's expertise and desires, whether informed by legal or non-legal considerations.[95] For criminal defense attorneys, practicing client-centered lawyering entails learning to understand and respect decision-making that may run counter to the attorneys' assumptions of best results.[96] Scholars of lawyering still advocate today for lawyering models based on client-centered representation.[97]

Many lawyers become public defenders out of a desire for social change.[98] However, not until the 1990s did lawyering theory delve into the relationship between criminal defense and social change.[99] The development of holistic representation offered a model of lawyering that sought to address underlying

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system.html (arguing that collectively asserting the right to trial would crash the judicial system, forcing some reform).

92. CHEN & CUMMINGS, *supra* note 37, at 207–08 ("Because of the nature of the criminal process, this type of litigation is generally reactive—defending the rights of the accused—making it less subject to the type of carefully orchestrated social change strategizing that characterizes affirmative public interest litigation in the civil context.").

93. Susan D. Carle, *Power As A Factor in Lawyers' Ethical Deliberation*, 35 HOFSTRA L. REV. 115, 128 (2006); John B. Mitchell, *Narrative and Client-Centered Representation: What Is A True Believer to Do When His Two Favorite Theories Collide?*, 6 CLINICAL L. REV. 85, 97 n.49 (1999). *But see* Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1, 5 (1998) (noting empirical study results revealing limited adoption of client-centered lawyering in the late 1990s).

94. *See* M. Chris Fabricant, *Rethinking Criminal Defense Clinics in "Zero-Tolerance" Policing Regimes*, 36 N.Y.U. REV. L. & SOC. CHANGE 351, 356 (2012) (describing current criminal defense clinical pedagogy as teaching a client-centered model of representation); *see also* William M. Kunstler, *Lawyers' Ethics in an Adversary System. By Monroe Freedman*, 4 HOFSTRA L. REV. 895 (1975); Uphoff & Wood, *supra* note 93 (conducting an empirical survey of public defender offices to assess the application of client-centered lawyering).

95. *See* Monroe H. Freedman, *Client-Centered Lawyering—What It Isn't*, 40 HOFSTRA L. REV. 349, 350–51 (2011).

96. Mitchell, *supra* note 93, at 98–99 ("I came to respect that some wanted to plead guilty in a case I thought I could win because they risked losing their jobs if they had to keep coming to court, or they didn't want to involve their family in a public court proceeding, or such.").

97. *See* Fabricant, *supra* note 94, at 355–58 (noting how current pedagogy focuses on client-centered lawyering); Jonah A. Siegel et al., *Client-Centered Lawyering and the Redefining of Professional Roles Among Appellate Public Defenders*, 14 OHIO ST. J. CRIM. L. 579, 580 (2017).

98. Etienne, *supra* note 91, at 1200–01.

99. *See, e.g.*, Blume, *supra* note 91, at 27–28; Etienne, *supra* note 91, at 1200–01.

circumstances that contributed to individuals' involvement with the criminal system, thus seeking to reduce such involvement by helping clients address needs beyond those involved in the criminal procedure of a prosecution.[100] Holistic lawyering practice began in lawyering practice,[101] as opposed to originating in scholarly works, but has garnered scholarly attention and has since spread as a popular model of providing indigent criminal defense.[102]

The rise of holistic defense as an indigent defense model of representation marks an inflection point, from critique of public defender systems as hamstrung in creating meaningful social change to a positive model for addressing social change needs through defense representation. Holistic lawyering is based on a view that "criminal behavior" has underlying causes and contributing factors that, if addressed, could reduce both the impact the criminal system has on a defendant and negative consequences other than conviction and sentencing. Based on this view, indigent defense organizations seek to represent individuals charged with criminal offenses in a manner that addresses needs beyond those defined by the criminal process. Furthermore, the individuals involved in the representation include those who can support various aspects of the representation.

Holistic lawyering was born out of a recognition that the problems individuals charged with criminal offenses face—a conviction and greater social control as a result—are related to other problems that merited attention simultaneously or with intentional coordination.[103] Holistic lawyering aims to address, for example, housing instability for individuals whose criminal system involvement followed from homelessness. Or, if an individual faced charges due to substance use disorder, a holistic lawyering organization would seek to find ways to provide treatment to that client. Advocates of this model argue that holistic defense can serve social-change purposes in the form of minimizing the impact the criminal system has on affected

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100. Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1067 (2004).

101. The origins of holistic lawyering are unclear and somewhat debated. Among the organizations that identify as implementing a holistic defense practice in the early 1990s are the Neighborhood Defender Services of Harlem, the Bronx Defenders, the Roxbury Defenders, and possibly the Public Defender Services.

102. *See* Cynthia G. Lee et al., *The Measure of Good Lawyering: Evaluating Holistic Defense in Practice*, 78 ALB. L. REV. 1215, 1216 (2015) (calling holistic defense lawyering "the most comprehensive statement to date of what defines the effective assistance of counsel for criminal defendants"). Lee notes, however, that the holistic model is not universally accepted as a preferred model of lawyering, and its critics argue that the model renders even thinner the scarce resources available to indigent defendants and can present ethical challenges. *Id.* at 1217.

103. *See Neighborhood Defender Services of Harlem: Who We Are*, LAWHELPNY, https://www.lawhelpny.org/organization/neighborhood-defender-service-of-harlem?ref=C6GKV (last updated Dec. 3, 2014) ("A core aspect of our holistic approach to public defense is a commitment to search for the underlying issues that bring our clients into contact with the criminal justice system, and providing comprehensive social service support to avoid or minimize future problems. Furthermore, when our clients face collateral consequences with their employment, schooling, or in family, housing, or immigration court, NDS strives to help our clients resolve those issues, either through direct representation or referrals to appropriate service providers.").

individuals, reducing recidivism,[104] and increasing access to information about systemic problems in the criminal and related systems.[105]

Some scholars have argued that holistic representation is not an extension of traditional public defender services to a broader set of services, but rather an ideology constantly seeking to redefine the role of lawyers in criminal defense.[106] And while holistic defense has become a popular model in indigent defense broadly,[107] it has not been incorporated in all aspects of defense systems.[108]

2. *Community-Oriented Defense*

Following the rise of the holistic lawyering model of defense, some defense organizations and politicians began exploring the use of community-based practices in criminal defense, seeking to effect social change through this lawyering model.[109] These practices include developing networks with community actors such as activists, services providers, and others in the communities served by the organization.[110] Community-oriented defense can also entail supporting community organizing or engaging in community education.[111] In some instances, these practices overlapped with organizations that based their practices on the holistic lawyering model.[112] One such example is the Bronx Defenders, a public defense organization that began implementing a number of community-facing activities, such as organizing street fairs and teaching debate skills to high school students.[113] In other instances, specific units within broader indigent defense organizations were modeled on community-oriented principles. The Seattle Defender Association created a unit that specifically focused on racial disparities and collaborated with

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104. *See, e.g.*, James M. Anderson et al., *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 HARV. L. REV. 819, 821–22 (2019).

105. Katherine E. Kinsey, Note, *It Takes A Class: An Alternative Model of Public Defense*, 93 TEX. L. REV. 219, 244–45 (2014).

106. *See, e.g.*, Pinard, *supra* note 100, at 1068.

107. Although the vast majority of legal scholarship on holistic lawyering focuses on criminal defense, the concept itself is not only applicable to criminal law; the model could, and in practice probably does, apply to immigration lawyering. *See generally* Andrés Dae Keun Kwon, *Defending Criminal (Ized) "Aliens" After* Padilla*: Toward a More Holistic Public Immigration Defense in the Era of Crimmigration*, 63 UCLA L. REV. 1034 (2016).

108. *See* Siegel et al., *supra* note 97, at 580 ("Although client-centered lawyering has gained enormous popularity in trial-level public defender offices across the United States, appellate-level defender offices have been slower to embrace the shift.").

109. The Brennan Center cites the development of community-oriented defense as "Community-oriented defenders are drawing on the resources and expertise of communities to make neighborhoods safe and the system more just." *Community-Oriented Defense Fact Sheet*, BRENNAN CTR. FOR JUSTICE (Feb. 1, 2002), https://perma.cc/8YBT-6Q87.

110. Taylor-Thompson, *supra* note 87, at 179.

111. Taylor-Thompson describes the Seattle Defender Association as a case study in community-oriented practices, citing, *inter alia*, the work the organization did supporting community organizing on car impoundment policies and its practice of going to college campuses for community education. *Id*. at 181–91.

112. BRENNAN CTR. FOR JUSTICE, *supra* note 109 (citing examples of public defender offices participating in community-oriented activities).

113. Pinard, *supra* note 100, at 1072 n.18.

community members in local campaigns to reduce racial disparities in criminal system enforcement.[114] By 2003, the National Legal Aid and Defender Association (NLADA) formed a community-oriented defense network and annually hosts a conference to provide training and networking opportunities on community-oriented defense.[115] Community-oriented defense intersects with holistic representation.[116] The NLADA, for example, provides a guide of best practices that community-oriented defenders can adopt. These best practices include those central to the holistic representation model, such as identifying client needs beyond prosecutorial defense, addressing civil legal needs, and using multidisciplinary approaches to representation.[117]

Although lawyering theorists during this time expressed the view that community empowerment is necessary for social change, several factors may limit its application in existing indigent defense organizations. One such factor is the view by some that criminal defense can be at odds with community-based goals, with scholars acknowledging the potentially complicated nature of serving individual defendants while incorporating community-based practices.[118] In addition, public defender offices are largely underfunded, and a public defender may carry hundreds of active cases on his or her caseload at a single moment.[119] Increasing workload beyond individual representation to community-oriented activities can therefore raise funding and, potentially, ethical concerns if community-oriented activism interferes with providing quality representation to individual defendants.[120]

Community-oriented defense, like holistic defense, has caused role redefinition or role expansion in defender offices practicing that model. For example, the Bronx Defenders have blurred the defense-plaintiff boundary by becoming involved as plaintiff counsel to a class action challenging New York City's "stop and frisk" practice and eventually forming an affirmative

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114. Taylor-Thompson, *supra* note 87, at 183–94 (discussing the formation of a unit in the Seattle Defender Association based specifically on a community-oriented model).

115. *See Community Oriented Defender Network*, NAT'L LEGAL AID AND DEFENDER ASS'N, http://www.nlada.org/community-oriented-defender-network (last visited Apr. 12, 2020) [hereinafter NLADA, *Community Oriented Defender Network*]; *2020 Holistic Defense & Leadership Conferences*, NAT'L LEGAL AID AND DEFENDER ASS'N, http://www.nlada.org/2020VirtualHDLC (last visited Apr. 12, 2020) (discussing the Community-Oriented Defender (COD) Network Annual Conference).

116. Some scholars have in fact used the terms interchangeably. *See, e.g.*, Lee et al., *supra* note 102, at 1216 ("Holistic defense, also known as . . . community oriented defense . . . ."). Unsurprisingly, some of the organizations engaging in community-oriented practices are based on the holistic defense model and are part of the Community Oriented Defense Network, according to the Brennan Center, but each maintains overlapping yet distinct goals and values on which the models are based. *See* CMTY. JUSTICE INST., BRENNAN CTR. FOR JUSTICE, TAKING PUBLIC DEFENSE TO THE STREETS 2–3 (2002) [hereinafter TAKING PUBLIC DEFENSE TO THE STREETS], *available at* https://www.brennancenter.org/sites/default/files/2019-08/Report_Taking_public_defense_streets.pdf ("Community-oriented defense can take a variety of forms and can serve a defense function, a 'holistic' or 'client-centered' function, or a policy advocacy/systemic reform function.").

117. *See* NLADA, *Community Oriented Defender Network*, *supra* note 115.

118. *See* Taylor-Thompson, *supra* note 87, 176–77.

119. *See* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1045–59 (2006).

120. *See* Taylor-Thompson, *supra* note 87, 176–77.

litigation unit.[121] The Federal Defenders of New York have done the same, challenging conditions of confinement at the federal jail in Brooklyn, New York.[122] These suits resemble civil law impact litigation aimed at creating social change in the criminal defense space, as is practiced by organizations like the Southern Center for Human Rights and the American Civil Liberties Union (ACLU).[123]

3. *Participatory Defense*

Most recently, participatory defense has emerged within the criminal defense lawyering discourse, and while mainly a community organizing model, it merits discussion as a lawyering model.[124] The participatory defense movement directly seeks to create social change within the criminal justice system by addressing systemic problems in the criminal system while further reducing the power imbalance between defense attorneys and their clients.[125] While it has been in existence for less than ten years, the movement has grown significantly since taking root in San Jose, California.[126] It represents the model most closely resembling movement lawyering in the criminal defense area.

Using community-organizing principles, the participatory defense movement engages families of individuals charged with criminal offenses in advocacy. Families of charged individuals form networks of support and advocacy and proactively seek involvement in the judicial process affecting defendants by participating in court watching, advocating for bail, and developing mitigation evidence.[127] They also advocate to have a role with the legal defense of the criminal process.[128] Practically speaking, family members and others help develop mitigation evidence and conduct fact investigation[129] and

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121. Kinsey, *supra* note 105, at 220.

