

AN INNOVATIVE APPROACH TO MOVEMENT LAWYERING: AN IMMIGRANT RIGHTS CASE STUDY

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INTRODUCTION

Communities are protesting systemic racism, police killings, xenophobia, rising unemployment, climate change, and widening economic inequality. The immigrant rights movement is a critical part of these efforts to foment change.¹ Despite ascendant nativism, immigrant communities continue to achieve moments of remarkable change.² The immigrant rights movement is one of the leading edges in the current development of movement lawyering. Lawyers and law students have renewed interest in creating a model of lawyering that will support the social change efforts of the moment.³ This Article

1. Communities organized around growing nativism and hostile policies such as the Trump administration's deployment of an elite tactical unit designed to support immigration arrest. See Caitlin Dickerson & Zolan Kanno-Youngs, *Border Patrol Will Deploy Elite Tactical Agents to Sanctuary Cities*, N.Y. TIMES (Feb. 14, 2020) (explaining that the elite tactical unit known as BORTAC, which acts essentially as the SWAT team of the Border Patrol, would be part of the units sent to help with interior enforcement. The unit carries additional gear such as stun grenades and has enhanced Special Forces-type training, including sniper certification).

2. In addition to the advocacy that led to the demise of Secure Communities, which is the focus of this Article, passage of the DREAM Act is another relatively recent moment of change. See Development, Relief, and Education for Alien Minors Act of 2011, H.R. 1842, 112th Cong. § 1 (2011); Development, Relief, and Education for Alien Minors Act of 2011, S. 952, 112th Cong. § 1 (2011).

3. In July 2020, we began a five-part course on Movement Lawyering titled, "Build Power, Fight Power," created and taught by lawyers and activists that are part of the Movement Law Lab. At the most recent session, over 4,000 participants joined. See *Build Power, Fight Power: A Five Part Course on Movement Lawyering*, Movement Law Lab (2019), <https://movementlawlab.org/mlcourse> [<https://perma.cc/RY2T-YT3B>]. The course explains that "Times of upheaval are also times of great opportunity and change. Lawyers and legal workers of conscience are needed now more than ever to support the people's resistance – be it the Movement for Black Lives, COVID-19 rapid-response, workers' rights, climate change, immigrant rights, and more. Yet movement lawyering is not what most of us [] were exposed to in law school or what we are trained and encouraged to do as legal practitioners. Some of us are ready and willing to support these movements, but aren't sure how to help. Others of us don't know what movement lawyering means, but know that doing case after case isn't going to solve the problems of our clients. Finally, some of us are already connected and volunteering for movements, but this moment presents new challenges that we haven't seen before. We believe, this moment asks us to think differently about our work. To find new ways to approach our cases, new partnerships, new thought-partners and new strategies. We created this course to help all legal advocates—the experienced and the newly

uses the context of deportation resistance to study a multi-layered campaign involving lawyers, organizers, advocates, and clients, and from that extrapolates an innovative approach to movement lawyering.

A rich body of literature subjects social change lawyering to critical examination.⁴ The traditional concept of lawyers using litigation to effectuate social change largely grew after World War II, between the 1950s and 1970s, as lawyers filed strategic cases to combat legalized segregation⁵ and reform public prisons, welfare systems, and mental hospitals.⁶ As enticing as it was to view litigation as a panacea to the large range of existing social ills, scholars and activists questioned the effectiveness of litigation as a tool for lasting social change.⁷

The ensuing debate in legal scholarship surrounding the role of lawyers involved in social change centers on the connected issues of the efficacy of lawyers' remedies and lawyer accountability.⁸ The efficacy of remedies issue questions how the legal system transforms disputes—funneling core political conflicts into legally cognizable issues that are divorced from marginalized

committed—learn and reflect together on how we can use our skills to support movements fighting for transformative change rooted in people power.” *Id.*

4. Scott Cummings has become the *de facto* participant-historian of the intellectual history of social movement lawyering. See Scott Cummings & Deborah L. Rhode, *Access to Justice: Looking Back, Thinking Ahead*, 30 GEO. J. LEGAL ETHICS 485 (2017) [hereinafter Cummings & Rhode, *Access to Justice*]; Scott Cummings, *Thematic Overview: Community Development Law and Economic Justice – Why Law Matters*, 26 J. AFFORDABLE HOUS. & CMTY. DEV. L. 35 (2017) [hereinafter Cummings, *Thematic Overview*]; SCOTT CUMMINGS & ALAN K. CHEN, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE (John Devins ed., 13th ed. 2013) [hereinafter CUMMINGS & CHEN, PUBLIC INTEREST LAWYERING]. While we cannot do justice to his contributions over the past few years, we hope to situate our research project within this body of literature and summarize his contributions sufficiently to demonstrate the intentions of our research methods.

5. Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 444 (2001) [hereinafter Cummings & Eagly, *A Critical Reflection*] (describing this part of the movement during the 1950s and 1960s).

6. *Id.* at 444–45 (describing the public litigation that took place in the 1970s).

7. Early advocates, like Stephen Wexler and Gary Bellow, offered a more nuanced role for lawyers. See Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L. J. 1049, 1053 (1970) (arguing that rights enforcement by lawyers would not have a significant impact upon poor people and urging practicing poverty lawyers to organize communities). Gary Bellow posited a model of legal-aid practice that emphasized political action and viewed litigation as ancillary to a broader social change strategy. See Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, GARYBELLOW.ORG (Aug. 1977), <http://www.garybellow.org/garywords/solutions.html> [<https://perma.cc/U4Y2-KQP9>] [hereinafter Bellow, *Turning Solutions into Problems*] (arguing for a broader conception of lawyering that included a “political perspective, directed toward specific changes in particular institutions that affect the poor” and “focused case” pressure in combination with community organizing and legislative advocacy). For an example of an early on-the-ground advocate of movement lawyering, see TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT 187–88 (Dave McBride ed., 2011) (describing the “volatile alliance” forged and destroyed between lawyers and demonstrators between 1961–64).

8. Often the literature distinguishes efficacy and accountability (sometime described as autonomy), but we, along with a smaller group of observers, find them inseparable. See generally Scott L. Cummings, *The Puzzle of Social Movements in American Legal Theory*, 64 UCLA L. REV. 1554 (2017) [hereinafter Cummings, *Puzzle of Social Movements*]; Scott L. Cummings, *Rethinking the Foundational Critiques of Lawyers in Social Movements*, 85 FORDHAM L. REV. 1987 (2017) [hereinafter Cummings, *Foundational Critiques*]; Scott L. Cummings, *Movement Lawyering*, 2017 U. OF ILL. L. REV. 1645 (2017) [hereinafter Cummings, *Movement Lawyering*]; Scott L. Cummings, *The Social Movement Turn in Law*, 43 LAW & SOC. INQUIRY 360 (2018) [hereinafter Cummings, *Turn in Law*].

peoples' core concerns and are not amenable to enforceable judicial decrees.⁹ The accountability problem encompasses lawyers' power to overwhelm individual clients and activists and the difficulty in determining the intentions and preferences of group clients, particularly those as large, multi-faceted, and diverse as those making up social movements.¹⁰

While these critiques combine to form the central concerns of relevant lawyering and constitutional scholarship, the literature still lacks a core group of in-depth examples that could help clearly define and theorize this type of lawyering.¹¹ Detailing actual movement lawyering experiences allows for the exploration of critical new questions. First, assuming that litigation or traditional lawyering roles, more generally, cannot provide the answer alone,¹² how do other plausible competitors—lobbying for legislative or administrative changes, electoral strategies, direct action, playing the media, community and labor organizing, social entrepreneurship, or mass social movements—compare?¹³ Second, can we develop a vision of progressive lawyering that enables lawyers involved in social movements to evaluate which tools to use

9. Cummings, *Movement Lawyering*, *supra* note 8, at 1655, 1704; Cummings, *Foundational Critiques*, *supra* note 8, at 1988.

10. Cummings, *Turn in Law*, *supra* note 8, at 374–75.

11. See Purvi & Chuck: *Community Lawyering*, ORGANIZING UPGRADE 4 (June 1, 2010, 7:20 PM), <http://archive.organizingupgrade.com/index.php/modules-menu/community-organizing/item/71-purvi-amp-chuck-community-lawyering> [<https://perma.cc/6MUJ-996J>]; Interview by Joseph Phelan with Purvi Shah, and Chuck Elsesser, Co-founder, Cmty. Justice Project Inc., in Miami, FL (June 15, 2010) (“Also, though there are a number of lawyers across the country engaged in the practice of community lawyering, the theory on community lawyering is at best, embryonic. Those of us engaged in the practice have simply not been able to effectively distill and document our experiences in a cohesive and clear theory.”).

12. Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY 715, 727 (1992) [hereinafter McCann, *Reform Litigation*]; Thomas F. Burke & Jeb Barnes, *Is There an Empirical Literature on Rights*, 48 STUD. IN L. POL. & SOC'Y 69, 74–75 (2009) [hereinafter Burke & Barnes, *Empirical Literature on Rights*]; Samuel R. Bagenstos, *Social Change Litigation as Just Another Political Tool*, NEW RAMBLER REV. (2015) [hereinafter Bagenstos, *Social Change Litigation*] (Review of JEB BARNES & THOMAS BURKE, *HOW POLICY SHAPES POLITICS: RIGHTS, COURTS, LITIGATION, AND THE STRUGGLE OVER INJURY COMPENSATION* (2015)), <http://newramblerreview.com/book-reviews/law/social-change-litigation-as-just-another-political-tool> [<https://perma.cc/HGC8-MVQK>] (last visited Aug. 21, 2019).

13. A notable exception is Cummings, who both raises the question of whether litigation is any more ineffective in producing social change, inspires greater backlash, diverts more resources from other strategies or is less respectful of the autonomy of marginalized groups than its available alternatives, principally social movements. See Cummings, *Foundational Critiques*, *supra* note 8, at 1992–2000; Scott L. Cummings, *Law and Social Movements: Reimagining the Progressive Cannon*, 2018 WIS. L. REV. 441 (2018); see also Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464 (2017) [hereinafter Ashar, *Movement Lawyers for Immigrant Rights*]; GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992). Some litigation critics take time to note that other means to social change might face similar difficulties. However, while these critics generally identify that legal strategies face barriers, such as entrenched legal bureaucracies, costs, deferral to elite decision-making and giving up control over framing and agendas to legal experts, they simply assume that other strategies are not similarly burdened. See, e.g., Michael Diamond, *The Transposition of Power: Law, Lawyers and Social Movements*, 24 GEO. J. ON POVERTY L. AND POL'Y 319, 350 (2017); Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61 (2011). There is also a failure to rigidly define which alternatives to litigation are under consideration—mass social movements, grassroots lobbying, direct action, electoral strategies, exploiting political vulnerabilities, self-help, ideological appeals, affecting cultural attitudes, imposing structural barriers or incentives, social entrepreneurship and market strategies seem to be some obvious examples. *Id.*

in specific contexts to most effectively further their clients' goals?¹⁴ These are both important questions not yet fully developed in the literature, and they remain central concerns of those engaged in lawyering for social change.

To address these questions, we designed a case study around a multifaceted campaign against the Department of Homeland Security's (DHS), administratively created immigration enforcement program known as Secure Communities (S-Comm). S-Comm compels state and local law enforcement agencies to send fingerprints they collect to DHS to identify and take action against persons with an immigration history. Although the program purportedly targets "criminal aliens" who have been convicted of serious offenses, S-Comm applies to immigrants regardless of guilt or innocence, how or why they came into contact with law enforcement, and whether their arrests, if any, were pretexts for checking immigration status based on racial or ethnic profiling.¹⁵ By embellishing threats of criminal immigrants as its putative justification, S-Comm revolutionized the relationship between federal and local law enforcement agencies, conflating criminal and civil law enforcement and altering political debates about immigration.

The campaign against S-Comm—involving lawyers, activists, politicians (at the federal, state, and local levels), and organizers—was mounted on several levels. The campaign's flexible and dispersed nature allowed it to evolve to meet the shifts in the larger immigrant rights movement and the political landscape. The campaign's larger strategic design involved litigation, direct action, media, social science engagement, electoral pressures, exploitation of political vulnerabilities, and ideological appeals to power holders with decision-making authority on S-Comm. Lawyers were intimately involved in many of the strategic decisions and actions related to the campaign, of which litigation was but one part. Lawyers, organizers, activists, and impacted communities worked together and were welcomed into what once had been thought of as strategic decision-making within lawyers' exclusive domain.

The case study relies upon examining the 23,411 internal government documents obtained through Freedom of Information Act (FOIA) litigation and

14. Our answer at present is ultimately, no. But we seek to outline here, and develop further in a follow-up article, an approach towards understanding and defining movement lawyering that might guide an understanding of why it might be a valuable approach on the measures we outline above. We can contribute to what we hope will become a trove of richly described stock stories about movement lawyering in action from which we all can draw to synthesize the still nascent picture of what movement lawyering is and how one moves in and adjacent to that role. We focus here on progressive social change, both because that is the focus of nearly all the relevant literature, and because, as we develop further at notes 53–55 and accompanying text, legal action in support of conservative or regressive social change might entail different barriers and facilitators and hence might fare differently according to the efficacy measure at least, even if lawyering for conservative or regressive causes is vulnerable to the same accountability critique. See JEFFERSON DECKER, *THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF AMERICAN GOVERNMENT*, 224–27 (2016).

15. See DHS's "Secure Communities": *No Rules of the Road*, NAT'L IMMIGR. L. CTR. (Mar. 2011), <https://www.nilc.org/issues/immigration-enforcement/scomm-no-rules-of-road-2011-03-0/> [<https://perma.cc/4V2D-GH3C>] (last visited Aug. 4, 2020) (describing problems underlying S-Comm).

organizing,¹⁶ thirty interviews with administrative officials, congressional actors, organizers, clients, activists, and lawyers,¹⁷ and a thorough review of mainstream media. This case study is unique because it draws upon an internal paper trail documenting the Obama administration's influences and deliberations leading to critical decision-making about the program.¹⁸ The data allowed us to reverse the vector of analysis used in previous studies. Unlike other scholarship that examines the efficacy and autonomy-enhancing effects of lawyering modalities from the top-down judicial perspective (did a given court decision change the outcome?),¹⁹ or the ground-up movement perspective (did lawyering impact activists' work?),²⁰ or lawyering perspectives (how can lawyers shift the modality of their work to be most effective?),²¹ we explore the question from the perspective of internal government deliberations to evaluate how (if at all) actions by lawyers impacted institutional decision making.

16. The litigation component began in 2010 when the National Day Laborer Organizing Network (NDLON), the Center for Constitutional Rights (CCR), and the Immigration Justice Clinic at Cardozo Law School filed a FOIA lawsuit in federal court in order to uncover information about S-Comm and its operations. *See, e.g.*, Nat'l Day Laborer Org. Network v. U.S. Immigration and Customs Enf't Agency, 811 F. Supp. 2d 713 (S.D.N.Y. 2011); Nat'l Day Laborer Org. Network v. U.S. Immigration and Customs Enf't Agency, 827 F. Supp. 2d 242 (S.D.N.Y. 2011); Nat'l Day Laborer Org. Network v. U.S. Immigration and Customs Enf't Agency, 877 F. Supp. 2d 87 (S.D.N.Y. 2012). The lawsuit spanned a period of three years, at the conclusion of which the federal government was ordered to turn over thousands of internal government documents related to the program and its implementation and ultimately pay \$1.2 million dollars in attorneys' fees to the plaintiff. Document 209, Nat'l Day Laborer Org. Network v. U.S. Immigration and Customs Enf't Agency, Case 1:10-cv-03488-SAS (S.D.N.Y. filed July 3, 2013) (stating in the stipulated settlement, that "[i]n consideration for the release of Plaintiffs' claims related to attorneys' fees and costs, Defendants agree to pay Plaintiffs \$1,212,500 in compensation for attorneys' fees and costs (the "Settlement Amount").

17. We include interviews as part of the case study because it seems more than a little unfair to critique progressive lawyering for failing to achieve objectives not intended by the lawyers involved, the clients they represent, or the movements they support, and because we want to situate progressive lawyering within diversely coupled multi-modal movements for social change. To do this effectively, we need to understand the advocates' intentions, goals, and strategies and their consciousness of the part each strategic move was designed to play in the larger movement.

18. Nat'l Day Laborer Org. Network v. U.S. Immigration and Customs Enf't Agency, 811 F. Supp. 2d 713 (S.D.N.Y. 2011); Nat'l Day Laborer Org. Network v. U.S. Immigration and Customs Enf't Agency, 827 F. Supp. 2d 242 (S.D.N.Y. 2011); Nat'l Day Laborer Org. Network v. U.S. Immigration and Customs Enf't Agency, 877 F. Supp. 2d 87 (S.D.N.Y. 2012).

19. *See, e.g.*, GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (Benjamin I. Page ed., 2d ed. 2008) [hereinafter ROSENBERG, *THE HOLLOW HOPE*] (examining the role of courts in producing major political and social change).

20. *See, e.g.*, MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 2-3* (John Tryneski ed., 1994) [hereinafter MCCANN, *RIGHTS AT WORK*] (examining through empirical research the movement to challenge wage discrimination).

21. *See, e.g.*, Jennifer Gordon, *The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CAL. L. REV. 2133 (2007) (questioning the role of the lawyer in relation to community groups serving as protagonists); William H. Simon, *Lawyers and Community Economic Development*, 95 CAL. L. REV. 1821 (2007); Anthony V. Alfieri, *Faith in Community: Representing Colored Town*, 95 CAL. L. REV. 1829 (2007); Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CAL. L. REV. 1879 (2007) [hereinafter Ashar, *Public Interest Lawyers*]; Scott L. Cummings, *Law in the Labor Movement's Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight*, 95 CAL. L. REV. 1 (2007); Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CAL. L. REV. 1999 (2007); Angela Harris, Margaretta Lin, & Jeff Selbin, *From the Art of War to Being Peace: Mindfulness and Community Lawyering in a Neoliberal Age*, 95 CAL. L. REV. 2073 (2007); 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. REV. 407 (1995) [hereinafter Gordon, *We Make the Road*].

Examining a program that was implemented and subsequently discontinued within a relatively constrained time period allows us to provide a contextually rich description of one particular instance that encompasses the kinds of legal and public policy battles that marginalized communities, lawyers, and activists collaboratively struggle against every day.²² We resist the assumption that litigation is engaged in a zero-sum game with competing advocacy efforts.²³ This case study bore out this resistance and allowed us to examine the effects of not only legal doctrine and arguments based on it, but also how movement actors assessed power systems and developed timely strategies and tactics. The movement actors' coordinated efforts led to success on the micro level (achieving immediate goals), the meso level (effecting broader policy change), and the macro level (organizing communities around narrative identities).²⁴

Through this case study, we identify a deficit (but not a disconnect) between what happened in the context of this campaign and the academic literature on the role of lawyers in social change. While the literature treats the questions of "accountability" and "efficacy" as separate elements, this case study illustrates that accountability and efficacy are inextricably intertwined. These questions are inter-related, both in that it is hard to define successful social change in terms other than those embedded in social movements, and because of the potential that movement lawyering can disempower the people it is designed to help while legitimizing the oppressive hierarchies that lead social movement actors to seek lawyers' help.²⁵ In combining the accountability and effectiveness queries, we identify, test, and then develop an approach to lawyering for social change— aspects of which are invoked by labels such as "movement lawyering," "liberal movement lawyering," "solidarity lawyering," "democratic lawyering," "demo-sprudence," "community lawyering," "cause lawyering," "rebellious lawyering," or "law and organizing." We use these terms interchangeably, with the idea of fleshing out elements shared among these visions of the lawyer's role and distinguishing what we have seen that is different or additional. The approach to lawyering we describe allows lawyers a more substantive role, along with

22. At the same time, we offer up this thick description of a relatively constrained moment in immigrant rights movements for others to consider in a growing base of stories of social change. Compare Clark Cunningham, *A Tale of Two Clients: Thinking about Law as Language*, 87 MICH. L. REV. 2459, 2493–94 (1989) [hereinafter Cunningham, *A Tale of Two Clients*] with Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) [hereinafter Delgado, *Storytelling for Oppositionists*].

23. JEB BARNES & THOMAS F. BURKE, *HOW POLICY SHAPES POLITICS: RIGHTS, COURTS, LITIGATION AND THE STRUGGLE OVER INJURY COMPENSATION* (2015) [hereinafter BARNES & BURKE, *HOW POLICY SHAPES POLITICS*]. See also *United States v. Windsor*, 570 U.S. 744 (2013) (Scalia, J., dissenting) (decrying how equal marriage litigation diverted resources that would have more effectively been focused on legislative innovation); ROSENBERG, *THE HOLLOW HOPE*, *supra* note 19, at 427 (describing litigation as political 'flypaper,' a trap for unwary activists who invest scarce resources—monetary, political, and human—in wasteful litigation).

24. Effective movement strategies adapted to systemic power, in turn leveraging, *inter alia*, the quantity, qualities and spread of networks, guiding movement narratives, and the nature of relationships within and exterior to the movement as well as the repertoire of deployed tactics to identify and respond to what, and who, influenced the exercise of government discretion in the context of S-Comm.

25. Cummings, *Puzzle of Social Movements*, *supra* note 8, at 1621.

organizers and activists, in envisioning power structures, imagining ways to affect power relations, identifying leverage points, and selecting the most effective levers to pull from their collection of possible moves or legal strategies.²⁶

In the campaign we examine, collaboratively inclined lawyers built a nimble, adaptive, and modular strategy to enhance concerted power from the ground up. The coalition relied upon recursive, interactive, and synergistic play among tools, roles, institutions, resources, and established repertoires of contention.²⁷ Within this model, legal interactions and discourse are important constitutive elements of an array of which the movement's relationship with legal rules, roles, and institutions are a byproduct.²⁸ This construct of lawyering envisions lawyers' engagement with activists and movement actors to develop ways of collaboratively and synergistically exploiting the advantages of various social-change strategies, producing strengthened relationships and lasting investments in organized resistance.

We identify a substantive, non-subservient, equal role for lawyers in assessing power. With other movement actors, lawyers identify leverage points and select among a dispersed, ground-up generated array of options and implementation strategies for pulling on the levers of power. This model of lawyering finds advantages in employing lawyers from different orientations and contexts to extend networks, leverage credibility, and complete narratives of the nature of power relations. The approach we observed utilized lawyers with different skill sets and strengths strategically throughout the various levels of the movement. On the micro level, lawyers in various localities throughout the country were brought in to be "lawyers for the situation." If a lawyer was needed to describe opt-out possibilities to a local city council, a local lawyer with ties to the immigration community was employed to support that piece of the project. On the meso level, outside lawyers were brought in to be "lawyers for the campaign." Because the FOIA litigation involved vast amounts of documents and a technically challenging discovery issue, the campaign sought assistance from pro bono lawyers with expertise in the substantive issues and establishment credibility. On the macro level, "lawyers for the movement" built a narrative framework for sustainable organizing. Lawyers often worked or coordinated the work of specialized-role lawyers at all three levels. The campaign used FOIA litigation, known in advocate circles as "advocacy through inquiry," to obtain information

26. See CHARLES TILLEY AND SIDNEY TARROW, *CONTENTIOUS POLITICS* (2d ed. 2015); MARIO DIANI & DONATELLA DELLA PORTA, *SOCIAL MOVEMENTS: AN INTRODUCTION* (3d ed. 2020).

27. The idea being that social movements, institutions, and law both change and are changed in the process, even as each constructs the assumptions on which each is built. See generally ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION* (1984) [hereinafter ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY*].

28. See MCCANN, *RIGHTS AT WORK*, *supra* note 20, at 2–6; see also FRANCESCA POLLETTA, *IT WAS LIKE A FEVER: STORYTELLING IN PROTEST AND POLITICS* 52 (Doug Mitchell ed., 2006) [hereinafter POLLETTA, *IT WAS LIKE A FEVER*]; Doug Smith, *Order (for Free) In the Courtroom: Re-conceiving Law as a Dynamic Complex Adaptive System*, 7 *EMERGENCE: COMPLEXITY IN ORG.* 53 (2005) [hereinafter Smith, *Order (for Free)*].

necessary to advocate for localities' opting out of S-Comm and develop the larger narrative that eventually led to S-Comm's demise. Local demonstrations supported the FOIA proceedings, and the success of the FOIA litigation helped bind movement organizing. This multilayered approach to movement lawyering utilized each layer in support of the other, creating a whole that was more effective than the sum of the individual pieces.

We also inquire into how this strain of movement lawyering developed and how the law-trained activists we studied came to embody their peculiar roles. We talked with lawyers who were inspired by law-clinic reflections inward toward relationships²⁹ and outward to storytelling.³⁰ At its core is the notion that the locus for change shifts the focus from judicial orders to developing loosely-coupled relationships among legal institutions, lawyers, movement leaders, and the communities they represent through legal storytelling, mobilized activists, and organized efforts that channel community priorities.³¹

To greatly oversimplify our observations, traditional lawyers' stories conventionally narrate how an individual client's claims are idiosyncratic so that granting a client the relief she seeks will not disturb existing power relationships (and indeed will only reinforce established hierarchies and privileges).³² Organizers tell stories that tie their clients' predicaments to the inevitable churning of existing orders, emphasizing that there is no way to resolve any single member's problem without examining, if not changing, that existing order.³³ Traditional lawyers attack the most immediate and addressable

29. Reflection on relationships between attorney and client began in earnest with the first wave of clinical scholarship on lawyering and focused on reframing the role of attorneys and clients through the introduction of client-centered lawyering. See GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978) (Foundation Press) [hereinafter BELLOW & MOULTON, *THE LAWYERING PROCESS*] (encouraging reflection on the appropriate role of the lawyer in relation to the client); DAVID BINDER, PAUL BERGMAN, PAUL TREMBLAY & IAN WEINSTEIN, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (4th ed. 2019) [hereinafter BINDER ET AL., *LAWYERS AS COUNSELORS*] (articulating a "client-centered" vision of lawyering and techniques for students to adopt). For an argument that relationships with client constituencies are not critical to movement lawyering so long as lawyers can piggy-back off of organizers' preexisting relationships, see Ashar, *Movement Lawyers for Immigrant Rights*, *supra* note 13, at 1504. Professor Ashar characterizes the effort as a retreat (at least temporarily) from the legal professions' social engineering project, while others see it as a supportive and necessary stage in the development of that project. *Id.* at 1491.

30. See generally RUTH ANNE ROBBINS, STEVE JOHANSEN & KEN CHESTER, *YOUR CLIENT'S STORY* (2013) [hereinafter ROBBINS ET AL., *YOUR CLIENT'S STORY*]; Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 *GEO. J. LEG. ETHICS* 1 (2000) [hereinafter Miller, *Telling Stories*]; Binny Miller, *Give Them Back Their Lives: Client Narrative and Case Theory*, 93 *MICH L.J.* 485 (1994) [hereinafter Miller, *Give Them Back Their Lives*].

31. For closely related analysis of social change, see DUNCAN GREEN, *HOW CHANGE HAPPENS* (2016) [hereinafter GREEN, *HOW CHANGE HAPPENS*]; MICHAEL J. PAPA, ARVIND SINGHAL, & WENDY H. PAPA, *ORGANIZING FOR SOCIAL CHANGE: A DIALECTIC JOURNEY OF THEORY AND PRAXIS* 233–242 (2006).

32. ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 73-182, 192-93 (2000) [hereinafter AMSTERDAM & BRUNER, *MINDING THE LAW*].

33. Ashar, *Movement Lawyers for Immigrant Rights*, *supra* note 13, at 1498. What we term here the organizer's story is more fully described by Margaret Levi as "communities of fate": the idea of a community organized around a common ideal, a common threat, a common enemy or a shared goal that comprehends a deeply-felt understanding that the community is bound by a common fate. See generally JOHN S. AHLQUIST AND MARGARET LEVI, *IN THE INTEREST OF OTHERS: ORGANIZATIONS AND SOCIAL ACTIVISM* 475–77 (2013).

symptoms; organizers seek out root causes least amenable to change.³⁴ The conception of movement lawyering we identify is to meld these two approaches to create novel ways to overcome the atomization of interests that traditional lawyering is said to inherently promote. The lawyers we interviewed found ways to tell the organizer's story to powerholders in different contexts and at different levels. We ultimately posit that twenty-first-century movement lawyering anticipates, tracks, or has grown up alongside coincident developments in social change movement practices, including (trans)local, emergent, open-source, integrative, and distributed organizing models.³⁵

Part I of this Article details the evolution of literature that focuses on lawyers' effectiveness in promoting social change and lawyers' accountability to clients. On the efficacy front, generally, this research finds that lawyers, litigation, and judges' rulings effect little direct or indirect positive change in the real world. And test-case litigation is more likely to harm than to help when people and movements rely on lawyers to shape movement stories. Conversely, significant empirical research and critical theory question whether at least some models of movement lawyering might have significantly positive *indirect* effects in building capacity for social movements by coalescing divergent interests around shared narratives.³⁶ On the accountability front, social movement theory offers the potential of social change lawyering to alter individual consciousness and collective cultures through motivation and creation of a base upon which social movement storying operates. Critics point out that this potential is not often realized. Instead, turning social change opportunities over to lawyers strips movements of their vitality, alienates activists from their grassroots sources of power, and obscures power relations in order to seek change within an institution neither equipped nor inclined to deliver on the promise of change. When the efficacy critique is paired with the transformative effects of legally translating clients' stories by and for the benefit of elites, the perils of social movement lawyering might seem overwhelming.

34. Ashar, *Movement Lawyers for Immigrant Rights*, *supra* note 13, at 1499.

35. See, e.g., ADRIENNE MAREE BROWN, EMERGENT STRATEGY (2017) [hereinafter BROWN, EMERGENT STRATEGY]; Interview with Pablo Alvarado, Co-Executive Director, National Day Laborers Organizing Network (Feb. 23, 2020) (interview on file with the authors) [hereinafter Interview with Alvarado]; Carolina Martinez et al., *An Integrated Organizing Approach as a Tool in the Fight for Workers Rights: The Case of Sara Lee Workers*, UCLA LABOR CTR. (2012); see also LESLIE R. CRUTCHFIELD, HOW CHANGE HAPPENS: WHY SOME SOCIAL MOVEMENTS SUCCEED WHILE OTHERS DON'T (2018); GREEN, HOW CHANGE HAPPENS, *supra* note 31. But see JANE MCALEVEY, NO SHORTCUTS: ORGANIZING FOR POWER IN THE NEW GILDED AGE (James Cook ed., 2016) (noting that effective new organizing models harken back to early twentieth century labor strategies). The new lawyering models examined likewise have venerable roots but are informed by the cognitive revolution and its offshoots, new media and complexity science, as well as clinical lawyering, critical legal traditions, and the experience of the past century.

36. See Victor Narro, *Finding the Synergy Between Law and Organizing: Experiences from the Streets of Los Angeles*, 35 FORDHAM URB. L.J. 339 (2008) (describing lawyers' ability to talk story about identity in the service of organizing).

Part II describes why the case study presents a unique opportunity to explore questions of social change lawyering. Part III situates advocacy efforts against S-Comm within the context of the larger immigrant rights movement to expose early and effective strategies of the team. Part IV identifies and exposes the internal, yet untold, story of S-Comm's rise, revision, and termination. Weaving together internal government documents with interviews of key informants and media accounts, we document the (trans)local movement to "Uncover the Truth" that formed the nucleus of the campaign. We link efforts at the (trans) local level, the FOIA litigation, and the larger movement to illustrate how they fed each other in a deftly orchestrated campaign.

Finally, in Part V, we describe what we observe to be remarkable lawyering in the peculiar context of the immigrant rights movements from 2008 to 2016, and we identify and explain a new innovative approach to lawyering for social change. The model we describe is tracked on the micro, meso, and macro levels and illustrates the collaborative, fluid, and multi-dimensional ways lawyers supported the movement. With the levels stacked upon each other as a whole, this Part situates where and how the concepts of "accountability" and "efficacy" are inextricably linked and synergistically interdependent. We then weave together what we learned from documents and interviews to illustrate how lawyers can effectively address the "efficacy" and "accountability" questions together, consistently and in collaboration with their partners, as they move toward their shared social change goals.

Most important, we offer a relatively thick description of a brief and constrained struggle in which lawyers and organizers, immigrant communities, impacted leaders, government officials, journalists, and social scientists collaborated to achieve a limited but nevertheless remarkably impactful moment of progressive social change.³⁷ We hope that the result of our research will inspire others to continue to flesh out models for effective lawyering within social movements so that clients, communities, and the lawyers who serve them will have important information when deciding which tools to best employ as part of a productive and supportive strategy for social change.³⁸

37. Our initial goal was to create a tactical typology matching community lawyers' moves to political obstacles in order to devise best practices for different types of struggles. However, we soon realized that such an effort was doomed. Scott Cummings, for example, has indicated an intention to create a movement lawyering effectiveness typology. If anyone could produce on that mission, our bets would be with Professor Cummings. See Scott Cummings, *Mobilizing Low Wage Workers—Evidence from Los Angeles*, YOUTUBE, (June 17, 2010), <https://www.youtube.com/watch?v=TayF9v8PffQ>. Any chances for success, however defined, for tactics within campaigns, campaigns within movements, and movements within overall projects for social change, are too bound by initial conditions, internal adaptations, and external events, too context dependent and too constrained by personalities and historical contingencies for any individual decision to be preconfigured in advance. The struggles engaged in by marginalized groups and discounted people take place on terrain that is hostile and complicated, constantly changing and dynamically complex. BELLOW & MOULTON, *THE LAWYERING PROCESS*, *supra* note 29 (warning that this effort was quixotic, that operating in the similarly complex, but not universally hostile, adaptive space of lawyering was too complex to script out in advance but too consequential to be left to chance).