122. *See* Larry Neumeister & Michael R. Sisak, *Lawsuit: Power Failure at Federal Jail a Humanitarian Crisis*, ASSOCIATED PRESS (Feb. 4, 2019), https://www.apnews.com/9dc64e47cb0a4bdcaaecb32e08d47e30.

123. *See* Kinsey, *supra* note 105, at 221–22, 241–44.

124. *See About*, PARTICIPATORY DEFENSE, https://www.participatorydefense.org/about (last visited Apr. 6, 2020). Participatory defense, as described by its founder, is a community organizing model. As such, it may seem odd to discuss it as a model of lawyering. However, the model has grown within lawyer organizations. At least one public defender office identifies as using a participatory defense model. *See Participatory Defense*, NASHVILLE PUBLIC DEFENDERS, https://publicdefender.nashville.gov/defend-nashville-initiative/participatory-defense/ (last visited Apr. 6, 2020). As such, it may be that—while aimed primarily to serve community organizing goals—lawyers may employ participatory defense principles. For this reason, this article discusses participatory defense as a lawyering model.

125. *See* Liana Pennington, *An Empirical Study of One Participatory Defense Program Facilitated by a Public Defender Office*, 14 OHIO ST. J. CRIM. L. 603, 604 (2017).

126. *Id.*; *see also National Participatory Defense Network*, PARTICIPATORY DEFENSE, https://www.participatorydefense.org/hubs (last visited Apr. 6, 2020).

127. *See* Pennington, *supra* note 125, at 607–08 ("Many public defender offices are chronically underfunded and cannot employ investigators, case advocates, social workers, or other professional support staff to help with case development and mitigation."); *see also* Raj Jayadev, *Why We Must Teach Law to Those Who Need It Most*, TIME (June 29, 2015), http://time.com/3940588/nonprofit-teaching-law-defense-families/ [hereinafter Jayadev, *Why We Must Teach Law*].

128. *See* Jayadev, *Why We Must Teach Law*, *supra* note 127.

129. *Id.*

also work with defense attorneys and defendants to ensure a greater understanding of the criminal prosecutorial process. The movement does not focus solely on the criminal process, however. Family and community members meet without legal advocates,[130] as the goal is not to take information from the lawyer but to develop knowledge from the community space and advocate for its participation in the criminal system. While part of the movement's aim is to shape how criminal defense works, it also strives to fundamentally restructure the role of community members in the criminal process.[131]

The participatory defense movement distinguishes itself from holistic defense, community-oriented defense, and client-centered representation as a result of its roots in community organizing. Proponents claim that these roots provide insights unavailable through the other models of representation.[132] Informed by these roots, participatory defense has a relationship to social change that is broader than the other models discussed. It seeks to enact a democracy-enhancing vision of criminal justice, where an increase in community self-governance is the catalyst for reducing the impact of the carceral state.[133] One prong of the movement's activities—advocacy for systemic change—is notably different than models that have been developed by and for lawyers. Community members protest defense attorneys' mishandling of a case and meet with local defense organizations to advocate for better policies by those organizations.[134] For example, when a defense organization failed to provide representation at arraignment when individuals charged with misdemeanors were entitled to it, movement members met with the leadership of the local defender organization to advocate for change.[135] In that manner, participatory defense seeks to alter the landscape of empowered stakeholders in the criminal system reform movement.[136]

The growth of the participatory defense movement challenges assumptions that community organizing is incompatible with criminal defense. It facilitates reflection about how organizing could be better incorporated into models of criminal defense lawyering. Importantly, the success of this model

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130. *See* Janet Moore et al., *Make Them Hear You*: *Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1285 (2015); *see also* Raj Jayadev & Pilar Weiss, *Organizing Towards a New Vision of Community Justice*, LAW AND POLITICAL ECONOMY (May 9, 2019), https://lpeblog.org/2019/05/09/organizing-towards-a-new-vision-of-community-justice/.

131. Moore et al., *supra* note 130, at 1282–83 (describing as a part of participatory defense "protest and celebrations, through which community members expose systemic flaws, force systemic change, and honor transformational successes"). In this movement, through weekly meetings and active participation in the criminal system, family and other community members develop networks and relationships and take leadership positions in the coordination of the actions the participatory defense organization takes, directly altering the power relationship between defense attorneys and affected individuals in the criminal system. *See* Jayadev & Weiss, *supra* note 130.

132. Moore et al., *supra* note 130, at 1281–83.

133. *See id*. at 1282.

134. *Id*. at 1288.

135. *Id*.

136. *Id*. at 1289 ("Participatory defense can trigger exponentially greater change—indeed, a cataclysmic shake-up of the criminal justice system—by adding a huge number of strong new voices to the criminal justice reform movement.").

depends on the presence of family and community members who want to participate in the criminal system; absent this, there are considerable limitations on organizing in criminal defense.[137]

III. THE EVOLUTION OF CRIM-IMM IN SOCIAL MOVEMENTS AND IN LAWYERING

While lawyering scholarship in criminal law and immigration law have developed independently from each other, social movements and lawyering practice defy a boundary between these two areas of law.[138] In social movements and in lawyering practice, the distinction between the two fields has increasingly blurred, if not disappeared. Lawyers across the country consistently practice at the intersection of criminal and immigration law. In criminal proceedings, they advise clients of potential immigration consequences[139] or challenge prior deportation proceedings that make up the basis of criminal liability for entering the country.[140] Immigration practitioners develop guides for criminal attorneys,[141] advocate for sanctuary policies and laws,[142] and file motions to suppress evidence in immigration court while challenging

137. This last point is particularly resonant in prosecutions of illegal entry and re-entry criminal provisions. Although, at times, the individual charged in an illegal re-entry prosecution has previously lived in the United States and has formed community and family bonds, such bonds cannot be assumed. And with respect to illegal entry—especially in the illegal entry cases prosecuted during the refugee crisis, which the family separation policy sought to affect—community or family bonds often cannot mobilize in order to participate in the criminal process. While this questions the extent to which the participatory defense model applies, it does not foreclose gleaning lessons from this model in developing new models of crim-imm lawyering.

138. Indeed, although *lawyering* scholarship has developed in civil and criminal law separately, *substantive law* scholarship at the intersection of the two fields is robust. *See, e.g.*, Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613 (2012); César Cuauhtémoc García Hernández, *Immigration Detention As Punishment*, 61 UCLA L. REV. 1346 (2014); Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463, 1465 (2019); Annie Lai, *Confronting Proxy Criminalization*, 92 DENV. U. L. REV. 879 (2015); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472 (2007); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289 (2008); Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

139. *See generally* Padilla v. Kentucky, 559 U.S. 356 (2010).

140. *See* 8 U.S.C. § 1326(d) (2018). At least one scholar doubts the efficacy of motions to dismiss illegal re-entry prosecutions. *See* Darlene C. Goring, *A False Sense of Security: Due Process Failures in Removal Proceedings*, 56 S. TEX. L. REV. 91, 99 (2014). *But see* Brent S. Wible, *The Strange Afterlife of Section 212(c) Relief: Collateral Attacks on Deportation Orders in Prosecutions for Illegal Reentry After* St. Cyr, 19 GEO. IMMIGR. L.J. 455, 456 (2005) (describing the viability of motions to dismiss in illegal re-entry prosecutions based on then-recent Supreme Court precedent). Nevertheless, immigrant rights organizations advocate the use of motions to dismiss based on Section 1326(d). *See, e.g.*, DAN KESSELBRENNER ET AL., NAT'L. IMMIGRATION PROJECT OF THE NAT'L. LAWYERS GUILD & IMMIGRANT DEF. PROJECT, PRACTICE ADVISORY: CHALLENGING THE VALIDITY OF NOTICES TO APPEAR LACKING TIME-AND-PLACE INFORMATION 17–19 (2018), *available at* https://www.immigrantdefenseproject.org/wp-content/uploads/FINAL_Pereira_Advisory_updated_July_16th_2018.pdf [https://perma.cc/HX3S-W5MW].

141. *See, e.g.*, *California Quick Reference Chart and Notes*, IMMIGRANT LEGAL RES. CTR. (Mar. 12, 2019), https://www.ilrc.org/chart.

142. *See, e.g.*, Christina Goldbaum, *State Courts Become Battleground Over Trump's Sanctuary Cities Policy*, N.Y. TIMES (Dec. 12, 2018), https://www.nytimes.com/2018/12/12/nyregion/sanctuary-cities-state-courts.html.

grounds of removability.[143] Today, under the current administration, lawyering at the intersection of the two fields is everywhere.

Lawyering in crim-imm parallels the convergence of attention by social movements to how interwoven the two systems are. Perhaps unsurprisingly, social movements based on prison abolitionist principles are leading calls for pushing agendas that cut across a criminal and civil divide. Abolish ICE, the Movement for Black Lives, and bail funds are some examples of mobilized groups that refuse to treat criminal reform as wholly separate from immigration reform. Even outside the abolitionist context, however, social movements operate in the crim-imm space. In the immigrant-rights movement, advocates over the past few decades have focused on limiting the entanglement of the criminal and immigration legal enforcement systems.

This part details examples of social movement activity and lawyering practice at the intersection of criminal and immigration law. The examples that follow by no means represent a full accounting of the breadth of lawyering and social movements operating in crim-imm. The goal of this part is not to provide a full picture of crim-imm social movement and lawyering activity. Rather, it is to illustrate the links between the two fields and the important implications for lawyering scholars. These trends suggest that crim-imm lawyering may be emerging as a distinct field of law, suggesting a need for lawyering theory to treat it as such. Short of this, however, lawyering practice and social movement activity in crim-imm still merit attention from lawyering scholars. They reveal that advocacy, and, within it, lawyering, cannot be reduced to the civil/criminal distinction that pervades lawyering scholarship.

A. *Social Movements and Crim-Imm*

Social movements are increasingly relating to immigration and criminal systems in a similar manner. Specifically, social movements that involve or are based on an anticarceral model are leading calls to identify the connections between imprisonment, violence on black lives, and immigration detention. Decarceral movements, such as Abolish ICE! (at its roots), the Movement for Black Lives, and the bail fund movement continue to draw connections between the criminal and immigration systems. Moreover, the Immigrant Rights movement increasingly focuses on dismantling practices that compound the effect of the criminal system on noncitizens.

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143. *See, e.g.*, Rodriguez v. Barr, 943 F.3d 134, 138, 144 n.6 (2d Cir. 2019) (holding that a noncitizen had established a prima facie case that the government violated the Fourth Amendment, for the purposes of the noncitizen's motion to suppress evidence in a removal proceeding); Jennifer Lee Koh, *Rethinking Removability*, 65 FLA. L. REV. 1803, 1838 (2013) ("Motions to suppress emerged in the late 2000s as a strategic response by immigration advocates to the government's use of raids against noncitizens.").

1. *Abolish ICE!*

Its namesake may indicate a focus solely on immigration issues, but in fact, the Abolish ICE! movement stands for more. At its roots, Abolish ICE! takes a direct abolitionist stance on immigration enforcement, calling for an end to immigration detention and deportations, beyond disbanding one agency to restructure it.[144] Since its growth from a hashtag on Twitter to a mainstream campaign slogan, the phrase now holds different meaning for different speakers, including non-abolitionist views about reforming immigration enforcement practices.[145]

The connection between Abolish ICE! and criminal legal reform issues extends beyond a shared abolitionist ideology. Abolish ICE! and organizations active in its movement call attention to the shared structure of incarceration, whether termed criminal or immigration, and the capitalist interests in both systems of detention—specifically, the profit-driven practices that are pervasive in both systems of incarceration.[146] Take, for example, Mijente, one of the groups actively organizing for the Abolish ICE! movement. Mijente has not only taken vocal abolitionist stances, such as ending deportations and immigration detention,[147] but has also called for greater identification of and alliance between systems that predominantly affect Brown communities (such as immigration detention) and Black communities (such as police violence). Mijente is also firmly opposed to privatization of immigration enforcement.[148] Although rooted in anti-deportation work, Mijente's principles call for movements that resist framing social justice issues as

144. Jennie Rose Nelson, *Abolish ICE! Fighting for Humanity Over Profit in Immigration Policy*, NACLA (June 6, 2019), https://nacla.org/blog/2019/06/06/abolish-ice-fighting-humanity-over-profit-immigration-policy; Tina Vasquez, *Abolish ICE: Beyond a Slogan*, REWIRE.NEWS (Oct. 10, 2018), https://rewire.news/article/2018/10/10/abolish-ice-beyond-a-slogan/; *see also* MIJENTE, FREE OUR FUTURE, AN IMMIGRATION POLICY PLATFORM FOR BEYOND THE TRUMP ERA 4, 7 (2018), *available at* https://mijente.net/wp-content/uploads/2018/06/Mijente-Immigration-Policy-Platform_0628.pdf (outlining the policy platform of one of the organizations involved in the Abolish ICE! movement).

145. Vasquez, *supra* note 144 (describing the roots of Abolish ICE! as advocating for an end to immigration detention and deportations). Besides calling for an end to immigration detention and deportations, Abolish ICE! has also been used to call for defunding, or even simply lowering the funds allocated to, immigration enforcement. Dara Lind, *"Abolish ICE," Explained*, VOX (June 28, 2018), https://www.vox.com/policy-and-politics/2018/3/19/17116980/ice-abolish-immigration-arrest-deport. Finally, the term has also been used, even in a Congressional bill, to refer to the restructuring or establishing of a new agency for the purposes of interior immigration enforcement. *See* Elaine Godfrey, *What 'Abolish ICE' Actually Means*, THE ATLANTIC (July 11, 2018), https://www.theatlantic.com/politics/archive/2018/07/what-abolish-ice-actually-means/564752/ (describing various movement and political leaders' stances on what the term 'Abolish ICE' calls for); Kari Hong, *10 Reasons Why Congress Should Defund ICE's Deportation Force*, 43 HARBINGER 40, 57 (2019) (describing, *inter alia*, the aforementioned congressional bill).

146. Nelson, *supra* note 144.

147. Mijente is an organization that acts as an online resource for Latinx and Chicanx organizing that grew out of the #Not1MoreDeportation campaign. *See Mijente Principles of Unity*, MIJENTE (June 30, 2018), https://mijente.net/2018/06/mijente-principles/; *Shesource: Marisa Franco*, WOMEN'S MEDIA CTR., http://www.womensmediacenter.com/shesource/expert/marisa-franco (last visited Apr. 12, 2020).

148. MIJENTE, *supra* note 144, at 2–4, 8.

isolated to one oppressed community.[149] Included in its principles is a call to cease immigration and controlled substance prosecutions, and it links family separation of migrants under the Trump Administration to the use of family separation during slavery.[150] One of its co-founders, Marisa Franco, a long-time organizer who led the #Not1MoreDeportation campaign and previously led organizing for the National Day Laborer Organizing Network (NDLON), has explicitly called for movements that resist differentiating between issues affecting Black and Brown communities.[151]

2. *The Movement for Black Lives*

Although the Movement for Black Lives may be known for having a primary social goal of police accountability, its members have also identified decarceration by immigration authorities as key to meaningful social change. As other scholars have noted, the Movement for Black Lives illustrates how social movements can reset the way in which social change is measured and facilitate the imagination of new possibilities for society.[152] Although the Movement for Black Lives provides a vision for social justice that resists the limits of the status quo, it does not forget or ignore the law, but asks to "reimagine its possibilities."[153]

In 2016, the Movement for Black Lives published its Vision for Black Lives, a document reflecting its strategic planning and goal prioritization.[154] Its Vision, rooted in an overarching goal to end the war on Black people, includes decarceral goals related to immigration, such as an end to deportations, immigration detention, and immigration raids.[155] The presence of immigration-related goals in its Vision may reflect the impact the deportation system has on Black people,[156] despite a public view that all individuals subject to immigration detention and removal are Brown.

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149. MIJENTE, *supra* note 147.

150. *See* MIJENTE, *supra* note 144, at 2–3.

151. In 2014, Franco penned an article calling for Latinx communities to see the issues salient in Ferguson, Missouri, after the killing of Michael Brown, as their own. Marisa Franco, *Latino Communities Must See Ferguson's Fight as Their Own*, MSNBC (Aug. 20, 2014), http://www.msnbc.com/melissa-harris-perry/latino-communities-must-see-fergusons-fight-their-own. In 2017, she linked the sanctuary movement to a broader justice movement that works across communities. *See* Marisa Franco, *A Radical Expansion of Sanctuary: Steps in Defiance of Trump's Executive Order*, TRUTHOUT (Jan. 25, 2017), https://truthout.org/articles/a-radical-expansion-of-sanctuary-steps-in-defiance-of-trump-s-executive-order/ ("Sanctuaries must include not only undocumented people, but also non-immigrant Muslims, LGBTQ people, Black and Indigenous folks and political dissidents.").

152. Amna A. Akbar, *Toward A Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 476 (2018).

153. *Id*. at 409; *see also* Jorge Rivas, *Black Lives Matter is Joining the Fight Against Deportations*, UNIVISION (Aug. 4, 2016), https://www.univision.com/univision-news/immigration/black-lives-matter-is-joining-the-fight-against-deportations.

154. Akbar, *supra* note 152, at 405, 409, 473.

155. *Id*. at 430.

156. *See* Raquel Reichard, *Black Lives Matter Joins Immigrants' Rights Fight Against Deportations*, LATINA (Aug. 4, 2016), http://www.latina.com/lifestyle/our-issues/black-lives-matter-joins-immigrants-rights-fight; Candis Watts Smith, *Black Immigrants in the U.S. Face Big Challenges. Will African Americans Rally to Their Side?*, WASH. POST (Sept. 18, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/09/18/black-immigrants-in-the-u-s-face-big-challenges-will-african-americans-

Partner organizations in the Movement for Black Lives illustrate how this movement operates in defiance of a boundary between criminal and immigration law. The Black Alliance for Just Immigration (BAJI), a partner organization in the Movement for Black Lives, organizes on immigration issues.[157] However, it explicitly uses a racial justice frame in its organizing and seeks to support and organize African Americans and Black immigrants.[158] BAJI focuses on issues that lie at the intersection of the criminal and immigration systems in ways that impact undocumented Black people.[159] Another partner organization in the Movement for Black Lives, the Undocublack Network, organizes Black youth on numerous issues, including but not exclusively immigration.[160] Undocublack is a member-based organization of current and formerly undocumented Black people that has been involved in Dreamer as well as border advocacy.[161] Both UndocuBlack and BAJI seek to raise awareness of the ways in which immigrant rights advocacy utilizes anti-Black frames and excludes Black immigrants.[162]

3. *Bail Funds*

Community bail funds evidence yet another way that mobilized groups operate in both the criminal and immigration legal enforcement systems. Bail funds have existed for much longer than their most modern iteration, and multiple bail funds supported civil rights activists in the 1960s and 70s when activism employed civil disobedience and was commonly criminalized.[163] Since the early twentieth century, various organizations, including the Vera Institute, the ACLU, and others have operated some form of fund seeking to

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rally-to-their-side/ ("Although people largely connect the black social movements to police brutality, organizations such as Black Lives Matter as well the lesser-known Movement for Black Lives focus on a wider set of problems faced by black Americans, including those who are undocumented.").

157. *Partners*, BLACK LIVES MATTER, https://blacklivesmatter.com/partners/ (last visited Apr. 3, 2020); *see also Home*, BLACK ALLIANCE FOR JUST IMMIGRATION, https://baji.org/ (last visited Apr. 3, 2020).

158. *Who We Are*, BLACK ALLIANCE FOR JUST IMMIGRATION, https://baji.org/who-we-are/ (last visited Apr. 22, 2020).

159. CARL LIPSCOMBE ET AL., BLACK ALLIANCE FOR JUST IMMIGRATION & NYU SCHOOL OF LAW IMMIGRANT RIGHTS CLINIC, THE STATE OF BLACK IMMIGRANTS PART I: A STATISTICAL PORTRAIT OF BLACK IMMIGRANTS IN THE UNITED STATES (2016), *available at* https://perma.cc/WT9W-WKHX.

160. *Our Work*, UNDOCUBLACK NETWORK, https://undocublack.org/ourwork (last visited Apr. 3, 2020).

161. *See id.*; *The Network*, UNDOCUBLACK NETWORK, https://undocublack.org/asdasd (last visited Apr. 20, 2020).

162. *See generally* Breanne J. Palmer, *The Crossroads: Being Black, Immigrant, and Undocumented in the Era of #BlackLivesMatter*, 9 GEO. J. L. & MOD. CRITICAL RACE PERSP. 99 (2017).

163. Robin Steinberg et al., *Freedom Should Be Free: A Brief History of Bail Funds in the United States*, 2 UCLA CRIM. JUST. L. REV. 79, 82 (2018) (locating the earliest documented bail fund as the ACLU National Bail Fund in the 1920s that had the goal of "free[ing] radicals, prosecuted under the sedition laws" (alteration in original)).

free incarcerated individuals.[164] Although some bail funds have radical goals, not all have used or been rooted in an abolitionist frame.[165]

More recently, during the past fifteen years, new bail funds sprang up in various localities, including New York, San Diego, Chicago, and Connecticut. These modern community bail funds were driven by various motivations and were led at times by minority communities and, at others, by activists or public defender offices.[166] Some modern bail funds explicitly use an abolitionist frame in their work.[167] A number of bail funds have begun operating to free individuals incarcerated by immigration authorities. The national network of bail funds, made up of over sixty bail funds, describes itself as working to free individuals from both pretrial criminal detention and immigration detention.[168] Although some localities have separate bail funds in each area of legal enforcement, at times one bail fund works in both simultaneously.[169]

4. *The Immigrant Rights Movement*

More broadly, the immigrant rights movement has increasingly focused on issues that cut across the criminal and immigration law enforcement systems. The movement has also capitalized on legislative battles over using the criminal legal system for immigration enforcement in order to increase support for immigration legalization reform. Immigrant rights advocacy today does not, and could not, operate isolated from criminal law issues.

Activism calling for delinking the criminal and immigration systems illustrates longstanding goals of immigrant rights actors.[170] Some of this activism dates back to the 1980s[171] but has since grown and its platforms are typically

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164. *Id*. at 84–92 (tracing the history of community bail funds from the early twentieth century to the present); *see also* Logan Abernathy, *Bailing Out: The Constitutional and Policy Benefits of Community and Nonprofit Bail Funds*, 42 LAW & PSYCHOL. REV. 85, 90 (2018).

165. The Vera Institute's Manhattan Bail Project is one example. Vera sought to create a "pretrial supervision program so good that it [could] compete with jail–one that [could] virtually guarantee that defendants under supervision [would] neither abscond nor commit new crimes." Andrea Clisura, *None of Their Business: The Need for Another Alternative to New York's Bail Bond Business*, 19 J. L. & POL'Y 307, 323 (2010).

166. Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 588–89 (2017) (comparing community-led bail funds in New York and Chicago, driven by frustrations with police practices, with public defender led bail funds and bail funds set up by activists connected to the Movement for Black Lives that focused on structural inequities in criminal court system).

167. *See, e.g.*, *About Us*, NAT'L BAIL OUT, https://nationalbailout.org/about/ [https://perma.cc/48R7-52Q9] (last visited Apr. 8, 2020) (describing itself as a network of abolitionist organizers).

168. *See National Bail Fund Network: Directory of Community Bail Funds*, CMTY. JUSTICE EXCH., https://www.communityjusticeexchange.org/nbfn-directory (last visited Apr. 3, 2020).

169. The Connecticut Bail Fund is one example. *See Home*, CONN. BAIL FUND, http://www.ctbailfund.org/ (last visited Apr. 3, 2020) (describing its mission as working "to reduce the direct harms caused by criminalization, incarceration, and deportation while building power among the people and families in our community who are most impacted by these systems").

170. *See* Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539, 543, 545, 547 (2017).

171. *Id*. at 543; Azadeh Shahshahani & Amy Pont, *Sanctuary Policies: Local Resistance in the Face of State Anti-Sanctuary Legislation*, 21 CUNY L. REV. 225, 229–30 (2018) (describing the roots of the sanctuary movement in the 1980s and the current formulation of sanctuary policies).

called "sanctuary" policies.[172] The immigrant rights movement has sought to limit sharing of information between criminal justice actors, such as local law enforcement and jail or prison officials, and federal immigration authorities.[173] It has also challenged and sought limits on the use of local law enforcement for immigration arrests and has sought to limit local law enforcement compliance with detainer requests from federal immigration authorities.[174] More recently, immigrant rights actors have launched campaigns to limit ICE's ability to arrest individuals at courthouses.[175] They have also embarked on legislative advocacy that seeks to directly reform the criminal legal system by seeking to limit misdemeanor sentences to 364 days.[176] These reforms, if successful, have the impact of rendering those misdemeanor offenses not subject to removability under a specific provision of the Immigration and Nationality Act.[177]

At the same time that the immigrant rights movement has sought to disentangle the criminal and immigration law enforcement systems, the movement's efforts at legalization have also implicated criminal law issues. In 2006, mass demonstrations erupted in response to the Sensenbrenner bill,[178] legislation that would have increased criminal penalties for re-entry to the country after removal and created new criminal offenses for being an undocumented immigrant and for providing humanitarian assistance to

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172. Shahshahani & Pont, *supra* note 171, at 229–30 (describing the origin and development of "sanctuary" policies). The sanctuary movement arguably encompasses more than challenges to the use of non-immigration actors for immigration removal purposes. *See* Rose Cuison Villazor & Pratheepan Gulasekaram, *Sanctuary Networks*, 103 MINN. L. REV. 1209, 1210 (2019) (describing new forms of "sanctuary" policies employed during the Trump Administration).

173. A number of legislative bills called the "Trust" Act prohibiting state or local employees from sharing immigration information with federal immigration enforcement have passed in jurisdictions around the country. *See* Christopher N. Lasch et al., *Understanding "Sanctuary Cities"*, 59 B.C. L. REV. 1703, 1741 (2018).

174. Lai & Lasch, *supra* note 170, at 547 (describing resistance to information sharing in the form of challenging immigration detainers).

175. *See, e.g.*, Jack Kramer, *Immigrant Rights Group: End Prison-to-Deportation Pipeline*, CT POST (Feb. 6, 2019), https://www.ctpost.com/local/article/Immigrant-rights-group-End-prison-to-deportation-13594635.php; Elijah Stevens, *Demand an End to ICE's Courthouse Arrests in New York*, ACTION NETWORK, https://actionnetwork.org/petitions/demand-an-end-to-ices-courthouse-arrests-in-new-york (last visited Apr. 3, 2020).