38. See LEVERAGING THE LAW: USING COURTS TO ACHIEVE SOCIAL CHANGE (David A. Schultz ed., 1998) [hereinafter Schultz, ed., *LEVERAGING THE LAW*]. We realize that social change is too dynamic, contextual, complex, and emergent to be captured in a chart of moves against a given adversary or within

I. LITERATURE ON LAWYERING AND SOCIAL CHANGE

After more than 60 years, the archetypal narrative of lawyering for social change remains one culminating in *Brown v. Board of Topeka*,³⁹ in which brilliant, brave, and tireless attorneys under Charles H. Houston and Thurgood Marshall identified doctrinal contradictions that were exploited in a series of test cases. These test cases ultimately set the stage for *Brown*, in which the Supreme Court effectively sounded the death knell for the Jim Crow South. This archetype, labeled “legal liberalism,” is defined as the stock story involving alliances between activist courts and crusading lawyers working to advance progressive political and social change through legal doctrines.⁴⁰ It was never an entirely accurate description of how activist lawyers, many of whom understood their constrained roles within larger social movements, did their work. It submerged earlier movement lawyering models, placed the Supreme Court at the locus of substantive change, placed changes in legal doctrine at the locus of movement efforts, denigrated the place of social movements in desegregation, and assumed that the blood, sweat, and defeats that came thereafter were just administrative cleanup. Whether or not “legal liberalism” accurately described the inner worlds of progressive legal work, it did operate as a story around which lawyers, social movement activists, and counter-mobilizing social movements organized their expectations and led generations of law school graduates to pursue “white knight” remediation of chosen societal ills. The first section within this Part documents the rich literature that critically examines social change lawyering on accountability and efficacy grounds, while the second section details the newer models of social change lawyering that emerged in response.⁴¹

A. *The Critique of Lawyers as Agents for Social Change*

The diffuse critical strands of lawyering for social change have ancient roots.⁴² Skepticism of the efficacy of litigation appears in very early Marx⁴³

a given context. We are reaching, at our most ambitious, to develop a thick description of the internal workings of institutions, roles, moves, and especially, the relationships and feedback loops among them. This, in combination with other such stories, might allow for the refinement of lawyering’s identity and role in social change. As such, our effort is shared in the tradition of the rich library of organizing stories as well as the effort by clinical lawyers to develop a way to talk about our work and pass the dialogue on to others. See, e.g., Cunningham, *A Tale of Two Clients*, *supra* note 22, at 2493–94; Delgado, *Storytelling for Oppositionists*, *supra* note 22.

39. See *Brown v. Bd. of Ed. of Topeka*, Shawnee Cty., Kan., 74 S. Ct. 686 (1954).

40. Cummings, *Puzzle of Social Movements*, *supra* note 8, at 1556.

41. See, for example, authorities cited *supra* notes 4, 8.

42. FRED RODELL, *Woe Unto You Lawyers* (1939) (quoting Luke, 11:52, 11:56 in which Jesus said, “Woe unto you, lawyers! for ye have taken away the key of knowledge. And you experts in the law, woe to you, because you load people down with burdens they can hardly carry, and you yourselves will not.”), https://www.constitution.org/lrev/rodel/woe_unto_you_lawyers.htm [<https://perma.cc/KJ3R-4AWC>] (last visited Feb. 20, 2020).

43. Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in LEFT LEGALISM/LEFT CRITIQUE, 178–228 (Wendy Brown & Janet Halley, eds., Duke University Press 2002) [hereinafter Kennedy, *The Critique of Rights*].

and the construction of the United States Constitution.⁴⁴ The early critiques evolved into a contentious dispute in the literature that touches upon the efficacy of rights talk⁴⁵ and the accountability of lawyers that rely upon rights talk to address social change. In terms of efficacy, on theoretical grounds, rights talk is too indeterminate, too limited, and too backward-looking a basis upon which to ground cognizable social change. Scholars question the efficacy of rights talk for marginalized groups with few political resources.⁴⁶ Courts lack implementation powers, and any court-wrought change of significance is likely to motivate counter-mobilization and backlash that would undermine the change.⁴⁷ In terms of autonomy, lawyers, armed with the allure of sufficiently mystifying legal change, have the power to overwhelm grassroots movements, tend to divert causes to those most amenable to court resolution, and leave decision making in the hands of a limited elite.⁴⁸ The

44. See DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS* (1974); JOEL HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM* (1978); Austin Sarat, *Special Issue; Social Movements/Legal Possibilities*, 54 *STUD. IN L. POL. & SOC'Y* (2011).

45. See, JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 149-50* (2005) [hereinafter GORDON, *SUBURBAN SWEATSHOPS*] (“Some scholars have argued that even when it happens in a social movement, talking about rights actively undermines the possibility of meaningful collective action for social change, because of the ways that a quest to win individual rights can atomize movement participants, because a battle for rights channels a movement’s energy from the streets to the courts and because of the way a focus on winning new rights leads to passive reliance on the state to grant those rights rather than a broad struggle for social justice.”). Classic formulations of this critique of rights talk include STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY AND SOCIAL CHANGE* 5 (Univ. of Mich. Press 2nd ed. 2004) (finding that the “myth of rights,” “tunnels the vision of both activists and analysts leading to an oversimplified approach to a complex social process—an approach that grossly exaggerates the role that lawyers and litigation can play in a strategy for change,” because, *inter alia*, judges cannot be counted on to find a right to fit all social goals or a remedy even when a coherent right can be formulated, leading lawyers to seek targets of opportunity based on their amenability to rights talk rather than social imperatives or community demands); see also Mark Tushnet, *An Essay on Rights*, 62 *TEXAS L. REV.* 1363, 1371–82 (1984) (finding that “rights talk is so indeterminate, it can provide only momentary advantages in ongoing political struggles.”). To the extent that rights talk provides such momentary advantages, our concern is with how those momentary advantages are secured through use of rights talk versus other frames and how and when rights talk supports more lasting organizing for social change.

46. LANI GUINIER, *LIFT EVERY VOICE: TURNING A CIVIL RIGHTS SETBACK INTO A NEW VISION OF SOCIAL JUSTICE* (Michael Korda ed., 1998); MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* 310 (1990); LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (Susan Wallace Boehmer & Kathleen McDermott eds., Harvard Univ. Press 2003) [hereinafter GUINIER & TORRES, *THE MINER’S CANARY*]; Shannon Portillo, *Social Equality and the Mobilization of the Law*, 5 *SOCIOL. COMPASS* 949, 955 (2011).

47. Cummings, *Turn in Law*, *supra* note 8, at 363; see generally Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 *J. OF AM. HIST.* 81 (1994); Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 *MICH. L. REV.* 431 (2004).

48. One of the better-known examples of the empirical testing of courts’ powers to affect societal relations was Gerald Rosenberg’s *THE HOLLOW HOPE*, see *supra* note 19. Its main thesis is that litigation is an ineffective means to achieve social change in most instances; worse yet, litigation, at least the issue-oriented litigation with which Rosenberg is mostly concerned, predictably, and all too often, actually leads to results at odds with what the public interest lawyers leading it, or at least at odds with the interests of the causes and movements those lawyers purport to represent. In particular, litigation is normally ineffective because courts have few implementation powers, even where they support change, and that support is often lacking because courts are inherently backward-looking institutions controlled by societal elites. But litigation is counterproductive because (successful?) litigation generates backlashes and because handing over the litigation reins to elite lawyers tends to suck the subversive energy from grassroots groups, while lawyers tend to divert social movements to issues the law will recognize rather than those that drive movements from the start.

result is that grassroots subversives get overlooked, their energies depleted, and their authentic voices turned over to establishment-bound elites.⁴⁹

That doctrinal change doesn't correlate to changes on the ground wouldn't come as a surprise to social movement activists, including: Wobblies at the turn of the twentieth century; civil rights and anti-war activists at its midpoint; conservative leaders in that century's last quarter; and anti-global institutionalists at the beginning of the twenty-first century. Each has loudly presaged suspicions of the efficacy of litigation as the driving force for social change.⁵⁰

Another critique is bottomed in writers' emphasis on major issue-oriented cases before the Supreme Court; indeed, on cases that impinge upon major public issue fissures in political and popular discourse.⁵¹ While a few legal theorists might expect lower court issues to more predictably effect changes demanded by logical extensions of legal doctrine,⁵² fewer lawyers struggling on behalf of poor and marginalized clients would be surprised by academic findings that Supreme Court victories rarely result in systemic change.⁵³ And

49. The Constitutional law scholar Mark Graber, in a 2007 posting on the *Balkanization* blog, called *THE HOLLOW HOPE*, "simply put, the most important work on law and the courts published in the last quarter century." <https://balkin.blogspot.com/search?q=hollow+hope> (last accessed 3/12/2021). Reading lists in political science or law cannot safely exclude the book or its standing challenge to the social change possibilities in lawyering. Gerald Rosenberg has described initially strong opposition among social sciences, but nothing like the reaction in the legal academy, where he remembers having casebooks and even a garbage can thrown at him; "I had people screaming at me, interrupting, walking out, slamming doors [t]he vehemence, it was really stunning." Interview with Gerald Rosenberg, in PATRICK D. SCHMIDT & SIMON HALLIDAY, *CONDUCTING LAW AND SOCIETY RESEARCH: REFLECTIONS ON METHODS AND PRACTICES* 10–171 (2009).

50. Compare Edward Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1 (2001); William Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109 (1989); Cummings, *Movement Lawyering*, supra note 8, at 1668 (quoting Charles Hamilton Houston, "nobody needs to explain to a Negro the difference between the law on the books and the law in action.") with Ashar, *Movement Lawyers for Immigrant Rights*, supra note 13, at 1500.

51. Tomasso Pavone, *Beyond THE HOLLOW HOPE: The Promise and Challenges of Studying Gradual Social Change* (2014), <https://pdfs.semanticscholar.org/6463/9f39a818ea8267a23b7e637c52a598df1c75.pdf> [hereinafter Pavone, *BEYOND THE HOLLOW HOPE*].

52. ROSENBERG, *THE HOLLOW HOPE*, supra note 19, at 427.

53. For example, various descriptions of United States landlord-tenant courts, and the outcomes of the so-called revolution in tenants' rights, are found in: Steven Lubet, *Professionalism Revisited*, 42 EMORY L. J. 197 (1993) [hereinafter Lubet, *Professionalism Revisited*]; Mark H. Lazerson, *In the Halls of Justice the Only Justice is in the Halls*, Richard Abel, *POLITICS OF INFORMAL JUSTICE, VOLUME 1* 122–26 (Academic Press 1982); Barbara Bezdeke, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992) [hereinafter Bezdeke, *Silence in the Court*]; Gary Blasi, *How Much Access? How Much Justice?*, 73 FORDHAM L. REV. 865 (2004); H. Lawrence Ross, *Housing Code Enforcement and Urban Decline*, 6 J. AFFORDABLE HOUSING AND COMMUN. DEV. L. 29 (1996); David Nelkin, *Legislation and Constraints: A Case Study of the 1965 British Rent Act*, LEGAL SYSTEMS AND SOCIAL SYSTEMS 70–86 (Adam Podgorecki et al. eds., 1985); Marilyn Miller Mosier & Richard A. Soble, *Modern Legislation, Metropolitan Court, Miniscule Results: A Study of Detroit's Landlord-Tenant Court*, 7 U. MICH. J. L. REFORM 8 (1973); J. M. Fitzgerald, *The Contract Buyers League and the Courts: A Case Study of Poverty Litigation*, 9 L. & SOC'Y REV. 165 (1974); Anthony J. Fusco, Nancy B. Collins, Julian R. Birnbaum, *Chicago's Eviction Court: A Tenant's Court of No Resort*, 17 URB. L. ANN. 93 (1979); Irwin J. Nebron, & Allan Ides, *Landlord-Tenant Court in Los Angeles: Restructuring the Justice System*, 11 LOY. L.A. L. REV. 537 (1978); Leonard N. Cohen, *The New York City Housing Court: An Evaluation*, 17 URB. L. ANN. 27 (1979); Mark C. Rutzick & Richard L. Huffman, *The New York City Housing Court: Trial and Error in Housing Code Enforcement*, 50 N.Y.U. L. REV. 738 (1975); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York Housing Court: Results of a Randomized Experiment*, 35 L. & SOC'Y REV. 419 (2001); Erica L.

there is littler still beyond anecdotal study of the effectiveness (much less the counter-mobilizing and/or resource-diverting differential) of coordinated small case strategies of the kind advocated by some of our most systemic-thinking social change lawyers.⁵⁴

To the above-outlined critiques, we add one of our own. The efficacy of lawyering for social change literature is largely concerned with progressive, liberal, or radical left social causes. It is entirely possible that litigation is an effective strategy for conservatives' or elites' favored causes.⁵⁵ There are good reasons to believe that might be so. They are exactly some of the commonly expressed reasons supporting contentions that courts are unlikely to be effective forums for social change for marginalized groups: the backward-looking predilection of law; its limited remedies; its elitism; and especially its inability to address root causes of social issues. Conservative or reactionary causes might be furthered in litigation, even when the law is designed to ruthlessly attack superficial problems, especially to the extent those problems can be attributed to changes in existing social ordering. If that is so, there might be creative and effective lawyering strategies to resist the traditional litigation-based strategies of power-holding elites in the context of conservatives' favored causes.⁵⁶ Critiques of litigation for social change focus on changes in government actions,⁵⁷ as we do in this Article. It might well be that even if litigation is of limited efficacy in affecting government policies, that litigation—or its threat—might have significantly more pull on private corporate defendants and foundation funders.

Even with these legitimate and extensive critiques, we are mindful of the many great and thoughtful lawyers who have devoted themselves to social

Fox, *Alone in the Hallway: Challenges to Effective Self-Representation in Negotiation*, 1 HARV. NEGOTIATION L. REV. 85 (1996); Richard H. Chused, *Saunders (A.K.A. Javins) v. First National Realty Corporation*, 11 GEO. J. ON POVERTY L. & POL'Y 191 (2004); Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79 (1997); Steven Gunn, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL'Y REV. 385 (1995). See 144 Woodruff Corp. v. Lacrete, 585 West N.Y. Supp. 2d 956, 960 (1992) (litigants in 400,000 cases filed yearly received less than five minute's attention each from the Housing Court judges). For the most part, these studies were designed to show the gaps between law and practice; between the law in action and the ideals of a particular statutory scheme. Although the authors were not seeking out patterns, patterns emerge nevertheless as an unwelcome surprise. Ross observed analogous dynamics in administrative enforcement of housing codes: discretion is guided not by formal law, but by informal priorities, neighborhood contexts and resource availability. Ross, *Housing Code Enforcement and Urban Decline*, *supra*.

54. Bellow, *Turning Solutions into Problems*, *supra* note 7, at 8–9. Deborah E. Anker, *Legal Change from the Bottom Up: The Development of Gender Asylum Jurisprudence in the United States*, GENDER IN REFUGEE LAW: FROM THE MARGINS TO THE CENTRE 46–73 (Efrat Arbel, et. al. eds., 2014).

55. See Stephen L. Carter, *Do Courts Matter?*, 90 MICH. L. REV. 1216, 1221 (1992) [hereinafter Carter, *Do Courts Matter?*] (explaining that courts might not be effective agents for progressive social change, but they can effectively block it). The role of movement lawyers, in this view, might be to defend activists and forestall attacks on changes wrought elsewhere.

56. We plan to explore this tension by testing the immigrant rights advocacy strategies during the Obama administration against those being utilized in the Trump Era in the third article of this series.

57. The focus of our case study is also on changes in government actions and policies, but we thought it important to note the possibility of a distinction for conservative, corporate causes.

change litigation⁵⁸ and the social movement leaders who sought them out to pursue litigation on behalf of social movements.⁵⁹ These critiques are not as tautological as they might first appear. After all, generations of public interest lawyers, inspired by *Brown*, have pursued public interest litigation on behalf of social movements they dearly believe in and individuals and groups with which they share deep commitments. These are lawyers who have been, by and large, stewed in Critical Legal Studies' (CLS) critique of rights, and through them Marxists' critiques, as well as that of twentieth-century Realists. If such leaders, activists, and litigators, who were well-versed in the dangers and limitations of legal remedy, continue to include litigation in their repertoire of contention, who are we to disrupt?

The literature of social change lawyering moved to support well-wrought critiques of rights talk and skepticism of legal institutions as loci of change with cold empirical evidence.⁶⁰ While the litigation deck will always be stacked against efforts at immediate social change,⁶¹ many critics foresee that litigation may be effective under certain limited circumstances. For example, Rosenberg finds that social change through court action is possible where established precedents exist for the remedies sought by plaintiffs and where there is elite and popular support for the sought remedy.⁶² However, in those cases, it is likely that social change through other means would be available, even inevitable.⁶³ Similarly, Cummings allows that litigation might be effective in circumstances in which individuals can monitor compliance with legal

58. Rosenberg, a conscientious reviewer who periodically responds to critics, himself notes this as among the most common responses he receives from the legal academy. GERALD N. ROSENBERG, *Ideological Preferences and Hollow Hopes: Responding to Criticism* HOLLOW HOPE, <http://www.press.uchicago.edu/books/rosenberg/index.html> [<https://perma.cc/C3BR-LHCW>] (last visited Aug. 5, 2020). Malcolm Feeley concurs, but would examine the source of such feelings to reveal the institutional drags that inhibit change. Malcom M. Feeley, *Hollow Hopes, Flypaper and Metaphors*, 17 L. & SOC. INQUIRY 745, 757–58 (1992) [hereinafter Feeley, *Hollow Hopes*].

59. Richard Delgado, *A Comment on Rosenberg's New Edition of The Hollow Hope*, 103 NW. U. L. REV. COLLOQUY 147 (2008); Feeley, *Hollow Hopes*, *supra* note 58.

60. See generally ROSENBERG, *THE HOLLOW HOPE*, *supra* note 19, at 427 (supporting its thesis that U.S. courts can almost never be effective producers of significant social reform through broad analysis of the effects of key cases in civil rights, abortion, women's rights, and (briefly) to each of environmental litigation, reapportionment, and what he terms, "the reform of criminal law").

61. See BARNES & BURKE, *HOW POLICY SHAPES POLITICS*, *supra* note 23.

62. ROSENBERG, *THE HOLLOW HOPE*, *supra* note 19, at 36. Professor Rosenberg, for example, posits that litigation may well be an effective means to achieve social change where (1) there is established precedent for the social change enacting result; (2) there is support for that result among the elected branches; (3) there is some public support for that result; and at least one of the following three factors are present: (4) other (non-court) power holders offer positive incentives or are willing to impose costs to induce compliance with courts' directives; (5) when markets produce incentives or impose costs for compliance with court directives; or (6) courts' roles are limited to providing protection to agents of change. *Id.*

63. *Id.* at 427 (Incorporating the object lesson of equal marriage litigation. Rosenberg, admittedly before *Windsor* and *Obergefell*, but following the Massachusetts Supreme Judicial Court decision in *Goodridge*, was unmoved to alter the basic thesis of *THE HOLLOW HOPE*. State courts' affirmance of equal marriage rights had not furthered such rights beyond what popular culture would demand, nor had it significantly impacted popular discourse on acceptance of GLBTQ issues or inspired more effective action in support. Instead, equal marriage litigation created its own backlash, which was more intense and more effective than the backlash that would have accompanied other means towards this social change).

doctrine and little non-mechanical bureaucratic implementation is required. Equal marriage is a contemporary example.⁶⁴

More sophisticated research is required to measure the significant indirect positive effects of court victories (or even defeats) such as opening policy windows⁶⁵ to other issues or inspiring activists and grassroots members to actions of other sorts.⁶⁶ McCann, for example, through extensive interviews of activists and marginalized peoples affected by litigation, draws meaning from litigation that sustains their efforts on other fronts.⁶⁷ Similarly, Stephen Carter bemoans ignoring the confidence-building effects of litigation (win or lose?) on activists' fighting on most inhospitable terrain,⁶⁸ no matter the array of their repertoires of change.⁶⁹ Relatedly, some recoil at the assumption that a linear causal analysis will reveal a single simple cause for any given—or desired—institutional change.⁷⁰ The causal bundle for an identifiable change is too fragmented, interrelated, and knotty to be untangled. The entirety of the early body of literature provides a critical and necessary foundation to academics that continue to explore questions of social change lawyering in an ever-changing social and political context.

B. *Newer Models of Social Change Lawyering*

As social and political realities shift so do articulated models of social change lawyering. More recent literature on law and social change uses a range of labels including, “movement lawyering,” “liberal movement lawyering,” “solidarity lawyering,” “democratic lawyering,” “demosprudence,” “community lawyering,” “cause lawyering,” “rebellious lawyering,” or simply lawyering for social change.⁷¹ The literature regarding law and social

64. See Scott L. Cummings, *Law and Social Movements: An Interdisciplinary Analysis*, HANDBOOK OF SOC. MOVEMENTS ACROSS DISCIPLINES, HANDBOOKS OF SOCIO. AND SOC. RES. 253 (C. Roggeband & B. Klandermands eds., 2017).

65. See generally JOHN W. KINGDON, *AGENDAS, ALTERNATIVES AND PUBLIC POLICIES* (2d ed. 1995).

66. Ashar, *Movement Lawyers for Immigrant Rights*, *supra* note 13, at 1502 (noting how the combination of plenary powers over immigration policy, instability in support and legislative gridlock provided an opening, as well as inducement, for immigrant activists to focus on local advocacy on ground level immigration enforcement).

67. See MCCANN, *RIGHTS AT WORK*, *supra* note 20.

68. Carter, *Do Courts Matter?*, *supra* note 55, at 1221.

69. SIDNEY TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS* (2d ed. 1998) [hereinafter TARROW, *POWER IN MOVEMENT*].

70. McCann, *Reform Litigation*, *supra* note 12, at 727; Pavone, *Beyond the Hollow Hope*, *supra* note 51.

71. For some examples of terms used by academics to describe lawyering for social change, see “rebellious lawyering.” See, e.g., GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992) [hereinafter LÓPEZ, *REBELLIOUS LAWYERING*] (using rebellious lawyering as an example of a term used by academics to describe lawyering for social change); Cummings & Eagly, *A Critical Reflection*, *supra* note 5 (using “law and organizing”); Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 *CLINICAL L. REV.* 355 (2008) [hereinafter Ashar, *Law Clinics and Collective Mobilization*]; Scott Cummings, *Mobilization Lawyering: Community Economic Development in the Figueroa Corridor*, 17 *J. AFFORDABLE HOUSING & COMMUNITY DEV. L.* 59 (2008) [hereinafter Cummings, *Mobilization Lawyering*] (using “mobilization lawyering”); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 *YALE L. J.* 2740 (2014); Ascanio Piomelli, *The Challenge of Democratic Lawyering*, 77 *FORDHAM L. REV.* 1383 (2009);

change continues to evolve.⁷² The legal profession and legal education also changed significantly in the past two decades. Most importantly, for our purposes, are increasing diversity among lawyers;⁷³ the development, implementation, and assessment of new models of movement lawyering; the emphasis on social movements in legal academia; and the spread of clinical legal education as a location for training and experimentation for the next generation of social change lawyers.⁷⁴

For the most part, the visions of social change lawyering⁷⁵ we briefly summarize here are not new. In subtle, but perhaps critical, respects, the newer models that are being adopted today hold the potential to address, but not nearly eliminate, the concerns regarding interference with autonomy and inefficacy that plagued even the most innovative and movement-deferential models for social change lawyering in the past. Concerns about lawyers being part of social movements still exist. Handbooks for community organizers frequently describe the ideal relationship between lawyers and organizers as cautious, or simply, “don’t.”⁷⁶ Suspicion of lawyers’ involvement in social

Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427, 441–42 n.62, 442 nn.63, 66 (2000) [hereinafter Piomelli, *Appreciating Collaborative Lawyering*] (“political lawyering”); Lucie E. White, *Collaborative Lawyering in the Field? On Mapping The Paths from Rhetoric to Practice*, 1 CLINICAL L. REV. 157 (1994) [hereinafter White, *Collaborative Lawyering*] (using “collaborative lawyering”); Cummings, *Puzzle of Social Movements*, *supra* note 8, at 1635–40 (using a variety of terms for the same or similar model including “new movement lawyering,” “legal mobilization,” the approximately similar “integrated lawyering” and, in essentially similar form, as a theory of legal practice, “movement liberalism”).

72. For example, Rosenberg’s analysis of lawyering’s relationship with social movements apparently ended sometime in the mid-1980s. Citing few authors writing after that date about the nature of lawyering, most of Rosenberg’s lawyering descriptions originated half a century or more ago. See ROSENBERG, *THE HOLLOW HOPE*, *supra* note 19.

73. In relative terms, of course. There seems to be a much-too-slowly increasing diversity in the bar. Am. Bar Assoc., PRESIDENTIAL INITIATIVE COMM’N ON DIVERSITY, PRESIDENTIAL DIVERSITY INITIATIVE REPORT AND RECOMMENDATIONS, RACE AND ETHNICITY, GENDER, SEXUAL ORIENTATION, DISABILITIES (2010) (finding that while the profession has become more diverse there is still much work to be done); DIVERSITY IN LAW FIRMS, U.S. EQUAL EMPL. OPP. COMM’N (2003) (examining the employment status of women and minorities at law firms required to file EEO-1 reports); DIVERSITY IN PRACTICE: RACE, GENDER, AND CLASS IN LEGAL AND PROFESSIONAL CAREERS (Spencer Headworth, et al., eds., 2016), <http://alliance-primo.hosted.exlibrisgroup.com/UW:gallagher:CP71243279920001451> (Expressions of support for diversity are nearly ubiquitous among contemporary law firms and corporations. Organizations back these rhetorical commitments with dedicated diversity staff and various diversity and inclusion initiatives. Yet, the goal of proportionate representation for people of color and women remains unrealized).

74. Cummings, *Puzzle of Social Movements*, *supra* note 8, at 1608; Cummings, *Movement Lawyering*, *supra* note 8, at 1647; see Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1 (2000).

75. See generally Karen Tokarz, Nancy L. Cook, Susan Brooks & Brenda Bratton Blom, *New Directions in Clinical Legal Education: Conversations on “Community Lawyering”*: The Newest (Oldest) Wave in Clinical Legal Education, 28 WASH. U. J. L. & POL’Y 359 (2008) [hereinafter Tokarz et al., *Conversations on “Community Lawyering”*].

76. KIM BOBO & MARIEN CASILLAS PABELLON, *THE WORKERS CENTER HANDBOOK: A PRACTICAL GUIDE TO STARTING AND BUILDING THE NEW LABOR MOVEMENT* 262 (2016) (“Historically, there are tensions between lawyers and attorneys. Some attorneys, leaning too much to legal caution, have discouraged organizers from using a variety of legitimate tactics. Organizers, on the other hand, have accused attorneys of disempowering workers, undermining organizing campaigns, siphoning off leaders, and operating arrogantly towards workers and organizers. Sometimes these accusations have been accurate.”). Compare GORDON, *SUBURBAN SWEATSHOPS*, *supra* note 45, at 185 (“Such legal claims tend to be deeply individual, dependent on a lawyer as an intermediary, tightly scripted in terms of how a client can behave

issues goes beyond the threats, real or imagined, described previously.⁷⁷ More fundamentally, lawyering may represent an existential threat to social movements because of the difference in the stories that lawyers and organizers tell. Our so-called “lawyer’s story” posits that many successful lawyers are used to telling stories of individual clients that effectively reinforce the established order, assuring powerholders that granting a client the relief she seeks will only reinforce established hierarchies and privileges.⁷⁸ In what we call “an organizer’s story,” social movement organizers habitually tell stories that tie individuals’ predicaments to the inevitable churning of existing orders so that there is no way to relieve any member’s problem without changing the existing order.⁷⁹ Lawyers attack the most immediate and addressable symptoms; organizers seek out root causes that are often least amenable to change.⁸⁰

The newer social change lawyering model, in its various forms, seeks to re-work lawyering relationships to halt the replication of power hierarchies that have drawn communities to seek their help and to retell lawyering stories through non-legal channels. The underpinnings for this model of social change lawyering came in the 1970s from scholarship that focused on limiting the attorney’s role and creating a client-centered approach to lawyering.⁸¹ Lawyering to enhance social movements reached a zenith of sorts through the law communes and movement lawyering of the 1960s, the Legal Services Organization experiments in multi-dimensional advocacy, and early law school clinics of the 1970s. The need to address perceived deficiencies of the rights talk as a way to effectuate social change was a central motivating force behind CLS and its progeny in the latter half of the twentieth century, including Critical Race Theory, Critical Class Theory, Queer Theory, and Feminist

and what she can demand, and limited in outcome to the law’s definition of justice. Much of this is antithetical to organizing’s belief in self-reliance and collective action.”) *with id.* at 218–36 (Gordon’s descriptions of her creative use of lawyering in the service of organizing.) and *with Lani Guinier & Gerald Torres, Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L. J. 2740, 2781–82 (2014) [hereinafter Guinier & Torres, *Changing the Wind*].

77. ROSENBERG, *THE HOLLOW HOPE*, *supra* note 19, at 427 (arguing that lawyers may coopt the most subversive elements of social movements; divert resources and issues to those most amenable to legal process; or cause activists to turn over decision making to elite professionals); *see also* MICHAEL W. MCCANN, *LAW AND POLITICAL STRUGGLES FOR SOCIAL CHANGE: PUZZLES, PARADOXES, AND PROMISES IN FUTURE RESEARCH*, IN *LEVERAGING THE LAW: USING COURTS TO ACHIEVE SOCIAL CHANGE* 319–49 (David A. Schultz ed., 1998).

78. AMSTERDAM & BRUNER, *MINDING THE LAW*, *supra* note 32.

79. Ashar, *Movement Lawyers for Immigrant Rights*, *supra* note 13, at 1498.

80. *Id.* at 1499.

81. *See* BELLOW & MOULTON, *THE LAWYERING PROCESS*, *supra* note 29, at 11–12 (asking students to reflect on the appropriate role of the lawyer); *see also* DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977) (providing a “client-centered” vision of lawyering that advocated for clients playing the central role in the representation and encouraged lawyers to enhance their interpersonal skills in order to engage in effective problem-solving with the client); Cummings, *Puzzle of Social Movements*, *supra* note 8, at 1585–86 (explaining that in the 1970’s Stephen Wexler and Gary Bellow, among many others, were teaching us about deficiencies in litigation as a tool for social change and advocating for experimentation in models of lawyering for grassroots bottom-up capacity building).

Studies in the twenty-first century,⁸² and reactionary new Federalism academic movements of the 1980s.⁸³ These disparate movements shared: skepticism of the determinative value of rights talk; skepticism of the efficacy of law to effectuate social change; a critique of the authenticity of lawyering voices on behalf of the poor and marginalized, and a commitment to making the legal process accessible.⁸⁴ This new model of lawyering seeped unevenly into the academy through what Lani Guinier and Gerald Torres call “demosprudence.”⁸⁵

In the late 1980s and early 1990s, literature on lawyering for social change was shepherded into the legal academy by scholars exploring the lawyering relationship in the context of low-income or marginalized communities. Anthony Alfieri,⁸⁶ Gerald Lopez,⁸⁷ and Lucie White⁸⁸ each contributed greatly to a new conception of the lawyer-client relationship that did not perpetuate power hierarchies between lawyers and low-income, marginalized

82. KENNEDY, THE CRITIQUE OF RIGHTS, *supra* note 43, at 178–228 (explaining that even as scholars writing in these post-CLS traditions turned on CLS’s denunciation of rights talk, they recognized the important narrative force of rights talk to marginalized communities).

83. Cummings, *Puzzle of Social Movements*, *supra* note 8, at 1585–86; Cummings, *Movement Lawyering*, *supra* note 8, at 1677 (explaining that in the United States, perhaps the real push for a movement-conducive lawyering began in earnest at the beginnings of the last century. It developed along with Marxist notions of lawyering on behalf of peoples and was informed by Realist theorist-lawyers such as Rodell, Cohen, and Frank, and reached its zenith of a sort through the law communes and movement lawyering of the 1960s, the Legal Services Organization innovations, law clinics of the 1970s and the Critical Legal Studies and reactionary new Federalism academic movements of the 1980s).

84. Cummings, *Puzzle of Social Movements*, *supra* note 8, at 1697.

85. Guinier & Torres, *Changing the Wind*, *supra* note 76.

86. See Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659 (1988) [hereinafter Alfieri, *Antinomies of Poverty Law*]; Anthony V. Alfieri, *The Politics of Clinical Knowledge*, 35 N.Y.L. SCH. L. REV. 7 (1990); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991) [hereinafter Alfieri, *Reconstructive Poverty Law Practice*]; Anthony V. Alfieri, *Speaking Out of Turn: The Story of Josephine V.*, 4 GEO. J. LEGAL ETHICS 619 (1991) [hereinafter Alfieri, *Speaking Out of Turn*]; Anthony V. Alfieri, *Stances*, 77 CORNELL L. REV. 1233 (1992) [hereinafter Alfieri, *Stances*]; Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769 (1992) [hereinafter Alfieri, *Disabled Clients*]; Anthony V. Alfieri, *Impoverished Practices*, 81 GEO. L.J. 2567 (1993); Anthony V. Alfieri, *Practicing Community*, 107 HARV. L. REV. 1747 (1994).

87. See Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984); Gerald P. López, *A Declaration of War by Other Means*, 98 HARV. L. REV. 1667 (1985); Gerald P. López, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603 (1988); Gerald P. López, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305 (1989); Gerald P. López, *The Work We Know So Little About*, 42 STAN. L. REV. 1 (1989); LÓPEZ, REBELLIOUS LAWYERING, *supra* note 71; Gerald P. López, *Economic Development in the “Murder Capital of the Nation,”* 60 TENN. L. REV. 685 (1993); Gerald P. López, *An Aversion to Clients: Loving Humanity and Hating Human Beings*, 31 HARV. C. R.-C. L. REV. 315 (1996).