176. New York and California have enacted such legislation to date, and Connecticut has a pending bill regarding the same; these reforms have been led by immigrant rights organizations. *See* IMMIGRANT DEFENSE PROJECT, LEGAL ALERT: ONE DAY TO PROTECT NEW YORKERS ACT PASSES IN NY STATE (2019), *available at* https://www.immigrantdefenseproject.org/wp-content/uploads/One-Day-bill-bullets-2019-4-15.pdf; IMMIGRANT LEGAL RES. CTR., CALIFORNIA DEFINES MISDEMEANOR AS MAXIMUM 364 DAYS (2014), *available at* https://www.ilrc.org/sites/default/files/resources/cal_misd_364_days_7_2014_pdf.pdf. In Connecticut, the Connecticut Immigrant Rights Alliance (CIRA) is the leading organization advocating for the passage of the bill that would impose a statutory maximum on misdemeanors of 364 days. *See* Jack Kramer, *Immigrant Rights Group Pushes for Legislation to Hinder Deportations*, CT NEWS JUNKIE (Feb. 6, 2019), https://www.ctnewsjunkie.com/archives/entry/20190206_immigrant_rights_group_pushes_for_legislation_to_hinder/.

177. *Id.*

178. Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99, 103 (2007).

undocumented individuals.[179] The demonstrations, while opposing the expansion of criminal liability and enhanced sentencing, quickly turned into advocacy for legalization, or creating a path to citizenship for undocumented immigrants, illustrating how movement actors can capitalize on unjust criminal policy proposals to create momentum for positive immigration policies. Admittedly, however, pro-legalization advocacy for the millions of undocumented immigrants in the United States has faced the challenge of trading enhanced enforcement of criminal policies for the provision of benefits to some, but not all, of the undocumented immigrant population.[180]

B. *Lawyering in Crim-Imm*

Lawyering, like social movement activity, does not treat the criminal and immigration legal systems as distinct. The breadth of lawyering at the intersection of these two systems demands that lawyering scholars pay greater attention to crim-imm. For the purpose of illustrating the various types of lawyering that occurs in crim-imm, this section looks at two examples: Zero Tolerance and Dreamer advocacy. Lawyering in response to the federal government's Zero Tolerance policy in 2018 exemplifies core crim-imm lawyering practice, as the government action entailed the use of the criminal legal system for immigration law enforcement. However, advocacy for immigration relief for undocumented immigrant youth, or Dreamers, highlights a set of more nuanced, but nevertheless important, crim-imm issues. These examples further show the need for additional attention to crim-imm lawyering in lawyering theory.

1. *Zero Tolerance and Family Separation*[181]

The criminal offense of improper entry to the United States was codified almost a century ago,[182] but its use changed dramatically under the Trump

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179. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005). Referred to as the "Sensenbrenner bill" after the representative that introduced and hailed it, the bill also sought to expand the definition of aggravated felony to include individuals convicted of illegal re-entry, increase the penalty for illegal entry to a felony, and expand mandatory detention for suspected immigration violations. *See id*. at §§ 201, 203, 606. It also sought to create a penalty for anyone who "assists, encourages, directs, or induces" a person to come to the United States without authorization or reside or remain in the United States without authorization. *Id*. at § 202; *see also* Allen Thomas O'Rourke, *Good Samaritans, Beware: The Sensenbrenner-King Bill and Assistance to Undocumented Migrants*, 9 HARV. LATINO L. Rev. 195, 201–08 (2006) (describing how the broad language of section 202 could criminalize humanitarian aid to undocumented individuals).

180. The negotiations around a path to citizenship for Dreamers is the most recent illustration of the position in which immigrant rights advocates find themselves. *See* discussion *infra* Section III.B.2.

181. This section focuses on a few aspects of lawyering during Zero Tolerance, but apart from criminal defense and class-wide federal litigation, there are countless organizations—mostly grassroots lawyering organizations—that sprang up nationwide in response. *See* Alex Samuels, *Here's a List of Organizations That Are Mobilizing to Help Immigrant Children Separated From Their Families*, TEX. TRIB. (June 18, 2018), https://www.texastribune.org/2018/06/18/heres-list-organizations-are-mobilizing-help-separated-immigrant-child/. Some legal organizations played a central role in locating and reuniting separated families, while pro bono networks for lawyers—such as private law firms—volunteered efforts to provide immigration advice, limited immigration representation, and full immigration representation

Administration. In April 2018, the federal government officially instituted a policy of prosecuting all violations of the federal misdemeanor offense of improper entry to the United States.[183] The "Zero Tolerance" policy, as it was called, applied to all individuals suspected of improper entry, including those who seeking protection in the United States from persecution in their home country.[184] The federal government used this prosecutorial policy as the purported justification for separating parents, who crossed the border without authorization, from children with whom they traveled.[185] For the past two years,[186] federal immigration authorities separated thousands of children from their parents and sent these children to other parts of the country[187] while the parents were criminally prosecuted. Once criminal proceedings concluded, parents returned to immigration custody and faced the extraordinary task of

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to families. *See* Hannah Wiley, *Hundreds of Migrant Kids Haven't Been Reunited With Their Parents. What's Taking So Long?*, TEX. TRIB. (Oct. 4, 2018), https://www.texastribune.org/2018/10/04/zero-tolerance-policy-reunite-separated-immigrant-families/; Adriana Zambrano, *CLINIC's Response to Family Separation Makes a Difference*, CLINIC (Apr. 2, 2019), https://cliniclegal.org/stories/clinics-response-family-separation-makes-difference. Indeed, grassroots lawyering took place on an international level. *See Family Separation Crisis Response*, JUSTICE IN MOTION (Apr. 2, 2020), http://justiceinmotion.org/family-separation.

182. *See* Doug Keller, *Re-Thinking Illegal Entry and Re-Entry*, 44 LOY. U. CHI. L.J. 65, 70–72 (2012) (explaining how Congress criminalized illegal entry and re-entry, thus combining immigration and criminal law).

183. *See* 8 U.S.C. § 1325(a) (2018); Memorandum from Jefferson Sessions, Att'y Gen., U.S. Dep't of Justice, to Federal Prosecutors Along the Southwest Border (Apr. 6, 2018), *available at* https://www.justice.gov/opa/press-release/file/1049751/download. Although Section 1325 prosecutions skyrocketed beginning in 2005, the government, prior to the Zero Tolerance policy, exercised discretion to refrain from prosecuting individuals migrating with children. *See* JOANNA LYDGATE, WARREN INST., ASSEMBLY-LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE 1–2, 3 n.11 (2010), *available at* http://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf.

184. In June 2018, the U.S. Department of Homeland Security (DHS) posted guidance on its website on the availability of seeking asylum or other legal protections from removal notwithstanding criminal prosecution for improper entry. *See Fact Sheet: Zero Tolerance Immigration Prosecutions – Families*, U.S. DEP'T OF HOMELAND SECURITY (June 15, 2018), https://www.dhs.gov/news/2018/06/15/fact-sheet-zero-tolerance-immigration-prosecutions-families.

185. SARAH HERMAN PECK, CONG. RESEARCH SERV., LSB10180, FAMILY SEPARATION AT THE BORDER AND THE *Ms. L.* LITIGATION, at 2 (July 31, 2018), *available at* https://fas.org/sgp/crs/misc/LSB10180.pdf.

186. Although the Trump Administration reportedly ended its Zero Tolerance policy, through which family separations were purportedly justified, in June 2018, *see* John Wagner et al., *Trump Reverses Course, Signs Order Ending His Policy of Separating Families at the Border*, WASH. POST (June 20, 2018), https://www.washingtonpost.com/powerpost/gop-leaders-voice-hope-that-bill-addressing-family-separations-will-pass-thursday/2018/06/20/cc79db9a-7480-11e8-b4b7-308400242c2e_story.html, family separations that continued past this date suggest both that family separations persisted and that DOJ maintained prosecutions of improper entry after that date. *See, e.g.*, Exec. Order No. 13841, 83 Fed. Reg. 29435 (June 20, 2018), *available at* https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/; Richard Gonzalez, *ACLU: Administration is Still Separating Migrant Families Despite Court Order to Stop*, NPR (July 30, 2019), https://www.npr.org/2019/07/30/746746147/aclu-administration-is-still-separating-migrant-families-despite-court-order-to-.

187. Children were then transferred from Customs and Border Protection (CBP) or Immigration and Customs Enforcement (ICE) custody to the custody of the Office of Refugee Resettlement (ORR). *See Fact Sheet: Zero Tolerance Immigration Prosecutions – Families*, U.S. DEP'T OF HOMELAND SECURITY (June 15, 2018), https://www.dhs.gov/news/2018/06/15/fact-sheet-zero-tolerance-immigration-prosecutions-families.

trying to reunite with their children: the federal government had failed to track the families in any systematic way after separating them.[188]

The explosion of criminal prosecutions of individuals entering the country without authorization was rapid and acute. In the six weeks following announcement of Zero Tolerance, the federal government separated over 2,600 children from their parents pursuant to the policy.[189] In a study of one week of federal criminal prosecutions, *The Guardian* found that 87.2% of all federal criminal prosecutions were based on low-level immigration charges.[190] By July 2018, 30,000 individuals had been convicted of the misdemeanor crime of improper entry into the country.[191] During the height of the crisis, every deputy federal public defender in the trial unit of a southern Texas district went to court each morning in order to staff the prosecutions for that day.[192]

Two criminal defense offices in particular employed practices that illustrate emerging crim-imm lawyering. In McAllen, Texas, where most illegal entry prosecutions occurred during the height of Zero Tolerance, federal public defenders worked with the Texas Civil Rights Project (TCRP), a regional organization based on a community lawyering model that provided limited representation and helped secure immigration counsel for parents prosecuted under Zero Tolerance and separated from their children.[193] During criminal proceedings, parents learned that the federal government lacked any tracking system to reunite separated families. Federal public defenders then provided time each morning for TCRP to interview parents in order for TCRP to engage in reunification efforts.[194]

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188. Miriam Jordan, *Family Separation May Have Hit Thousands More Migrant Children Than Reported*, N.Y. TIMES (Jan. 17, 2019), https://www.nytimes.com/2019/01/17/us/family-separation-trump-administration-migrants.html.

189. Olivia Solon et al., *3,121 Desperate Journeys: Exposing a Week of Chaos Under Trump's Zero Tolerance*, THE GUARDIAN (Oct. 14, 2018), https://www.theguardian.com/us-news/ng-interactive/2018/oct/14/donald-trump-zero-tolerance-policy-special-investigation-immigrant-journeys.

190. *Id*.

191. Julia Preston, *Zero Tolerance Lives On*, MARSHALL PROJECT (Sept. 14, 2018), https://www.themarshallproject.org/2018/09/14/zero-tolerance-lives-on. Although the criminal offense of improper entry has long been in the federal criminal code, in the past federal prosecutors tended to criminally charge unauthorized entry after a prior deportation or when an individual had a criminal history. *Id*. The prosecutions were haphazard. Criminal complaints were boilerplate, and sometimes filed with obvious errors. For example, one criminal complaint, in purporting to state what federal agents witnessed in encountering the person charged with illegal entry, read "#DOINGWHAT? PICK ONE DELETE REST#" followed by a number of behaviors such as running or attempting to evade detection. Solon et al., *supra* note 189.

192. Preston, *supra* note 191. The district with the largest number of federal prosecutions for the misdemeanor offense of improper entry has been the Southern District of Texas. *Id*.

193. Interview with Efrén Olivares, Director of Racial and Economic Justice, Texas Civil Rights Project (Aug. 13, 2019) (on file with author). According to Olivares, deputy federal public defenders in McAllen reached out after a significant rise in the number of individuals prosecuted for improper entry who did not know the whereabouts of their children. TCRP began interviewing those parents charged in criminal cases who had been separated from their children, obtaining what information was possible within the short amount of time the Federal Public Defender's office had to interview and prepare their clients for criminal proceedings. *Id*.

194. *See id*.; *see also* LAURA PEÑA, TEX. CIVIL RIGHTS PROJECT, THE REAL NATIONAL EMERGENCY: ZERO TOLERANCE & THE CONTINUING HORRORS OF FAMILY SEPARATION AT THE BORDER 8–9 (2019),

In San Diego, California, the Federal Defenders of San Diego[195] used a strategy of litigating bond, including collaborating with a bail fund called the Bail Project, to disrupt the mass plea process the government sought to institute in illegal entry prosecutions.[196] By litigating bail issues and posting bail for individuals charged with illegal entry, this collaboration forced federal prosecutors to dismiss numerous cases and, in some instances, led to non-misdemeanor resolutions. Although not a direct attack on the policy of separating parents from their children, the Federal Defenders' strategy prevented large numbers of convictions.[197] Aggressive litigation also led to the dismissal of the first illegal entry prosecution cases to proceed to trial in that district.[198] The Federal Defenders also litigated constitutional challenges to government practices implemented in Zero Tolerance, such as a separate judicial system for these prosecutions and challenges to the criminal statutes themselves.[199]

Crim-imm lawyering also occurred outside of the criminal legal process. The central piece of class-wide litigation surrounding Zero Tolerance was *Ms. L*, a case filed in the Southern District of California and litigated by the ACLU.[200] Filed in early 2018, the case brought constitutional and statutory challenges to the Department of Homeland Security's practice of separating families who migrated into the country through the southern border.[201]

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available at https://texascivilrightsproject.org/wp-content/uploads/2019/02/FamilySeparations-Report-FINAL.pdf; *First Non-Governmental Data Reveal Family Separation Actively Ongoing at the Border*, TEX. CIVIL RIGHTS PROJECT (Feb. 21, 2019), https://texascivilrightsproject.org/release-family separations-report/.

195. The Federal Defenders of San Diego is part of the Federal Community Defender Organization, a private, non-profit organization that provides indigent criminal defense to individuals charged with federal offenses. *Who We Are*, FED. DEFENDERS OF SAN DIEGO, https://fdsdi.com/about_fdsdi.html (last visited Apr. 3, 2020). They are therefore independent from the local federal judiciary, unlike many federal defender offices. *Id.* Some credit this structure with the office's ability to engage in aggressive litigation strategies. *See, e.g.*, Maya Srikrishnan, *How San Diego is Pushing Back Against 'Zero Tolerance' at the Border*, VOICE OF SAN DIEGO (Nov. 27, 2018), https://www.voiceofsandiego.org/topics/news/how-san-diego-is-pushing-back-against-zero-tolerance-at-the-border/.

196. Kristina Davis, *New Ability to Post Bond in Illegal Entry Cases Was Undermining Trump Administration's 'Zero Tolerance' Policy. So Prosecutors Changed Tactics*, SAN DIEGO TRIB. (Oct. 15, 2018), https://www.sandiegouniontribune.com/news/courts/sd-me-illegal-entry-bond-20181015-story.html; *see generally* District Court Bail Redetermination Appeal, United States v. Nazario Jacinto-Carrillo, No. 18MJ2574-NLS (S.D. Cal. May 24, 2018), ECF No. 8, *available at* https://www.voiceofsandiego.org/wp-content/uploads/2018/06/bondobjectionnazario.pdf.

197. 90% of misdemeanor cases where the defendant was held on bail resulted in guilty pleas; however, individuals for whom the Bail Project posted bond had their cases dismissed 60% of the time, and had their cases resolved through a violation instead of a misdemeanor the other 40% of the time. Davis, *supra* note 196.

198. Maya Srikrishnan, *The First 'Zero Tolerance' Case to Go to Trial Didn't Go Well for the Government*, VOICE OF SAN DIEGO (June 25, 2018), https://www.voiceofsandiego.org/topics/government/the-first-zero-tolerance-case-to-go-to-trial-didnt-go-well-for-the-government/ [hereinafter Srikrishnan, *The First 'Zero Tolerance' Case*]; *see also* Maya Srikrishnan, *Government Drops Another Illegal Entry Case*, VOICE OF SAN DIEGO (June 27, 2018), https://www.voiceofsandiego.org/topics/government/government-drops-another-illegal-entry-case/ (describing another illegal entry prosecution that led to dismissal).

199. *See* Srikrishnan, *The First 'Zero Tolerance' Case*, *supra* note 198.

200. *See* Ms. L v. U.S. Immigration and Customs Enf't, 302 F. Supp. 3d 1149 (S.D. Cal. 2018).

201. *See* Complaint at 7–9, Ms. L v. U.S. Immigration and Customs Enf't, 302 F. Supp. 3d 1149 (S.D. Cal. 2018) (No. 18-CV-0428).

Lawyers argued that family separation without an adequate justification—that is, finding that the parent was unfit to care for the child—or without process was unlawful. In summer 2018, a federal judge granted preliminary injunctive relief to the plaintiffs, holding that the government unlawfully separated families without a showing that the parent was unfit to care for or a danger to the child, and that the government had a duty to affirmatively reunify separated families.[202]

Zero Tolerance raised a number of questions about lawyering practice in crim-imm. Lawyers working on Zero Tolerance in the criminal system faced decisions around whether to coordinate outside of their practice area, as federal public defenders did in Texas and California,[203] or whether to litigate additional matters beyond criminal defense, which requires the use of significant resources for resource-constrained offices. In the *Ms. L* litigation and the press advocacy surrounding family separation, lawyers had to decide how to frame the wrongs they were challenging and what narratives to advance to aid their cause. By highlighting asylum-seekers, the narratives and frames used in and around this case were effective in public while also stopping short of challenging the ongoing mass criminalization policy.

Of particular note in the *Ms. L* litigation was the decision to challenge the act of separation but not the government practice of detaining families together or the legality of the Zero Tolerance prosecutions.[204] By the filing of the first amended complaint, the ACLU explicitly stated its position that the Constitution and federal law did not require more than family detention as long as parent and child were detained together.[205] The legal position in *Ms. L* litigation marks a meaningful divergence from social movement activity calling for an end to family detention, which dates to at least 2015, when family detention was expanded by the Obama Administration. By that time, immigrant rights groups had called for an end to the detention of families for immigration law enforcement,[206] and legal advocacy groups, including the

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202. *See* Order Granting Plaintiffs' Motion for Classwide Preliminary Injunction at 1, 3, Ms. L v. U.S. Immigration and Customs Enf't, 302 F. Supp. 3d 1149 (S.D. Cal. June 26, 2018) (No. 18-CV-0428).

203. While this may seem like an easy decision, it comes at a cost. The federal public defender's office in McAllen, Texas, typically had only about 45 minutes to discuss criminal proceedings with each of the individuals who were being criminally charged that day; collaborating with TCRP also meant decreasing the time spent ensuring individuals understood the criminal process and were knowingly and intelligently waiving rights if they pled guilty and were being sentenced that same day. *See* Interview with Efrén Olivares, *supra* note 193.

204. *See* Complaint at 9, Ms. L v. U.S. Immigration and Customs Enf't, 302 F. Supp. 3d 1149 (S.D. Cal. 2018) (No. 18-CV-0428).

205. *See* First Amended Complaint at 12, Ms. L v. U.S. Immigration and Customs Enf't, 302 F. Supp. 3d 1149 (S.D. Cal. 2018) (No. 18-CV-0428). Indeed, even if the litigation strategically sought very narrow relief, the litigants' media advocacy could have advanced a broader agenda but failed to do so. *See, e.g.*, *Rachel Maddow: US Inflicting Lifelong Trauma on Immigrant Children Seeking Help*, MSNBC (June 4, 2018), https://www.msnbc.com/rachel-maddow/watch/us-inflicting-lifelong-trauma-on-immigrant-children-seeking-help-1248298563620.

206. In mid-2015, over 180 immigrant rights organizations, including the ACLU itself, had sent a letter to the administration demanding an end to the use of family detention. *See* Letter from Women's Refugee Commission et al., to Barack Obama, President of the United States (May 11, 2015), *available at* https://lulac.org/advocacy/Family_Detention_Letter_May_2015_FINAL.pdf [https://perma.cc/UZ2J-Q7DR].

ACLU, had litigated the legality of detaining families for purposes of deterring migration to the United States.[207]

It is clear that the decisions made by lawyers have immediate and significant consequences. For example, when other individual lawsuits challenging family separation were filed,[208] the government defended those lawsuits on the ground that *Ms. L* would provide relief to plaintiffs despite the fact that other lawsuits argued that the Constitution or federal laws required *more* than what the ACLU had sought in *Ms. L*.[209]

The use of the criminal system for immigration enforcement makes lawyering in the family separation space a particularly useful frame for exploring how lawyering models get implemented in practice. The diversity of the lawyering involved—from criminal and immigration defense, affirmative litigation challenging separations and conditions of confinement, and on-the-ground reunification efforts—serves to illustrate how lawyering models can work in parallel to or in conjunction with each other.[210]

2. *Dreamer Advocacy*

The nearly twenty-year effort by undocumented immigrant youth, commonly called Dreamers, [211] to obtain a path to citizenship offers another lens through which to analyze lawyering that implicates both criminal and immigration law. Since 2001, some version of a bill titled the Dream Act has been introduced in Congress, garnering varied levels of political attention but never becoming law.[212] During this period, the proposed legislation has been

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Over 100 organizations had already been calling for the government to cease detaining families for immigration law enforcement in 2014. *See* Letter from Washington State Coalition Against Domestic Violence et al., to Jeh Johnson, Sec'y of Homeland Sec. (Sept. 18, 2014), *available at* https://www.immigrantjustice.org/sites/default/files/DV%20Family%20Detention%20Letter%20FINAL%202014_09_18.pdf.

207. *See* R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 170–71 (D.D.C. 2015) (ordering preliminary injunctive relief against the Department of Homeland Security policy using family detention in order to deter further migration by asylum seekers).

208. *See, e.g.*, J.S.R. v. Sessions, 330 F. Supp. 3d 731, 733 (D. Conn. 2018).

209. *See* Federal Defendants' Opposition to Plaintiffs' Motion for a Temporary Restraining Order or Preliminary Injunction at 1–2, 23–26, J.S.R. v. Sessions, 330 F. Supp. 3d 731 (D. Conn. July 10, 2018) (No. 18-CV-1106), ECF No. 46.

210. This section does not claim that any particular legal strategy was due to a lack of lawyering theory in crim-imm. Rather, this article proffers that scholarly attention to lawyering in crim-imm, specifically in the area of family separation, can be a case study for future lawyering, consistent with current scholarly calls for greater attention to social movements. *See, e.g.*, Amna A. Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 354 (2015) (outlining the incorporation of social movements in pedagogy).

211. The term "Dreamers" has at times been used more narrowly. In its broadest sense, the term signals undocumented immigrant youth who entered the country as children; in its narrowest, the term refers to those who also meet qualifications that would provide them a path to relief through the current version of the Dream Act. Some use the term Dreamers as co-existent with those who have qualified for deferred action under the Deferred Action for Childhood Arrivals (DACA) policy, although the qualifications for DACA recipients and Dreamers have been distinct for numerous years. Joanna Walters, *What is DACA and Who Are the Dreamers?*, THE GUARDIAN (Sept. 14, 2017), https://www.theguardian.com/us-news/2017/sep/04/donald-trump-what-is-daca-dreamers.

212. In 2010 and in 2019, some versions of the Dream Act passed the House of Representatives. Julie Hirschfeld Davis, *House Votes to Give 'Dreamers' a Path to Citizenship*, N.Y. TIMES (June 4,

modified more than ten times,[213] each one presenting an opportunity for defining inclusion and exclusion from the terms of immigration relief.

Unsurprisingly, every bill providing immigration relief for undocumented immigrant youth has excluded certain categories of young immigrants who have been involved in the criminal legal system.[214] Typically, and in the most recent version of the bill, the Dream Act excludes from relief individuals convicted of felonies and of multiple misdemeanor offenses.[215] For the first time, the most recent Dream Act, which passed the House of Representatives in June 2019, permits the government to exclude from the path to legalization certain individuals who would otherwise qualify but for being ordered detained in juvenile delinquency proceedings.[216] The inclusion of this provision marks an expansion of the use of a criminal legal system into the juvenile system and put in potential jeopardy support for the bill from organizations involved in advocacy surrounding it.[217]

Accompanying the text of the bill is a narrative that advocates, including lawyers, use to frame justification for passage of the Dream Act. Narratives such as these not only articulate core messages that advocates hope will shape a successful legislative strategy, but also frame conceptualizations of who is worthy of obtaining relief. Broadly speaking, criminal convictions have been excluded from narratives surrounding immigration relief for undocumented immigrant youth.[218] The notion of undocumented immigrant youth as law-abiding reflects a common narrative used in Dreamer advocacy. Narratives such as this one can be quickly incorporated by media and politicians alike

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2019), https://www.nytimes.com/2019/06/04/us/politics/dream-promise-act.html; Julia Preston, *House Backs Legal Status for Many Young Immigrants*, N.Y. TIMES (Dec. 8, 2010), https://www.nytimes.com/2010/12/09/us/politics/09immig.html; Scott Wong & Shira Toeplitz, *DREAM Act Dies in Senate*, POLITICO (Dec. 18, 2010), https://www.politico.com/story/2010/12/dream-act-dies-in-senate-046573.

213. AM. IMMIGR. COUNCIL, FACT SHEET: THE DREAM ACT, DACA, AND OTHER POLICIES DESIGNED TO PROTECT DREAMERS (2019), *available at* https://www.americanimmigrationcouncil.org/research/dream-act-daca-and-other-policies-designed-protect-dreamers.

214. Such exclusion is consistent with a historical broader trend for advocates to frame arguments for immigration relief by contrasting immigrants with individuals convicted of criminal offenses. *See* Rebecca Sharpless, *"Immigrants Are Not Criminals": Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. 691, 693 (2016).

215. American Dream and Promise Act, H.R. 6, 116th Cong. (2019). H.R. 6 combines provisions from the Dream Act with a path to citizenship for people with Temporary Protected Status, a temporary immigration relief program. *See also* AM. IMMIGR. COUNCIL, *supra* note 213, at 5 n.16.