88. See Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1988); Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699 (1988); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) [hereinafter White, *Sunday Shoes*]; Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861 (1990); Lucie E. White, *Representing the “Real Deal,”* 45 U. MIAMI L. REV. 271 (1990); Lucie E. White, *Seeking “...The Faces of Otherness...” : A Response to Professors Sarat, Felstiner, and Cahn*, 77 CORNELL L. REV. 1499 (1992); Lucie E. White, *Paradox, Piece-Work, and Patience*, 43 HASTINGS L.J. 853 (1992); White, *Collaborative Lawyering*, *supra* note 71.

clients. Instead of seeing clients as victims that are helpless and subordinate, these new models of lawyering focused on ways to involve clients as partners in problem-solving and to encourage clients' participation in individual and collective efforts to improve their situations.⁸⁹ This vision for lawyering is not without critics who find the work to be: inaccessible to those unfamiliar with postmodern theory;⁹⁰ unlikely to persuade lawyers to adopt new models of practice given the critical description of their current practices;⁹¹ focused on small-scale, one-on-one interactions between individual lawyers and individual clients;⁹² and inappreciative of the structural and institutional explanation of clients' oppression outside of the lawyer-client relationship.⁹³ But scholars continue to push back on these critiques⁹⁴ and refine what it means to engage in social change lawyering.⁹⁵

89. See Piomelli, *Appreciating Collaborative Lawyering*, *supra* note 71 (noting that “[t]hese scholars also share certain conceptions of the nature of power. Influenced by Michel Foucault, they do not view power as a static resource that some have and others completely lack. Rather, they conceive of power as a shifting dynamic acted out in relationships.”).

90. See Gary Blasi, *What's a Theory For? Notes on Reconstructing Poverty Law Scholarship*, 48 U. MIAMI L. REV. 1063, 1074 n.29 (1994) [hereinafter Blasi, *What's a Theory For?*] (stating, “[t]he import of this discourse is often buried in a prose that seems to value most highly subtlety, nuance, suggestion, gesture, and indirect reference to other even more obscure works. Like much of legal scholarship, it seems mainly designed to impress other scholars That tendency is amplified in this particular genre by the inaccessibility of the work of those masters of postmodern thought upon which it draws.”).

91. See Blasi, *What's a Theory For?*, *supra* note 90, at 1088–89 (describing a focus on the practice of others that mirrors the stance the scholars accuse lawyers of adopting toward less powerful clients).

92. See Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 L. & SOC'Y REV. 697, 715, 724 (1992) (finding that the stories told by postmodernists are about individuals, engaging in very small acts of defiance where very little of consequence, outside of that individual, happens); William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099, 1099–1100 (1994) (finding that the scale of practice is typically small—often one on one—and the benefits are often as much psychological as they are material).

93. See Blasi, *What's a Theory For?*, *supra* note 90, at 1091 (arguing that avoidance of structuralist explanations dooms effective progress of systemic issues).

94. See Ascario Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 CLINICAL L. REV. 541, 546 (2006) [hereinafter Piomelli, *Democratic Roots*] (explaining that those who view collaborative lawyering through the postmodernist label fail to “accentuate the core values and vision driving this lawyering. Indeed, the link to postmodernism has contributed to widespread misunderstanding and underappreciation of this approach to practice.”).

95. For thoughtful contributions and discussions of community lawyering and its challenges, see Susan D. Bennett, *On Long-Haul Lawyering*, 25 FORDHAM URB. L.J. 771 (1997); Michael Diamond & Aaron O'Toole, *Leaders, Followers, and Free Riders: The Community Lawyer's Dilemma When Representing Non-Democratic Client Organizations*, 31 FORDHAM URB. L.J. 481 (2004); Christine Zuni Cruz, *[On The] Road Back in: Community Lawyering in Indigenous Communities*, 5 CLINICAL L. REV. 557, 568 (1999); Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67, 67 (2000); Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619 (1992); Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 VA. ENVTL. L.J. 687 (1995); LUKE COLE & SHEILA FOSTER, FROM THE GROUND UP—ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT (Richard Delgado & Jean Stefancic eds., 2001); JENNIFER GORDON, SUBURBAN SWEATSHOPS, *supra* note 45; Gordon, *We Make the Road*, *supra* note 21; Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147 (2000); Dean Hill Rivkin, *Lawyering, Power, and Reform: The Legal Campaign to Abolish the Broad Form Mineral Deed*, 66 TENN. L. REV. 467 (1999); Louise G. Trubek, *Critical Lawyering: Toward a New Public Interest Practice*, 1 B.U. PUB. INT. L.J. 49 (1991); Louise G. Trubek, *Embedded Practices: Lawyers, Clients, and Social Change*, 31 HARV. C.R.-C.L. L. REV. 415 (1996); Alfieri, *Antinomies of Poverty Law*, *supra* note 86; Alfieri, *Disabled Clients*, *supra* note 86; Alfieri,

Newer critiques of lawyering's efficacy include implementation barriers, channeling concerns to those most amenable to judicial decision making, storying in inauthentic voices, and deferral to elites coupled with a resulting failure to identify and foster community leaders.⁹⁶ Newer critiques of lawyering's accountability problems include lawyerly domination of clients and groups that privilege certain voices within diverse social movements.

More recent social change lawyering scholarship purports to address these concerns by adjusting lawyering roles to the social movement's needs. These conceptions of "movement lawyering" explore multimodal problem solving as one small part of a social movement, one wary of the threat of legalism, respectful of the power of social movements, and committed to seeing the real change demanded by social movements affected on the ground.⁹⁷

The "movement lawyering" approach to practice encourages lawyers to work collaboratively, or obediently, with low-income, marginalized, and of-color communities and clients, to effectuate social change and to avoid the type of subordinating relationships that clients are asking lawyers to help combat.⁹⁸ While this approach has been explored in many different contexts,⁹⁹ nowhere has the "movement lawyering" model taken hold more strongly in recent years than among lawyers for irregular migrant communities.¹⁰⁰

Reconstructive Poverty Law, *supra* note 86; Alfieri, *Speaking Out of Turn*, *supra* note 86; Alfieri, *Stances*, *supra* note 86.

96. See Guinier & Torres, *Changing the Wind*, *supra* note 76, at 2756; see also Ashar, *Movement Lawyers for Immigrant Rights*, *supra* note 13, at 1497.

97. See Scott L. Cummings, *Law and Social Movements: An Interdisciplinary Analysis*, in HANDBOOK OF SOCIAL MOVEMENTS ACROSS DISCIPLINES, HANDBOOKS OF SOCIOLOGY AND SOCIAL RESEARCH 233 (Conny Roggeband & Bert Klandermans, eds., 2017); Scott L. Cummings, *The Social Movement Turn in Law*, 43 LAW & SOC. INQUIRY 360 (2018); Renee Hatcher, *Solidarity Economy Lawyering*, 8 TENN. J. OF RACE, GENDER, & SOC. JUST. 23 (2019); Ashar, *Movement Lawyers for Immigrant Rights*, *supra* note 13.

98. See Piomelli, *Democratic Roots*, *supra* note 94, at 547–48 (2006) (identifying that "[c]ollaborative lawyers have two key inter-related aims for their work with lower-income clients. One, highlighted through a postmodernist lens, is to avoid re-enacting the very sort of subordinating relations clients seek help in combating. The second goal, which is not as readily accentuated by a postmodernist frame, is to encourage collective action in which lawyers, clients, community groups, and other allies work together, in legal, political, social, and other spheres, to change social conditions.").

99. See Bellow, *Turning Solutions into Problems*, *supra* note 7 (advocating for attorneys to undergo self-scrutiny to identify troubling patterns; enhance client education and participation; and be more explicitly political to address inequality); Cummings & Eagly, *A Critical Reflection*, *supra* note 5 (identifying practical difficulties with the law and organizing movement and calling for additional research); Cummings, *Mobilization Lawyering*, *supra* note 71 (describing the role of lawyers in a context where community economic development principles were applied and experimented with); Tokarz et al., *Conversations on "Community Lawyering," supra* note 75, at 363–65 (identifying the core principles of community lawyering as "first, community lawyering involves formal or informal collaborations with client communities and community groups to identify and address client community issues. . . . Second, community lawyering clinics are focused on empowering communities, promoting economic and social justice, and fostering systemic change. . . . Third, the work of community lawyering clinics involves collaborative, and frequently interdisciplinary practice.").

100. See GORDON, *SUBURBAN SWEATSHOPS*, *supra* note 45; Gordon, *We Make the Road*, *supra* note 21 (finding that individual lawsuits did little to correct systemic issues and in response designed a clinic that included community outreach and education program on workers' rights; grassroots organizing and worker participation in exchange for help from the organization); Ashar, *Law Clinics*, *supra* note 71 (advocating for grassroots organizations made up of poor and working class people to act to oppose

Cummings locates this innovation in lawyering within social movements as a natural professional and academic response to lawyers' coming of age in the political and legal environment of the Obama Era,¹⁰¹ and defines the elements of this "new movement lawyering" to include: (1) a critical view of the role of law and lawyers in moving social change; (2) multidimensional problem-solving strategies aided by newer technologies;¹⁰² (3) appreciation of distributed control mechanisms for change and legal skills fashioned in response; (4) effecting mobilization of legal rules, institutions and roles both inside and outside of traditional legal forums; and (5) deliberately planned and interconnected advocacy by role-cognizant lawyers who are accountable to marginalized constituencies. Ideally, this will build power in marginalized communities to produce and sustain social change goals as the community defines them.¹⁰³ Betty Hung similarly defines this new type of "movement lawyering" as "the building and exercise of collective power, by those most directly impacted, to achieve systemic institutional and cultural change."¹⁰⁴ Sameer Ashar frames "movement lawyering" in terms of its reliance on "legal tactics that emphasize the development of grassroots and activist agency in justice campaigns."¹⁰⁵

These incipient typologies of instances in which lawyering promises real, progressive advances seem both limited and more amenable to after-the-fact justification than a real aid to social movements considering legal action. One of the more telling critiques of both the litigation inefficacy and lawyer disempowerment literature is the persistent failure to ask, much less rigorously test, "compared to what?"¹⁰⁶ How do other tools for social change—such as lobbying (for legislative or administrative changes), electoral strategies, direct action, social entrepreneurship, playing the media, or mass social movements—compare to litigation? Many skeptics of lawyers' role in effecting change merely assume that social movements, generously defined, are the obvious alternative to traditional lawyering as a medium for social change

neoliberalism and focus on local action while thinking globally); Ashar, *Public Interest Lawyers*, *supra* note 21; Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999 (2007); Brenda Montes, *A For-Profit Rebellious Immigration Practice in East Los Angeles*, 23 CLINICAL L. REV. 707 (2017) (confronting the challenge of rebellious lawyering in the for-profit immigration world by injecting empathy into collaboration with clients); Bill Ong Hing, *Contemplating a Rebellious Approach to Representing Unaccompanied Immigrant Children in a Deportation Defense Clinic*, 23 CLINICAL L. REV. 167 (2016) (identifying seven principles that helps Hing practice rebellious lawyering with students).

101. See Ashar, *Movement Lawyers for Immigrant Rights*, *supra* note 13, at 1497 (attributing the ascendancy of a new form of movement lawyering in the immigrant rights community to the political environment of the late Obama Era in which immigration policy change, wrought large, had stalled, a politically vulnerable population was at risk from largely unpublicized locally centered enforcement actions).

102. See Cummings, *Movement Lawyering*, *supra* note 8, at 1652.

103. *Id.* at 1690.

104. Betty Hung, *Movement Lawyering as Rebellious Lawyering: Advocating with Love, Humility and Courage*, 23 CLINICAL L. REV. 663, 664 (2017).

105. Ashar, *Movement Lawyers for Immigrant Rights*, *supra* note 13, at 1497.

106. See McCann, *Reform Litigation*, *supra* note 12, at 727; see also Burke & Barnes, *Empirical Literature on Rights*, *supra* note 12, at 74–75; Bagenstos, *Social Change Litigation*, *supra* note 12.

for marginalized groups.¹⁰⁷ A notable exception is Cummings, who raises the question of whether litigation is any more ineffective in producing social change, inspires greater backlash, diverts more resources from other strategies, or is less respectful of, or accountable to, marginalized groups than its available alternatives.¹⁰⁸ Other critics generally assume that legal strategies face barriers, such as entrenched legal bureaucracies, costs, deferral to elite decision-making, and loss of control over framing and agendas to legal experts—problems that do not burden many other strategies.¹⁰⁹ However, these early critics fail to rigidly define alternatives to traditional legal strategies. To explore the “compared to what” question, we designed a case study around the campaign against S-Comm, which employed many alternatives to traditional lawyering.

II. THE RISE AND FALL OF S-COMM AS AN EFFECTIVE CASE STUDY

The choice of the means and object of our study is no less an operationalization of—or at least influenced by—our shared conceptions of how lawyers engage with others in campaigns to effectuate social change. The S-Comm case study provides us a rare opportunity to conduct an in-depth exploration of one campaign that engaged lawyers, organizers, activists, clients, federal, state, and local government officials, law enforcement officers, foundation funders, and social scientists. Social movement theory instructs us to attend to how mass social movements translate activism into institutional change, the importance of rights talk as a vehicle for translating contention from the language of excluded groups into change in societal institutions and roles, and the courts as a forum to frame discourse to make societies’ institutions listen.¹¹⁰

This case study presents us with an example in which law and lawyers were but one piece of a larger strategy to effectuate change. We do not purport to use this case study to identify the cause and effect of different lawyering actions.¹¹¹ Instead, through interviews, the examination of internal

107. Compare Cummings, *Foundational Critiques*, *supra* note 8, at 1994–2005 (comparing litigation alleged deficiencies with other tactics, often finding little proof of any differential between the—admittedly small—impact of litigation on producing social change, engendering backlash, resolving intra-group conflicts or diverting resources and subversive energies, with that of social movements) with Karen J Pita Loo, *A Study on Immigrant Activism, Secure Communities and Rawlsian Civil Disobedience*, 100 MARQ. L. REV. 565 (2016) (speculating that marches and sit-ins by organized social movement actors motivated both litigation and the eventual demise of S-Comm).

108. See Cummings, *Foundational Critiques*, *supra* note 8, at 1994–2009.

109. *Id.* See generally ROSENBERG, *THE HOLLOW HOPE*, *supra* note 19.

110. TARROW, *POWER IN MOVEMENT*, *supra* note 69; McCann, *Reform Litigation*, *supra* note 12, at 733–34. See generally JACKIE SMITH AND DAWN WEIST, *SOCIAL MOVEMENTS IN THE WORLD-SYSTEM: THE POLITICS OF CRISIS AND TRANSFORMATION* (2012).

111. MCCANN, *RIGHTS AT WORK*, *supra* note 20, at 11 (relying on Althusser who “implied by his important but misleadingly labelled argument about the ‘overdetermination’ of revolution: that every radical movement is unique product of myriad factors whose exact development is impossible to determine in advance” and stating “it is important to remember that social action is generated out of ever-changing processes of human conceptualization. Even if contextual complexity could be fully accounted for by

government documents disclosed as a result of FOIA litigation, an analysis of mainstream media, and the examination of court decisions and transcripts, we identify a new approach to movement lawyering and articulate a preliminary theory arising from this case study.

The campaign against S-Comm is a particularly well-suited vehicle to explore the question of the lawyer's role in social movements. First, unlike long-standing politically volatile issues such as desegregation, abortion, or equal marriage, this Article utilizes a discrete but impactful federal immigration enforcement program that was never addressed by the Supreme Court¹¹² and never became the subject of wide public discourse. Most studies of lawyering's impacts on doctrinal, social and/or cultural change focus on messy, longstanding, very public issues of subordination in which it is very challenging to tease out the role of lawyers. Were social or cultural changes the product of longer-term social dynamics quite separate from any identified legal strategy? To what extent did the resources of time, money, political capital, or public attention get expended or replenished by instances or combinations of litigation, public action, organizing, political strategy, administrative advocacy, or education campaigns? Debates over S-Comm, while very intense, were largely limited to relatively discrete political communities: law enforcement, state and local government leaders, immigrants, immigrant advocacy organizations, and limited Nativists groups. Because of this limited reach, the case study allows for the identification of the relevant actors to interview and permits us to get a more accurate understanding of the entire campaign.

Second, the case study allows us to examine the critiques of lawyers as agents of social change that we identify in Part I because lawyers were involved in multi-modal coordinated campaigns in which they used litigation, direct action, media, and organizing efforts to challenge S-Comm. In collaboration with lawyers, organizers adopted a (trans)local strategy designed to enlist support from state and local politicians and law enforcement authorities to opt out of participation. The wide array of tools used in the S-Comm campaign and the close relationship between lawyers, organizers, and activists, permit us to explore the multitude of ways lawyers can engage with organizers and activists to effect social change.

Finally, the case study involves a single, discrete policy initiative allaying some concerns over the difficulties of specifying winners and losers based on

social scientists (which it cannot), future subjects will inevitably act from understandings of their situation different from those available to us in the present.”)

112. While legal efficacy critics tend to assume that data regarding seminal Supreme Court decisions extend at least as far as lower federal and state court decisions, there may be good reasons to expect that different possibilities for change exist at more local or accessible bureaucratic levels. In particular, with ground-level, relatively unpublicized decisions there might well be more amenability to exploit or convince sympathetic power holders, greater ability to monitor effects, larger possibilities to translate community concerns into the language of bureaucratic change, and greater potential to bring matters to public consciousness so as to construct or impact both the narrative of public discourse and that held by movement activists themselves.

the diffuse effects of policy consequences.¹¹³ Even though the policy initiative is discrete, the program was the subject of concerted organizing, political action, community education, and litigation. In addition, the policy at issue was directed and implemented by a central command structure whose internal communications at critical junctures are available through government documents released as a result of the FOIA litigation. But that central command was vulnerable to local law enforcement and dispersed activists as the consequences of the S-Comm policy—including the apprehension, detention, and deportation of those identified—implicated local agency cooperation.¹¹⁴

III. THE IMMIGRANT RIGHTS LANDSCAPE PRIOR TO S-COMM

The story of S-Comm's rise and fall is only a piece of the larger, long-standing, and ongoing struggle for immigrant rights. To understand the strategic decisions made and actions taken by advocates in the campaign to dismantle S-Comm, it is critical to contextualize S-Comm within the larger immigrant rights movement.

A. *The Local/National Fight Over Immigration*

As perceptions of rising crime rates during the 1990s and September 11, 2001, linked immigration to national security, the federal government reasserted its traditional authority over immigration and citizenship through a series of legislative and administrative changes.¹¹⁵ In 1996, the Clinton administration began this push with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) which allocated more resources to enforcement, expedited deportation procedures, restricted judicial discretion during removal proceedings, reduced possibilities for appeals, and expanded the list of deportable offenses.¹¹⁶ That same year, Congress passed, and President Clinton signed the Antiterrorism and Effective Death Penalty Act (AEDPA),¹¹⁷ adding provisions that enhanced the country's ability to "detect and remove immigrants while restricting judicial review."¹¹⁸ Following this lead, the Bush administration used the newly-created DHS to expand the geographic and temporal area for expedited removals to all unlawful entrants found within 100 miles of the border, within 14 days of

113. McCANN, RIGHTS AT WORK, *supra* note 20, at 186.

114. Ashar, *Movement Lawyers for Immigrant Rights*, *supra* note 13, at 1502.

115. Philip Martin, *Proposition 187 in California*, 29 INT'L MIGRATION REV. 255 (1995) (describing California Proposition 187, the "Save Our State" (SOS) initiative).

116. WALTER J. NICHOLLS, THE IMMIGRANT RIGHTS MOVEMENT: THE BATTLE OVER NATIONAL CITIZENSHIP 112 (2019) [hereinafter NICHOLLS, IMMIGRANT RIGHTS MOVEMENT].

117. Antiterrorism and Effective Death Penalty Act of 1996, S. 735, 104th Cong. (1996) (expanding the offenses that could be considered as a basis "aggravated offenses" even if not felonies).

118. See NICHOLLS, IMMIGRANT RIGHTS MOVEMENT, *supra* note 116, at 113 (explaining that President Clinton's impact on the lives of immigrants also included the passage of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) that restricted the receipt of public assistance to undocumented immigrants).

entry into the country, leaving this class of immigrants no practical way to contest their removal in court.¹¹⁹

In an attempt to expand enforcement resources, the IIRIRA created 287(g), a program that gives local police the ability to interview individuals to determine their immigration status, search for and enter data into the U.S. Immigration and Customs Enforcement's (ICE) database, and issue ICE detainers permitting local law enforcement to hold a person for ICE pick up.¹²⁰ The 287(g) program is voluntary, requires state or local agencies to enter into agreements to participate, and mandates local police training before implementation.¹²¹ While the 287(g) program was designed to target undocumented individuals accused of "violent crimes, human smuggling, gang/organized crime activity, sexual offenses, narcotics smuggling, and money laundering,"¹²² the program led to racial profiling, civil rights violations, isolation of immigrant communities, and family separation—consequences that have largely been attributed to a lack of adequate training, oversight, or an institutional mission that otherwise might have avoided these dire results.¹²³

119. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,880 (Aug. 11, 2004). In July 2019, the Trump administration's DHS issued notice of regulations further expanding the reach of expedited removal to anyone found anywhere in the country who could not show that they had entered the country more than two years ago. *See* Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409 (July 23, 2019). That regulation, expanding the scope of expedited removal to the full extent allowed under the Clinton Era AEDPA, is as of this writing enjoined by Federal Court Order. *Make the Rd. New York v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020).

120. *See* H.R. Rep. No. 104-828, at 16-17 (1996) (amending the INA to add § 287(g) which allows local law enforcement officials to be deputized as immigration enforcement officials after training and for issuance of detainers to hold a person up to 48 hours after they are lawfully eligible for release in order to allow ICE to pick up individuals and transport them to detention centers); *see also* NICHOLLS, IMMIGRANT RIGHTS MOVEMENT, *supra* note 116, at 116.

121. Immigration & Nationality Act § 287(g), 8 U.S.C. § 1357(g) (authorizes the Director of ICE to enter into agreements with state and local law enforcement agencies, that permit designated officers to perform limited immigration law enforcement functions). Agreements under § 287(g) require the local law enforcement officers to receive appropriate training and function under the supervision of ICE. *See* U.S. IMMIGR. AND CUSTOMS ENF'T, DELEGATION OF IMMIGRATION AUTHORITY SECTION 287(G) IMMIGRATION AND NATIONALITY ACT (2021).

122. *See* Randy Capps, Marc R. Rosenblum, Cristina Rodriguez & Muzaffar Chishti, *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement*, MIGRATION POL'Y INST. (2011), <https://www.migrationpolicy.org/sites/default/files/publications/287g-divergence.pdf>.

123. *Id.* CAPPS ET AL., DELEGATION AND DIVERGENCE (explaining that studies find about half of immigration detainers used in 287(g) jurisdictions were for people arrested in connection with only misdemeanors and traffic violations). Further study found that when local police operate under 287(g) agreements, they are more likely to stop and harass Latinx residences, leaving immigrants to withdraw from their communities and move away from using police to protect the community. *See* N.Y. OFFICE OF THE ATT'Y GEN., OFFICE OF THE ATT'Y GEN. OF CAL., OFFICE OF THE ATT'Y GEN. OF D.C., STATE OF OR. OFFICE OF THE ATT'Y GEN., STATE OF R.I. OFFICE OF THE ATT'Y GEN., & WASH. STATE OFFICE OF THE ATT'Y GEN., SETTING THE RECORD STRAIGHT ON LOCAL INVOLVEMENT IN FEDERAL CIVIL IMMIGRATION ENFORCEMENT: THE FACTS AND THE LAW 13 (2017) https://ag.ny.gov/sites/default/files/setting_the_record_straight.pdf [<https://perma.cc/85UW-6QVS>] [hereinafter ICE, Setting the Record Straight] (finding that "State and local governments and LEAs are closer to the communities they serve than the federal government and thus are in a better position to assess the needs of those communities, including how best to use their limited resources to ensure public safety. These assessments include determining how and when to become involved in federal civil immigration enforcement, as permitted by law, and how to build the trust of immigrants in their communities to ensure that victims and witnesses come forward to report crimes."); *see also* Nik Theodore, DEP'T OF URBAN PLANNING & POLICY, U. OF ILL. CHI., INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENF'T (2013), https://greatcities.uic.edu/wp-content/uploads/2014/05/Insecure_Communities_Report_FINAL.pdf [<https://perma.cc/3M7L-3HYQ>].

In the early 2000s, it was widely recognized that the immigration system needed repair. Upon election in 2001, President Bush began high-level talks with the President of Mexico, seeking broad-scale immigration reform opportunities.¹²⁴ These talks were abruptly impeded by the September 11, 2001, terrorist attacks on the United States. With an emerging and overwhelming narrative that linked terrorism to immigrants,¹²⁵ the federal government funneled tremendous resources into immigration enforcement and passed laws to detect, detain, and deport unauthorized immigrants.¹²⁶

Conversations about immigration, including the potential for Comprehensive Immigration Reform (CIR),¹²⁷ moved to the forefront of the national dialogue. Nativist issue entrepreneurs like Kris Kobach and Sheriff Joe Arpaio were staunchly pushing enforcement-only measures. In 2005, a federal-enforcement-only-bill in Congress, sponsored by Wisconsin Representative James Sensenbrenner, led to what were, at the time, the largest public demonstrations in the country's history.¹²⁸ Importantly, the demonstrations were generated and, in most instances, led by impacted individuals, including many who were at risk of deportation.¹²⁹ Discussions around CIR focused on policy trade-offs requiring stricter enforcement in exchange for limited legalization. In 2006 and 2007, the Senate considered proposals that provided a limited path to legalization for undocumented immigrants along with increased criminal penalties for unlawful immigration, stricter employer verification requirements, and the development of physical barriers to entry at the U.S.-Mexico border.¹³⁰

For advocates working with day laborers, 2007 provided the stark realization that all proposals for amnesty excluded and criminalized day laborers, as

124. See NICHOLLS, IMMIGRANT RIGHTS MOVEMENT, *supra* note 116, at 114.

125. See NICHOLLS, IMMIGRANT RIGHTS MOVEMENT, *supra* note 116, at 115.

126. See NICHOLLS, IMMIGRANT RIGHTS MOVEMENT, *supra* note 116, at 115–16.

127. David A. Super, *The Future of U.S. Immigration Law*, 53 U.C. DAVIS L. REV. 509, 521 (2019) (explaining that while CIR is used as a term of art, “no consensus exists as to what it means.”).

128. Kathryn Hoban, *The Emergence and Obstacles of the Immigrant Rights Movement*, ADVOC. F., 2008, at 1–2.

129. DANIEL DENVER, ALL-AMERICAN NATIVISM: HOW THE BI-PARTISAN WAR ON IMMIGRANTS EXPLAINS POLITICS AS WE KNOW IT 189–191 (2020) [hereinafter DENVER, ALL-AMERICAN NATIVISM] (explaining that soon thereafter, in December 2006, the Bush administration conducted the largest work site raids in the country's history); Leo R. Chavez, *THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION* 152–75 (Stanford Univ. Press 2d ed. 2013).

130. Comprehensive Immigration Reform Act, S. 2611, 109th Cong. (2006) (sponsored by Sen. Arlen Specter); Comprehensive Immigration Reform Act, S. 1348, 110th Cong. (2007) (sponsored by Sen. Harry Reid). Efforts for immigration reform were attempted the year prior in 2005; *see also* Comprehensive Enforcement and Immigration Reform Act, S. 1438, 109th Cong. (2005) (co-sponsored by Sens. John Cornyn and Jon Kyl); Secure America and Orderly Immigration Act, S. 1033, 109th Cong. (2005) (co-sponsored by Sens. John McCain and Ted Kennedy). For an interesting analysis of the “criminalization complex” in the context of comprehensive immigration reform attempts see Mary Fan, *The Case for Criminalization Reform*, 92 N.C. L. REV. 75 (2013).

did many local initiatives.¹³¹ Realizing that day laborers had bigger concerns than a possible amnesty bill, advocates for this community focused their concerns on the ways police and sheriffs engaged in immigration enforcement.¹³² Day laborer advocates were acutely aware that “if police have the power to act as immigration officials, then they [will] be able to disappear our street corners.”¹³³ In response, the National Day Laborers Organizing Network (NDLON) decided to prioritize the fight against devolved immigration enforcement, which at that time was being played out through 287(g) and the proposed CLEAR Act of 2007.¹³⁴

Debates over immigration were increasingly polarizing. Anti-immigrant sentiment grew in localities where community members perceived a lack of federal enforcement at the border and an ever-growing population of unlawful entrants into the country.¹³⁵ In some localities, this anger and animosity toward immigrants manifested itself in state and local initiatives designed to take control of immigration in the absence of federal action.¹³⁶ Sheriff Joe Arpaio of Maricopa County, Arizona, became the lightning rod and epicenter of the local government anti-immigration cause, as he “diverted resources away from basic law-enforcement functions to highly publicized immigration sweeps.”¹³⁷

Fearing that Arizona’s anti-immigration sentiment would spread,¹³⁸ NDLON sought to disentangle police from immigration enforcement by

131. Interview 2 with Jordan, Attorney, Non-Profit Immigrant Workers’ Rights Organization (Sept. 10, 2019) (transcript on file with authors) [hereinafter Interview 2 with Jordan].

132. *Id.*

133. Interview with Blake, Immigrant Rights Community Organizer (Nov. 4, 2019) (transcript on file with authors) [hereinafter Interview with Blake].

134. CLEAR Act, H.R. 842, 110th Cong. § 2 (2007) (the Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act of 2007 proposed that: state and local law enforcement had inherent authority to investigate, apprehend, or transfer to federal custody aliens in the United States in order to assist in the enforcement of U.S. immigration laws; and that states that prohibited such law enforcement assistance would be denied some federal money).

135. DENVIR, ALL-AMERICAN NATIVISM, *supra* note 129, at 203–21.

136. AM. IMMIGR. LAWYERS ASSOC’N, NAVIGATING THE IMMIGRATION DEBATE: A GUIDE FOR STATE AND LOCAL POLICYMAKERS AND ADVOCATES 1–7 (2009).

137. William Finnegan, *Sheriff Joe*, THE NEW YORKER, July 20, 2009, <https://www.newyorker.com/magazine/2009/07/20/sheriff-joe> [hereinafter Finnegan, *Sheriff Joe*] (Arpaio is an outspoken anti-immigrant champion who advocated for some of the most restrictive actions against immigrants in the country); Clint Bolick, *Mission Unaccomplished: The Misplaced Priorities of the Maricopa County Sheriff’s Office*, THE GOLDWATER INST. (Dec. 2, 2008), <https://goldwaterinstitute.org/wp-content/uploads/2019/02/Mission-Unaccomplished-Misplaced-Priorities-of-the-Maricopa-County-Sheriff%E2%80%99s-Office.pdf> [<https://perma.cc/AC3D-4DJG>] (finding that at the same time resources were increased to target immigrants, Sheriff Arpaio’s deputies failed to investigate 400 sex crimes that occurred during his time as sheriff between 2005 and 2007. Between 2007 and 2008, the Maricopa County Sheriff’s Office had a total of 77,949 outstanding warrants, including 42,297 felony warrants, because the sheriff’s office prioritized immigration enforcement over other law enforcement efforts).

138. Interview with Blake, *supra* note 133. The roots laid by Arpaio locally, took hold on a state-wide level in April 2010 with the passage of Arizona Senate Bill 1070, Support Our Law Enforcement and Safe Neighborhoods Act: the broadest and strictest anti-immigration measure passed by a state. The law was to go into effect on July 29, 2010, but legal challenges sought to enjoin its implementation, including a challenge filed by the United States Department of Justice. On June 2012, the U.S. Supreme Court upheld the provision requiring immigration status checks during law enforcement stops but struck down three other provisions finding that they violated the Supremacy Clause of the U.S. Constitution.

engaging and persuading sheriffs and police. In a series of strategic moves that would reap benefits in the long run, NDLOM capitalized on connections with a former immigrant rights lawyer turned Ford Foundation Officer, working with the National Police Foundation Project.¹³⁹ As an initial step, NDLOM's Executive Director, Pablo Alvarado, was placed on the advisory board of the Police Foundation Project.¹⁴⁰ In 2008, NDLOM advocates participated in the Police Foundation¹⁴¹ conference that brought together law enforcement agencies, policymakers, academics, and community stakeholders to work collaboratively on the implications of local law enforcement of immigration laws.¹⁴²

Local law enforcement opposed taking on immigration enforcement for two reasons: it ultimately undermined community safety as immigrants did not provide information or seek assistance from the police, and local police did not want the burden of utilizing discretion to decide who would stay or go.¹⁴³ The large majority of sheriffs were in favor of local enforcement of immigration laws.¹⁴⁴ Unlike police, sheriffs were focused on finances and the need to "fill the beds."¹⁴⁵ This striking contrast was illuminated during a particularly memorable conference exchange between the Police Chief from Sacramento, Arturo Venegas, Jr., and the Sheriff of Mecklenburg County, North Carolina, Jim Pendergraph.¹⁴⁶ During a debate about the use of 287(g), Sheriff Pendergraph explained that "[i]f [law enforcement agents] don't have enough evidence to charge someone criminally, but you think he's illegal, we can [use 287(g) to] make him disappear."¹⁴⁷ Observing how Police Chief Venegas stood up to Sheriff Pendergraph provided organizers a connection to

139. Interview 2 with Jordan, *supra* note 131; Interview with Garret, Senior Program Officer at Foundation (Feb. 5, 2020) (transcript on file with authors) [hereinafter Interview with Garret]. The Police Foundation is a national, nonpartisan, nonprofit organization dedicated to supporting innovation and improvement in policing. See Nat'l Police Foun. (Feb. 27, 2020, 8:30 PM) <https://www.policefoundation.org/> [<https://perma.cc/7VV8-BN3B>].

140. Interview with Garret, *supra* note 139; see also ANITA KHASHU, THE ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES xi (2009) (acknowledgments) [hereinafter KHASHU, THE ROLE OF LOCAL POLICE].

141. The conference was funded by the Ford Foundation. See Interview with Garret, *supra* note 139.

142. KHASHU, THE ROLE OF LOCAL POLICE, *supra* note 140.

143. Interview 9 with Jordan, Attorney, Non-Profit Immigrant Workers' Rights Organization (Jan. 31, 2020) (transcript on file with authors).