216. Eli Hager, *The New Dream Act Holds Some Dreamers' Pasts Against Them*, MARSHALL PROJECT (June 17, 2019), https://www.themarshallproject.org/2019/06/17/the-new-dream-act-holds-some-dreamers-pasts-against-them. Specifically, the bill provides for discretionary denials to qualifying applicants whom the government deems a public safety concern, based on an order to be detained in a secure facility in juvenile delinquency proceedings.

217. For example, Human Rights Watch and the National Association for the Advancement of Colored People (NAACP)—along with a multitude of other organizations—sent a joint letter to the House Judiciary Committee expressing their concerns for the bill based on the new juvenile adjudication provision. *See* Letter from Human Rights Watch et al., to Jerry Nadler, Chair, House Judiciary Committee, and Majority Members of the House Judiciary Committee (May 21, 2019), *available at* https://www.hrw.org/news/2019/05/21/letter-house-judiciary-committee-regarding-concerns-hr-2820-dream-act-2019.

218. *See* Amy F. Kimpel, *Coordinating Community Reintegration Services for "Deportable Alien" Defendants: A Moral and Financial Imperative*, 70 FLA. L. REV. 1019, 1045 (2018) ("'Criminal aliens' are not the Dreamers . . . .").

and can have significant consequences for immigration reform.[219] The Dreamer movement has demonstrated a keen awareness of the implications of these narratives and choices, with some seeking to disrupt the "law-abiding" narrative by pushing for broader frames justifying immigration relief.[220]

Crim-imm lawyering manifests across a diversity of settings, including criminal courts, legislative advocacy, and media campaigns. Similarly, social movements are not contained to one space, bridging the supposed divide between civil and criminal law. Lawyering theory would be wise to recognize that much lawyering will occur at the intersection of the two fields. In response to the call from mobilized groups to view these systems as interrelated, lawyering scholars should explore models of lawyering specific to crim-imm lawyering.

IV. CRIM-IMM LAWYERING

This part seeks to initiate a conversation about a new model of lawyering: *crim-imm lawyering*. It does so by identifying the ways in which the practice of crim-imm lawyering would benefit from scholarly attention and offering suggestions for further exploration. I do not claim that lawyering at the intersection of criminal and immigration law is completely unique. Rather, my goal is to mark the importance of exploring lawyering models that focus specifically on the space where the two systems meet.

What follow are three suggestions for further attention from lawyering scholars. These suggestions stem directly from what on-the-ground lawyering and social mobilization tell us about lawyering needs, areas where lawyering theory could serve both current and aspiring lawyers developing intentional and self-reflective practices. Specifically, any model of crim-imm lawyering should grapple with principles of movement lawyering in indigent criminal defense and with commitment to immigrant justice as racial and criminal justice. Second, future scholarly work on crim-imm lawyering should also explore collaboration between various lawyering organizations and with non-lawyer advocacy organizations, or what this article refers to as lawyering across models. Finally, in light of the ever-growing urgencies in lawyering and the frequency of emergency lawyering in the crim-imm space, crim-imm lawyering theory requires accounting for the challenges of lawyering during emergencies. These suggestions, while developed with crim-imm lawyering in mind, are not necessarily unique to crim-imm. They may very well serve lawyering scholars and other fields of practice more broadly.

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219. Elizabeth Keyes, *Defining American: The Dream Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101, 144 (2013) (arguing that the undocumented immigrant youth movement validates a broader exclusion from immigration relief to noncitizens with criminal convictions by advancing a law-abiding narrative in Dream Act advocacy).

220. *See* Jonathan Perez, *Challenging the "DREAMer" Narrative*, HUFFPOST (Nov. 16, 2014), https://www.huffpost.com/entry/challenging-the-dreamerna_b_6163008; Von Diaz, *How 5 DREAMers Are Rethinking Their Role In The Immigrant Rights Movement*, HUFFPOST (Apr. 28, 2014), https://www.huffpost.com/entry/dreamers-immigrant-rights_n_5227646.

A. *Movement Crim-Imm Lawyering*

Social movements like Abolish ICE!, community bail funds, and the Movement for Black Lives illustrate the vibrancy of social mobilization in and around the crim-imm space. This vibrancy should not be ignored, as it calls for practitioners and scholars to explore how crim-imm lawyering should engage with these social movements and the movements' stated goals. Two such areas for further exploration are indigent criminal defense models that incorporate principles of movement lawyering and immigration lawyering models committed to racial justice goals.

1. *Indigent Criminal Defense and Movement Lawyering*

The movement lawyering model and indigent criminal defense may appear to be in tension, if not irreconcilable. Movement lawyering contemplates the deliberate use of a variety of strategies toward a systemic-change goal, including non-litigation strategies and non-legal strategies, and assumes a degree of mobilization in the client population.[221] In contrast, criminal defense is commonly understood as seeking an outcome for an individual, and litigation in criminal defense is not a deliberate choice, as it is imposed upon individuals. Some have also argued that structural limitations render it difficult, if not impossible, to organize individuals charged with criminal offenses.[222] Indeed, individuals charged with criminal offenses are often detained, rendering them difficult to reach. Furthermore, pre-trial detention—and the criminal process—may be brief, thereby constraining organizing opportunities.

Despite the contrast between the criminal adjudicatory process, its accompanying carceral system, and the movement lawyering model, principles from the model could and should inform indigent criminal defense practice. First, the claim that detained populations cannot organize or be organized is inaccurate. Recent prisoner-led organizing challenging solitary confinement in California illustrates the potential power of mobilization by a detained population.[223] Admittedly, sentenced prisoners are incarcerated for much longer periods of time than individuals in pre-trial or immigration incarceration. However, even for a more transient population, mobilization efforts by individuals in immigration detention defy the claim that detained populations

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221. Cummings, *Movement Lawyering*, *supra* note 70, at 1653 (defining the features of movement lawyering as representing "mobilized clients" and deploying "integrated advocacy" that de-centers litigation and includes operating outside "formal lawmaking arenas").

222. Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 725–26 (2005) (noting that difficulties in self-identification and timing put criminal defendants in a "poor position to organize"); Jeffrey A. Love, *Fair Notice About Fair Notice*, 121 YALE L.J. 2395, 2401 n.37 (2012).

223. Keramet Reiter, *The Pelican Bay Hunger Strike: Resistance Within the Structural Constraints of a US Supermax Prison*, 113 S. ATLANTIC Q. 579 (2014), *available at* https://read.dukeupress.edu/south-atlantic-quarterly/article-abstract/113/3/579/3720/The-Pelican-Bay-Hunger-Strike-Resistance-within; *see also* Benjamin Wallace-Wells, *The Plot From Solitary*, NEW YORK MAGAZINE (Feb. 21, 2014), https://nymag.com/news/features/solitary-secure-housing-units-2014-2/index2.html.

cannot organize.[224] Furthermore, community mobilization already occurs on criminal legal system issues, as evidenced by the ArchCity Defenders, a legal advocacy organization that provides, among other things, criminal defense representation in the St. Louis area.[225] Second, while movement lawyering seeks to support mobilized communities, it also teaches that lawyers seeking social change should employ capacity-building techniques in their practice, regardless of whether the community is already mobilized.[226] Criminal defense organizations could employ capacity-building practices, such as connecting clients or their families to community organizations.

I do not mean to over-simplify the challenges faced by indigent defense organizations. Caseloads, underfunding, and other factors situate providers of indigent criminal defense differently, and arguably not all can effectively employ a movement lawyering model.[227] But the profession need not rely solely on existing organizations to employ practices inspired by movement lawyering or seek to change every indigent defense organization. New organizations could aim to provide indigent criminal defense while experimenting with different models for accountability, case selection, and priority setting.[228]

New criminal defense organizations can help identify and work out tensions raised by the movement lawyering model in criminal defense. For example, in criminal defense, the prevailing theory is that the lawyer is accountable to the individual. This, for some, calls into question how a lawyer practicing a movement lawyering model could maintain accountability to an individual client.[229] A new organization devoted to lawyering in crim-imm would provide opportunities to set priorities and develop advocacy strategies informed by mobilized groups, without rejecting the traditional lawyer-client

224. *See* Allegra M. McLeod, *Immigration, Criminalization, and Disobedience*, 70 U. MIAMI L. REV. 556, 571–72 (2016) (detailing certain organizing efforts in immigration detention centers).

225. For example, the introduction of defense attorneys from ArchCity Defenders helped uncover excessive fines and fees and abuse of warrants in the Ferguson municipal court, leading to activism, public outcry, and calls for reform. Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation As A Tool of Systemic Reform*, 58 WM. & MARY L. REV. 1171, 1224 (2017).

226. While movement lawyering assumes a level of mobilization, the issues it underscores—such as how lawyers engage in capacity building in spaces that lack mobilization—extend far beyond how lawyers relate to already-mobilized people. Cummings, *Movement Lawyering*, *supra* note 70, at 1653.

227. Because criminal defense is—for the most part—localized, different jurisdictions may be more or less amenable to employing movement lawyering principles. In some jurisdictions, public defenders can face significant backlash for engaging in advocacy beyond that of individual client representation. Most recently, top public defenders were fired in Montgomery County, Pennsylvania after filing an amicus brief arguing for bail reform. *See* Samantha Melamed, *Fired Montco Defenders Faced Threats for Advocating Reforms, Emails Show*, PHILA. INQUIRER (Mar. 2, 2020), https://www.inquirer.com/news/montgomery-county-public-defender-dean-beer-independence-20200302.html.

228. One example of an organization providing criminal defense that has also employed different lawyering models with the goal of seeking systemic change—which have evolved over time—is the Public Defender Association in Seattle. *See About*, PUBLIC DEFENDER ASSOCIATION, http://www.defender.org/about (last visited Apr. 3, 2020).

229. Taylor-Thompson, *supra* note 87, at 199–200 (questioning how an organization committed to community-oriented defense maintains accountability to individual clients).

accountability model that existing organizations apply in individual representation.

However, even within existing criminal defender organizations, movement lawyering also calls for consideration of collective action in the adjudicatory process. Coordinated motions to suppress or trial strategies could be contemplated as a practice that criminal defense attorneys provide as an option to their clients.[230] One example of criminal lawyering that seeks to employ a different model, one which is closer to the movement lawyering theories seen in immigration law, is Pace Law School's criminal defense clinic, which responded to New York City's "broken windows" policing (of aggressive zero tolerance arrests for minor public nuisance charges) by going beyond a model of individual representation.[231] The clinic modified their docket, moving from away from direct individual representation to the development of advocacy strategies to support community efforts to end the city's aggressive police practices.[232] Similar models could be developed in other areas of the law, like challenging traffic court debt.[233]

To this point, law school clinics are also an ideal place for experimenting with movement lawyering principles in criminal defense. It is one thing to ask a funding-strapped, over-extended public defender office to engage in capacity building and systemic reform on top of what the office does every day. Law school clinics, however, can serve as sites for new models of criminal defense, and can use the classroom for exploring the complications and ethical issues that arise.

Much crim-imm lawyering occurs in criminal defense proceedings—prosecutions of illegal entry and illegal re-entry, other immigration-related charges, and various criminal charges against noncitizens. While movement lawyering may not easily apply to lawyering in criminal defense, the presence of social movements advocating in the crim-imm space and the growth of social change theory in models of criminal defense call for increased exploration of how principles of movement lawyering could be applied in criminal defense.[234] If lawyers and scholars take seriously the claim that social

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230. *See* Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1100 (2013) ("[T]hat representation can include an invitation (in appropriate cases) to participate in a collaborative effort to change the system by forcing it to bear some of the real costs of mass misdemeanor processing.").

231. Fabricant, *supra* note 94, at 353. Fabricant notes how, in the civil arena, including in immigration, law school clinics were already experimenting with combined advocacy approaches. *Id*. at 357.

232. *Id*. at 363–68.

233. One scholar has proposed a model of movement lawyering in traffic court debt litigation, presenting a theory of movement lawyering in traffic court. *See* Veryl Pow, Comment, *Rebellious Social Movement Lawyering Against Traffic Court Debt*, 64 UCLA L. REV. 1770, 1773 (2017).

234. Gideon's Promise and Zealous illustrate efforts to build upon the public defender model by providing training and expertise to public defenders around the country. *See Home*, GIDEON'S PROMISE, https://www.gideonspromise.org/ (last visited Apr. 3, 2020); *Overview*, ZEALOUS, https://zealo.us/action/zealous (last visited Apr. 3, 2020). Open Society Foundations has also, for now decades, provided financial support to criminal justice reform efforts including those that focus on enhancing the provision of criminal legal defense. *See* OPEN SOCIETY INSTITUTE, 2002 U.S. PROGRAMS ANNUAL REPORT, at 9

change will not be effective without a model that centers on movement actors, then an exploration of movement lawyering in criminal defense is imperative.

2. *Immigrant Justice, Criminal Justice, Racial Justice*

Social movements have increased calls for advocacy driven by immigrant justice as racial justice and for alliances between Black and Brown communities.[235] Criminal justice has long been tied to racial justice and, as a result, racial justice frames are present in criminal justice advocacy. A lawyering theory of crim-imm should engage with these calls, as they demand that practitioners and scholars develop practices and strategies of lawyering that are informed by racial justice outside its already known role in criminal system advocacy reform. In other words, crim-imm lawyering must explore immigrant justice as criminal justice and as racial justice.