144. *Id.*

145. *Id.*

146. Josie Duffy Rice, "We Can Make Him Disappear": The Power of County Sheriffs, THE APPEAL (May 7, 2018), <https://theappeal.org/we-can-make-him-disappear-the-power-of-county-sheriffs-b27de57061e4/> ("[Sheriff] Pendergraph was maniacal about his dislike of immigrants, intent on ridding America of them. 'We've got millions of illegal immigrants that have no business being here. . . . These people are coming to our country without documents, and they won't even assimilate,' he said in 2006. 'Every person we remove from the county is one person you and your family won't meet on the highway,' he stated that same year. Eventually, Pendergraph dropped the pretense of safety altogether, simply setting up checkpoints in neighborhoods with large immigrant populations and arresting people for violating civil immigration law).

147. *Id.*; see also Interview 7 with Jordan, Attorney, Non-Profit Immigrant Workers' Rights Organization (Jan. 3, 2020) (transcript on file with authors) [hereinafter Interview 7 with Jordan].

someone who later became a critical ally and a stock story feasted upon by anti-S-Comm coalitions.¹⁴⁸

While there were certainly differences of opinions, conference attendees reached an overarching consensus that “the costs of participating in the U.S. Immigration and Customs Enforcement’s (ICE) 287(g) program outweigh[ed] the benefits.”¹⁴⁹ This consensus culminated in the publication of a report that was a collaborative effort between members of the legal, academic, and public policy communities.¹⁵⁰ NDLO’s presence and high visibility on the project provided the organization access to the law enforcement community, “credentials” with other immigrant rights organizations,¹⁵¹ and insights into potential future allies and collaborators, all of which proved to be critical in the later fight against S-Comm.¹⁵²

B. *The Start of S-Comm and the Transition from the Bush to Obama Administration*

While much of the immigrant rights community was focused on combating the ills of 287(g), the Bush administration was working on S-Comm, a new enforcement program that relied upon the intra-agency sharing of biometric identification information. On December 26, 2007, Congress passed the Consolidated Appropriations Act of 2008 that provided ICE with \$200 million to improve and modernize efforts to identify incarcerated criminal aliens.¹⁵³ S-Comm was the Bush administration’s answer to this modernization effort.¹⁵⁴

148. Interview 7 with Jordan, *supra* note 147.

149. KHASHU, THE ROLE OF LOCAL POLICE, *supra* note 140, at xii (Findings include: “Police officers should be prohibited from arresting and detaining persons to solely investigate immigration status in the absence of probable cause of an independent state criminal law violation; If a local agency nevertheless enters the 287(g) program, its participation should be focused on serious criminal offenders and should be limited to verifying the immigration status of criminal detainees as part of the 287(g) Jail Enforcement Officer program; Local and state authorities participating in federal immigration enforcement activities should develop policies and procedures for monitoring racial profiling and abuse of authority; In order to preserve the trust that police agencies have built over the years by aggressively engaging in community oriented policing activities, local law enforcement agencies should involve representatives of affected communities in the development of local immigration policies; There is a need for empirical research on ICE’s 287(g) program and other methods of police collaboration with federal immigration authorities so that we have more objective data by which to better understand the way in which these programs are carried out in the field and their impact on public safety and civil liberties; Local law enforcement agencies should employ community-policing and problem-solving tactics to improve relations with immigrant communities and resolve tension caused by expanding immigration; Local law enforcement leaders and policing organizations should place pressure on the federal government to comprehensively improve border security and reform the immigration system, because the federal government’s failure on both issues has had serious consequences in cities and towns throughout the country.”).

150. *See id.*

151. Interview 7 with Jordan, *supra* note 147 (“NDLO was able to start punching a bit out of their weight class and met many important law enforcement officials at the big convening, including, importantly, Arturo Venegas, Jr. who at the time was the Chief of Police of Sacramento, CA.”).

152. *Id.*

153. *See generally* Consolidated Appropriations Act, 2008, H.R. 2764, 110th Cong. (2007). In 2006, a precursor pilot to S-Comm, known as the Interim Data Service Model (iDSM), was offered in Suffolk County, MA and Dallas County, TX.

154. U.S. IMMIGR. & CUSTOMS ENF’T, SECURE COMMUNITIES: A COMPREHENSIVE PLAN TO IDENTIFY AND REMOVE CRIMINAL ALIENS (2009), https://www.ice.gov/doclib/foia/secure_communities/

In April 2008, the Bush administration defined the overall strategic goals of S-Comm to include: identifying and processing all removable criminal aliens; enhancing detention strategies so removable criminal aliens were not released into the community; expediting removals, and deterring the return of criminal aliens back into the United States.¹⁵⁵

S-Comm's initial rollout, which proceeded without public announcement,¹⁵⁶ was first piloted in seven jurisdictions and extended to an additional fourteen jurisdictions by October 2008.¹⁵⁷ In the first quarterly status report for S-Comm, ICE detailed outreach efforts made to state and local Law Enforcement Agencies (LEAs) designed to culminate in voluntary agreements known as Memoranda of Agreement (MOAs).¹⁵⁸ In 2008, ICE perceived that the support for S-Comm was vast and that the main outreach challenge would be "managing rapidly growing interest from LEAs seeking to initiate immediate collaboration efforts with ICE."¹⁵⁹ In late 2008, little evidence showed that low-wage labor or immigrant rights advocacy communities were conscious of S-Comm, and no evidence showed any concerted effort to dismantle or retard the growth of the nascent S-Comm project during this period.

During the initial start-up phase of the program, ICE made a strategic decision to focus outreach on states, as opposed to localities, to "simplify relationship complexity by limiting the number of agreements that ICE [was] participating in" and "encourage state leadership" to develop "consistent working relationship with LEAs throughout the state."¹⁶⁰ In the absence of

securecommunitiesstrategicplan09.pdf. [hereinafter U.S. IMMIGR. & CUSTOMS ENF'T]. The final plan was submitted to Congress on April 7, 2008. See AM. IMMIGR. COUNCIL, SECURE COMMUNITIES: A FACT SHEET (2011), <https://www.americanimmigrationcouncil.org/research/secure-communities-fact-sheet> [hereinafter AM. IMMIGR. COUNCIL].

155. See U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 154; see also AM. IMMIGR. COUNCIL, *supra* note 154.

156. See U.S. IMMIGR. & CUSTOMS ENF'T, SECURE COMMUNITIES: QUARTERLY REPORT (2011), https://www.ice.gov/doclib/foia/secure_communities/congressionalstatusreportfy104thquarter.pdf [<https://perma.cc/7N8B-TBV6>]. In the initial stages of the program, ICE made clear that implementation of S-Comm at the local level required two steps: (1) execution of a Memorandum of Agreement (MOA) with the state; and (2) signed statements of intent from county and local agencies. U.S. Immigr. & Customs Enf't, Memorandum of Understanding between Dep't of Homeland Sec., ICE, and Cal. Dep't of Just., Bureau of Criminal Identification and Information (Jan. 23, 2009), http://www.ice.gov/doclib/foia/secure_communities/securecommunitiescaliforniamoa10april2009.pdf [<https://perma.cc/W7AZ-VM9H>] [hereinafter *ICE Secure Communities MOA*].

157. The pilot initially included the following jurisdictions: Boston, MA; Dallas County, TX; Harris County, TX; Wake County, NC; Henderson County, NC; Buncombe County, NC; and Gaston County, NC. U.S. Immigr. & Customs Enf't, SECOND CONGRESSIONAL STATUS REPORT COVERING THE FOURTH QUARTER FISCAL YEAR 2008, FOR SECURE COMMUNITIES: A COMPREHENSIVE PLAN TO IDENTIFY AND REMOVE CRIMINAL ALIENS 8 (2008).

158. U.S. IMMIGR. & CUSTOMS ENF'T, 1ST QUARTERLY STATUS REPORT (2008) for SECURE COMMUNITIES: A COMPREHENSIVE PLAN TO IDENTIFY AND REMOVE CRIMINAL ALIENS 2 (2008) [hereinafter *ICE, 1st Quarterly Status Report*]. In the initial stages of the program, ICE made clear that implementation of S-Comm at the local level required two steps: (1) execution of a Memorandum of Agreement (MOA) with the state; and (2) signed statements of intent from county and local agencies. *ICE Secure Communities MOA, supra* note 156.

159. ICE, 1st Quarterly Status Report, *supra* note 158, at 12.

160. *Id.*

public engagement, many advocates and even elected officials were not aware of the program's implementation until after state agreements were signed.¹⁶¹

While the Bush administration was creating the S-Comm machinery, immigrant rights legal advocates focused on detainers as the weak link between criminal justice and immigration detention systems.¹⁶² “The primary strategy was to get people out of detention so they would not wind up in the criminal alien program. If [we] kept people out of detention [we] could stop the immigration repercussions.”¹⁶³ But the enforcement landscape was already changing behind the scenes. While advocates were focused on 287(g), the Obama transition team was being briefed on S-Comm. Government officials saw S-Comm as an opportunity to address advocates' concerns that 287(g) was infused with racial profiling, bias, and intimidation by law enforcement officials.¹⁶⁴ Bush officials presented S-Comm as “a program that [would] solve a lot of problems” related to discriminatory enforcement because it was rooted in technology that was objective, namely fingerprints.¹⁶⁵ In fact, during the transition, the Obama administration “[a]ssumed all would be on board . . . [we] didn't anticipate push back.”¹⁶⁶

Some immigrant rights advocates were concerned with the selection of Janet Napolitano as the Secretary of DHS, who they perceived normatively believed in police as part of the immigration enforcement scheme.¹⁶⁷ Secretary Napolitano's record of permitting Sheriff Joe Arpaio, the country's most hostile, anti-immigrant sheriff, to engage in constitutionally questionable

161. Christopher Strunk & Helga Leitner, *Resisting Federal-Local Immigration Enforcement Partnership: Redefining 'Secure Communities' and Public Safety*, 1 J. TERRITORY, POLITICS, GOVERNANCE 62, 70 (2013) (stating, “In late 2009, advocates in Washington, DC were shocked to find out that the District of Columbia's police chief had signed a Secure Communities Memorandum of Agreement (MOA) with ICE because of the city's long-standing opposition to local immigration enforcement.” The authors cited an interview with a community activist in Washington, DC in September 2010 that explained little was known about Secure Communities at this point, and local organizations only learned of the program through the National Day Laborer Organizing Network (NDLON)).

162. Interview with Taylor, Attorney on NDLON FOIA Case (Dec. 9, 2019) (transcript on file with authors) [hereinafter Interview with Taylor].

163. *Id.*

164. Interview with Avery, Former DHS Official (Jan. 17, 2020) (transcript on file with authors) [hereinafter Interview with Avery] (Government officials were concerned about racial profiling with 287 (g) after a report issued by the United States Government Accountability Office (GAO), concluding that ICE needed better program controls to ensure that the program was operating, as intended, by focusing on individuals involved in “serious crime”). See U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-109, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS 4 (2009).

165. Interview with Avery, *supra* note 164.

166. *Id.* (“I mean, it's interesting that at the time that was thought to be well, that's a good idea and that'll help again contain overeager police officers, they'll just be enforcing their own laws. And, and then DHS will step in and decide what to do with individuals who show up through this fingerprint check as being here unlawfully.” Issues of racial profiling generated by targeted police arrests and the undermining of community policing strategies weren't “so much in the picture early on, nor in those early briefings when I was on the transition team.”)

167. Interview 1 with Jordan, Attorney, Non-Profit Immigrant Workers' Rights Organization (Sept. 4, 2019) (transcript on file with authors) [hereinafter Interview 1 with Jordan] (“normatively Napolitano believed in police as part of the immigration enforcement scheme.”)

behavior supported this concern.¹⁶⁸ There was a sense that Napolitano “understood that Arpaio was the cost” of the 287(g) program in Maricopa County.¹⁶⁹ And, Napolitano made it clear that ending 287(g) was not on the table.¹⁷⁰ These concerns only grew as the Obama administration moved aggressively on enforcement efforts.¹⁷¹

In an attempt to start a dialogue with immigrant rights advocates, Secretary Napolitano hosted an invitation-only meeting for approximately 130 immigration advocates.¹⁷² President Obama entered the room late into the meeting and delivered some general talking points from what appeared to be notes prepared by others.¹⁷³ Most attendees were swept up in the pro-Obama feeling and didn’t press him on why he was leaving 287(g) in place, while others left feeling unsettled.¹⁷⁴

C. *The Tradeoff of Increased Enforcement for CIR*

Initially, President Obama’s election provided immigrant rights activists hope that CIR might become a reality.¹⁷⁵ Cecilia Munoz, the twenty-year

168. See generally Finnegan, *Sheriff Joe*, *supra* note 137 (“[Napolitano] was the U.S. Attorney for Arizona when conditions in Arpaio’s jails were first investigated by the Justice Department, in the mid-nineteen-nineties. Her performance then was memorably weak. Despite receiving a devastating federal report on brutality inside the jails, she held a friendly press conference with Arpaio . . . [and] [l]ater, as the state’s attorney general, she stood by as Sheriff Joe ran his jails any way he pleased.”).

169. Interview 5 with Jordan, Attorney, Non-Profit Immigrant Workers’ Rights Organization (Oct. 17, 2019) [hereinafter Interview 5 with Jordan]. This concern has a basis in Napolitano’s past actions surrounding the work of Sheriff Joe Arpaio. The New Yorker ran a profile of Joe Arpaio and reported “Janet Napolitano, President Obama’s Secretary of Homeland Security, has a history with Arpaio. She was the U.S. Attorney for Arizona when conditions in Arpaio’s jails were first investigated by the Justice Department, in the mid-nineteen-nineties. Her performance then was memorably weak. Despite receiving a devastating federal report on brutality inside the jails, she held a friendly press conference with Arpaio in which she announced the settlement of the case against him and, according to the Arizona Republic, passed the time “trading compliments with the sheriff.” Later, as the state’s attorney general, she stood by as Sheriff Joe ran his jails any way he pleased. Then, when she ran for governor in 2002, Arpaio returned the favor by crossing party lines—Napolitano is a Democrat—and making a last-minute campaign commercial for her that, by all accounts, helped her eke out a victory.”

170. Finnegan, *Sheriff Joe*, *supra* note 137 (“In 2008, in her second term as governor, Napolitano, a moderate on immigration, finally opposed Arpaio, ordering that \$1.6 million in state funds going to his office be used not for immigration sweeps but for the investigation of felonies. Arpaio was furious and later got his funding reinstated. His opponents in Maricopa County wonder privately about Napolitano’s willingness to defy him again, even from a Cabinet position. Last week, she announced a revision of the 287(g) program, intended to make local agencies more accountable. But, according to her office, ending Homeland Security’s partnership with Arpaio is not under consideration.”).

171. Julia Preston, *Firm Stance on Illegal Immigrants Remains Policy*, N.Y. TIMES (Aug. 3 2009), <https://www.nytimes.com/2009/08/04/us/politics/04immig.html>; Press Release, Dept. Homeland Sec., Sec’y Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships and Adds 11 New Agreements (July 10, 2009), <https://www.dhs.gov/news/2009/07/10/secretary-announces-new-agreement-state-and-local-immigration-enforcement> [<https://perma.cc/75RP-NX8L>] (announcing that DHS granted 11 new jurisdictions 287(g) immigration enforcement powers).

172. Seth Hoy, *The President and Secretary Napolitano Reaffirm Commitment to Immigration Reform*, IMMIGRATIONIMPACT.COM (Aug. 21, 2009), <https://immigrationimpact.com/2009/08/21/the-president-and-secretary-napolitano-reaffirm-commitment-to-immigration-reform/#.YEP1Bi2ZPGI>.

173. Interview 1 with Jordan, *supra* note 167.

174. *Id.*

175. Ivy O. Suriyopas, Program Officer, Open Soc’y Found., Portfolio Review: The 2013 Pursuit Of Comprehensive Immigration Reform, in OPEN SOCIETY U.S. PROGRAMS BOARD MEETING, OPEN SOCIETY FOUND. 42 (May 6, 2016), <http://freebeacon.com/wp-content/uploads/2016/08/soros-board-book-2016>.

Senior Vice President at the National Council of La Raza, was appointed to Obama's senior staff¹⁷⁶—giving immigrant rights advocates one of their own on the “inside.”¹⁷⁷ During a trip to Mexico in 2009, President Obama indicated that immigration reform would have to wait until after health care and energy bills passed in Congress.¹⁷⁸ Upon returning to the U.S., Obama tried to reassure over 100 immigration reform backers that work on CIR would begin in 2009.¹⁷⁹ According to one high-level government official, there was a lot of “behind the scenes” work happening on CIR during 2009.¹⁸⁰ But, the economic crisis and the health care debate got in the way of CIR being “front and center in the political process.”¹⁸¹

It was thought that the Administration needed to show real seriousness—some bona fides—about immigration enforcement in the hopes that this would gain some Republican support for legalization.¹⁸² In November of 2009, Secretary Napolitano made a speech at the Center for American Progress that some advocates saw as the Obama administration's campaign to launch S-Comm.¹⁸³ Celebrating the first anniversary of S-Comm,

pdf [<https://perma.cc/Q6NE-RF4Q>] (explaining that while there was strong verbal support, “[t]he first four years of the Obama administration was marked by a ramp up in immigration enforcement, operating under the assumption that increased enforcement against unauthorized immigration would create conditions amenable for legislative reforms.”).

176. Cecilia Muñoz served first as the Director of Intergovernmental Affairs and subsequently as the Director of the Domestic Policy Council. See *Cecilia Muñoz*, NEWAMERICA.COM, <https://www.newamerica.org/our-people/cecilia-mu%C3%B1oz/> [<https://perma.cc/8GRQ-CANH>] (last visited Feb. 28, 2020).

177. A common theme among immigrant advocates we interviewed was disappointment over the inability to capitalize on an effective “inside/outside” strategy. Interview with Sydney, Community Organizer (Oct. 21, 2019) (transcript on file with authors) [hereinafter Interview with Sydney]; Interview 5 with Jordan, *supra* note 169.

178. Josh Gerstein, *Obama Addresses Immigration Reform*, POLITICO (Aug. 20, 2009) <https://www.politico.com/story/2009/08/obama-addresses-immigration-reform-026308>.

179. *Id.*

180. Interview with Sam, US Department of Homeland Security Official (Jan. 28, 2020) (transcript on file with authors) [hereinafter Interview with Sam].

181. *Id.* (“[I was] working very extensively on comprehensive immigration reform and drafting, uh, participating in team, leading a team that was drafting what we hoped would become a kind of administration bill that could feed into the overall process of getting very complicated interagency, being in inter-agency meetings to get agreement on what approach we take on a lot of detailed issues that would go into that bill. So ironically, this is during the time when a lot of people say, ‘Oh, the Obama administration didn’t do anything during their first year, first couple years on comprehensive immigration reform.’ There was a lot going on behind the scenes. There were a few other things that got in the way of it actually becoming front and center in the political process, mainly the economic crisis and the health care. The plan had been to do health care early in the first few months of the [A]dministration and then turn to comprehensive immigration reform. And of course, to deal with an economic crisis along the way as it was necessary, but health care didn’t get done in a few months, it took, I think, 13 months. And by then the political scene had changed. And so, we didn’t really get to make full use of what it was that we’d been working on.”).

182. *Id.* (explaining “it never was really spelled out all that clear, but particularly looking at recent, new violators . . . we said okay, yes, we can agree [if we can] win support from some Republicans [with] . . . a track record of solid enforcement and with some . . . innovations [such as] E-verify . . . that that would create the better framework to get Republican support for a comprehensive immigration reform bill.”).

183. Interview 1 with Jordan, *supra* note 167.

Secretary Napolitano boasted that the program was “being used by 95 jurisdiction[s] and [had] identified 111,000 criminal aliens.”¹⁸⁴

Instead of taking advantage of a Democratic majority in Congress during his first two years, President Obama ramped up internal enforcement in line with the Senate leadership’s “get-tough” strategy.¹⁸⁵ As one Obama administration official explained, “[t]here was certainly a thought early on that [enforcement] needed to be part of the balance—serious enforcement focused on recent violators. And that would lay the groundwork for getting comprehensive immigration reform.”¹⁸⁶ Even Cecilia Munoz defended S-Comm on the grounds that if Obama was tough on enforcement, it would help gain support from Republicans for CIR.¹⁸⁷ But, congressional House Democrats had a different view. As one Senior Counsel to the Immigration Subcommittee of the House Judiciary Committee said, “[t]he narrative of we need to give in on enforcement to get CIR was what the Administration was pushing as a narrative, but not what [c]ongressional Democrats thought.”¹⁸⁸

The first year of the Obama administration came and went without an immigration bill. While Obama’s team cited the healthcare debate and the financial crisis of 2008 as reasons for the delay,¹⁸⁹ advocates decried the President’s unwillingness to lead on the issue.¹⁹⁰ The result was an enforcement strategy that legitimated anti-immigrant prejudices and fostered a splinter in the immigrant rights movement.¹⁹¹ On one side were the national, Beltway CIR advocates who were willing to trade the “undeserving” for the “deserving” immigrants and ramp up enforcement in the hopes that they

184. See *A Discussion on Immigration Policy with Homeland Security Secretary Janet Napolitano*, *CTR. FOR AM. PROGRESS* (Nov. 13, 2009), <https://www.americanprogress.org/events/2009/11/13/16871/a-discussion-on-immigration-policy-with-homeland-security-secretary-janet-napolitano/> [hereinafter *Immigration Policy*].

185. NICHOLLS, *IMMIGRANT RIGHTS MOVEMENT*, *supra* note 116, at 121; see also *Immigration Policy*, *supra* note 184 (expressly linking the possibility of passing CIR to “serious enforcement at the border” by referencing members of Congress who conditioned enforcement on consideration of immigration reform).

186. Interview with Avery, *supra* note 164 (explaining that the intent was to focus on recent arrivals to the US in order to help gain Republican support for legalization).

187. Interview with Sydney, *supra* note 177.

188. Interview with Quinn, Chief Counsel, House Cong. Subcomm. (Jan. 10, 2020) (transcript on file with authors) [hereinafter Interview with Quinn].

189. Interview with Avery, *supra* note 164 (explaining that, “ironically, this is during the time when a lot of people say, ‘Oh, the Obama administration didn’t do anything during their first year, first couple years on comprehensive immigration reform.’ There was a lot going on behind the scenes. There were a few other things that got in the way of it actually becoming front and center in the political process, mainly the economic crisis and [healthcare]. The plan had been to do [healthcare] early in the first few months of the [A]dministration and then turn to comprehensive immigration reform. And of course, to deal with an economic crisis along the way as it was necessary, but [healthcare] didn’t get done in a few months, it took, I think, 13 months. And by then the political scene had changed. And so, we didn’t really get to make full use of what it was that we’d been working on.”)

190. Ginger Thompson and David M. Herszenhorn, *Obama Set for First Step on Immigration Reform*, *N.Y. TIMES* (June 24, 2009) (“Aides to Mr. Obama say he does not intend to get out in front of any proposal until there is a strong bipartisan commitment to pass it. That stance has the potential to paralyze the process, since lawmakers are looking to him to use his bully pulpit, and high approval ratings, to help them fend off any political backlash among their constituents.”).

191. NICHOLLS, *IMMIGRANT RIGHTS MOVEMENT*, *supra* note 116, at 121.

would gain something in terms of legalization in return.¹⁹² National CIR advocates tried to bring all immigrant rights activists under the same umbrella to support what was dubbed “Obama’s flagship immigration project.”¹⁹³ Those inside the Obama team didn’t want local activists to take on S-Comm because it was seen as a necessary trade-off.¹⁹⁴

On the other side were advocates for those left out in the binary “deserving, undeserving” split, including so-called “in the field” advocates.¹⁹⁵ These activists saw power coming from the local level, in movements built from the ground up.¹⁹⁶ Locally-focused activists understood that their community of “undesirable” immigrants would be the first sacrificed and that a movement that sacrificed any part of impacted communities would be weaker overall.¹⁹⁷ As one advocate put it, “we kind of knew in the back of our heads that when CIR does really get going, that the first people that will be thrown under the bus will be people with criminal convictions or those even with arrests.”¹⁹⁸ Locally-focused organizers recall that there was “a little bit of push back” from national organizations concerned that local fights against S-Comm would be a distraction from the larger CIR efforts.¹⁹⁹

The Administration’s prime strategy of “felons, not families,” as a smart enforcement tool began to fall apart when S-Comm started picking up people that would be prime candidates for legalization.²⁰⁰ Government officials, in hindsight, realized that the launch of S-Comm was tied in a very unfortunate way to a tsunami of state law changes that forbid the issuance of driver’s licenses to undocumented immigrants.²⁰¹ While the offense of driving without a license typically would not be a priority for S-Comm, it is an offense that typically leads to arrest and fingerprinting. The fingerprints were then automatically shared with ICE to check against their database.²⁰² As a result, many sympathetic cases of people who otherwise would have been very clear

192. DENVIR, ALL-AMERICAN NATIVISM, *supra* note 129, at 231–37.

193. Interview with Blake, *supra* note 133 (explaining that CIR advocates did not want them going after S-Comm because it required them to defend “criminals” and this advocacy might undermine the national CIR efforts).

194. Interview with Josh, Attorney on NDLOM FOIA Case (Nov. 19, 2019) (transcript on file with authors) [hereinafter Interview with Josh]; Interview with Taylor, *supra* note 162 (“That is kind of what we did, we did just said, ‘We’re gonna [get] to work on this. We’re happy to keep you informed. And you know, you can keep working on comprehensive immigration reform or lay the groundwork for it and keep us informed.’ But we also we kind of knew in the back of our heads that when CIR does really get going, that the first people that will be thrown under the bus will be people with criminal convictions or those even with arrests. And so, we’ve kind of we have kept in mind that although these two tracks can operate at the same time, there will be a time where one is given up for the other. And that’s more of the reason why we needed to move as quickly as possible.”).

195. Interview 3 with Jordan, Attorney, Non-Profit Immigrant Workers’ Rights Organization (Sept. 12, 2019) (transcript on file with authors) [hereinafter Interview 3 with Jordan].

196. Interview with Sydney, Community Organizer (Oct. 21, 2019) (transcript on file with authors).

197. Interview with Blake, *supra* note 133; Interview 2 with Jordan, *supra* note 131.

198. Interview with Taylor, *supra* note 162.

199. Interview with Sydney, *supra* note 177.

200. Interview with Avery, *supra* note 164.

201. *Id.*

202. *Id.*

candidates for legalization got swept up in the S-Comm deportation process.²⁰³ In the end, the attempts to gain some legalization in exchange for increased enforcement “polarized so badly that the [A]dministration didn’t get a lot of credit [and] eventually got hammered as ... ‘deporter-in-chief.’”²⁰⁴

IV. THE UNTOLD, MULTI-DIMENSIONAL STORY OF THE CAMPAIGN TO UNDERMINE S-COMM

This Part provides an in-depth narrative of the campaign against S-Comm by weaving together into a coherent whole the interplay between administrative actors that sought to implement the program, congressional actors that funded and oversaw the program, advocates that sought to dismantle the program, and lawyers who supported the client’s campaign. The tools used and the strategic decisions made to further the campaign are identified, and the lawyer-client relationship from the perspective of organizers, advocates, clients, and the lawyers themselves is exposed. This Part traces the narrative from the initial idea to tackle S-Comm through to the advocacy approach after compliance with S-Comm was federally mandated.

A. *The Seed of the Campaign to End S-Comm*

In July 2009, a group of immigrant rights advocates hosted a Soros Foundation retreat designed to bring together people working at the intersection of immigration and criminal justice.²⁰⁵ While much of the retreat conversation focused on 287(g), one advocate identified S-Comm as being the “next big issue.”²⁰⁶ But, S-Comm was viewed as an Obama program, and there “was a sense of incredulity that Obama could be doing something so damaging,”²⁰⁷ even “laugh[ing] and mock[ing] at the idea that S-Comm was the issue of the “future.”²⁰⁸ Despite a lack of concern by some, several advocates continued to explore the difference between 287(g), the “street enforcement” program, and S-Comm, the “jail enforcement” program.²⁰⁹ The retreat

203. *Id.*

204. *Id.* (stating, “I think the deporter-in-chief narrative is the result of how [ICE] acted in this time frame, how they tried to keep things from, you know, the White House and from the Department, how they started to limit the information flow and, and were not afraid to mislead people just to keep, you know, so they could maintain autonomy over, over an agency they were not autonomous over.”).

205. Email from Jordan, (Jan. 25, 2020) (on file with authors). This conference was hosted from July 8 to July 10, 2009). Interview with Jamie, Attorney on NDLOM FOIA Case (Nov. 19, 2019) (transcript on file with authors) [hereinafter Interview with Jamie]. This conference was organized by Judith Greene, Aarti Shahani and Sunita Patel. Green and Shahani have just published a report on 287(g) in Maricopa County. See Aarti Shahani & Judith Greene, LOCAL DEMOCRACY ON ICE: WHY STATE AND LOCAL GOVERNMENTS HAVE NO BUSINESS IN FEDERAL IMMIGRATION LAW ENFORCEMENT, A JUSTICE STRATEGIES REPORT (2009).

206. Interview 1 with Jordan, *supra* note 167.

207. *Id.*

208. *Id.*

209. Interview with Jamie, *supra* note 205.

created the space for momentum-building conversations around S-Comm,²¹⁰ and several advocates made a conscious decision to pivot away from 287(g) toward S-Comm advocacy. “There was a moment of debate . . . when it came to it—do we try to put a nail in the coffin of 287(g) and finish that fight or do we need to pivot because the fight has changed?”²¹¹

The campaign to dismantle S-Comm was forged as an alliance between immigrant rights organizers on the ground and organizations including NDLO, the Center for Constitutional Rights (CCR), and the Benjamin Cardozo School of Law Immigration Justice Clinic (IJC).²¹² Taking on S-Comm presented a set of unique challenges for the advocacy community. The program was being pushed by the first African American president who spoke from a pro-immigration posture and promised to champion CIR. The express focus of S-Comm was to deport the worst of the worst, serious criminals and create secure communities.²¹³ Advocates were concerned about the optics of opposing such a policy. As one advocate said, “it’s like saying you are against happiness.”²¹⁴ Advocates felt bound by this “linguistic propaganda tautology; to merely utter the words Secure Communities, is to reify a frame you are opposing.”²¹⁵ Despite these challenges, several advocates started to host monthly conference calls to talk about S-Comm. During the initial months, “there were not many people on the calls,”²¹⁶ but the campaign soon started to expand.²¹⁷

Anti-S-Comm advocates understood that their “theory of change” in the Obama Era had to be different.²¹⁸ “We were trying to invert the whole theory

210. *Id.* (“And you know, what was really nice is it was just an opportunity to build intentional community and intentional relationships, which is so critical to, you know, really thinking about how to do meaningful work, and how to interpret, like cross, cross-issue around the challenges that we all face and from a really intentional, like, racial justice perspective.”).

211. Interview with Blake, *supra* note 133 (“Or do we need to pivot, and he was really, I think one of the people who is saying that the fight has changed. And, if we’re not fighting S-Comm now, then we’re going to be missing the opportunity or like before the cement or the paint dries, or however you would say it.”).

212. The CCR had a track record of engaging in FOIA litigation, was looking to do more work at the intersection of mass incarceration and immigration enforcement, and sought a community-based client. Interview with Jamie, *supra* note 205 (“[W]e have a history and a track record of doing FOIA litigation. And there were a lot of internal conversations about how to do more or more at the intersection of mass incarceration and immigration enforcement since that was, that’s also a core area that we had been litigating for a long time. . . . It felt like it was important to work on something that not that many, that folks were looking at, at the time and also squarely within other areas of interest and engagement, where we have a history and some, you know, some track record.”). The IJC was looking to collaborate with exciting people or groups as a way to build out their docket and was connected to NDLO through a mentor. Interview with Taylor, *supra* note 162 (explaining that in talking to a clinical mentor NDLO was mentioned as an exciting group to work with). CCR and the IJC worked together previously and were familiar with each other. Interview with Jamie, *supra* note 205.

213. Interview 3 with Jordan, *supra* note 195.

214. *Id.*

215. Interview 4 with Jordan, Attorney, Non-Profit Immigrant Workers’ Rights Organization (Sept. 17, 2019) (transcript on file with authors) [hereinafter Interview 4 with Jordan].

216. Interview 3 with Jordan, *supra* note 195.

217. Interview 1 with Jordan, *supra* note 167.

218. Interview 6 with Jordan, Attorney, Non-Profit Immigrant Workers’ Rights Organization (Nov. 18, 2019) (transcript on file with authors).

of change and advocacy during the Obama years.”²¹⁹ Because the bigger, mainstream immigrant rights groups were supporting Obama and CIR, we had to be “scrappier, more sanctimonious, progressive, and more strategic to build power and exert leverage on adjacent, powerful allies.”²²⁰ S-Comm advocates rooted the movement locally, recognizing that they lacked power as outside resisters at the national level but believing that they could gain ground from within locally.²²¹ Advocates saw the failure of CIR as a “power angle” for the local movement.²²² Many immigrant rights advocates focused all their energy on CIR at the national level, where local organizing was less critical. But this campaign “felt different because there were local goals and local targets and that was energizing . . . in a way that the comprehensive immigration reform [fight] wasn’t.”²²³

Major mainstream national immigration social movement organizations resisted attacks on S-Comm, and hence they had little impact on emerging narratives around which the struggle against S-Comm played out. In fact, DC-insider advocates told the local advocates that “S-Comm was going to be untouchable. That it would be a waste of time to advocate around it, and that [we] would be causing problems for the President and problems for the larger project of CIR.”²²⁴ The local-level vacuum created space for a distributed campaign in which local organizing would advocate that states and localities opt-out. This strategy, combined with the Administration’s embarrassing efforts to cover up mandatory implementation, was largely responsible for the success of the effort to terminate S-Comm on terms favorable to the (trans)local campaigners.