Immigrant justice as criminal and racial justice will mean reimagining how immigration issues are framed in media advocacy, policy advocacy, and in the courts through litigation. In the family separation example, immigrant justice as criminal justice could mean centering advocacy on the use of the prosecutorial power to criminalize migration to the United States. Some criminal justice frames already available in 2018 included wasteful and senseless prosecutions.[236] While advocates had advanced these frames specifically to call an end to mass prosecution of migration,[237] they were not

(2003), *available at* https://www.opensocietyfoundations.org/uploads/a442f926-db8b-4871-8474-6dfd313eef40/a_complete_10.pdf (listing funding for public defender services programs).

235. *See* Section III.A, *supra*. The increased awareness of immigrant justice as racial justice is illustrated by the public outcry surrounding the detention of musician 21 Savage, which also illustrated the increased public awareness of immigration enforcement affecting not just Brown communities but also Black ones. *See* Briana Younger, *The Shameful Arrest of 21 Savage*, NEW YORKER (Feb. 6, 2019), https://www.newyorker.com/culture/cultural-comment/the-shameful-arrest-of-21-savage. Still, however, although 21 Savage immigrated to the United States as a child, the press surrounding his detention notably did not use the Dreamer label in describing his saga. *See, e.g.*, Hannah Giorgis, *21 Savage and the False Promise of Black Citizenship*, THE ATLANTIC (Feb. 6, 2019), https://www.theatlantic.com/entertainment/archive/2019/02/21-savages-ice-detention-false-promise-black-citizenship/582013/ (discussing the musician's childhood arrival to the United States).

236. Outside of the immigration context, and specifically in the controlled substance context, criminal reform had already utilized frames of diverting resources away from low-level offenses in order to have more efficiency in the criminal legal system. *See* Press Release, U.S. Dep't of Justice, New Smart on Crime Data Reveals Federal Prosecutors Are Focused on More Significant Drug Cases and Fewer Mandatory Minimums for Drug Defendants (Mar. 21, 2016), *available at* https://www.justice.gov/opa/pr/new-smart-crime-data-reveals-federal-prosecutors-are-focused-more-significant-drug-cases-and; *see also* Stephanie Clifford & Joseph Goldstein, *Brooklyn Prosecutor Limits When He'll Target Marijuana*, N.Y. TIMES (July 8, 2014), https://www.nytimes.com/2014/07/09/nyregion/brooklyn-district-attorney-to-stop-prosecuting-low-level-marijuana-cases.html?mcubz=3; Justin George, *Can Bipartisan Criminal-Justice Reform Survive in the Trump Era?*, NEW YORKER (June 6, 2017), https://www.newyorker.com/news/news-desk/can-bipartisan-criminal-justice-reform-survive-in-the-trump-era (describing efforts to "relax mandatory minimum sentences, giving federal judges somewhat more discretion in sentencing and helping low-level offenders avoid prison time").

237. As early as 2015, advocates—including the ACLU—had advanced these frames in seeking to reform the mass use of criminal prosecutorial power over migration. JUDITH A. GREENE ET AL., GRASSROOTS LEADERSHIP & JUSTICE STRATEGIES, INDEFENSIBLE: A DECADE OF MASS INCARCERATION OF MIGRANTS PROSECUTED FOR CROSSING THE BORDER (2016), *available at* https://justicestrategies.org/sites/default/files/publications/indefensible_book_web.pdf; *see also* Letter from American Civil Liberties

employed in the litigation or mainstream media advocacy on family separation. They were only utilized in mainstream media when decriminalizing migration entered the political space through the 2020 Democratic primary.[238]

Immigrant justice as criminal and racial justice also requires disrupting narratives that contribute to racial stereotypes in immigrant advocacy. A common narrative in immigration advocacy is that of the "good" immigrant, contrasted with the "bad," or criminal, immigrant.[239] Similarly, the slogan "we are not criminals" has been used in pro-legalization campaigns and calls for relief from removal.[240] These narratives are then utilized by political leaders, compounding their negative effects on individuals involved in the criminal legal system.[241] Immigrant justice as racial justice would necessarily involve refraining from using narratives that compound criminal labeling as worthy of exclusion. Crim-imm lawyering must grapple with the consequences of making decisions that compound the effect of this narrative.

More broadly, in crim-imm, numerous social movement groups have come to view immigrant justice as racial justice and vice versa.[242] Crim-imm lawyers could, and arguably should, utilize media strategies and framing opportunities to further these connections. What would it have looked like if public awareness surrounding the *Ms. L* litigation captured images of Black immigrants, as opposed to Brown immigrants from Central America? Such

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Union et al., to Loretta Lynch, Att'y Gen. of the United States (July 28, 2015), *available at* https://www.aclu.org/letter/coalition-letter-attorney-general-171-organizations-end-streamline-prosecutions; Letter from Legal Assistance and Advocacy Organizations to Charles Schumer, Senate Minority Leader, et al. (July 11, 2018), *available at* https://www.nationalimmigrationproject.org/PDFs/community/2018_11Jul_decrim-signatures.pdf (calling on Congress to decriminalize migration).

238. *See* Kara Hartzler, *Open Forum: Why Crossing the Border Shouldn't Be a Crime*, SAN FRANCISCO CHRONICLE (July 29, 2019), https://www.sfchronicle.com/opinion/openforum/article/Open-Forum-Why-crossing-border-shouldn-t-be-a-14190752.php?utm_campaign=CMS%20Sharing%20Tools%20(Premium)&utm_source=t.co&utm_medium=referral&psid=lVCBD; *see also* Alex Samuels, *Julián Castro Shifted the Democratic Conversation About Immigration Reform. Can It Help His Bid?*, TEX. TRIB. (Aug. 29, 2019), https://www.texastribune.org/2019/08/29/julian-castro-immigration-reform-2020-presidential-candidacy/.

239. Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 226 (2012) (describing the use of the good and bad immigrant dichotomy frame in immigration removal).

240. Angélica Cházaro, *Beyond Respectability: Dismantling the Harms of "Illegality"*, 52 HARV. J. ON LEGIS. 355, 374 (2015); *see also* Claudia Morales, *Families Crossing the Border: 'We Are Not Criminals'*, CNN (Nov. 2, 2016), https://www.cnn.com/2016/11/02/us/family-immigration-detention-centers/index.html.

241. Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243, 253 (2017) (detailing how Obama-era removal priorities fell along the good and bad immigrant dichotomy, and how the Trump Administration has exploited these narrative frames); Carrie L. Rosenbaum, *Crimmigration—Structural Tools of Settler Colonialism*, 16 OHIO ST. J. CRIM. L. 9, 32 (2018) (arguing that the use of these narrative frames "further[s] the racialized narrative portraying native-born Central Americans and Mexicans as criminal").

242. Some groups have already begun doing so, such as BAJI and the UndocuBlack Network. *See* Section III.A.2, *supra*. Families for Freedom also did so in response to President Obama's statements about noncitizens with criminal convictions. *See* Abraham Paulos, *People With Felonies, Criminal Records and Gang Affiliation Are Our Friends and Family*, HUFFPOST (Nov. 30, 2014), https://www.huffpost.com/entry/people-with-felonies-crim_b_6228310.

framing was available, as Ms. L herself is Black and African.[243] However, perhaps illustrating how immigration is often understood in terms of Brown communities, Ms. L, when initially detained by immigration law enforcement, had to communicate her fear of returning to her home country in her very limited Spanish, although her native and primary language is Lingala.[244]

B. *Lawyering Across Models*

Crim-imm lawyering is, by its nature, heterogeneous. It occurs in various forums, in and out of courtrooms, in brief interactions with clients and in large, impactful cases. With diversity in lawyering comes diversity in lawyering models and the use of various lawyering models toward similar social change goals. If we are to take seriously the claim that lawyering models matter for social change, crim-imm lawyering requires attention to how lawyers employing different lawyering models work to achieve social change together, as well as how lawyers work with non-legal actors.

Lawyering theory would benefit from engaging with two dynamics that manifest in lawyering in practice. First, although lawyering theory typically describes lawyering models as applying to whole organizations, organizations do not always perfectly correspond to a lawyering model. Lawyers within one organization may identify with different lawyering models or have different conceptions of what the same lawyering model entails. Lawyering theory also appears to treat individual lawyers as if they embody a sole model of lawyering in their entire practice. But lawyers may shift from one model to another, not just over time but also across their cases. A lawyer may practice movement lawyering in one matter with active mobilization and handle another matter based on a rebellious lawyering model that lacks the main characteristics of movement or even community lawyering. Second, because social movements may have local, national, and international ties, movement lawyering also implicates lawyering across lawyering models. Take, for example, Ashar's account of movement lawyering in the Dreamer movement. According to Ashar, some organizations maintained traditional forms of lawyering despite being connected to the immigrant rights movement at the time, while others employed a community-oriented model of practice.[245] Crim-imm lawyering today requires collaboration across different models of lawyering.

The example of family separation is illustrative. Lawyering happened in numerous forms and models, including class action litigation, individual pro

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243. *See* Karla McKanders, *Immigration and Blackness: What's Race Got to Do With It?*, 44 HUM. RIGHTS 20 (2019), *available at* https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=2122&context=faculty-publications.

244. *See* Complaint at 6, Ms. L v. U.S. Immigration and Customs Enf't, 302 F. Supp. 3d 1149 (S.D. Cal. 2018) (No. 18-CV-0428).

245. *See* Ashar, *Movement Lawyers in the Fight*, *supra* note 75, at 1499–1501.

bono representation, and individual criminal defense representation.[246] Numerous legal nonprofits also provided various levels of legal and non-legal assistance.[247] These varied forms of lawyering were necessary to properly respond to the widespread chaos that ensued in 2018, but their simultaneous existence complicates lawyering theory's premise that a lawyer may effect social change by adopting a particular model of lawyering. If a lawyer seeks to increase the efficacy of her advocacy, she must grapple with the countervailing impact of other forms of lawyering that are occurring simultaneously. She must be able to translate her social change goals into collaborative methods with lawyers who have different processes for decision-making and accountability. To date, while lawyering scholarship has done much to advance understanding of concepts of lawyering models and their distinct characteristics, it has yet to fully develop theories of lawyering that account for the multiplicity of lawyering models that coexist in practice.

Other recent lawyering in immigrant rights also highlights how often multiple lawyer models coexist in seeking social change, even as to specific social change goals. Scholars have described the lawyering that occurred in response to the Trump Administration when it first announced a Muslim and refugee ban as possessing some characteristics of a movement-lawyering model.[248] But that lawyering was incredibly diverse. It included multiple affirmative lawsuits seeking to enjoin the ban, including a nationwide class action lawsuit,[249] lawyers providing direct services at airports,[250] and sample habeas and legal pleadings disseminated around the country.[251] Sometimes lawyers are working in concert; sometimes they are at cross-purposes. Similarly, the advocacy around immigration relief for some Dreamers, and the efforts to halt the termination of the 2012 DACA program for some Dreamers, involves various types of lawyering models. There are community lawyers working with organizations around the country, and at least one of the lawsuits challenging the DACA termination contains characteristics of a movement lawyering model, involving Make the Road New York, a member-based organization acting as both client and counsel.[252] This

246. *See* Section III.B.1, *supra*.

247. For example, reunification efforts for separated families, in which lawyers were involved, were non-legal activities conducted by legal actors.

248. Carle & Cummings, *A Reflection on the Ethics of Movement Lawyering*, *supra* note 72, at 448.

249. *See* Press Release, American Civil Liberties Union, Government Settles in First Lawsuit Filed Against Trump's Muslim Ban (Aug. 31, 2017), *available at* https://www.aclu.org/press-releases/government-settles-first-lawsuit-filed-against-trumps-muslim-ban ("The settlement came in the case of *Darweesh v. Trump*, which was filed as a nationwide class-action in federal district court in New York City . . . .").

250. *See* Jonah Engel Bromwich, *Lawyers Mobilize at Nations 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.

251. *See id.* (discussing how Cecilia Wang, the ACLU's deputy legal director, described "sitting at [her] desk working on a template habeas petition that could be used by lawyers at airports all around the country").

252. *See Batalla-Vidal v. Nielsen*, YALE LAW SCHOOL, https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/worker-and-immigrant-rights-advocacy-clinic/batalla-

advocacy also involves cause lawyering within government; over twenty State Attorneys General are challenging the Trump Administration's attempt to terminate the DACA program.[253]

In addition, crim-imm lawyering entails collaborative work across professional fields. Lawyers may work with organizers as clients, but they may also work with organizers as collaborators. Crim-imm lawyering requires lawyers to work with policy advocates, legislators, and communication professionals, among others.[254] Each of these roles impacts social change goals and dispels any notion that lawyers could set social change goals and execute them absent collaboration outside the legal field. Lawyering theory could help lawyers develop models for engaging in non-legal strategies and with non-legal actors.

Lawyering trends are neither linear nor monolithic. The rise of one lawyering model does not mean the decline of another. As evidenced by Ashar's discussion of immigrant rights lawyering during the 2009-2012 period, and as recent lawyering in immigrant rights shows, lawyers make choices in relation to social movements, but the presence of a vibrant social mobilization does not necessarily result in lawyering that is furthering the goals of the movement or is accountable to movement actors.[255] Crim-imm lawyers—and others seeking social change through the law—must navigate working across models with impact litigators, client-centered lawyers that are not connected to mobilized individuals, and—to use López's conception of flawed lawyering—even regnant lawyers.