B. *The Campaign’s Three Pillars: Local Organizing, Litigation, and Publicity*

The campaign was based upon three pillars: local organizing, litigation, and publicity.²²⁵ Each pillar worked in conjunction with and supported the others. The organizing work around S-Comm was built off the sanctuary movement of the 1980s.²²⁶ The cities that were active around the 1980s sanctuary movement were the cities that engaged the most in resisting

219. *Id.*

220. *Id.* (explaining that “leverage was needed to bring in the bigger mainstream groups. That was done through shaming techniques, and explicitly saying that is what we were doing. You know, forcing, creating sign on letters that made you know kind of [inaudible] some of, you know, the Obama ally adjacent organizations, you know, forcing, ‘are you going to sign this letter or not?’ And methodically sort of like we got everybody eventually to go from, like I said, literally laughing at us, because like I think by the time it ended like everyone was at that point on record against, being against Secure Communities at the very end.”).

221. Interview with Sydney, *supra* note 177.

222. Interview with Josh, *supra* note 194.

223. *Id.*

224. Interview with Blake, *supra* note 133.

225. Interview with Sydney, *supra* note 177.

226. *Id.*

S-Comm.²²⁷ Organizers needed a broad coalition of labor unions and traditional civil rights organizations because they had more power than NDLON in the localities.²²⁸ The (trans)local organizing strategy was built upon the concept of “starting locally, building resistance at the state level and then translating those gains to the federal level.”²²⁹ The ability to connect local groups and create systems that enable organizers from different cities and localities to share time, resources, knowledge, and experiences was essential to success.²³⁰ Through previous 287(g) advocacy, NDLON had contacts with interested advocates all over the country.²³¹ The first step was to “sound the alarm bell and let people know what was coming down the pipeline.”²³²

Litigation, organizing, and publicity were all part of sounding the alarm. First, advocates renamed the program S-Comm, instead of Secure Communities. They did not want the words “secure” and “communities” uttered in the same sentence²³³ and instead decided on S-Comm as an “Orwellian” title that sounded futuristic.²³⁴ Second, the initial round of advocacy was designed around transparency because not much was known about the program, and condemning S-Comm out of the box was too big of a bridge to cross.²³⁵ If S-Comm was a key component of the President’s enforcement program, the advocacy community needed to know more about it.²³⁶ The approach, termed “advocacy through inquiry” by one of the lawyers, brought together the organizing and litigation teams to work in concert.²³⁷ Finally, the team understood that grassroots participation from the initial stages was critical.²³⁸

As a component of the larger campaign to dismantle S-Comm, the team launched the “Uncover the Truth Campaign,” hoping that just as it was hard to be against “secure communities,” it would be hard to be against a truth and transparency campaign.²³⁹

227. *Id.* (identifying these cities as Washington, DC, Cambridge, MA, San Francisco and Los Angeles, CA, and Seattle, WA).

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. Interview 4 with Jordan, *supra* note 215.

234. *Id.*

235. Interview with Blake, *supra* note 133 (explaining, “I think that’s where you so the incremental approach of well, if it was going to be the flagship project, shouldn’t we know what it is? Shouldn’t we understand what S-Comm is? And so that’s why the first round of advocacy was about transparency. Because if organizers are there to expand the political will and expand what’s possible, in that initial moment, just condemning S-Comm was a bridge too far for where a lot of that advocacy community was in the Beltway—because the Beltway always lags behind where people are actually having to deal with the impact of enforcement. Yeah.” . . . “So we said we need to uncover the truth about what is S-Comm.”).

236. *Id.*

237. Interview with Josh, *supra* note 194 (a lawyer joining the team in 2010 saw the “advocacy through inquiry” approach as very successful in slowing down the program implementation and finding out more about the program).

238. Interview with Taylor, *supra* note 162.

239. Interview with Jamie, *supra* note 205.

The campaign kicked off by filing FOIA litigation against DHS, ICE, and the Federal Bureau of Investigation (FBI)²⁴⁰ and a week of rallies and press conferences in fourteen cities to denounce an ICE-Police collaboration program and engage mobilization on the ground.²⁴¹

The lawyers understood that the FOIA litigation was not an end in and of itself.²⁴² The litigation “was a tool, but the really important part was the local organizing effort.”²⁴³ As one advocate stated, “it was not lost on any of us that the power of the litigation was going to be what the organizers could turn it into.”²⁴⁴ The filing of the lawsuit, which was accompanied by a protest march and a press release,²⁴⁵ “was designed to help the organizing effort and give the local campaign something of a runway.”²⁴⁶ Press coverage was a key component of the campaign launch, and all the allied local groups were encouraged to push stories to the press.²⁴⁷ Advocates wanted to capitalize on the fact that a localized and decentralized campaign would be difficult for ICE to combat.²⁴⁸

C. *The “Grupo Duro” and the Use of Narrative to Mobilize*

The organizing team created “Grupo Duro,” a crew of approximately eight organizers and lawyers around the country who volunteered to review

240. Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enf't, 877 F. Supp. 2d 87 (S. D.N.Y. 2012). Uncover the Truth Campaign, <http://uncoverthetruth.org/campaign/> (designed to expose the lack of information about the S-Comm program. The campaign notes that S-Comm is moving toward nationwide implementation “without the public, elected officials, and sometimes police chiefs themselves knowing. Indeed, the program has been advanced in secrecy despite significant public attention paid to the devastating consequences to communities where police enforcement of immigration law has been piloted.”); see also Interview with Sydney, *supra* note 177 (“[T]he immigrants’ rights movement has been focused on a national movement for so long that the trans(local) campaign breathed in life to the immigrants’ right movement—in places that had been pro immigrant—it allowed the immigrant rights movement to flex its muscle and have some concrete victories.”); see also Ashar, *Movement Lawyers for Immigrant Rights*, *supra* note 13, at 1480 (describing through interviews with various actors the desire to get ahead of the issues and fight a new battle).

241. *National Day Laborer Organizing Network (NDLON) v. U.S. Immigration And Customs Enf't—Historic Case*, CTR. FOR CONST. RIGHTS, <https://ccrjustice.org/home/what-we-do/our-cases/national-day-laborer-organizing-network-ndlon-v-us-immigration-and-customs> [<https://perma.cc/4A9V-7EX9>] (describing the timeline of events related to the FOIA litigation). Interview 4 with Jordan, *supra* note 215 (combining FOIA litigation to strengthen organizing campaigns is a strategy that was used historically by NDLON dating back to efforts to organize around Redondo Beach).

242. Interview with Sydney, *supra* note 177.

243. *Id.* (explaining, “[m]ost FOIA cases are never heard about—without the local groups organizing [S-Comm] would not have gotten that far and would not have gotten the press coverage it got.”).

244. Interview with Taylor, *supra* note 162.

245. Interview 4 with Jordan, *supra* note 215 (explaining that whenever doing public records litigation, we organize groups to march down to the place of service, organize press, serve them with the summons and complaint in front of the press and protest.). Interview with Jamie, *supra* note 205 (explaining that anytime CCR filed in court the organization did a corresponding press release and there were some conversations about how to leverage CCR’s communications resources for things that were happening in court or for documents that were going to be released. CCR had the ability to coordinate a press briefing call with thirty reporters and getting out information about the program really influenced the public).

246. Interview with Jamie, *supra* note 205.

247. Interview with Sydney, *supra* note 177.

248. *Id.*

the FOIA documents.²⁴⁹ Grupo Duro participants read through documents, annotated them, and reported back to a website staff support team made up of NDLON and CCR staff.²⁵⁰ This small tech team put together a website titled “Uncover the Truth” and started uploading and posting all relevant FOIA documents.²⁵¹ “There was a sense of us against the world with Grupo Duro . . . [we] were really motivated, committed and working incredibly hard.”²⁵²

The first set of FOIA documents released identified quick deployment of the program in states and localities, a lack of focus on high priority individuals, misrepresentation of the program, and racial profiling concerns.²⁵³ Pushing this information to the public through a coordinated media campaign was fundamental to the (trans)local efforts. ICE responded by pushing out publicity of their own, refuting the claims made by the “Uncover the Truth” campaign.²⁵⁴ The public debate fed into the strength of the (trans)local campaign as advocates called ICE’s attempt to refute merely spin in the face of truth.²⁵⁵

Organizers were committed to distributing the documents widely for use in addressing localities’ specific issues. As an advocate explained, “one of the cool things about that campaign was that there was like a million different local campaigns, but people [were] all collaborating.”²⁵⁶ As documents were released, the communications team, made up of a couple of organizers, would pitch the story to an identified reporter as an exclusive, help draft the press

249. Interview 5 with Jordan, Attorney, Non-Profit Immigrant Rights Organization (Oct. 17, 2019) (transcript on file with authors). Interview with Sydney, *supra* note 177.

250. Interview 2 with Jordan, *supra* note 131.

251. *Id.*

252. *Id.*

253. CTR. FOR CONST. RIGHTS, BRIEFING GUIDE TO “SECURE COMMUNITIES” – ICE’S CONTROVERSIAL IMMIGRATION ENFORCEMENT PROGRAM NEW STATISTICS AND INFORMATION REVEAL DISTURBING TRENDS AND LEAVE CRUCIAL QUESTIONS UNANSWERED, (July 30, 2010), <https://ccrjustice.org/files/Secure%20Communities%20Fact%20Sheet%20Briefing%20guide%208-2-2010%20Production.pdf> [<https://perma.cc/8VSW-FWWJ>] [hereinafter BRIEFING GUIDE TO “SECURE COMMUNITIES”].

254. U.S. IMMIGR. CUSTOMS ENF’T., SECURE COMMUNITIES: SETTING THE RECORD STRAIGHT (Aug. 17, 2010), <https://www.aila.org/infonet/ice-issues-secure-communities-fact-sheet> [<https://perma.cc/386F-3X96>] [hereinafter ICE, Setting the Record Straight]. While the government pushed this document out in the hopes of clearing up any confusion, it did the opposite and was later taken down by ICE due to their shifting position.

255. *Immigration and Customs Enforcement (ICE) Agency’s Spin Cannot Obscure the Truth About the “Secure Communities” Program: Rights Groups’ Advocacy Leads to Critical ICE Admissions and Breakthroughs Related to the Flawed Program*, UNCOVER THE TRUTH (Sept. 1, 2010), <http://uncoverthetruth.org/wp-content/uploads/2010/09/CCR-NDLON-Cardozo-Response-to-ICE-Spin-9-1-10-FINAL.pdf> [<https://perma.cc/FL3C-LWBL>].

256. Interview with Josh, *supra* note 194 (“Well the cool thing I remember about that campaign, or one of the cool things about that campaign, was that there was like a million different local campaigns but people are all collaborating so there were meetings with local police and local sheriffs at which people would use ICE [inaudible] so if you would meet with the sheriff and you would say, look, you know, ‘ICE sold this program to you as a program to get at convicted criminals but we have this FOIA and we’re still getting information, . . . but from what we know, 50% of the people who are arrested from your jurisdiction have never been convicted with anything more serious than a traffic offense.’ . . . [I]t sort of set up some antagonism with ICE and ICE had misrepresented the program to them.”); *see also* Interview with Sydney, *supra* note 177.

release, and create talking points to be shared with localities.²⁵⁷ At the local level, every coalition was autonomous and could pursue its own strategies, but groups often asked for a draft press release and talking points from the national team.²⁵⁸

The (trans)local campaign took care to connect with local government officials that later served as critical allies in successful local campaigns.²⁵⁹ The “inside/outside” strategy, which was not used at the national level, proved effective on the local level.²⁶⁰ “The goal was to speak not only from outside of the government institutions, but also from within, and make sure we identified the best messenger in each instance [to] legitimate the underlying concerns.”²⁶¹ Having local law enforcement officials speak authoritatively about community policing and public safety proved to be a particularly effective example of the campaign’s use of “insiders.”²⁶²

The campaign to dismantle S-Comm had a clear and consistent message that never wavered, in contrast to the government’s message that continuously shifted.²⁶³ The shifting positions played into the anti-S-Comm narrative that the government was hypocritical, at the least, and perhaps even intentionally misleading.²⁶⁴ The anti-S-Comm advocates were always out front shaping the narrative, while the government reacted inconsistently and ineffectively. Advocates created connections with reporters and got them

257. Interview with Blake, *supra* note 133 (describing how organizers just do whatever it is that needs to be done. “At times I am a communications person, other times I get supplies, other times I am on the group, other times doing mailings—whatever is needed”); *see also* Interview with Sydney, *supra* note 177.

258. Interview with Sydney, *supra* note 177.

259. *Id.* (explaining that “the most ardent supporters [were] people with immigrant, activists, or labor backgrounds.” For example, in New York, an immigrant and former SEIU organizer Melissa Marcieto was one of the biggest supporters of the legislation resisting S-Comm. In San Francisco, the main sponsor of the TRUST Act was a gay rights activist. In Chicago, the campaign connected with Chuy Garcia, an immigrant from Mexico with an organizing and local political background).

260. Interview with Casey, Chief of Staff, City Councilperson (Jan. 6, 2020) (transcript on file with authors) (Chuy Garcia’s Chief of Staff) (Chicago and Cook County Commissioner Chuy Garcia was a prime example of working from the inside as well as the outside.); *see also* Interview with Sydney, *supra* note 177.

261. Interview with Sydney, *supra* note 177.

262. *Id.* (explaining that Sheriff Michael Hennessey of San Francisco was a critical partner in the fight against S-Comm. He participated in a briefing hosted by Cardozo but the organizers strategically did not put NDLOJ’s name on the event because the briefing was directed at state and local elected officials and the organizers thought that delivery of the message from the Sheriff was more effective.).

263. Interview with Kai, Attorney on NDLOJ FOIA Case (Nov. 4, 2019) (transcript on file with authors) [hereinafter Interview with Kai] (“the Obama administration [sic] trying to be friendly and ‘appear like they were doing the right thing sometimes made them appear hypocritical.”); *see also* Interview with Sydney, *supra* note 177.

264. Letter from Rep. Zoe Lofgren to Charles K. Edwards, Acting Inspector General, U.S. Dept. of Homeland Security and Timothy Moynihan, Asst. Dir., Office of Professional Responsibility, Immigr. and Customs Enf’t (April 28, 2011), <http://uncoverthetruth.org/wp-content/uploads/2011/04/Letter-to-DHS-OIG-and-ICE-OPR-re-SComm-Opt-Out-Investigation-4.28.11.pdf> [<https://perma.cc/G5LX-UHUU>] (stating “[h]aving conducted with my legal staff an initial review of the documents [related to the deployment of S-Comm] that have been made public, I believe that some of these false and misleading statements may have been made intentionally, while others were made recklessly, knowing that the statements were ambiguous and likely to create confusion.”).

involved early as issues were developing and continued to foster those relationships by updating reporters regularly.²⁶⁵

The organizers used two narratives as mobilizing tools. The first narrative was designed to use Arizona and Sheriff Arpaio as a foil. Organizers urged states and localities to distinguish themselves from Arizona and Maricopa County by passing local ordinances that separated police and ICE collaboration.²⁶⁶ It was challenging to explain 287(g), S-Comm, and the devolution of immigration enforcement to the public, but it was much easier to persuade localities not to replicate the approach of Maricopa County and Sheriff Joe Arpaio.²⁶⁷ An advocate explained, “if you have that contrast, or that analogy, to what’s happening in Arizona with the sheriff actively going out and humiliating and racially profiling Latinos, . . . that’s more tangible. People understand that [better].”²⁶⁸ The ability to use Arizona as a foil proved an effective tool. For example, when the District Council for the District of Columbia (DC) was debating legislation to limit police-ICE partnerships, people in the room were chanting “No More Arizona’s.”²⁶⁹ Once Arizona passed SB 1070, the state became a pariah in the new era of immigration federalization, and demonizing Arizona motivated other localities to act.²⁷⁰

265. Interview with Taylor, *supra* note 162 (“[Y]ou’ll find reporters . . . and keep [them] informed throughout the process. Don’t just contact [them] when you have a press release, but just keep being in [their] ear . . . keep that reporter . . . always thinking about the issues [so] that they are prolific in what they write and that they’re the first to put out a piece on the issue. [This way] other reporters are basically just responding to that framing that you’ve already put out there by working so closely with that reporter.”).

266. Interview with Josh, *supra* note 194 (“I guess it was like 2010 when Arizona had just passed SB 1070 and there was a sort of surge in opposition to 1070 and at the same time, the local campaign staff of Secure Communities were starting and there was a very stark mention of the DC folks that I remember that was like ‘DC is not Arizona.’ And I have a clear memory of sort of this framing of like Arizona is going one way but like all these other places are going to go a different way and the way we are going to convey that message of get[ting] local players to say ‘We’re not that, we’re not Arizona, we’re not Arpaio, so we’re not going to participate with ICE.’”); *see also* Interview 7 with Jordan, *supra* note 147 (“And in solidarity with Arizona, you have organizers in other parts of the country working with local governments, distinguishing themselves from Arizona and fighting on the local front.”).

267. Interview 7 with Jordan, *supra* note 147 (noting the downsides to using Arizona and Sheriff Arpaio in this way. “You know, that, that cuts a little bit both ways. . . . There also was a little bit of a cost of kind of us contributing to kind of nationalizing the campaign against Arpaio, of kind of like normalizing, normalizing him too. Like so, I mean, on the one hand, it was a benefit because it created a contrast it became sort of personification of what we were saying police should not become. The negatives were that we kind of normalized him. I mean, raising his notoriety created a sort of de-sensitivity to him.”); Interview 5 with Jordan, Attorney, Non-Profit Immigrant Rights Organization (Oct. 17, 2019) (transcript on file with authors) [hereinafter Interview 5 with Jordan].

268. Interview with Taylor, *supra* note 162 (“And it’s just, you know, it goes back to the civil rights movement lessons, right? Make things [as] stark as possible and make the contrast, the injustice as clear as possible in order to get people to care and to take action. For Secure Communities, because it’s behind the scenes, right, it’s this thing that happens, you know, behind closed doors in a jail where they take a fingerprint and then send to multiple databases where it gets to DHS, except not particularly tangible or compelling to the public.”).

269. *DC district Council Today Unanimously Introduces Legislation to Limit Police-ICE Partnerships. Chants of “No More Arizona’s!!!” UNCOVER THE TRUTH* (May 4, 2010), <https://uncoverthetruth.org/category/media/press-releases/page/8/> [<https://perma.cc/SUYC-NV56>]. *See also* Interview with Sydney, *supra* note 177.

270. Interview with Blake, *supra* note 133 (explaining, “In solidarity with Arizona, organizers in other parts of the country started working with local governments, distinguishing themselves from AZ and fighting on the local front.”); *see also* Interview 7 with Jordan, *supra* note 147.

Instead of simply pushing back, the second narrative that gained traction provided an alternative formative vision.²⁷¹ Local campaigns started in pro-immigrant communities were labeled “beacon” localities.²⁷² The contrast between “hot spots,” such as Arizona and “beacon” localities, such as DC, provided another way to organize (trans)locally and an identity narrative around which to construct an emergent national message.

D. *Using Social Science to Support Utilitarian, Public Safety Narrative*

NDLON’s role was to “frame the overall public message and create talking points to be adopted by others.”²⁷³ Three possible messaging options were identified, but only the utilitarian, public safety argument proved viable. To advance the utilitarian narrative, the advocates needed objective support for two critical claims. The first claim was that the immigrants most subjected to S-Comm are not, in fact, serious offenders, but instead, innocent immigrants or even US citizens.²⁷⁴ The government’s FOIA disclosures allowed advocates to collaborate with researchers at the University of California, Berkeley Law School, to examine the demographics of Secure Communities enforcement priorities.²⁷⁵ The study’s findings supported the advocates’ narrative by showing that “well over half of those deported through Secure Communities had either no criminal convictions or had been convicted only of very minor offenses, including traffic offenses and that 3,600 US citizen were arrested by ICE through S-Comm (1.6% of the cases analyzed).”²⁷⁶ The report concluded

271. Interview 5 with Jordan, *supra* note 267 (“And then, and then this is the thing, the point that, that I guess sometimes often get[s] lost, I mean, we really did sort of develop a theory that we needed sort of an inverse Maricopa County and Arizona SB1070, and we needed to start to do the, you know, have the sort of what we call them ‘hotspot locations’—Phoenix and the beacon locations in California and Washington, DC. And when I talk about how we were pitching things to grant makers, that was it. It was sort of like, ‘Like it or not, we’re in this era of new immigration federalism, and you need to be sort of on both sides of the extremes. You need to be rushing to the gunfire, and, and then, and then we also need to be developing a formative kind of opposite, counter bearing examples.’ And that was the idea.”).

272. *Id.*

273. *Id.*

274. Interview with Taylor, *supra* note 162 (describing that the data was used to work with social scientists to create support for advocacy).

275. AARTI KOHLI, PETER L. MARKOWITZ & LISA CHAVEZ, *SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS* at 3, THE CHIEF JUSTICE EARL WARREN INSTITUTE ON LAW AND SOCIAL POLICY, (Oct. 2011), https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf [<https://perma.cc/TTT7-MV57>] [hereinafter KOHLI, MARKOWITZ & CHAVEZ, *SECURE COMMUNITIES BY THE NUMBERS*]; N. WAHAB, RIGHTS WORKING GROUP, *FACING THE TRUTH: RACIAL PROFILING ACROSS AMERICA* 7 (2010).

276. KOHLI, MARKOWITZ & CHAVEZ, *SECURE COMMUNITIES BY THE NUMBERS*, *supra* note 275 (finding, “that approximately 3,600 United States citizens have been arrested by ICE through the Secure Communities program; more than one-third (39%) of individuals arrested through Secure Communities report that they have a U.S. citizen spouse or child, meaning that approximately 88,000 families with U.S. citizen members have been impacted by Secure Communities; Latinos comprise 93% of individuals arrested through Secure Communities though they only comprise 77% of the undocumented population in the United States; Only 52% of individuals arrested through Secure Communities are slated to have a hearing before an immigration judge; Only 24% of individuals arrested through Secure Communities and who had immigration hearings had an attorney compared to 41% of all immigration court respondents who have counsel; Only 2% of non-citizens arrested through Secure Communities are granted relief from deportation by an immigration judge as compared to 14% of all immigration court respondents who are

that S-Comm implementation targeted racial minorities and that those wrapped up in the complex system were rarely provided legal advice or due process protections.²⁷⁷

The second claim was that S-Comm decreased community safety because the immigrant community was less likely to seek police assistance for fear of immigration repercussions.²⁷⁸ Advocates understood that to reach the middle, they needed a narrative around community policing and trust in the police.²⁷⁹ To create this narrative, NDLO built off collaborative relationships forged with police around 287(g) advocacy.²⁸⁰ The 2008 collaboration with the Police Foundation, and the connections made during that time, were used to galvanize sheriffs and police that were opposed to using local resources to support immigration enforcement.²⁸¹ NDLO went back to the Ford Foundation seeking funds to conduct a study about public safety in the context of S-Comm.²⁸² Advocates believed that the veneer of a social science study helped lend credibility to the claims being made by advocates and were challenging for the government to rebut.²⁸³ Using these connections, a study was commissioned to examine the link between S-Comm adoption and public safety.²⁸⁴ The study, funded with money from the Ford Foundation, was designed to explore whether police involvement in immigration enforcement made communities more or less safe.²⁸⁵ Among the study's conclusions was

granted relief; and [a] large majority (83%) of people arrested through Secure Communities [are] placed in ICE detention as compared with an overall DHS immigration detention rate of 62%, and ICE does not appear to be exercising discretion based on its own prioritization system when deciding whether or not to detain an individual.”).

277. *Id.* at 13.

278. Interview 4 with Jordan, *supra* note 215. One clear example of how this narrative was the only one adopted by immigrant rights advocates came out in the advocacy around the passage of California's TRUST Act (Sanctuary policy). The California Trust Act/Truth Act Advocacy (SB CA 1078) was the strongest state level sanctuary policy and the speech on the floor of the legislature was only about the safety issue—there was no civil rights or normative arguments about criminalization of immigrants. While the government said that the program was designed to target serious criminal offenders, one of the ways that the advocates undermined S-Comm was to show that serious offenders in fact were only a very small portion of those being detained under S-Comm. In fact, a large percentage of those being detained were immigrants charged with very minor offenses.

279. Interview 3 with Jordan, *supra* note 195 (explaining that this idea of capturing the middle was long understood in the campaign against S-Comm as well as in the sanctuary movement).

280. *See infra* notes 281-86.

281. Interview 7 with Jordan, *supra* note 147.

282. *Id.*

283. *Id.* (explaining that the idea for the study came during a meeting with one of the Ford Foundation senior program officers as they were discussing how to address the question of public safety related to S-Comm).

284. Interview 2 with Jordan, *supra* note 131 (identifying Linda Lake from Policy Link and Nik Theodore, Professor, Urban Planning & Policy, University of Illinois at Chicago, as critical collaborators. The Co-Executive Director of NDLO, Pablo Alvarado, met Linda Lake at a previous conference and talked about the possibility of future collaboration and the S-Comm study made that possible.).

285. NIK THEODORE, DEP'T OF URBAN PLANNING AND POLICY UNIVERSITY OF ILLINOIS AT CHICAGO, INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT (MAY 2013), https://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF [<https://perma.cc/VE5E-ASE4>] (establishing that “the survey was designed to assess the impact of police involvement in immigration enforcement on Latinos’ perceptions of public safety and their willingness to contact the police when crimes have been committed,” and that “[t]he survey was

that in communities with S-Comm, forty-four percent of undocumented immigrants were less likely to contact police officers for fear that police officers would use these interactions as an opportunity to inquire into their immigration status or that of people they knew.²⁸⁶

E. *Opt-In, Opt-Out Confusion Supports Narrative of Government as Deceptive*

The roll-out of S-Comm was fraught with inconsistent messaging to the public and differing expectations internally between DHS and ICE, both of which fed into the anti-S-Comm narrative. From late 2009 to October 2010, ICE publicly represented that S-Comm was “voluntary” and presented localities the opportunity to “opt-out” of program participation.²⁸⁷ The internal documents reveal several underlying issues that appear to have led ICE to launch the program by means of voluntary participation. First, on legal grounds, ICE was concerned that mandatory compliance with S-Comm raised Tenth Amendment concerns.²⁸⁸ Second, while representations were made that the system was “technologically ready” for full deployment early in 2010, a decision was made to wait until 2013 to mandate full compliance to get staffing and other resources in place.²⁸⁹ Finally, ICE hoped that providing states and localities an opportunity to opt out would encourage voluntary participation and minimize opposition.²⁹⁰

The launch appeared flawed from the beginning as the messaging ICE pushed to the public did not comport with their own internal messaging. Publicly, the government described S-Comm as an opt-out or opt-in program, but internally program participation was described as a “policy decision” that

conducted in English and Spanish by professional interviewers during the period November 17 to December 10, 2012.”)

286. *Id.*

287. ICE, Setting the Record Straight, *supra* note 254.

288. ICE FOIA 10-674.0002927. (“SC’s position that participation in the ‘Secure Communities initiative’ is voluntary is supported by applicable case-law. Under the Tenth Amendment, ‘[t]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.’ *Printz v. United States*, 521 U.S. 898, 925 (1997).” The memo goes on to make a distinction between program and other government actions such as initiatives, strategies or plans and finds ultimately “[t]herefore, even though ICE may not truly consider SC a ‘program’ in the same manner as, e.g., CAP, a court may find that SC’s infrastructure, purpose, and activities mark it a program and, thus, could find that ICE cannot compel LEAs to participate.”)

289. Interview with Sawyer, U.S. Immigr. and Customs Enf’t (Jan. 14, 2020) (transcript on file with authors).

290. ICE FOIA 10-674.0002927. In some of the first internal documents exposing the program’s inconsistencies the government states the following: “LEA participation in SC’s current deployment plan, which runs through 2012, [is] not mandatory. Local jurisdictions inside a State with an MOA with SC that do not want to participate must formally notify their SIB and ICE (via letter, email or facsimile). Upon notification, ICE will request a meeting with CJIS, the LEA, and the SIB to discuss the request and come to a resolution, which may include adjusting the jurisdiction’s activation date or removing the jurisdiction from the deployment plan. Because Secure Communities’ MOA is with the SIB, and CJIS currently requires an SIB to approve LEA Activation, Secure Communities’ current internal position is that the decision to allow an LEA to ‘opt out’ rests with the state (*i.e.* state can veto LEA). Negotiations between CJIS, SC, and the various states, however, are fluid; therefore, the procedures by which an LEA may ‘opt out’ (or even ‘opt in’) may change soon depending on future negotiations.”

would ultimately require all jurisdictions to participate.²⁹¹ Additionally, DHS and ICE were not communicating with each other, and the Department and Agency had different understandings about the implementation of S-Comm. Unlike ICE, DHS did not think that there was a commandeering problem. DHS officials reasoned that since states voluntarily submit fingerprints to the FBI, the federal government has control over the fingerprints.²⁹² Once under federal control, DHS believed that they could share this information with other federal agencies, obviating the need for MOAs.²⁹³

Internally, DHS officials did a lot of “head scratching,” wondering why a written agreement was required.²⁹⁴ Originally, DHS assumed that the MOAs were used simply to share information about how the process would work.²⁹⁵ Despite the belief that MOAs were unnecessary, one DHS government official believed that “somebody at a key point in the implementation said, well, let’s just use as a [prior] model, and the agreements used for [the] 287(g) [program] were modified to fit S-Comm even though the government did not believe that implementation required agreement on both sides.²⁹⁶ This left DHS officials in a quagmire. On one side were states and localities that wanted to opt-out publicly, leaving DHS to navigate the question of the program as optional or mandatory. On the other side were states and localities that wanted to sign onto the program but needed the political cover of a “federal mandate.”²⁹⁷ In retrospect, DHS officials admitted that they were “not tracking the issue that closely.”²⁹⁸

With confusion abound, on July 27, 2010, Congresswoman Zoe Lofgren sent a letter to United States Attorney General Eric Holder and Secretary of Homeland Security Janet Napolitano seeking “a clear explanation of how local law enforcement agencies may optout of Secure Communities by having the fingerprints they collect and submit to the SIBs checked against

291. ICE FOIA 10-674.0002927 (claims it is a “policy decision” and technologically ready now but will wait until 2013 until all will participate— regardless of desire. “According to SC, however, Assistant Director David Venturella and the SJIC Director met last week and reached an agreement by which CJIS Will send ICE, starting in 2013, all fingerprint requests from any LEAs that do not participate in SC. This information-sharing ability is technologically available now; however, for policy reasons and to ensure adequate resources are in place, SC and CJIS have currently chosen to wait until 2013 until sharing info without state/local participation.”).

292. Interview with Avery, *supra* note 164 (explaining that once the states voluntarily submit the fingerprints to the FBI, the fingerprints are “federally possessed,” and they can share the information with other federal agencies without running afoul of anti-commandeering concerns).

293. *Id.*

294. *Id.*

295. *Id.* (describing the MOA’s as a way of sharing information about the process, and what gets triggered and what the government will do with the information).

296. *Id.*

297. *Id.* (stating that “[s]ome local politician didn’t want to have to sign on because of the local options . . . sometimes governors, sometimes mayors, sometimes police chiefs, depending on the structure locally, and once it started to become a controversial issue . . . we’d hear from some of those governor’s offices asking ‘why are you putting us in . . . the position where we have to sign on and agree to it? You know, you should just go ahead and do it. It’s just a federal function.’ There was a lot to that.”).

298. Interview with Sam, *supra* note 180 (explaining, that the letter comes from Lofgren to Sec. Napolitano’s executive secretary who sends it back to ICE for a reply. It goes to the office of the general counsel and there was insufficient monitoring of the response).

criminal, but not immigration databases.”²⁹⁹ On August 10, 2010, before the Secretary replied, FOIA documents were released³⁰⁰ creating “[w]idespread confusion . . . about how jurisdictions can choose not to participate in S-Comm.”³⁰¹ In response, a week later, ICE publicly released a memo detailing the opt-out process that included formal notification and follow-up meetings to address any issues.³⁰² ICE expressly stated that “removing [a] jurisdiction from the deployment plan” was an option.³⁰³

On September 7, 2010, Secretary Napolitano replied to Congresswoman Lofgren by describing the steps that must be taken by a locality that does not wish to participate in the Secure Communities deployment plan, explaining that “[i]f a local law enforcement agency chooses not to be activated in the Secure Communities deployment plan, it will be the responsibility of that agency to notify its local ICE field office of suspected criminal aliens.”³⁰⁴ As one former highly ranked government official said, “after Secretary Napolitano sent out the reply, all hell [broke] loose.”³⁰⁵

The first effort to officially “opt-out” was backed by the organizing efforts of the anti-S-Comm coalition in Washington, DC. Organizers hoped to capitalize on the outsized impact that could be gained through access to *The Washington Post*, a national news outlet.³⁰⁶ Strategically, organizers hoped that local victories would generate press and provide a roadmap for other localities to do the same.³⁰⁷ That same month, advocates in San Francisco (SF) capitalized upon a good relationship with the Sheriff, who himself devised a strategy to “opt out” of S-Comm publicly.³⁰⁸ The SF Sheriff, Sheriff Hennessey, directed the Attorney General to renegotiate the contract

299. Letter from Congresswoman Zoe Lofgren to AG Eric Holder and DHS Secretary Napolitano dated July 27, 2010, <http://uncoverthetruth.org/resources/docs-reports/july-27-2010-letter-from-representative-zoe-lofgren/> (“I am writing to follow up on recent conversations that I have had with each of you regarding the current deployment of ICE’s Secure Communities program. As we discussed, Secure Communities is a voluntary program that relies upon the resources of both of your agencies in order to provide State, local, and federal law enforcement agencies with information related to the immigration status of persons booked into our nation’s jails and prisons. . . . Please provide me with a clear explanation of how local law enforcement agencies may opt out of Secure Communities by having the fingerprints they collect and submit to the SIBs checked against criminal, but not immigration databases.”).

300. BRIEFING GUIDE TO “SECURE COMMUNITIES,” *supra* note 253.

301. *Id.* at 3 (explaining that the desire not to participate in S-Comm is “due to concern about how the program will impact community policing initiatives and public safety.”).

302. ICE, Setting the Record Straight, *supra* note 254.

303. *Id.*

304. Letter from Sec. Napolitano to Rep. Lofgren (Sept. 7, 2010), <http://crocodoc.com/yzmmKP> (stating, “[a] local law enforcement agency that does not wish to participate in the Secure Communities deployment plan must formally notify the Assistant Director for the Secure Communities program. The agency must also notify the appropriate state identification bureau. . . . If a local law enforcement agency chooses not to be activated in the Secure Communities deployment plan it will be the responsibility of the state agency to notify its local ICE field office of suspected criminal aliens.”).

305. Interview with Sam, *supra* note 180.

306. Interview with Sydney, *supra* note 177.

307. TOOLKIT FOR ADVOCATES, UNCOVER THE TRUTH, <http://uncoverthetruth.org/wp-content/uploads/2010/09/S-COMM-Toolkit-07-08-2010.pdf> [<https://perma.cc/WE2W-YZLY>]; *see also* Interview with Sydney, *supra* note 177.

308. Interview 2 with Jordan, *supra* note 131; Michele Waslin, *Counties Say No to ICE’s Secure Communities Program, But is Opting Out Possible?* IMMIGRATIONIMPACT.COM (Oct. 1, 2010),

with ICE as a mechanism to unlock local jurisdictions' ability to opt-out.³⁰⁹ Using ICE's own language as a tool, Sheriff Hennessey sent the request publicly, and ICE responded that state officials, as opposed to local sheriffs, had to make the formal request.³¹⁰ The state of California, in turn, denied the Sheriff's request generating considerable confusion about whether opting-out was possible. Sheriff Hennessey renewed his request relying upon the express process outlined by Secretary Napolitano on September 7, 2010.³¹¹ Santa Clara and Arlington counties followed and voted to opt-out of S-Comm on the same day.³¹²

ICE officials were concerned about a "domino effect" where one county's "opt out" would lead to many others,³¹³ while at the same time keeping an eye on "difficult interoperability deployment locales" that ICE officials deemed reluctant to participate.³¹⁴ To counter this possibility, ICE hired a global public relations and digital marketing agency focused on crisis communications, brand marketing, and social media to lead messaging efforts to maintain a positive image for the program.³¹⁵ But, consistent messaging

<https://immigrationimpact.com/2010/10/01/counties-say-no-to-ices-secure-communities-program-but-is-opting-out-possible/#.Xj2wC2hKg2w> [<https://perma.cc/92JZ-HR94>].

309. Interview 4 with Jordan, *supra* note 215.

310. ICE, Setting the Record Straight, *supra* note 254 (stating that "[i]f a jurisdiction does not wish to activate on its scheduled date in the Secure Communities deployment plan, it must formally notify its state identification bureau and ICE in writing (email, letter, or fax). Upon receipt of that information, ICE will request a meeting with federal partners, the jurisdiction, and the state to discuss any issues and come to a resolution, which may include adjusting the jurisdiction's activation date in or removing the jurisdiction from the deployment plan."); see also Interview 2 with Jordan, *supra* note 131 (explaining that ICE sent the head of Secure Communities (or the assistant head) to San Francisco to meet directly with the Sheriff).

311. Letter from Sheriff Hennessey to California Atty. Gen. Brown, Exec. Dir. of Secure Cmty., Mr. David Venturella, and Deputy Dir. of Secure Cmty., Mr. Marc A. Rapp (Aug. 31, 2009).

312. *Arlington and Santa Clara Join SF in Demanding to Opt Out of Flawed ICE Program*, ASIAN AMERICANS ADVANCING JUST. (Sept. 30, 2010), https://www.advancingjustice-alc.org/news_and_media/arlington-and-santa-clara-join-sf-in-demanding-to-opt-out-of-flawed-ice-program/ [<https://perma.cc/FM2B-73NF>]; see also Interview with Sydney, *supra* note 177 (explaining that when Santa Clara and Arlington County opted-out of S-Comm on the same day, Sept. 28, 2010, the government recognized they had a big problem).

313. ICE FOIA 10-2674.0003245 ("The domino effect is starting. I spoke with Mr. Beiers, Chief Deputy County Counsel for San Mateo this morning and hopefully answered all of his questions. He asked for some reading material and sample messages they will be receiving. I also spoke with Marin County Juvenile Probation yesterday and they were quite agitated about the program being 'forced' on them and why the Chief Probation Officers were not invited to the outreach. I told him I would be happy to come speak to him so I will work on arranging it. I'm guessing this is just the tip of the iceberg. . .").

314. ICE FOIA 10-2674.001812, Email from Dan Cadman to Marc Rapp and Vincent Archebique titled "Strategy for difficult interoperability deployment locales" (Nov. 9, 2009) (exposing what ICE refers to as "difficult interoperability deployment locales").

315. ICE FOIA 10-2674.0004996, Email from Senior VP at Fleishman-Hillard to Randi Greenberg about postings of letters by "deportation Nation" on government's position on opt-out (Sept. 20, 2010) ("Randi, just identified that our 'friends' from Deportation Nation have posted the letters sent from DOJ and DHS to Rep. Lofgren regarding 'opting out.' Wanted you to have this ASAP so there are no surprises. The posting online of the letters reinforces the current 'opt out' policy and adds more pressure to when we announce the new policy, as now there are two separate documents posted online that reflect the current policy. We might want to revisit what tactics should be undertaken when that policy is announced, likely on October 6th. As you know, I am still an advocate of some kind of online release of the policy so that it too comes up when reporters and others begin searching. I'd rather the stories at least include our reasoning as to why the change and not just the position of the Deportation Nations of the world. Free to discuss at your convenience.").

appeared elusive. Even an official from the FBI's Criminal Justice Information Services Division (CJIS), who assumed the program was mandatory, was confused after reading Secretary Napolitano's letter, stating in an email that "reading the response alone would lead one to believe that a site can elect never to participate should they wish (at least it reads that way on my small [Blackberry] screen)."³¹⁶

Understanding that voluntary participation across the board was unlikely, ICE started to reframe the meaning of "opt-out," explaining that information sharing between the federal agencies was mandatory, but states and localities retained the ability to opt-out of receiving information back on any matches.³¹⁷ As one advocate explained,

I think [ICE] wanted to give the illusion of choice and they were hoping no one would exercise it. Maybe they were initially correct because the immigrant rights movement was so singularly focused on federal answers. But the local campaigns cropped up all over and started to change things. [Advocates] were not just protesting on the streets but were talking to local officials that had the power to actually change things and this is when I think things started to shift.³¹⁸

Internal emails make it clear that in September 2010, ICE planned to move from optional to mandatory S-Comm participation, and they were trying to figure out how to match the media presence of the S-Comm detractors, who were identified in emails as "the Deportation Nations of the world."³¹⁹ On September 9, 2010, ICE asked attorneys to gather support to reverse policy and mandate participation by state and local governments.³²⁰ Specifically, Beth Gibson, ICE Assistant Deputy Director, directed ICE attorneys to "rewrite" an earlier memo that had supported opt-out and raised constitutional concerns about making S-Comm mandatory.³²¹ ICE employees shared

316. FBI-SC-1719.

317. ICE FOIA 10-2674.0005131 (May 20, 2010) (Marc Rupp in briefing the House Judiciary Committee explains ICE's intent: "As far as the intent—we are trying to make it clear that there is no direct information-sharing happening between local law enforcement and ICE, but rather between ICE and CJIS—which is already federally mandated. Additionally, we want to demonstrate the immigration response "shared" back to local routes through CJIS and the states, thereby providing the opportunity for locals to opt-out. ICE would ideally like to receive any prints transmitted to CJIS, again highlighting limited or no change to current operating procedures. We are open to all suggestions for how to convey those messages, as currently there seems to be some confusion. . . . You are able to opt out of this at this point if you are a local government.").

318. Interview with Sydney, *supra* note 177.

319. ICE FOIA 10-2674.0004996, Email from Senior VP at Fleishman-Hillard to Randi Greenberg about postings of letters by "deportation Nation" on government's position on opt-out (Sept. 20, 2010).

320. See e-mail from Beth Gibson, Assistant Deputy Dir., U.S. Immigr. and Customs Enf't, to David Venturella, former Assistant Dir., U.S. Immigr. & Customs Enf't (Sept. 9, 2010, 7:40 AM), <http://uncoverthetruth.org/wp-content/uploads/2011/02/ICE-FOIA-10-2674.0002997-0003001.pdf>.

321. A *Briefing Guide to the Secure Communities October 2, 2010 "Mandatory Memo,"* UNCOVER THE TRUTH 1 (2012), <http://uncoverthetruth.org/wp-content/uploads/2012/01/1-9-12-Briefing-Guide-Oct-2-Mandatory-Memo.pdf>; Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enf't, 827 F. Supp. 2d. 242, 258–59 (S.D.N.Y. 2011); see also ICE FOIA 10-2674.0003726, Email from Sec. Chief,

frustration about the lack of clarity and necessary information as they tried to bring localities onboard.³²² In one email exchange between ICE employees, one writes,

“I have a silly question[—]and I ask only because you’ve [had numerous] conversations with Randi on this issue. Is there any reason we don’t say NO or YES on whether a LEA agency can opt out? I understand the answer is No, but wanted to know the latest and greatest reasoning.”³²³

While ICE employees were working with some willing state participants, they were getting frustrated with the “constant pressure from the NGOs and a lack of clear opt-out messaging or federal mandate.”³²⁴

High-level correspondence within ICE—between Beth Gibson, Assistant Deputy Director of ICE; David Venturella, Executive Director of Secure Communities; and Peter Vincent, Principal Legal Advisor for ICE—evidences the Department’s attempt to retroactively establish “legal support for the ‘mandatory’ nature of participation by 2013.”³²⁵ As late as September 29, 2010, despite messaging help from a public relations firm, S-Comm employees could not answer the question of whether a local government could opt out of participation.³²⁶ On October 1, 2010, Beth Gibson expressed concern about

Enforcement. L. Sec., Office of the Principal Legal Advisor, to redacted recipients (Sept. 29, 2010, 3:22 PM) (on file with authors).

322. ICE FOIA 10-2674.0195612 (Sept. 29, 2010) (ICE S-Comm Regional Coordinator did not have access to the Congresswoman Lofgren’s letters and dialogue with Napolitano, while the local governments seemed to have what was needed to support opting out (e.g., Allegheny Co., PA and Multnomah Co., OR): “This is the second time I’ve seen a message referencing the S1–Congresswoman Lofgren dialogue. [Redacted] of CJIS referred to it the other day in an email discussion about going forward with activation in Allegheny County Pennsylvania. Shouldn’t we be given a copy of said letter, so we can be guided accordingly? Apparently, any number of other parties are privy to it.”)

323. E-mail from [redacted] to [redacted] (provided from Secure Communities: Communications and Outreach Office: Blackberry) (Sept. 29, 2010)).

324. ICE FOIA 10-2674.0195612 (Sept. 29, 2010) (“The Oregon SIB is supportive of SC, but they are getting frustrated with the constant pressure from the NGOs and a lack of clear opt-out messaging or federal mandate.”).

325. E-mail from Beth Gibson, Assistant Deputy Dir., U.S. Immigr. & Customs Enf’t, to David Venturella, former Assistant Dir., U.S. Immigr. & Customs Enf’t (Sept. 9, 2010, 7:40 AM), <http://uncoverthetruth.org/wp-content/uploads/2011/02/ICE-FOIA-10-2674.0002997-0003001.pdf>. In these e-mail exchanges, Beth Gibson, David Venturella, Peter Vincent, and unknown ICE officials, including the Director of Enforcement and Litigation in the Office of the Principal Legal Advisor, go back and forth, trying to figure out who should and how they will gather “the legal support for the ‘mandatory’ nature of participation in 2013.” *Id.* On September 29, 2010, Beth Gibson writes, “In terms of specific meeting get backs—OPLA is gathering the legal support for the ‘mandatory’ nature of participation in 2013—SC is drafting revised language to describe the shift from the current ‘voluntary’ formula to the 2013’ formula.” *Id.*

326. ICE FOIA 10-2674.0005515 (Sept. 29, 2010). The “to” and “from” in the e-mails are redacted from the record, but the text of the e-mails still clearly illustrate that internally, as of September 29, 2010, ICE employees could not simply answer “yes” or “no” to the opt-out question. Even with help from the public relations firm, the questions did not provide an easy yes/no answer.

From: [mailto: [redacted]]

Sent: Wednesday, September 29, 2010 9:27 AM

To: [redacted]

Subject: RE: Opt Out Q&A

an anticipated article by *The Washington Post* that would “keep the heat on.”³²⁷ On that same day, *The Washington Post* reported that ICE “now says that opting out of the program is not a realistic possibility[—]and never was.”³²⁸ It was a day later, on October 2, 2010, that Riah Ramlogan, Deputy Principal Legal Advisor, sent a memo to Beth Gibson, Assistant Deputy Director for ICE, presenting legal arguments to support the position that participation in Secure Communities would be mandatory in 2013. This memo directly contradicted the initial memo issued on the same question in 2008.³²⁹

While ICE agreed to meet and negotiate the timing of S-Comm implementation at the local level, the agency asserted that since the program ultimately involved information sharing between federal agencies, localities did not have an option regarding participation.³³⁰ ICE removed the “opt-out” instructions from its website in October 2010, when Secretary Napolitano began to contradict her earlier representation, stating that “we do not view this as an opt-in, opt-out program.”³³¹

I have a silly question[—]and I ask only because you’ve had numerous conversations with Randi on this issue. Is there any reason we don’t say NO or YES on whether a LEA agency can opt out. I understand the answer is No, but wanted to know the latest and greatest reasoning. Secure Communities: Communications and Outreach Office: Blackberry.

In response, this e-mail was sent:

To:

Subject: RE: Opt Out Q&A

That’s not a silly question at all. In this case, it’s not a yes or no answer because yes, they can opt of receiving the IDR, but no they can’t opt out of having fingerprints checked against IDENT by 2013. However, we’re also about to have a meeting with the SF Sheriff so we don’t want to totally pre-empt that meeting. So the first question here attempts to address the opting out question by explaining that yes they can opt out of the IDR. The second question gets to the heart of the issue which is ok well does opting out then mean that their prints don’t get checked against IDENT . . . there we’re pretty straightforward in that they will still be checked, noting that this program has proven its value and that Congress directed us to go after criminal aliens, which is what we’re doing. Then the third question takes it that next step to get to what if they don’t want to give you their prints. We could actually reorder that one to put the last couple sentences at the beginning. Long story short. We’re trying to be sensitive, at least until we talk to SF. Ideally, we would be able to give them a yes or no.

327. E-mail from Beth Gibson, Assistant Deputy Dir., U.S. Immigr. & Customs Enf’t, to Peter Vincent, former Principal Legal Advisor, Office of the Principal Legal Advisor; & David Venturella, former Assistant Dir., U.S. Immigr. & Customs Enf’t (Oct. 1, 2010, 5:39 AM), <http://uncoverthetruth.org/wp-content/uploads/2011/02/ICE-FOIA-10-2674.0002997-0003001.pdf> (“I expect the WP article today to keep the heat on this issue. Any sense of eta?”).

328. Shankar Vedantam, *No Opt-Out for Immigration Enforcement*, WASH. POST (Oct. 1, 2010), https://www.washingtonpost.com/wp-dyn/content/article/2010/09/30/AR2010093007268_pf.html (including a comment from an anonymous senior ICE official, who claimed, “Secure Communities is not based on state or local cooperation in federal law enforcement.” The only way out of S-Comm would be for local officials to refuse to send fingerprints to another federal agency, but “[s]tate and local law enforcement agencies are going to continue to fingerprint people and those fingerprints are forwarded to the FBI for criminal checks. ICE will take immigration action appropriately.”).

329. See ICE FOIA 100-2674.0010795, Memorandum from Riah Ramlogan, Deputy Principal Legal Advisor, U.S. Immigr. & Customs Enf’t, to Beth Gibson, Assistant Deputy Dir., U.S. Immigr. & Customs Enf’t, (Oct. 2, 2010) https://epic.org/privacy/secure_communities/ice-secure-communities-memo.pdf (“Based on applicable statutory authority, legislative history, and case law, we conclude that participation in Secure Communities will be mandatory in 2013 without violating the Tenth Amendment.”).

330. See Shankar Vedantam, *Federal Immigration Program Is Applied Inconsistently in Region*, WASH. POST (Feb. 26, 2011, 7:28 PM), <https://www.washingtonpost.com/wp-dyn/content/article/2011/02/26/AR2011022603582.html>.

331. Renée Feltz & Stokely Baksh, *ICE Attributes Record Deportation Levels to Secure Communities*, DEPORTATION NATION (Oct. 6, 2010), <https://web.archive.org/web/20101014021156/>

In retrospect, despite the concerted time and effort spent internally strategizing how best to message S-Comm to the public, the Department only managed to create more confusion.³³² ICE officials blamed political actors that “got more defensive and gun shy and [tried to] control [the messaging] and [it] didn’t help.”³³³ Congresswoman Lofgren accused the Secretary of misleading her,³³⁴ and congressional staff confirmed that there was a perception in Congress that DHS/ICE was “shifting perspectives on the program and was lying.”³³⁵ The lack of clarity and shifting positions only fed into the S-Comm detractor’s narrative of government duplicity. Even a high-ranking DHS official described that there was “deep mistrust in the [D]epartment and . . . [the] whole thing felt duplicitous.”³³⁶

F. *Advocacy After Mandatory S-Comm*

In the face of mandatory compliance at the federal level, advocates shifted focus to state and local levels.³³⁷ While some state and local advocacy was already underway or well developed, the federal government’s clear

<http://www.deportationnation.org/2010/10/ice-attributes-record-deportation-levels-to-secure-communities>.

332. ICE FOIA 10-2674.0003849.

I wanted to inform you of some recent happenings at SC. There has been a lot of media attention recently in California, specifically the San Francisco Bay Area regarding a jurisdiction’s ability to “opt-out” of participating in Secure Communities. While we still believe a jurisdiction can “opt-out” of receiving the second response containing immigration related information, we’ve been asked to clarify our stance on a jurisdiction choosing not to participate at all—meaning fingerprint submissions do not get sent from CJIS onto DHS/IDENT. ICE and CJIS are working together to draft a proper response to this question that will be shared with US-VISIT as soon as we’re ready.

333. Interview with Sawyer, *supra* note 289.

334. Interview with Sam, *supra* note 180 (“At some point the White House under the pressure from the advocacy groups got involved and wanted to conduct a review of the program. Despite our frustrations with ICE, despite with what we viewed as a massive gross mismanagement by ICE, despite the ridiculous self-inflicted confusion regarding . . . whether it was a mandate or not or voluntary or compulsory program, as far as the states were concerned, we conducted our own review at the Department with the Secretary and concluded, [that] [t]his program was essential to accomplishing the larger policy goals [of] the Obama administration, which is to transition the agency to one that focuses on public safety.”).

335. Interview with Quinn, *supra* note 188 (Chief Counsel, H. Judiciary Subcomm. on Immigration and Citizenship) (“ICE was just lying to us. Later we found out that they were knowingly lying to us and deliberately lying to us.”).

336. Interview with Sam, *supra* note 180.

337. Despite a concerted shift to the state and local levels, NDOLN did not give up on federal pressure. NDOLN circulated a petition to the Assistant Director of S-Comm and Secretary Napolitano renewing the request that states and localities retain the ability to opt out; *see* ICE FOIA 10-2674.0006032, E-mail to Marc Rapp (Oct. 15, 2010) (sender information has been redacted). “Marc, NDOLN (and other orgs) are circulating an online petition (http://action.altoarizona.com/p/dia/action/public/?action_KEY=4383) [<https://perma.cc/A5JA-X8X6>] to send to Napolitano requesting that localities be able to opt out of SC. We have developed a set of Talking Points to help POA with any responses they may receive regarding this. If you have a moment to review what we have drafted, I’d like your thoughts or edits if you have any. Includes talking points to respond to questions about petition to make S-Comm [o]pt[] out.” In response, ICE prepared to respond to anticipated publicity; *see* ICE FOIA 10-2674.0006573 (Oct. 15, 2010), in which ICE is trying to get approval for responding with talking points to the NDOLN petition they need approval from CJIS. ICE wanted to make sure to get a timely response since the petition was out and would likely get some press: “Susan, Concerning the petition and the relevant [t]alking point language you are running by CJIS; can you ask that we receive their comments/approval by COB Monday October 18th. The issue is timely, since the petition is out and will most likely generate some press. Kind regards, Secure Communities, ICE desk.”

pronouncement of mandatory compliance fed the sanctuary city rebellion. Ordinances in the District of Columbia, Santa Clara, California, and Cook County, Illinois, declared that their respective law enforcement officers shall not enforce any immigration detainees without a written agreement from the federal government promising to pay the full cost of the detainee.³³⁸ Chicago passed a “Welcoming City” anti-detainer ordinance that barred compliance with detainees, except in cases involving major crimes, outstanding criminal warrants, or gang members.³³⁹ States such as California³⁴⁰ and Connecticut³⁴¹ sought legislative solutions—known as TRUST Acts—limiting state obligations to comply with federal immigration detainees.³⁴²

In April 2011, disturbed by DHS’s shift in position as exposed through the now publicized FOIA documents, Congresswoman Lofgren requested an investigation into any misconduct, including possible violations of criminal law.³⁴³ As sanctuary advocacy continued on the state and local levels, ICE

338. Phil Mendelson, Chairman, Comm. on the Judiciary, Report on Bill 19–585, “Immigration Detainer Compliance Amendment Act of 2012,” at 6, 11–12 (2012) (noting that the District of Columbia bill requires Department of Correction holds pursuant to ICE detainees to be executed only where ICE agreed to reimburse the Department); Santa Clara, Cal., Policy Res. 2011–504, 2011 Bd. of Supervisors (Cal. 2011) (resolving to decline compliance with immigration detainees unless the federal government agreed to pay the costs of detention, and then only if the prisoner were convicted of a serious crime and not a juvenile); COOK COUNTY, ILL., CODE § 46–37(a) (2011).

339. CHI., ILL. MUN. CODE § 2-173-042(c) (2012). Press Release, City of Chicago, Mayor Emanuel Introduces Welcoming City Ordinance (July 10, 2012), https://www.chicago.gov/city/en/depts/mayor/press_room/press_releases/2012/july_2012/mayor_emanuel_introduceswelcomingcityordinance.html [<https://perma.cc/3DGU-9XS7>] (claiming that it would “prevent law abiding Chicagoans from being unfairly detained and deported”).

340. The California “TRUST (Transparency and Responsibility Using State Tools) Act,” aimed at limiting the State’s compliance with federal immigration detainees, was signed into law on October 5, 2013. See Assemb. B. 4, 2013–2014 Reg. Sess. (Cal. 2013) (codified at CAL. GOV’T. CODE §§ 7282, 7282.5 (West 2014)), http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0001-0050/ab_4_bill_20130624_amended_sen_v97.pdf [<https://perma.cc/RV8N-EWLE>]; see also *AB-4 State Government: Federal Immigration Policy Enforcement*, CAL. LEGIS. INFO., http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB4 [<https://perma.cc/4LY8-A38G>] (last visited May 17, 2014) (providing the bill’s history).

341. In June 2013, the Connecticut General Assembly passed, and the Governor signed into law, a bill that will expand the limitations on detainer compliance beyond the Department of Correction to other state and local law enforcement agencies. H.B. 6659, 2013 Gen. Assemb., Reg. Sess. (Conn. 2013) (codified at CONN. GEN. STAT. § 54-192(h) (2014)), <http://www.cga.ct.gov/2013/act/pa/pdf/2013PA-00155-R00HB-06659-PA.pdf> [<https://perma.cc/MRE4-QQ8J>].

342. For examples of similar legislation proposed in other states, see ICE Enforcement and Removal Operations Weekly Declined Detainer Outcome Report for Recorded Declined Detainers Feb 11 – Feb 17, 2017, Section III: Table of Jurisdictions that have Enacted Policies which Restrict Cooperation with ICE, https://www.ice.gov/doclib/ddor/ddor2017_02-11to02-17.pdf. In Florida, the latest attempts to pass a Trust Act were SB 1674 and HB 1407, which both died in committee on May 5, 2017. Previous attempts to pass similar legislation to HB 767 and SB 730 died in committee in 2013. In Massachusetts, the most recent attempts were made during the 2015–2016 legislative session via bills S.1258 and H.1228. Both were unsuccessful. Previous attempts (Bill S.1135 and H.1613) were also unsuccessful.

343. Letter from Congresswoman Zoe Lofgren to Charles K. Edwards, Acting Inspector General, Dep’t of Homeland Sec. (Apr. 28, 2011), <http://big.assets.huffingtonpost.com/LofgrenFollowUp.pdf> [<https://perma.cc/65B6-VUE6>] (“In recent months, it appears that Department of Homeland Security (DHS) and Immigration and Customs Enforcement (ICE) personnel and contract staff may have made false and misleading statements to local governments, the public, and [m]embers of Congress in connection with the deployment of the Secure Communities program. In response to a Freedom of Information Act request, ICE and the Federal Bureau of Investigations (FBI) have released many thousands of pages of documents, including internal e-mails and memoranda. Having conducted with my

was still searching for “statutory underpinnings” to support the mandatory nature of the program³⁴⁴ and combatting negative publicity.³⁴⁵ On May 9, 2011, an ICE whistleblower sent a letter to Congresswoman Lofgren stating “that confusion over opting out of Secure Communities has arisen . . . because of the government’s vacillation, policy shifts and inconsistent public stance.”³⁴⁶ Sufficiently concerned over the issues raised by the ICE whistleblower, on May 17, 2011, Congresswoman Lofgren requested that the DHS Office of Inspector General (OIG) expedite the investigation.³⁴⁷ The OIG ultimately issued two reports, the latter of which concluded

We did not find evidence that ICE intentionally misled the public or States and local jurisdictions during implementation of Secure Communities. However, ICE did not clearly communicate to stakeholders the intent of Secure Communities and their expected participation. . . . As a result, [three] years after implementation began, Secure Communities continues to face opposition, criticism, and resistance in some locations.³⁴⁸

In 2013, DHS and ICE shifted leadership. John Morton left as the Director of ICE and was replaced by Acting Director John Sandweg. Jeh Johnson replaced Janet Napolitano as Secretary of DHS.³⁴⁹ In light of ongoing criticism of Obama’s record on immigration enforcement, even after Director

legal staff an initial review of the documents that have been made public, I believe that some of these false and misleading statements may have been made intentionally, while others were made recklessly, knowing that the statements were ambiguous and likely to create confusion.”)

344. ICE FOIA 10-2674.0176067, E-mail from Riah Ramlogan to Bill Orrick and Peter Vincent (May 9, 2011) (requesting a meeting between DOJ and ICE to clear up continued questions on the mandatory or opt-out nature of S-Comm). They are looking to find “statutory underpinnings” that were previously provided to Beth Gibson with the October 2010 memo.

345. ICE FOIA 10-2674.0158366, Barbara Gonzalez, Press Secretary of ICE, writes

“I know these meetings can be a bit hostile, but the community appreciates when we show up. I’ve attended these local meetings and the response has been good because they appreciate our willingness to speak. Do we know if media will be present?” Gary Mead, Executive Associate Director of Enforcement and Removal Operations of ICE, writes, “At first we thought this was going to be NGO’s meeting with LEAs on the problems with SC. If that was the case I was inclined to attend to support the LEAs with the facts on SC. If this is just a community meeting with no LEAs present, I am having second thoughts. What do you think?” Beth Gibson writes, “Not going to go if the media is there: I am happy to go if media is not present.”

346. Letter from Dan Cadman to Congresswoman Zoe Lofgren (May 9, 2011) (on file with authors).

347. Letter from Congresswoman Zoe Lofgren to Charles K. Edwards, Acting Inspector General, Dep’t of Homeland Sec. (May 17, 2011), <http://big.assets.huffingtonpost.com/LofgrenFollowUp.pdf> [<https://perma.cc/65B6-VUE6>] (In support of her request, Congresswoman Lofgren cited a letter from a former contractor who served as an ICE Regional Coordinator within the S-Comm program that raised questions about staff responsibility for misleading statements).

348. DEP’T OF HOMELAND SECURITY, OIG, COMMUNICATION REGARDING PARTICIPATION IN SECURE COMMUNITIES 1 (June 2014), https://www.oig.dhs.gov/assets/Mgmt/2012/OIG_12-66_Jun14.pdf [<https://perma.cc/TCB3-RSUL>].

349. Seung Min Kim, *Johnson OK’ed for Homeland Security*, POLITICO (Dec. 16, 2013), <https://www.politico.com/story/2013/12/jeh-johnson-department-of-homeland-security-senate-101213> [<https://perma.cc/QQP9-BLMD>].

Morton's memoranda specifically limited interior enforcement priorities,³⁵⁰ pressure remained on the Administration to take further action. Secretary Johnson wanted to take a different approach and "appear more progressive on immigration."³⁵¹

In November 2014, in what advocates believe was an intentional move designed to quiet the sanctuary city revolt,³⁵² Secretary Johnson issued a memorandum ending S-Comm and creating the Priority Enforcement Program (PEP).³⁵³ Several of the themes employed by advocates were proffered as reasons for ending the program. At the time, Secretary Johnson noted that S-Comm "has attracted a great deal of criticism, is widely misunderstood, and is embroiled in litigation;³⁵⁴ its very name has become a symbol

350. Memorandum from John Morton, Homeland Sec. Assistant Sec'y, to All Ice Employees, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens, (June 30, 2010), www.ice.gov/doclib/news/releases/2010/civil-enforcement-priorities.pdf [<https://perma.cc/B9WK-VA57>] (explicitly limiting interior enforcement priorities to people with criminal convictions, recent arrivals, and immigrant fugitives (those who failed to comply with removal orders); Memorandum from John Morton, ICE Dir., to All Field Office Dirs., All Special Agents in Charge, All Chief Counsel, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [<https://perma.cc/S4QJ-722T>].

351. Interview with Sam, *supra* note 180.

352. Interview 3 with Jordan, *supra* note 195.

353. *Id.* (explaining that "Secretary Johnson wanted to implement it himself when he became Secretary. . . I think [he] wanted to . . . try to reset Secure Communities himself thinking [that] the brand was so ruined. And [we] came up with the . . . Priority Enforcement Program"); U.S. Immgr. and Customs Enf't, Priority Enforcement Program, <https://www.ice.gov/pep> [<https://perma.cc/55YF-E9GR>] (explaining that PEP differs from S-Comm in that "PEP focuses on targeting individuals convicted of significant criminal offenses or who otherwise pose a threat to public safety. Under prior policy, detainers could be issued when an immigration officer had reason to believe the individual was removable and fell within one or more enumerated priorities, which included immigration-related categories and having been convicted of or charged with certain crimes. Under PEP, ICE will only seek transfer of individuals in state and local custody in specific, limited circumstances. ICE will only issue a detainer where an individual fits within DHS's narrower enforcement priorities and ICE has probable cause that the individual is removable. In many cases, rather than issue a detainer, ICE will instead request notification (at least 48 hours, if possible) of when an individual is to be released. ICE will use this time to determine whether there is probable cause to conclude that the individual is removable.").

354. The litigation referred to in the memorandum related to detainers issued by ICE that federal courts routinely found violated the Fourth Amendment. *See, e.g.,* *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-cv-02317-ST., 2014 WL 1414305, at *1 (D. Ore. Apr. 11, 2014) (holding that the county violated the Fourth Amendment by relying on an ICE detainer that did not provide probable cause regarding removability); *Morales v. Chadbourne*, 996 F. Supp. 2d 19, 29 (D.R.I. 2014) (concluding that detention pursuant to an immigration detainer "for purposes of mere investigation is not permitted"); *see also* *Moreno v. Napolitano*, Case No. 11 C 5452, 2014 WL 4814776 (N.D. Ill. Sept. 29, 2014) (denying judgment on the pleadings to the Government on the Plaintiffs' claim that ICE's detainer procedures violate probable cause requirements); *Gonzalez v. ICE*, Case No. 2:13-cv-0441-BRO-FFM, at 12-13 (C.D. Cal. July 28, 2014) (granting the Government's motion to dismiss, but allowing Plaintiffs to file an amended complaint and noting that plaintiffs "have sufficiently pleaded that Defendants exceeded their authorized power" by issuing "immigration detainers without probable cause resulting in unlawful detention"); *Villars v. Kubiatoski*, Case No. 12 CV 4586, 2014 WL 1795631, at *10 (N.D. Ill. May 5, 2014) (rejecting dismissal of Fourth Amendment claims concerning an ICE detainer issued "without probable cause that Villars committed a violation of immigration laws"); *Galarza v. Szalczuk*, Civ. Action No. 10-cv-068 15, 2012 WL 1080020, at * 14 (E.D. Penn. Mar. 30, 2012) (denying qualified immunity to immigration officials for unlawful detention on an immigration detainer issued without probable cause), *rev'd* and remanded on other grounds, 745 F.3d 634 (reversing district court's finding of no municipal liability); *Uroza v. Salt Lake City*, No. 2: 11 CV713DAK, 2013 WL 653968, at *6-7 (D. Utah Feb. 21, 2013) (denying dismissal on qualified immunity grounds where plaintiff claimed to have been held on an immigration detainer issued without probable cause). *Cf. Makowski v. United States*, No. 12 C 5265, 2014 WL

for general hostility toward the enforcement of our immigration laws.”³⁵⁵ While FOIA litigation was not directly named, the strategy that was devised deftly exploited the documents obtained through such litigation. The idea that S-Comm undermined community policing was directly referenced when ICE leadership stated that the PEP “must be implemented in a way that supports community policing and sustains the trust of all elements of the community in working with local law enforcement.”³⁵⁶ Efforts to organize states and localities also appeared to weigh-in on the Secretary’s decision. Specifically, the memorandum stated, “Governors, mayors, and state and local law enforcement officials around the country have increasingly refused to cooperate with the program, and many have issued executive orders or signed laws prohibiting such cooperation.”³⁵⁷

Advocates posit that S-Comm ended as a result of a confluence of events. S-Comm was synonymous with distrust,³⁵⁸ and the window for CIR was closed, negating prior assertions that increased enforcement was a necessary trade-off for CIR. And importantly, the timing gave rise to beliefs that PEP was an intentional way to quiet the sanctuary city revolt that was underway.³⁵⁹ With these concessions to the advocates, the government could say, “we did things for you and now we need your help to quiet the sanctuary city rebellion.”³⁶⁰

PEP permitted states and localities to negotiate cooperation guidelines and to notify ICE of release dates instead of holding individuals using detainers.³⁶¹ PEP appears to have succeeded in obtaining support from many states and localities. At the end of Fiscal Year 2016, DHS announced that twenty-one of the twenty-five largest jurisdictions that previously declined the largest number of detainers were cooperating with ICE through PEP.³⁶²

In January 2017, newly inaugurated President Trump announced the resurrection of S-Comm in an early executive order in what would be a series of such orders reimagining immigrants’ rights and migrants’ vulnerability to

1089119, at **10 (N.D. Ill. 2014) (concluding that plaintiff stated a plausible false imprisonment claim against the United States where he was held on a detainer without probable cause).