C. *Lawyering in Urgency*

Crim-imm lawyering also asks scholars to think about lawyering in urgency. As this article is going to print, the country is living through a public health crisis due to the COVID-19 pandemic,[256] upending the legal market

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vidal-v-nielsen (last visited Apr. 3, 2020) (discussing *Batalla-Vidal v. Nielsen*, which was argued before the Supreme Court on November 12, 2019).

253. State Attorneys General, during the Trump Administration, have comprised a notable part of cause lawyering, litigating matters such as the Muslim ban, the government's attempt to ask a citizenship question to the 2020 census, the expansion of the public charge ground of inadmissibility, the termination of DACA, among others. While government lawyering entails its own set of characteristics, intentional lawyering methods with aims similar to those of movement or social change lawyers exist inside the government. *See* Douglas NeJaime, *Cause Lawyers Inside the State*, 81 FORDHAM L. REV. 649, 654–55 (2012).

254. Even within an organization, lawyers may often find themselves working across fields. Take, for example, the national ACLU, which is staffed by and runs campaigns by litigators, organizers, communicators, and policy advocates. *See Defending Our Rights*, ACLU, https://www.aclu.org/defending-our-rights/ (last visited May 17, 2020).

255. *See* Section III.B.2, *supra*.

256. On March 13, 2020, President Trump declared a national emergency as a result of the COVID-19 pandemic. *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, THE WHITE HOUSE (Mar. 13, 2020), https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/. By the end of the month, the United Sates had more reported cases of the virus than any other country in the world. Donald G. McNeil, Jr., *The U.S. Now Leads the World in Confirmed*

and creating a staggering demand for lawyers.[257] In crim-imm, community mobilization, advocacy, and litigation has sprung up around the country. Bail funds are mobilizing to obtain the release of as many people as possible from both criminal and immigration custody.[258] Lawsuits seek to reduce the population of those imprisoned in both criminal and immigration carceral facilities.[259] Decarceral activism is crossing boundaries between fields of law.[260] It is too early into the pandemic to analyze how crim-imm lawyering plays out during this crisis. But it would be remiss to not take note of this moment and how scholarship regarding lawyering in urgency could be extremely useful at this time.

Even outside the current moment, crim-imm lawyering regularly occurs in urgency. The family separation crisis that resulted from the government's Zero Tolerance policy in 2018 is the most high-profile example of recent crim-imm emergency lawyering, but it is not the only one. Immigration arrest practices have led to emergency lawyering during the current administration. In late summer 2019, ICE carried out what may have been the largest worksite raid in the agency's history.[261] It did so in Mississippi, a state with a dearth of immigration legal services.[262] During the Trump administration,

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Coronavirus Cases, N.Y. TIMES (Mar. 26, 2020), https://www.nytimes.com/2020/03/26/health/usa-coronavirus-cases.html.

257. Lyle Moran, *The High Demand for Lawyers Amid the Coronavirus Pandemic*, ABA JOURNAL (Mar. 17, 2020), https://www.abajournal.com/web/article/lawyers-and-law-firms-say-they-are-inundated-with-coronavirus-related-queries.

258. National Bail Fund Network (@bailfundnetwork), TWITTER (Mar. 28, 2020, 8:14 AM), https://twitter.com/bailfundnetwork/status/1243874148289396736 ("20/Whether it was community bail funds posting pretrial bail or immigration bond, @bailfundnetwork funds (and so many other comrades & partners) spent this hard week fighting to #FreeThemAll in every way they could. We need mass release NOW. But we are also running out of time.").

259. Josh Gerstein, *Legal Battles Escalate Over Virus Dangers to Immigration Detainees*, POLITICO (Mar. 24, 2020), https://www.politico.com/news/2020/03/24/coronavirus-immigration-detainees-147721; *see also* Spencer S. Hsu, *Federal Judge to Order Inspection of D.C. Jail in Coronavirus Lawsuit Seeking Emergency Inmate Releases*, WASH. POST (Apr. 7, 2020), https://www.washingtonpost.com/local/legal-issues/us-judge-hears-lawsuit-to-release-dc-jail-inmates-amid-coronavirus-outbreak/2020/04/07/b5ae7ae0-7836-11ea-8cec-530b4044a458_story.html; Corene Kendrick, *California Prisoners Seek Federal Court Action to Lower Population Levels*, SAN FRANCISCO BAY VIEW (Mar. 26, 2020), https://sfbayview.com/2020/03/california-prisoners-seek-federal-court-action-to-lower-population-levels/. These efforts come in response to the serious public health concerns posed by the spread of COVID-19 in carceral facilities. Timothy Williams et al., *'Jails Are Petri Dishes': Inmates Freed as the Virus Spreads Behind Bars*, N.Y. TIMES (Mar. 30, 2020), https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html.

260. For example, organizing that demands that Connecticut officials de-densify the prison population has brought together criminal justice advocates, a bail fund that works in both systems, and an immigrant rights group. *See, e.g.*, Press Release, CT Coalition Pens Open Letter to Governor Demanding Emergency Action to Protect Incarcerated People and Public from COVID-19 (Mar. 16, 2020), *available at* https://d3n8a8pro7vhmx.cloudfront.net/katal/pages/2242/attachments/original/1584470692/2020-03-16_COVID-19_Press_Release.pdf?1584470692 (listing, among others, multiple criminal justice groups demanding decarceration in Connecticut prisons).

261. *See* Jordan, *supra* note 27; Abigail Hauslohner, *ICE Agents Raid Miss. Work Sites, Arrest 680 People in Largest Single-State Immigration Enforcement Action in U.S. History*, THE WASHINGTON POST (Aug. 7, 2019).

262. *See* Audie Cornish, *Immigration Lawyer Discusses Working With Families in Mississippi After ICE Raids*, NPR (Aug. 8, 2019), https://www.npr.org/2019/08/08/749500879/immigration-lawyer-discusses-working-with-families-in-mississippi-after-ice-raid.

ICE issued a policy regarding arrest practices in courthouses,[263] which it claims are appropriate in light of sanctuary policies that hinder its ability to use local law enforcement agencies for removal purposes.[264] The remarkable increase of arrests made in courthouses has made communities scramble to locate arrested individuals, secure legal services, and attempt to obtain people's release from detention and prevent deportations.[265] Even outside litigation, urgent lawyering occurs. For example, legislative advocacy can also occur in urgent circumstances, as was the case from November 2017 to January 2018 when the government shut down over Dream Act negotiations. Indeed, under the current administration, it is hard to identify a time in which lawyers in the crim-imm space have not operated under urgent or emergency circumstances.

The lawyering literature, to date, has focused little on emergency lawyering, and the existing scholarship on emergency lawyering centers around how lawyers can meet legal services needs.[266] A critical gap in the lawyering scholarship is about maintaining or adapting practices during urgencies. For crim-imm lawyering, addressing this gap requires additional scholarly attention to how lawyers practicing in urgent situations can maintain intentional practices to empower clients, communities, and social movements. It also calls for lawyering scholarship that sets forth how social change lawyers maintain accountability to the groups that they strive to serve during emergencies.

The challenges of lawyering in urgency are numerous. Simply stated, maintaining accountability and intentionality takes time. Lawyering in urgency increases workload demands, shortens time for decision-making, and places great stress on lawyers and non-lawyers alike.[267] Emergency lawyering requires creativity, resourcefulness, and quick action.[268] During an emergency, lawyers will likely lack the time for careful consultation before deciding where to devote resources or what arguments to make and narratives

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263. U.S. Immigration and Customs Enforcement Directive 11072.1, *Civil Immigration Enforcement Actions Inside Courthouses* (2018), *available at* https://www.ice.gov/sites/default/files/documents/Document/2018/ciEnforcementActionsCourthouses.pdf.

264. *See id.*

265. *See, e.g.*, Tepfer, *supra* note 2. In New York state, the advocacy group Immigrant Defense Project documented a 1,700% increase in ICE arrests conducted at courthouses around the state. *See The Time to Act to Get ICE Out of Courts Is Now*, IMMIGRANT DEFENSE PROJECT, https://www.immigrantdefenseproject.org/ice-courts-nys/ (last visited Apr. 3, 2020).

266. *See, e.g.*, Barbara A. Glesner, *The Ethics of Emergency Lawyering*, 5 GEO. J. LEGAL ETHICS 317, 370–72 (1991) (prescribing methods for increasing the efficiency of legal services during emergency situations); Brenna Nava, Comment, *Hurricane Katrina: The Duties and Responsibilities of an Attorney in the Wake of a Natural Disaster*, 37 ST. MARY'S L. J. 1153 (2006); Roger Nowadzky, *Lawyering Your Municipality Through a Natural Disaster or Emergency*, 27 URB. LAW 9 (1995) (describing avenues for localities to address legal service needs in emergencies); Clifford J. Villa, *Law and Lawyers in the Incident Command System*, 36 SEATTLE U. L. REV. 1855 (2013).

267. Zero Tolerance illustrates some of the challenges placed on lawyers who seek to support social movements while practicing in urgent circumstances. And Zero Tolerance is not an outlier. In the civil rights space today, it is not uncommon for lawsuits to be filed within a day of government action.

268. *See* Judith L. Maute, *Reflections on "Public Service in A Time of Crisis"*, 32 FORDHAM URB. L.J. 291, 292 (2005) (describing the provision of emergency lawyering services in the wake of 9/11).

to advance. How crim-imm lawyers can adapt their goals, practices, and values to emergencies would benefit from additional scholarship.[269] While crim-imm heightens the need for development of lawyering theory that accounts for lawyering in urgent and emergency situations, the need is not unique to crim-imm.

Lawyering theory could explore whether urgent circumstances warrant organizations to have a lawyering advisor, whose role, separate from engaging in substantive advocacy, is to advise on lawyering models. Because one of the challenges of emergency lawyering is the lack of time for those involved in the work, having a specified role for someone who is not directly involved in the work could create an avenue for feedback and reflection that otherwise can be missed. A key reason that recent lawyering models often gravitate towards decision-making by non-lawyers is the belief that lawyers are not well situated to make decisions for communities. Emergency lawyering only heightens the challenges a lawyer faces in decision-making because emergencies increase the number and the gravity of decisions. An outside advisor can help address this challenge.

Another area for further exploration in crim-imm lawyering is diversification of staff, not just in terms of ethnicity and race, but also in terms of non-lawyers in positions of power in lawyering organization. Such non-lawyers may also maintain intentionality during urgent circumstances. Encouragingly, some organizations have begun to hire community organizers as a way to incorporate community feedback into the lawyering organization.[270] But if organizations are structured in such a way that lawyers have the ultimate discretion in the direction and goals of an organization, the blind spots the lawyers have, even if exposed by others, will still prevail.

CONCLUSION

For too long, lawyering theory has treated civil and criminal lawyering as wholly distinct areas of practice. That separation may have been tenable in the 20th century, but the past few decades have altered the landscape of lawyering at the intersection of criminal and immigration law. Under the current presidential administration, crim-imm lawyering practice is inescapable. It is simply everywhere.

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269. My colleagues Muneer Ahmad and Michael Wishnie contribute to this conversation in a chapter of a forthcoming book, where they explore lessons learned from crisis lawyering in the clinic we co-direct. *See* Muneer Ahmad & Michael Wishnie, *Call Air Traffic Control!, Confronting Crisis as Lawyers and Teachers*, *in* CRISIS LAWYERING: EFFECTIVE LEGAL ADVOCACY IN EMERGENCY SITUATIONS (Ray Brescia & Eric K. Stern, eds., 2021) (forthcoming) (on file with author).

270. *See, e.g.*, *ACLU Hires Indigenous Justice Organizer for the Dakotas*, DAILY REPUBLIC (Oct. 4, 2019), https://www.mitchellrepublic.com/news/crime-and-courts/4704309-ACLU-hires-indigenous-justice-organizer-for-the-Dakotas; Press Release, American Civil Liberties Union, Former Justice Overcoming Boundaries Executive Director Joins the San Diego ACLU (Feb. 29, 2012), *available at* https://www.aclu.org/press-releases/aclu-hires-seasoned-organizer-build-people-power-san-diego.

Crim-imm lawyering needs are all around us. Crim-imm is found at local criminal courthouses, where immigration law enforcement conducts arrests of individuals complying with court obligations. It is happening in residential neighborhoods and workplaces when raids are executed with the cooperation of local law enforcement cooperation. It is present in the expansion of detention and the use of criminal prosecutorial authority over migration. Social movements are telling the world how interwoven these systems are. Lawyering scholars must pay attention.

At a time when social mobilization is active, vivid, and blurring the line between criminal justice and immigrant rights, lawyering theorists should engage with these trends and interrogate what the trends mean for lawyering in pursuit of social change. Lawyering models help guide lawyers in decision-making, setting priorities, and developing practices that further social justice goals and empower the people and communities that lawyers seek to serve. Further attention to crim-imm lawyering would aid not only existing lawyers engaged in social change lawyering, but also would enhance clinical legal education and be useful for aspiring lawyers in career-charting. The need for a scholarly conversation on crim-imm lawyering is important. This article hopes to initiate that conversation.