355. Memorandum on Secure Communities For Thomas S. Winkowski Acting Dir. U.S. Immigr. & Customs Enf’t, Megan Mack Officer Office of Civil Rights and Civil Liberties, and Philip A. McNamara Assistant Sec’y for Intergovernmental Affairs, From Jeh Charles Johnson, Sec’y DHS, at 1 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [<https://perma.cc/K2X6-HELA>].

356. *Id.*

357. *Id.*

358. *Id.* (“But the reality is the program has attracted a great deal of criticism, is widely misunderstood, and is embroiled in litigation; its very name has become a symbol for general hostility toward the enforcement of our immigration laws.”).

359. Interview 3 with Jordan, *supra* note 195.

360. *Id.*

361. Randy Capps, Muzaffar Chishti, Julia Gelatt, Jessica Bolter & Ariel G. Ruiz Soto, *Revvig Up the Deportation Machinery, Enforcement and Pushback under Trump*, MIGRATION POLY INST. (May 2018) at 18–19.

362. DEP’T OF HOMELAND SECURITY, DHS RELEASES END OF YEAR FISCAL YEAR 2016 STATISTICS (Dec. 30, 2016), www.dhs.gov/news/2016/12/30/dhs-releases-end-year-fiscal-year-2016-statistics [<https://perma.cc/324L-66L8>].

punitive detention in and removal from the United States.³⁶³ On January 20, 2021, President Biden, on the afternoon of his inauguration, issued an executive order terminating S-Comm once again and promising a re-evaluation of ICE enforcement priorities.³⁶⁴

V. AN INNOVATIVE APPROACH TO MOVEMENT LAWYERING

In this final Part, we share what we learned from the in-depth examination of one loosely structured model of how lawyers, organizers, activists, clients, and political actors worked together to change an immigration enforcement program and organize a movement. Instead of finding a model of movement lawyering that is easily adaptable in other contexts, what we discovered was the very opposite. We found that two necessary components of a successful effort to forge social change are flexibility and adaptability in the face of radically uncertain challenges wrought by dynamic, dispersed, and similarly recursively self-reconstructing power structures. This finding steered our conclusion away from a specific “new model” and towards a “new approach” to movement lawyering that is rooted in discrete themes. This Part will identify these themes and draw upon them to offer some preliminary underlying theories.³⁶⁵

The themes that emerged from the case study confirm much of the efficacy of the variously named movement lawyering models we described above. While these models of movement lawyering are accurate, important, and insightful, we find them incomplete. They fail to fully describe all that made the lawyers we studied critical agents of a larger movement enterprise. First, lawyer accountability and effectiveness are enhanced when lawyers, organizers, activists, and clients together build a modular strategy from the ground up through recursive, interactive, and synergistic play among tools, roles, institutions, and resources. Second, leading with humility³⁶⁶ enables all participants to bring their expertise to the table for equal consideration in a nimble, ever-evolving strategic discussion. Third, we find that change must occur within the relationships among the legal institutions, lawyers, movement leaders, and the communities they represent through legal storytelling,

363. Exec. Order No. 13768, *Enhancing Public Safety in the Interior of the United States*, 82 Fed. Reg. 8799 (Jan. 30, 2017) (stating, *inter alia*: “The Secretary shall immediately take all appropriate action to terminate the Priority Enforcement Program (PEP) described in the memorandum issued by the Secretary on Nov. 20, 2014, and to reinstitute the immigration program known as “Secure Communities” referenced in that memorandum.”).

364. Exec. Order No. 133993, *Revision of Civil Immigration Enforcement Policies and Priorities*, 86 Fed. Reg. 7051 (Jan. 25, 2021).

365. A second article that delves deeply into theoretical underpinnings of our observations is in progress.

366. “Humility,” as used herein does not connote undue deference or servility; instead, humility or “humble” as we describe it, resonates both in notions of respect for expertise borne of the lived experience of others and the limits of lawyers’ roles and patient determination in the face of obstacles to change for marginalized groups. This sense of humility requires boldness, an experimental ethos, and a taste for risk-taking under conditions of uncertainty.

mobilized citizens, and organized efforts that channel community priorities.³⁶⁷ This approach to movement lawyering addresses the accountability and efficacy questions together by reflecting inward toward nurturing relationships³⁶⁸ and outward to solidarity-building storytelling.³⁶⁹ Finally, we find that an intentional approach to power that is jointly constructed by lawyers, organizers, and impacted communities was vital to shared commitment, mutual respect, and effective strategic decision making. This approach appreciates the dynamic, emergent, recursively self-organizing power systems and, in response, conceives of similarly dynamic and emergent strategies to affect power, and identifies leverage points where lawyers can sometimes promote change.

Our work is designed to build upon the foundational literature focused on client-centered lawyering as well as more recent movement lawyering work that is wary of legalism, invested in multi-modal problem solving, and respectful of the power of movements. We contribute additional layers, and perhaps some conceptual detail, to an existing theoretical framework. The social change efforts we observed can best be described as fractal—infinately complex patterns that are self-similar across different scales and created by recursively constructing a process in an ongoing feedback loop.³⁷⁰ Change occurred within a complex system through interactions of multiple factors at different levels and on different timescales.³⁷¹ The recursive nature of the strategy employed in this context implies that actors responded to, or even created, similar feedback loops that led to common structures, habits, incentives, and challenges. In this sense, a social movement is a learning organization that nurtures feedback loops in a way that is familiar to anyone who has participated in a law school clinical program or an organizer’s training program. To create a more concrete picture of the dynamic we describe, we offer the following description of how the lawyers we met operated—in conjunction with the movements of which they formed a part—simultaneously at the

367. Interview with Alvarado, *supra* note 35; Ashar, *Movement Lawyers for Immigrant Rights*, *supra* note 13.

368. Interview with Alvarado, *supra* note 35; Ashar, *Movement Lawyers for Immigrant Rights*, *supra* note 13 (reframing the role of attorneys and clients through the introduction of client-centered lawyering). See BELLOW & MOULTON, *THE LAWYERING PROCESS*, *supra* note 29, at 35–70 (encouraging reflection on the appropriate role of the lawyer in relation to the client); BINDER ET AL., *LAWYERS AS COUNSELORS*, *supra* note 29 (articulating a “client-centered” vision of lawyering and techniques for students to adopt). For an argument that relationships with client constituencies are not critical to movement lawyering so long as lawyers can piggy-back off of organizers’ preexisting relationships, see Ashar, *Movement Lawyers for Immigrant Rights*, *supra* note 13, at 1504. Professor Ashar characterizes the effort as a retreat (at least temporarily) from the legal professions’ social engineering project, *id.* at 1491, while others see it as a supportive and necessary stage in the development of that project.

369. ROBBINS ET AL., *YOUR CLIENT’S STORY*, *supra* note 30; Miller, *Telling Stories*, *supra* note 30; Miller, *Give Them Back Their Lives*, *supra* note 30.

370. See *What are Fractals?*, FRACTALFOUNDATION.ORG, <https://fractalfoundation.org/resources/what-are-fractals/> [<https://perma.cc/4A4R-ZS5G>] (explaining that fractals are images of dynamic systems that are driven by recursion).

371. See e.g., Linda B. Smith & Esther Thelen, *Dynamic System Theory*, in *ADVANCES IN CHILD DEVELOPMENT AND BEHAVIOR* (2019).

micro, or client-centered lawyering; the meso, or campaign; and the macro, or organizational, layers during this campaign.

A. *Micro Level: Client-Center Lawyering for the Situation*

On the micro level, all of the lawyers involved in the campaign employed a client-centered framework.³⁷² As one of the lawyers on the team stated, the

[C]ampaign was one example of lawyers and organizers working very well together because it was clear from the beginning that the whole point of the FOIA [request and litigation] was to support the organizing and there was a lot of respect between the particular attorneys who were working on it, and the NDLOM organizer [as well as] other local organizers.³⁷³

The legal team's goal, from the beginning, was to develop a legal strategy to support the organizational strategy.³⁷⁴ The team agreed that they would make decisions based upon "[w]hat would be of greatest utility for the movement and . . . the organizing."³⁷⁵ Understanding that FOIA litigation is a limited tool that cannot enjoin the program or substantively challenge the program,³⁷⁶ the lawyers knew that the lawsuit would only be as good as the underlying information obtained and the creative ways organizers could then use that information to push the movement.

As the documents were released, organizers and lawyers worked together to identify documents that would be most helpful for the organizing efforts.³⁷⁷ Lawyers then drafted "practice advisories" for organizers with

372. Interview with Kai, *supra* note 263 (NDLOM, as a client, had a clear idea of what the relationship would look like).

373. Interview with Josh, *supra* note 194 ("I think everybody went into it with a framework of working really collaboratively and so I remember it as a positive little lawyering-organizer collaboration and one in which everyone [], like the lawyers, organizers, were all pretty clear idea that the litigation was like one tool that [we] were trying to use in this campaign which the goal which was to get out of S-Comm. So, there was like really open communication and stuff I haven't seen on subsequent FOIAs. Like, like we get facts and so like the legal team would get documents and sent them immediately without even reviewing ourselves to sort of figured out, which ones pertain to which jurisdiction, farm of out, give the Chicago people the Chicago documents, the San Francisco people San Francisco documents, and everyone review[ed] them on their own and then sort of like come together and say what we had, what folks had found. So, it was like a very, a lot of openness that like everybody was sort of in it together and supporting each other.").

374. Interview with Taylor, *supra* note 162.

375. *Id.*

376. Interview with Emerson, Attorney on NDLOM FOIA Case (Dec. 10, 2019) (transcript on file with authors) [hereinafter Interview with Emerson]; Interview with Parker, Attorney on NDLOM FOIA Case (Dec. 10, 2019) (transcript on file with authors) [hereinafter Interview with Parker]; Interview with Josh, *supra* note 194 (stating, "I think it's probably because the campaign was designed from the beginning with organizers and lawyers all having an equal role and also because there was like a very clear campaign goal and it was a goal that like definitely couldn't be achieved by the lawyers alone because it was a FOIA case it wasn't like litigation to you know, enjoin Secure Communities. It was FOIA and the power of litigation was limited in the FOIA and everybody thought and understood and further, there wasn't that feeling that sometimes develops of 'Okay, the lawsuit's going to solve the problem' or something.").

377. Interview with Jamie, *supra* note 205.

each new batch of FOIA documents that would include highlights of the impactful documents that might catch media attention.³⁷⁸ When helpful, conference calls were scheduled to bring together organizers from across the country so that the legal team could share information about the important documents.³⁷⁹ There was an initial decision that lawyers would field press calls, but very soon into the case, a strategic decision was made to push those calls through to organizers.³⁸⁰ Enacting what we refer to as their catalytic function,³⁸¹ lawyers described their role in this case at times as an intermediary, a person who translated what was going on in the litigation to organizers and then communicated the priorities of the organizers and advocates to the legal team.³⁸²

On the micro level, the case study provided an opportunity to examine the difference, if any, between private pro bono lawyers, so-called movement lawyers, and public interest lawyers in their relationships with organizers, the campaign, and the larger movement. As the FOIA litigation got underway, novel issues around electronic-discovery (e-discovery), as well as large document production, led the team to seek pro bono assistance from a private firm.³⁸³ The organizers and clients saw the private firm lawyers as a way to leverage those within the establishment to support the movement.³⁸⁴ The private lawyers were specifically selected for their expertise with e-discovery.³⁸⁵ At first glance, the case appeared to present a dry FOIA issue, but the judge assigned to the case was “the preeminent judge in the country on e-discovery,” and the private lawyers knew that the judge “would not be afraid to issue groundbreaking rulings.”³⁸⁶ The possibility of “moving the law on FOIA” was enough to motivate the private lawyers to jump in.³⁸⁷ These

378. Interview with Josh, *supra* note 194.

379. *Id.*

380. *Id.*; Interview 3 with Jordan, *supra* note 195.

381. JONAH BERGER, THE CATALYST: HOW TO CHANGE ANYONE’S MIND 6 (2020) [hereinafter BERGER, THE CATALYST] (explaining that “reactions usually require a certain amount of energy . . . [Catalysts] speed up the process. But rather than upping the heat or adding more pressure, they provide an alternate route, reducing the amount of energy required for reactions to occur.”).

382. Interview with Josh, *supra* note 194 (stating, “I feel like I did a lot of the, or some of the work of, like translating what was going on in the litigation to the organizers and advocates, making sure all the organizers and advocates understood what was going on in the litigation, communicating to the legal team what the priorities were of the organizers and advocates. So almost sort of like the intermediary between the two groups, I would say, which is cool, because I subsequently like, start[ed] doing more litigation. And I always miss I feel like there should always be someone like that on litigation, like a lawyer or someone whose job is to do the non-litigation parts of the litigation because when you’re doing them yourself, it’s like you finish the brief and you just collapse. You don’t really have the time to make sure that you’re communicating what’s going on to the organizers and advocates as well as you should and so I feel like it was really great that I had that time and space to like play that role on the campaign.”).

383. Interview with Kai, *supra* note 263; Interview with Jamie, *supra* note 205.

384. Interview 3 with Jordan, *supra* note 195.

385. Interview with Parker, *supra* note 376.

386. *Id.* (“[H]aving the case assigned to Judge Scheindlin was the trigger.” The lawyers knew “based on the judge’s writings that she would be much more hands on and she might be willing to make groundbreaking rulings.” This presented the opportunity to create law that was much broader than the issues of disclosures required in this case.)

387. Interview with Emerson, *supra* note 376 (explaining that there was a conflation of what had been happening to data and information—which had been percolating in not only the FOIA space—but in

private lawyers were able to leverage relationship, network, and credibility advantages in service of the organizing campaign. In turn, this transformed technical FOIA litigation into a celebration, and the dynamic tension that mapped emergent, self-recreating power identified critical junctures where the pro bono lawyers' intervention could vitalize the campaign.

The pro bono lawyers spoke enthusiastically about their experience because “[they] were making real change—and it is not that often that we get to make real change.”³⁸⁸ While generally they viewed the attorney-client relationship in this case similarly to their private clients, they identified some distinctions.³⁸⁹ With “regular clients [we] are the hired gun to win the case. Here, winning the case was important, but it was more important to keep up the narrative.”³⁹⁰ The goal was to constantly churn the information to further the narrative that the government was not transparent.³⁹¹ The advocates used every court appearance as an opportunity to further the narrative, and each court ruling exposed the government's lack of transparency which fed the narrative that the program was misleading.³⁹²

The pro bono team characterized the FOIA clients as “savvy” because, in part through coordinated demonstrations, they were able to use the media to further a narrative that ultimately made people care about what the FOIA litigation was revealing about the program.³⁹³ From the perspective of the pro bono lawyers,

[T]he connection to the community organization and the connection to their broader goals . . . it worked seamlessly how we learned and moved the ball forward for their aims [and] is something that you know we don't see in ordinary corporate rulings. So, the way the legal rulings weaved into the advocacy, that wove into the press and how all of those things were used together to achieve our client's aims—which overall was about their advocacy for their clients, their constituencies—I think this was different from what we ordinarily see, and something that what we learned from them in terms of how the pieces fit together beyond just the law.³⁹⁴

the ability to get the information to advocates and have the open information needed to challenge the program whatever it may be. It turned out that getting the information in this case was what changed things.); Interview with Parker, *supra* note 376.

388. Interview with Parker, *supra* note 376.

389. *Id.* (explaining that the attorney client relationship was similar in that the client gets to dictate the direction of the litigation); Interview with Emerson, *supra* note 376.

390. Interview with Parker, *supra* note 376.

391. *Id.*

392. *Id.* (stating, “every [court] ruling said [the government] needed to be more transparent and [release] documents and the documents showed that [the government was] not transparent—the constant narrative of the program and Obama not being transparent [fed the narrative that if they were transparent] people/states/localities would not be signing MOA.”).

393. *Id.* (stating “[a]t every ruling they would do a press release and the press were there for every ruling and then once they got the documents they would do a press release and it was a constant flow of information to the press.”).

394. Interview with Emerson, *supra* note 376 (“It was eye opening in terms of how they worked with the advocacy organizations in terms of how what we were doing was directly impactful on their advocacy

The attorney-client relationship was tested at a critical moment in the case when the opportunity to create precedent appeared but conflicted with the clients' need to get the information as quickly as possible.³⁹⁵ The government's initial document production came in the form of a large file that, according to one of the lawyers, "was basically a bunch of junk."³⁹⁶ Another lawyer described the initial production as

[I]f someone took a box of paper and threw it up in the air and then assembled it and gave it to you, you can't use that. You don't know what goes with what, you can't you have [] authenticity, you can't validate it, you can't find the things you need. You can't say, I know that this document said this.³⁹⁷

The Plaintiffs sought access to the "metadata," the underlying information about the documents.³⁹⁸ While metadata issues were considered by courts previously, that consideration occurred in the reverse context, with the federal government seeking specific metadata from private individuals or entities.³⁹⁹ In this case, the judge issued a ruling placing the same burden, this time on the government, to produce the requisite metadata.⁴⁰⁰ "When Judge Scheindlin's ruling came down, [the] . . . reverberations around the e-discovery community and frankly, in the government, were tremendous."⁴⁰¹ The lawyers understood that "it would have taken . . . years to get the rest of the

and it certainly dictated our strategy and we won the case but the case was not what the goal was, the goal was to get information about SC and to change it and that is what they did.").

395. *Id.* (stating, "[i]t was the only right thing to do for their clients that absolutely needed the information sooner rather than later.").

396. Interview with Parker, *supra* note 376 ("When they produced it, they produced it and it was basically a bunch of junk. And I was shocked because I never [] knew that they would do this but what they produced was a lot of email, it was basically a, it's almost like paper, it was a PDF, but it was like paper, you've got a box of documents, and it was lots of the emails. And then in the email, you would see that there were attachments, but we didn't have the attachments. And then farther along in the box, in essence, there would be [inaudible] Word documents or whatever, like an agenda or a draft of a document, and we had no way of connecting it to the email. So we can say, for our purposes, Janet Napolitano got this email that had this attachment, and this is why it's so important. We couldn't do that.").

397. *Id.*

398. *Id.* (describing "[a]nd so what the metadata does[—]I mean metadata is basically information about the document. So, like [Parker] said, you know, who authored it? What's the title of the document, not inside it, but the name of that file, who was it sent to, who did it to go to, what were the dates, and things like that. But also level of searchability. So if you get big masses of documents, it's much harder to find what you need if you can't search it. And you have to go through one by one, right? And so the first thing they gave us was information that was not usable. We couldn't have, you couldn't have used it for advocacy purposes, because you couldn't possibly know what went with what or what the document was. Right?").

399. *Id.* (describing, "[typically] the government is suing you know corporations, right? . . . And the government asks for this all the time, right? They want the metadata, they want it in a certain format, they actually say, when you give it to us, you have to actually produce the documents, you know, from a technological perspective, in very distinct ways, right. And one of the things that [Judge Scheindlin] found amusing or ironic, when we said we literally said, we want to exactly what the FCC and the DOJ ask of . . . corporate America . . . her ruling was basically, yes, you have to do that. The problem was the government . . . could not comply, like literally they could not comply because their processes were not designed that way for them to actually do that.").

400. *Id.*

401. *Id.*

data because [the government] would have fought that ruling tooth and nail and we would have had to appeal it multiple times.”⁴⁰² Instead, the parties agreed collectively to allow the judge to withdraw her order in exchange for certain metadata that the plaintiffs requested.⁴⁰³ The pro bono lawyers were clear that while the victory would have been fun, it would have been detrimental to their client’s goal. In this way, it was not a hard call, even if it was personally disappointing.⁴⁰⁴

The case study also provided the opportunity to examine the foundational experiences of the lawyers we encountered. It seemed to us that they were both humble in their assessments of the role of law in movements for social change and confident in their abilities to sit at the table with experts and impacted people and contribute to discussions of policy, politics, media approaches, organizing strategy, and stories. They seemed to have an overall understanding of their role in the campaign and the larger movement and listened hard to others. Indeed, they understood the role of organizers, workers, social scientists, and activists and respected each one’s skills, relational networks, values, conceptual understandings of power, relationships, and stories. We did not expect but found that almost every lawyer involved had a formative experience in a law school clinic or externship in a sophisticated movement practice. Except for the pro bono lawyers, the lawyers working on the campaign had law school clinical experiences. With one exception, each of the lawyers talked about how their clinical experience shaped their concept of the role of lawyers. We believe that law school clinics foster the combination of accountability and efficacy questions that enable law students to see critical discourses put into practice while working with marginalized individuals, groups, and communities. Our hope for legal education moving forward is that the combination of lawyers with clinical experience, well-versed in critical theory,⁴⁰⁵ well-endowed clinical fellowship programs focused on the development of broad concepts of lawyering, and an emphasis on notions of storying fostered in some legal writing curriculums, will create the conditions in which novel approaches to lawyers’ work might thrive.

We understand that, as clinicians, we might be predisposed to find our theory in the data, as opposed to grounding theory in the data presented. However, it seems apparent to us that the social movement lawyers we

402. Interview with Parker, *supra* note 376.

403. *Id.* (stating that “the metadata we got eventually . . . was the result of an order from Judge Scheindlin that then the parties agreed collectively to allow her to withdraw. . . [we agreed to this] because [it was] in the interest of our clients, it would have taken us years to get the rest of the data, because they would have fought that that ruling tooth and nail and we would have had to appeal it multiple times. And so we . . . backed off, [and] they agreed to give us certain metadata to avoid a larger ruling that would hurt them at the appellate level.”)

404. *Id.* (explaining “It was not a hard call, personally disappointing, but ultimately, [we] are representing a client and that was the best result and so you do what the client says.”)

405. Cummings, *Movement Lawyering*, *supra* note 8, at 1581–85 (explaining that the critical theory including professionalism and constitutional law texts shares the praise or blame depending upon the situation).

visited exhibited a humbleness, yes, but also a confidence in skills and clear-eyed assessment of structures of power and the limits of the law, along with a commitment to finding ways of working with, and in, movements that do not recreate the hierarchies of domination, oppression, or fecklessness that have occasionally infected earlier descriptions of movement lawyers' work.⁴⁰⁶

B. *Meso Level: Lawyering for the Campaign*

At the meso, campaign level, lawyers operated as an important part of an overall effort, neither leading the campaign nor acting subservient to it, but engaged with full agency in planning strategies, implementing tactics, and reflecting on action to renew the process. The campaign relied upon lawyers' FOIA litigation, with even preliminary motion practice often accompanied by mass demonstrations, to uncover opt-out opportunities, which were then used to pressure local authorities to resist mandatory implementation. This, in turn, fed into a powerful narrative of a program founded on deception that undermined local law enforcement and community building.

There was a consistent theme of humility (exhibited by lawyers) and a willingness to do whatever was needed to serve the larger collective goal.⁴⁰⁷ From the organizer's perspective, lawyers are one of their greatest tools.⁴⁰⁸ "Organizers' jobs are to be in service of community and make a way out of no way."⁴⁰⁹ But organizers also acknowledged the differences that made their relationships challenging at times. One organizer described the

[P]otential rub between lawyers and organizers comes from the inversion of certain 'traits.'⁴¹⁰ I think one of the tensions is . . . wanting to have agency and wanting to be a partner in strategy, and not wanting to

406. *Id.* at 1691–95. We understand that we are not the first to note that movement lawyering combines a critical look at law's potential for change with a client-centered approach developed in clinical practice over the past thirty years.

407. To some extent, substituting the campaign and, at the macro level, the movement itself, as the client allowed these lawyers to maintain their self-professed client-centered focus while negotiating—some might say skirting—the critiques that client-centeredness tends to atomize disputing. This also allowed lawyers to substitute a movement leader for the traditional lawyer in dominating the members and detour from scrutiny of systemic power structures to overweening navel gazing. *See Bezdec, Silence in the Court*, *supra* note 53, at 539. Robin West, *The Zealous Advocacy of Justice in a Less than Ideal Legal World*, 51 STAN L. REV. 973, 974 (1998); *see generally* Paul R. Tremblay, *Critical Legal Ethics*, 20 GEO. J. LEGAL ETHICS 133, 143–44 (2007); Julie D. Lawton, *Who is My Client? Client-Centered Lawyering with Multiple Clients*, 22 CLINICAL L. REV. 145 (2015).

408. Interview with Blake, *supra* note 133.

409. *Id.* ("I think, organizers, we understand ourselves as doing whatever it is needed to build the power of the group to get us towards the goal. And so, you know, in my, in my time I've been a book-keeper, I've been a grant writer, I've been an organizer, I've been a communications person, I've been a facilitator, I've been a strategic planner. Because in our tiny grassroots groups . . . there isn't a distinguishing between roles, and what we do. And, what, I think there's an ethos for organizers of being in service of community and figuring out, making a way out of no way. And so, the legal work and the role of the lawyers in all of that feels like one more tool in our tool belt . . . Today, it might be a direct action; tomorrow, it might be a FOIA discovery claim; the day after that it might be a lawsuit under the Administrative Procedures Act. But all of these things are just tools and tactics that we're deploying in service of the strategy and in service of kind of a longer goal.").

410. *Id.*

just be objectified in that way of being told what to do. And . . . that isn't to create a hierarchy of the organizer as the decider and everybody else is there to do what they're told. It's just saying that, strategy is about deploying whatever resources and tools we have access to, and each of us with a specialty is there to lend our specialty in service of the collective.⁴¹¹

According to this organizer, the training that lawyers (and politicians) receive is the inverse of what helps movements.

[T]here are certain traits that . . . are inverted . . . where part of the training seems to be that you are there to be the smartest in the room, to be the one who knows best, to be the one that helps save [others]. . . . [T]hat's where it can be like a little bit of a culture clash of deciding things.⁴¹²

Another way that lawyers and organizers noticed the potential clash stems from their respective senses of time.⁴¹³ Organizers can be impatient and desire to move quickly to support organizing efforts on the ground that are changing by the moment.⁴¹⁴ Lawyers have a much slower sense of time as litigation moves at a different pace.⁴¹⁵ On different levels, lawyers are said to misunderstand the organizers' imperative to move "at the speed of trust" in taking the time necessary to build a self-reinforcing, sustainable, organized movement.

While there were conflicts at times between the lawyers and organizers,⁴¹⁶ there was also close collaboration.⁴¹⁷ Lawyers described the working

411. *Id.*

412. *Id.*

413. Interview with Sydney, *supra* note 177.

414. Interview with Blake, *supra* note 133; Interview with Jake, Immigrant Rights Community Organizer (Feb. 12, 2020) (transcript on file with authors); Interview with Sydney, *supra* note 177.

415. Interview with Sydney, *supra* note 177. One of the lead organizers is now a lawyer and can see the stark contrast around time: "Looking back now in my role as an attorney one year seems like a really short amount of time, but when I was an organizer that felt incredibly long."

416. Interview with Josh, *supra* note 194 (stating, for example, "[T]here would be times when the legal team thought it would be helpful to have an action, like a public action that would coincide with something happening in the litigation like filing a motion or something like that. And the organizers would feel like it wasn't actually . . . didn't make sense for their local goals. You know what I mean? So, there was like a little tension there, I guess it was like, everybody had too much to do, so it was like, 'Why do we have to drop everything and like, plan a rally just because you're filing a motion? That doesn't necessarily make sense?' But I feel like people were generally pretty open about that. They'd just talk about it, figure it out."); Interview with Jamie, *supra* note 205 ("I think there were these moments where the organizers were like, you know, I think in the preliminary injunction hearing, like a judge did not care about [our organizer's] testimony. But it was important, I think, from a, from a mobilization perspective, to have her testify. And so, you know, I think for people in the audience that day, some of the organizers, maybe not NDLOM so that other people were like, yeah, like, you know, that's like, [our organizer] was testifying, she's like, she's our people and she was the one up there telling the judge what's going on. And, you know, there was clearly some resistance from the judge on about like, putting her on as a witness at all like, what was the relevant and so for them, for people in the audience, for community members and organizers to see like lawyers pushing back against a judge that made, and I don't know that it was persuasive at all or really made a difference but she did allow us to put the testimony on.").

417. Interview with Josh, *supra* note 194.

relationship as a truly equal partnership among affected community leaders, organizers, and lawyers.

[I]t seems like organizations are either structured where lawyers sort of lead the way, or alternatively, there are very few lawyers and they just sort of do discrete tasks that the organizers or advocates ask them to do. I think the Secure Communities campaign was truly [equal] from the beginning, like the litigation resides together with organizers and advocates. And that's very explicitly understood by everybody as one part of the strategy to achieve some bigger goal that can't be achieved through the litigation alone. And I feel like that gives lawyers the humility that they sometimes don't have and the organizers effective ownership of the litigation that sometimes is missing.⁴¹⁸

Because of the way S-Comm was strategically, silently, and slowly being rolled out in states across the county, advocates initially did not know much about the workings of the program. The FOIA litigation, which advocates refer to as “advocacy through inquiry,” was designed to obtain information about the program. The lawyers and advocates understood that the information's value was dependent upon the organizers' abilities to utilize it effectively. At the same time, the litigation was a tool for organizing media strategies. The lawyers and organizers used every opportunity in the litigation to bring publicity to the issues. Press were kept in the loop on an ongoing basis and were aware of each motion filed in the case and each government disclosure. This was a tool that the organizers could use to galvanize their respective local campaigns. Litigation was designed to serve the intermediate objective of “advocacy through inquiry” and supported the overall frame of dominating and restructuring the narrative—front-end advocacy for the Plaintiffs to define the narrative and back-end narrative for the Respondents who tried to justify decisions or switch prior decisions.

Litigation, and for that matter, the lawyering role in general, were geared toward enhancing so-called indirect effects such as media coverage, public attention, coalition building, political pressure, and bending the overall cultural fabric. Although litigation's direct effects were instrumentally designed to support indirect effects, the strategy was by no means incidental or unplanned. It was evident that the Administration was driven to change more based on media attention and, to a lesser extent, local politics, than by the prospects of carrying out, much less losing, in litigation. Government officials explained that, from their perspective, the FOIA litigation was “irrelevant.” From an internal government perspective, the litigation was a waste of time and money, and the modalities that impacted government decision making were the media and concerns being raised at the congressional, state, and

418. *Id.*

local levels. A review of the FOIA documents reveals that DHS legal resources were used internally as the government tried to figure out the best way to publicly present the program.⁴¹⁹

By contrast, we found that even if the actual direct consequence of responding to a FOIA request did not impact the government's actions, the documents and information unearthed through the FOIA litigation were the very foundation of success with the media, law enforcement, and other legislators (federal, state and local)—the very things that even DHS officials concede made the difference. The lawyers we spoke to were more than willing to fulfill traditional lawyering roles in support of campaigning and organizing goals, understanding the relationships between the immediate product of their actions, the campaign, and the larger movement. The legal work was designed to support the organizing, but lawyers worked collectively to coordinate moves and roles in litigation, media, social science reports, direct actions, political influence, and even overall organizing goals. Indeed, even large-firm corporate lawyers enthusiastically embraced their place at the table of movement advocacy. In this, they were hardly alone.

What impact did “traditional” lawyering have on government decision making? The answer to this question depends upon perspective and an understanding of the goal of the litigation. Lawyers inside the Obama administration claimed that the FOIA litigation itself did not directly play a big role in shaping the government's response.⁴²⁰ Instead, hearing from state and local officials and members of Congress was instrumental in rethinking the program and deciding how to respond.⁴²¹ Another DHS official explained that the FOIA litigation did not impact the government's decision making,⁴²² whereas the media and input from Congress made great impacts.⁴²³ As one DHS official explained,

419. Peter S. Vincent, Principal Legal Advisor, Office of the Principal Legal Advisor (OPLA) for U. S. Immigr. and Customs Enf't, U.S. Department of Homeland Security was asked to spend time and resources on the legal question of mandatory participation in S-Comm; see ICE FOIA 10-2674.0002998. (“OPLA is gathering the legal support for the ‘mandatory’ nature of participation in 2013” and “Peter, I understand Director Morton asked you to pull together a binder of the legal underpinnings.”) Other email correspondence illustrates DHS's effort to find legal support for the desired position. “As we continue to refine our implementation strategy, Mr. Venturella has asked us to look into a legal mandate, provision, law, etc. that would allow ICE/DHS to request fingerprint information from the FBI for law enforcement and/or criminal justice purposes, regardless of whether states and locals can opt in or out.” ICE FOIA 10-2674.0011149-0011151, Email from Randi Greenberg, Secure Cmty, Dir. of Outreach and Communications, ICE to [recipient redacted] (Aug. 2, 2010).

420. Interview with Sam, *supra* note 180.

421. *Id.*

422. *Id.* (stating, “I could care less about the FOIA case, I mean really could care less about the FOIA case. What scared me was, this program was important for everything we're trying to accomplish. How can you—ICE needed this program to transition to a public safety organization that you got 9000 agents, they're, they're immigration enforcement agents only, we have to do something with them. We can't tell them as much as the advocates would like to stay at home and do the *New York Times* crossword puzzle, instead of going out. And so, if we've got to, if we've got to deploy these 9000 agents, which we are legally required to do, let's deploy them and give them the tools focused on the population we want, and the single best place to do that is in jails and prisons. It still is.”).

423. *Id.* (stating, “[m]edia, absolutely. The *New York Times* editorial page was killing us. Absolutely. . . [l]etters from congressman, angry, . . . the advocates are out there lobbying members of

I'd wake up every morning and . . . [the] first thing [I do] is just double check the *New York Times* to make sure there isn't some story about ICE in there, that I'm going to get a call from the White House in five minutes. You know, but I hate to say it, the FOIA suit did not move the needle. But on . . . this issue, advocacy was the most important, then media.⁴²⁴

Notwithstanding their protestations to the contrary, our review of the FOIA production clearly demonstrates that officials were deeply concerned, even obsessed, with media reports of what the FOIA litigation revealed. More to the point, the FOIA litigation directly informed the advocacy which officials claimed turned the tide against S-Comm.

C. *Macro Level: Lawyering for the Movement*

NDLON organizing-visionary, Pablo Alvarado,⁴²⁵ told us that taking down S-Comm, while important in itself to members, was, from the start, part of a larger narrative of shared identity and struggle at the heart of persistently innovative organizing.⁴²⁶ At the macro level, lawyers were more or less active in selecting among and spreading the gospel of dispersed action strategies and storylines. These strategies and storylines were crafted into an overall narrative that developed into what University of Washington sociologist Margaret Levi calls “communities of fate,”⁴²⁷ and what we describe as a melding of the “organizer’s story” with the “lawyer’s story.” All lawyers we talked to—no matter how they identified in terms of lawyering style or how invested they were in constructing an overall narrative of shared identity and struggle that could sustain a movement—told us that they understood the contributions of their work in constructing this overarching narrative, and, to a person, told us how much they enjoyed having a place at the table in building that narrative.

NDLON has long operated on a model of distributed, emergent, (trans) local, integrated organizing for social change. NDLON links member-led autonomous workers’ centers together, providing support and coordination. The organization culls from the work of multiple experiments in advocacy in real time and scales up at national and international levels, as appropriate.

Congress. That’s effective, the media is effective, and just direct advocacy with the White House [was] effective. You know, all of it was effective, honestly, litigation was the least effective. Litigation just didn’t move, doesn’t move the needle. It was everything else that moved the needle . . . [when the Secretary has members] of her own party mad at her . . . and blaming her for things. All of that very effective . . . you can’t have Senator Durbin think the [Secretary] is a problem. You just can’t have that.”)

424. *Id.*

425. The description is ours. Mr. Alvarado is the co-executive director and a founder of NDLON among other impactful projects.

426. Interview with Alvarado, *supra* note 35.

427. See John A. Ahlquist and Margaret Levi, IN THE INTEREST OF OTHERS: ORGANIZATIONS AND SOCIAL ACTIVISM 8, 26 (2013) (explaining that when we share a common fate, we are called to engage in concerted action for a shared remedy that binds us together).

NDLON, its member organizations, and members structure their organizing work this way to capitalize on their own power and change power dynamics at different levels of society.

In this emergent, nimble, multidimensional, integrated, (trans)local, and humble-in-legal-judgment-but-involved-in-organizing model, lawyers compressed the accountability and efficacy domains in a problem space.⁴²⁸ The power of narrative and storytelling formed the core of the campaign in the same way that it forms the core, and perhaps the periphery as well, of lawyering.⁴²⁹ In the campaign we studied, advocates, organizers, and lawyers working together created the narrative, and the government was left to react. In turn, the government's often awkward reactions were used to further develop the contours of the story. In particular, instead of trashing the indeterminacy and accountability costs of rights talk,⁴³⁰ rights talk was effectively used by organizers and lawyers to build an identity-based movement that connected the most alienated with larger impacted communities and movements.⁴³¹ Law talk enabled a vocabulary for shared injustices and identities to inspire and sustain collective action.⁴³² The very indeterminacy of rights talk allowed for disparate factions and individuals to sustain the movement despite often intense fractionalizing pressures. Indeterminacy provided a narrative umbrella under which different factions could place their own stories, further their own interests, and unite despite the remaining differences among them.⁴³³

Advocates understood that to topple S-Comm, they had to create a compelling narrative that focused on government deception instead of the deportation of criminal aliens, which would have been impossible to fight. Advocates

428. The S-Comm campaign is a particularly striking example of this fractal geometry of organizing, recreating, enforcing and expropriating repertoires of contention in different contexts, in support of immediate institutional effects which recursively support and are supported by the larger organizing missions.

429. Martha Minnow, *Stories in Law*, in *TELLING STORIES TO CHANGE THE WORLD* 249, 257 (Rickie Solinger, Madeline Fox & Kayhan Irani, eds., 2008). We take no position, here at least, in the disputes over whether storytelling is the basis of all human thought, the basis at least for thinking about big, fuzzy problems implicating meaning and understanding in human action, or just the mode by which lawyering, among other endeavors, proceeds. Compare Roger C. Schank & Robert P. Abelson, *Knowledge and Memory: The Real Story*, in *KNOWLEDGE AND MEMORY: THE REAL STORY* (Robert S. Wyler, Jr., ed., 1995); ROGER S. SCHANK, *TELL ME A STORY: NARRATIVE AND INTELLIGENCE* (1995) with Minnow, *Stories in Law*, *supra* (summarizing Hannah Arendt's use of narrative to lend meaning to human actions) and ROBBINS ET AL., *YOUR CLIENT'S STORY*, *supra* note 30 (employing storytelling as a tool for lawyering).

430. STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS* 86–87 (1974).

431. Interview with Alvarado, *supra* note 35.

432. Lauren B. Edelman, Gwendolyn Leachman & Doug McAdam, *On Law, Organizations, and Social Movements*, 6 *ANN. REV. L. & SOC. SCI.* 653, 664 (2010).

433. Compare POLLETTA, *IT WAS LIKE A FEVER*, *supra* note 28 (finding that the indeterminacy of storytelling in organizations provides room in which factions of movements can cohere despite differences), with LESLIE R. CRUTCHFIELD, *HOW CHANGE HAPPENS: WHY SOME SOCIAL MOVEMENTS SUCCEED WHILE OTHERS DON'T* 103–18 (2018) (finding every social movement that the author's group had studied had been wrought by conflicts over credit, funding, personalities, ideologies, relationships, and/or tactics) and NICHOLLS, *IMMIGRANT RIGHTS MOVEMENT*, *supra* note 116, at 191–93 (discussing conflicts between national and local immigrant rights organizations and among national organizations that were dividing immigrant rights movements in Los Angeles and across the United States during the first reign of S-Comm discussed in this Article (roughly 2008–2014)).

intentionally shifted the narrative, even changing the name to get rid of the words “secure” and “communities,” to one of government deception, or at the least ineptitude, that led to the deportation of “innocent” immigrants. Because the advocates were the first to create the narrative, the government was left to react and combat the image that it had been lying about the program’s scope and implementation.⁴³⁴ Advocates also reframed the narrative about safety by creating and publicizing studies that showed non-dangerous immigrants were being deported and that the use of local law enforcement to carry out immigration laws actually created less secure communities.⁴³⁵ Once again, the government was on the defensive, trying to convince local and state officials that this program was easy to implement, would concentrate on dangerous criminals, and would not undermine community policing in their communities.

Strategic utilization of the press was key from the beginning. Immigrant rights advocates, and the government, in response, attempted to use the press to spin their respective messages.⁴³⁶ A review of the FOIA documents demonstrates that a huge amount of time was spent by ICE, in particular, and the

434. Opinion and Order, *NDLON et. al v U.S. Immigration and Customs Enforcement Agency et. al.* No 10-CV-3488 (S.D.N.Y July 11, 2011) per Scheindlin, J. slip. op. at 32. Judicial findings only supported the advocates’ position finding that “there is ample evidence that ICE and DHS have gone out of their way to mislead the public about Secure Communities” and “whether participation in the program is mandatory or voluntary.”

435. The first claim relates to who was being deported. The government’s justification for S-Comm was rooted in the claim that the program was designed to deport dangerous, criminal immigrants. Advocates working closely with local communities knew this assertion to be false. Instead, they reported that the majority of individuals picked up by ICE either were charged with a minor criminal offense, such as a traffic violation, or no criminal offense at all. If advocates relied upon their assertion against the government’s assertion without concrete evidence, the government’s narrative would prevail. Understanding this, advocates and lawyers used the records obtained through the FOIA litigation to conduct a social science study that exposed the program’s practice of deporting those with little or no criminal history. The second claim addressed, through social science study, the question of whether S-Comm was actually making communities safer or undermining community policing. Advocates and lawyers built off relationships developed in 2008 through strategic advocacy with the Police Foundation. Thinking broadly back in 2008, advocates knew that local law enforcement would be part of the government’s immigration enforcement tools. The 287(g) program was used to deputize local law enforcement as immigration officers and advocates understood that this trend was not going away. Having identified potential allies back in 2008, lawyers were able to strategically engage sheriffs and local police who they believed would be sympathetic to their concerns. Using funds provided by the Ford Foundation, the advocates and lawyers designed a study to flip the government narrative on its head. Instead of S-Comm making communities safer, the study showed that using local police as immigration enforcement officers undermined public safety. With these two narrative threads in their favor, advocates could design a media campaign to undercut the government’s fundamental assertions about S-Comm.

436. An illustrative example occurred when the FOIA litigation was filed. The day the litigation was filed, the Uncovering the Truth on ICE and Police Collaboration Campaign began a week-long effort of rallies and press conferences in fourteen cities to denounce an ICE-Police collaboration program that rights groups said could have dangerous and disastrous effects on community safety. See *Ctr. for Const. Rights, National Day Laborer Organizing Network (NDLON) v. US Immigration and Customs Enforcement Agency (ICE)*, <https://ccrjustice.org/home/what-we-do/our-cases/national-day-laborer-organizing-network-ndlon-v-us-immigration-and-customs/> [<https://perma.cc/RHM5-BC5F>]. Two days later, an ICE memorandum on a media counter-offensive against NDLON, scheduled for April 26-30, 2010, was leaked. The memorandum included the targeted placement of opinion-editorials in “major newspapers in the right cities where protests are planned.” On the day of the launch, ICE Assistant Secretary John Morton placed opinion editorials in Atlanta, Georgia; Miami, Florida; and Morristown, New Jersey—all sites of the campaign. See *id.*

Administration in general, on how to respond to the media attention that the campaign had generated. In terms of dedicated hours, agencies spent most time dealing with media reports, responding to media, and actively configuring policy in anticipation of media coverage. While publicity was garnered around the filing of the complaint and subsequent action on the case, the media coverage was not designed to focus on whether litigation was successful. In fact, some scholars submit that the real value of litigation strategies (win or lose) is in their power to frame media accounts.⁴³⁷ This certainly played out in this context.

(Trans)local organizing, distributed organizing, emergent strategy, and integrative movements were all employed in diverse, developing coalitions of organizations, roles, and institutions.⁴³⁸ The campaign was striking in both equality of roles and fluidity of expertise. There was horizontal equality—across levels of organization nationally and locally, in terms of political, social science, media, legal, labor, organizers, and day laborers—and vertically—among local autonomous centers of activities and national coordinating social movement organizations. This flexible, adaptive, and coordinated network of loosely-coupled organizations bound by strong relationships and authentic communication proved effective in the near-term goal of changing a pernicious federal government policy. The approach also strengthened ties binding the network together and individuals' ties to that network by realizing the power of collective action around a shared identity. Efficacy thus is enveloped in the notion of accountability. There is reason to suspect, from our limited data, that accountable structuration⁴³⁹ will be more effective. That is because accountability might change the terms of efficacy and because the kinds of accountable structures employed in the campaign are likely to be better at solving the kinds of complex social problems that challenge the best movement lawyers.

Visionary and ruthlessly effective organizers, such as NDLON's Pablo Alvarado, taught us that it was possible to seek to win based on legal discourse's ability (or potential) to expose existing power relations and provide

437. Roy B. Flemming, John Bohte & B. Dan Wood, *One Voice Among Many: The Supreme Court's Influence on Attentiveness to Issues in the United States, 1947-1992*, in *LEVERAGING THE LAW: USING COURTS TO ACHIEVE SOCIAL CHANGE* 53–54 (David A. Schultz, ed., 1998).

438. Interview with Alvarado, *supra* note 35. See BROWN, *EMERGENT STRATEGY*, *supra* note 35 (describing ground-up emergent strategies and tactics in movement organizing and fractal structures in construction of social movement organizations involving similar structures at different levels of planning); JANE F. MCALEVEY, *NO SHORTCUTS: ORGANIZING FOR POWER IN THE NEW GILDED AGE 187–89* (2016) (describing versions of integrated, whole-person, and whole-community organizing in the Chicago Teachers' Strike and Smithfield Foods organizing campaigns and distributed organizing in flat organizations in which diverse roles are horizontally and vertically integrated in Make the Road, New York's organizing model, including that organization's role in the anti-S-Comm campaign); see also GORDON, *SUBURBAN SWEATSHOPS*, *supra* note 45 (discussing the author's work with and organization of Make the Road, New York).

439. GIDDENS, *THE CONSTITUTION OF SOCIETY*, *supra* note 27 (explaining that the term 'Giddens' connotes the idea that individual or organizational autonomy is influenced by the structures in which it is exercised, but at the same time, the exercise works to construct those structures).

stories that can congeal incipient identities. Moreover, accountable lawyering models were effective in securing immediate institutional relief, too.⁴⁴⁰ Think of how this immigrant rights community came together to conduct this campaign. Local workers highlighted stories of the increasing use of local policing to detain contingent workers and their missing colleagues. National organizers and advocates recognized the phenomenon and planted the seeds of a campaign against S-Comm while working at a focused gathering of national experts. Emerging from discussions among local and national leaders was an imagined network of local campaigns to opt out of S-Comm, each based on local contexts and power relationships. A focused FOIA initiative was used to inform the campaign but also served as a vehicle around which to coalesce, forge new relationships, involve diverse voices in the conversation, gain media attention, and embarrass the government. The information obtained and the relationships developed garnered energy for locally autonomous opt-out campaigns. These local opt-out campaigns, in turn, provided energy, leaders, personalities, attention, and a concise enough theory of the case to support a national movement to constrain S-Comm. As the movement grew, more localities sought to opt out, bringing additional media attention and eventually the effective end of S-Comm (for a time).

The campaign against S-Comm did not happen in isolation. The efforts at CIR revealed splintering within the larger immigrant rights movement. In a strategic effort to win bipartisan support for CIR, national immigrant rights organizations were willing to trade stepped-up enforcement for the hope that Republicans would be swayed to support CIR. Despite continued concessions on enforcement, efforts at CIR were never realized. The S-Comm advocates were skeptical of the national model that they saw as far removed from the people most impacted, caught up in establishment democratic party politics, and providing too much deference to President Obama. The S-Comm advocates, organizers, and lawyers, instead engaged in a sophisticated, coordinated strategy to leverage political pressure at state and local levels to influence national policy in a way recommended by community-lawyering models.⁴⁴¹ Electoral issues at the local and state levels were part of the strategy of S-Comm opposition groups.⁴⁴² Lawyers worked flexibly with communities as clients, co-constructing lawyering roles in ways that

440. Cass R. Sunstein, *On the Expressive Functions of Law*, 144 U. PENN. L. REV. 2021, 2021 (1996) (“We are all Expressionists part of the time. Sometimes we just want to scream loudly at injustice, or to stand up and be counted. These are noble motives, but any serious revolutionist must often deprive himself of the pleasures of self-expression. He must judge his actions by their ultimate effects on institutions.”).

441. Ashar, *Movement Lawyers for Immigrant Rights*, *supra* note 13, at 1497.

442. See ICE FOIA 10-2674.0006599, Email from Special Assistant to the Sheriff in SF and the Special Assistant to the California Attorney General (Sept. 29, 2010) (wanting to hold off and have the meeting after the election because “Secure Communities is being tainted by politics because the California Attorney General, the mayor of SF and the DA of SF are all running for state office.”). The email also said that they would make it clear that it was the SF sheriff who was requesting that the meeting be delayed—if they got requests, including from immigrant groups and the press.

simultaneously supported community priorities and empowered community leaders.

Because the S-Comm campaign had organizers and advocates across the country, they were ever aware of what was happening on the ground in different localities. They were poised to use this information to their advantage in creating another successful aspect of the campaign. They utilized the draconian provisions of Arizona SB 1070 and Sheriff Joe Arpaio's discriminatory actions as a foil in other localities. They pushed localities known to be sympathetic to immigrants to adopt policies opposite of those being adopted in Arizona. These localities, known as "beacon cities," provided a contrast to the more restrictive policies being implemented in Arizona and other more conservative cities.

D. *A (Very) Preliminary Theory Arising from this Case Study*

The lawyers we studied not only aspired to but inhabited the characteristics and roles attributed to movement lawyers. They were appropriately skeptical of the efficacy of litigation to directly produce legal change but appreciative nevertheless of the adjacent indirect effect of litigation. In this case study, the indirect effects of litigation changed narratives and, in turn, relationships that impacted the ways affected communities negotiated the moment. Decidedly humble in their roles in relation to organizers, lawyers understood organizers as doing the heavy lifting of social change. Nevertheless, these lawyers were assertive at the tables where organizing was imagined, and organizers, activists, and other movement actors listened hard to what the lawyers had to say in mapping the contours of entrenched power and in investigating leverage points for concerted action.

Such a fluid, multidimensional, adaptive community effort in which impacted groups were heavily represented and listened to led to effective immediate institutional gains in this instance. We suspect that in any complex human endeavor governed by entrenched narratives such as rules or institutional exigencies, impacted individuals will have insights on efficacy—as well as accountability—which effective professionals should heed.⁴⁴³

Critics of law as a modality for social change deride law as ineffective because legal change only codifies social change already wrought through other means.⁴⁴⁴ Worse, elite lawyers tend to rip the core that animates more effective and more democratic social movements, translating systemic oppression into causes of action already deemed remediable by legal institutions.⁴⁴⁵ Ultimately, we admit that law's power, such as it is, rests on its elite-centered legitimacy, and seeking redress through law entails

443. White, *Sunday Shoes*, *supra* note 88.

444. Cummings, *Social Movement Turn in Law*, *supra* note 8, at 393.

445. *Id.*

further retrenching law's legitimizing machinery.⁴⁴⁶ In some instances, a lawyer's work might provide language to change social narratives, provide affected groups with dignity-enhancing recognition and offer meaning to individual parties.⁴⁴⁷ Litigation might even create issues (win or lose) that social movements can use to enhance organizing, attract public attention, and force opponents into the open.⁴⁴⁸ But ultimately, while lawyers might try to transcend or extract themselves from liberal institutions and the patterns of thought that sustain them, part of their strength is the ability to situate grievances within and outside of the system.⁴⁴⁹

Lawyers in our small sample negotiated this divide between law and politics, and legitimacy and insurrection, by sharing a vision of how power is exercised with the organizers and affected communities with whom they worked. The lawyers we met worked side-by-side with organizers and activists. Their humility was not realized in subservience. Together, they mapped dynamic, self-sustaining, emergent, and dispersed power and imagined equally dispersed, emergent, adaptive strategies to affect power relations. Lawyers' investment in mapping power fostered an ability to envision leverage points where lawyers' skills, networks, and legitimacy could be utilized simultaneously at micro, meso, and macro levels. A table full of individuals with diverse outlooks on a common problem led to visionary explorations of the problem and better selection devices for the solutions that emerged from it.⁴⁵⁰

A diverse group of advocates and activists trying out different strategies and coordinating what works is an optimal strategy for exploring any aleatory problem space, but it is especially critical in dealing with complex adaptive systems, such as those faced by marginalized groups in law and (or as) politics.⁴⁵¹ In such a system, the institutions and roles that comprise it are changing in reaction to what activists and movement lawyers are doing. In this way, the already hostile ground beneath activists' feet is constantly

446. *Id.* at 371. See MICHAEL W. McCANN, *TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM* 200 (1986).

447. McCANN, *RIGHTS AT WORK*, *supra* note 20, at 10.

448. Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULLETIN 61, 63 (2011); McCANN, *RIGHTS AT WORK*, *supra* note 20, at 139.

449. Austin Sarat and Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 9 (Austin Sarat and Stuart Scheingold, eds., 1998); see also Scott Cummings, *Puzzle of Social Movements*, *supra* note 8 at 1159 (referring to movement liberalism's failure to transcend the divide between politics and law, and concluding that movement liberalism, evades reckoning with the underlying normative question of when, courts and lawyers should be leaders in social movements?).

450. The logic is more evolution than physics; we can expect to produce a trajectory rather than a typology. See FRITJOF CAPRA AND UGO MATTEI, *THE ECOLOGY OF LAW: TOWARD A LEGAL SYSTEM IN TUNE WITH NATURE AND COMMUNITY* 22–29 (2015).

451. See Smith, *Order for Free*, *supra* note 28; STUART A. KAUFFMAN, *REINVENTING THE SACRED: A NEW VIEW OF SCIENCE, REASON AND RELIGION* 270–73 (2008); GREEN, *HOW CHANGE HAPPENS*, *supra* note 31, at 112–34; Lubet, *Professionalism Revisited*, *supra* note 53.

churning.⁴⁵² Lawyers can learn from organizers who have accepted this proposition and incorporated it into their working lives.⁴⁵³ It would hardly be surprising to find that, while organizers taught lawyers about power mapping and how to affect power relations, lawyers were vital in identifying institutions and roles that had prevented change and adept at mapping the institutional history of what kept a dysfunctional power structure in place.⁴⁵⁴ Together they drew a more complete picture of the power structures the movement sought to change.

Rather than seeking spots in which to lead or follow on social movements, lawyers acted more like the vision of catalysts set forth by Jonah Berger: “[R]ather than increasing the frequency of [molecular] collisions, as adding energy does, catalysts increase their success rate. [Catalysts encourage] reactants to encounter each other at the right orientations for change to occur.”⁴⁵⁵

Lawyers, prominently sitting at the table mapping emergent power, offered valuable input on why the change that activists sought hadn’t already been realized. This input included assessing how lawyers’ own roles, including their role in sustaining legal institutions, reinforce existing power relations. Understanding these power relationships was core to understanding the system they sought to change.⁴⁵⁶ In the absence of this critical understanding, any effort at change would likely have been impaired.⁴⁵⁷

In the process of jointly mapping power relations, lawyers of all stripes and organizers became willing to concede that power might be the emergent residue of the interactions between dispersed institutions and roles acting independently in identified problem spaces. In this view, as one organizer told us, dispersed power requires dispersed action, so you won’t find a linear solution to a non-linear problem. You have to think non-linearly and plan holistically.⁴⁵⁸

452. SCOTT E. PAGE AND JOHN H. MILLER, *COMPLEX ADAPTIVE SYSTEMS: AN INTRODUCTION TO COMPUTATIONAL MODELS OF SOCIAL LIFE* 213–27 (2007) (explaining that one strategy, often optimal, to manage complex adaptive systems such as law, social conditions, economies, or organizations is to balance excavation or action with distributed experimentation and inquiry).

453. MICHAEL J. PAPA, ARVIND SINGHAL AND WENDY H. PAPA, *ORGANIZING FOR SOCIAL CHANGE: A DIALECTICAL JOURNEY OF THEORY AND PRACTICE* 233–37 (2006); BROWN, *EMERGENT STRATEGY*, *supra* note 35, at 44–121; GREEN, *HOW CHANGE HAPPENS*, *supra* note 31, at 9–28.

454. Perhaps lawyers have are peculiarly adept due to their origin stories in two of the more robust, entrenched and dysfunctional institutions in society today: the bar exam and United States legal education. These origins, along with lawyers’ socialization in the legal profession—which is itself concerned with dealing with entrenched historical contingencies—has left lawyers uniquely well-qualified to identify these power dynamics.

455. BERGER, *THE CATALYST*, *supra* note 81, at 6 n.1.

456. GREEN, *HOW CHANGE HAPPENS*, *supra* note 31, at 240 (advising activists to spend more time understanding the systems of which they are a part and less on planning actions to affect such systems to be effective agents of progressive social change).

457. *Id.* ERIC LIU, *YOU’RE MORE POWERFUL THAN YOU THINK: A CITIZEN’S GUIDE TO MAKING CHANGE HAPPEN* 31 (2017) (pointing to systems justification theory as support for the idea that legitimacy is a story that power tells itself that it deserves power; the powerless tell a contrasting legitimacy story about their own lack of power and the justness of power over them. Lawyers’ tools were effective in upsetting such feedback loops by forced outing of power systems’ contradictions).

458. Interview with Alvarado, *supra* note 35.

The contours of the problem space from which legally robust power structures emerge might be imagined, in lawyering's discourse, in terms of Galanter's case congregations (the institutions, roles, habits, relationships, and communicative practices of a particular legal community over time),⁴⁵⁹ Halliday and Karpik's Legal Complex (denoting the legal occupations which mobilize on a given issue at a given historical moment, usually through collective action that is enabled through discernible structures of ties among different roles in law),⁴⁶⁰ or the emergent order arising from the interactions of institutions, roles, rules, and ideologies in space known as assemblage theory.⁴⁶¹ In each instance, an inclusive space is envisioned in which order might arise in the absence—or even in contravention⁴⁶²—of central control or determinate rules. Over time, relationships, practices, and communications structures build an emergent order that might be altered, exploited, or exposed—or out of which a subversive order, itself emergent or planned, might arise.⁴⁶³

No matter which formulation is imagined, and we favor the more complete assemblage theory, the extant order is sustained with all its contradictions and redundancies. That is, the assemblage that implemented and sustained S-Comm also identified why S-Comm had not yet been abolished or changed. Like Berger's catalysts, the lawyers we met added value to social movements in, among other qualities and actions, understanding the language of, and threats to, entrenched power structures. The power structures were comprised of loosely-coupled institutions and roles, rules and ideologies, and habits and intentions. These dynamics played out through relationships and stories told in the elite spaces where power is enjoyed.

However clearly case congregations, the legal complex theory, or assemblage theory describe the problem space of the corridors of power, none of these theories gives either the movement lawyer or progressive organizer a hint as to how to change the products of dispersed exercises of power.⁴⁶⁴ Complexity theory might.

459. Mark Galanter, *Case Congregations and Their Careers*, 24 L. & SOC'Y REV. 371 (1990).

460. Lucien Karpik & Terence C. Halliday, *The Legal Complex*, 7 ANN. REV. L. & SOC. SCI. 217 (2011).

461. Jason Dittmer, *Geopolitical Assemblages and Complexity*, 38 PROGRESS IN HUM. GEO'Y 385, 387 (2013); MANUEL DELANDA, *ASSEMBLAGE THEORY* (2016); MANUEL DELANDA, *A NEW PHILOSOPHY OF SOCIETY: ASSEMBLAGE THEORY AND SOCIAL COMPLEXITY* (2006).

462. See generally ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1994).

463. Brian Z. Tamanaha, *Law's Emergent Phenomena: From Rules of Social Intercourse to Rule of Law in Society*, 95 WASH. U. L. REV. 1149, 1150 n.6 (2018) (doubting the applicability to complexity theory to law because of the difficulty of imagining the fitness landscape in play, at least if to construct it one will be called upon to separate law from society). We would not seek to cleave the fitness landscape in this way.

464. LUCIEN KARPIK, TERENCE HALLIDAY & MALCOM FEELEY, *The Legal Complex and Struggles for Political Liberalism*, in *FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM* 3–4 (Lucien Karpik, Terence Halliday & Malcom Feeley, eds., 2007) (explaining that the concept of the legal complex holds no explanatory power for so-called cause lawyers).

Complexity theory seeks to discover regularities across instances in which order emerges without or against centralized control. Complex adaptive systems are made up of many actors that adapt to each other without any overall plan or ruler. Anthills, patterns of famines, stock markets, and the brain's emergent consciousness are examples of complex adaptive systems. Legal systems are complex adaptive systems, as are social movements.⁴⁶⁵

Complexity theory teaches us to look for hidden sources of order in physical, biological, and social systems.⁴⁶⁶ It also provides a theoretical basis for the robustness of emergent order, warning us that too-heavily ordered systems might be fragile and subject to unexpected non-linear change, while chaotic systems might tend to be attracted to particular patterns of orders.⁴⁶⁷ Although change is not perfectly predictable, it might still be manageable. And among the ways to ride the wave of social change is to introduce shocks to the system, to imagine possible reactions to different stories in a kind of narrative game-theoretic fashion. We observed lawyers, organizers, and advocates introducing diverse voices to reveal wide arrays of options and a triage method to choose, assess, and select from grassroots-generated tools.⁴⁶⁸ Throughout, the group selected many different moves—vigorously reflecting on-the-fly on the impact of each and sharing the results widely for application in other areas and contexts.⁴⁶⁹

Complexity theory identifies paths of agents' communication and mutual adjustment—in social systems, through story. Above, we identified two central tropes: the lawyer's story that atomizes conflict and individualizes remedies, and the organizer's story, what the sociologist Margaret Levi calls "communities of fate," erecting a community that shares a common fate which calls for concerted action for a shared remedy binding the newly-constructed community together.⁴⁷⁰ Complexity theory gives the language of lay

465. STUART A. KAUFFMAN, *REINVENTING THE SACRED: A NEW VIEW OF SCIENCE, REASON AND RELIGION* 268–70 (2008); *see generally* COMPLEXITY THEORY AND LAW: MAPPING AN EMERGENT JURISPRUDENCE (Jamie Murray, Thomas E. Webb & Steven Wheatley, eds., 2019).

466. GRAEME CHESTERS & IAN WELSH, *COMPLEXITY AND SOCIAL MOVEMENTS: MULTITUDES AT THE EDGE OF CHAOS* 100–102 (2006).

467. *Id.*

468. If this reminds the reader of their clinical experience in law school that is exactly how it struck us and led us to inquire further.

469. *See e.g.*, Interview with Sydney, *supra* note 177 (describing the way work was pushed out for wider application across the country, "And as I mentioned, D.C. became the first city to opt out. So, then we took what worked in D.C. and then spread the word, [inaudible] calls, we were traveling all over the place and like holding trainings—like that tool kit I just sent to you guys, that's something we did shortly after I think the D.C. victory—and continued to like push this information out all over the country and to not just educate people but also give them like very concrete ideas on how to build local campaigns. And then organizing like a national day of action, whether that was the launch or when we had like the release of the documents, I think in August, the first batch was like an August 2010. I remember having a major briefing and then like material that we prepared for local group so that they can go have press conferences again in front of their like local city council and be like, essentially lobbying days will go and push this information forward and get a lot of local press as well.").

470. *See* JOHN A. AHLQUIST & MARGARET LEVI, *IN THE INTEREST OF OTHERS: ORGANIZATIONS AND SOCIAL ACTIVISM* 8, 26 (2013). Such stories might, for example, invoke a common enemy, a shared threat, a mutual plight or collective identity.

power structures context to identify inflection points where legal skills or legitimacy might be useful. In this way, there was a place in the overall effort to end S-Comm for lawyers acting in varied roles at the micro, meso, and macro levels identified earlier.

At the micro level, lawyering for the situation, lawyers with immigration expertise were brought into various localities to support local efforts to opt-out of S-Comm. For example, in DC, the first city to opt-out of S-Comm, “lawyering was key in [meetings with the city council] . . . [and the] local coalitions that formed all over the country would always have a lawyer at these meetings to explain to the council members and elected officials how [things] worked.”⁴⁷¹ City and county officials had “so many legal questions and honestly, even though [the organizer could have] answered these questions, there was something, it gave, you know, the authority of someone who has a legal degree.”⁴⁷² Organizers used the name “trophy lawyers” to refer to lawyers who came in and out of local campaigns to lend expertise on a particular, narrow issue.⁴⁷³ This micro-level lawyering was coupled with the meso-level lawyering that focused on the FOIA litigation. The FOIA litigation team was comprised of lawyers steeped in FOIA and relevant immigration litigation.⁴⁷⁴ The campaign was able to leverage the relationships and legitimacy of pro bono lawyers, who well understood and enjoyed their place in the campaign and the overall movement. On the macro level, the lawyers for the campaign, in turn, worked to fashion stories that would be understood by movement activists and lawyers who maintained their subversive purity while leveraging the talents and establishment credibility of expert pro bono lawyers operating at other levels.

Placing these three layers on top of each other, the different scales of social change worked together to create a movement strategy that encompassed an emergently constructed “community of fate.” By trying out different tactics with different players in different contexts, the overall movement developed an advocacy strategy, derived through evolutionary dynamics of dispersed strategies and selection mechanisms, that resulted in the termination of S-Comm. The relationships and narratives that incited the movement continue to inspire and bind immigrant workers’ movements to this day.

471. Interview with Sydney, *supra* note 177.

472. *Id.* (explaining that recognizing the authority that a law degree provided is “probably why I went to law school.”)

473. *Id.* (describing that “at the local level . . . local groups would often have an attorney that was part of the coalition . . . [These lawyers] were not involved in the litigation of the FOIA.”)

474. The litigation team included lawyers from the Center for Constitutional Rights, an organization with a mission to “stand with social justice movements and communities under threat—fusing litigation, advocacy, and narrative shifting to dismantle systems of oppression regardless of the risk.” *Mission and Vision*, CTR. FOR CONST. RIGHTS (Oct. 18, 2018), CTR. FOR CONST. RTS <https://ccrjustice.org/home/who-we-are/mission-and-vision> [<https://perma.cc/RW6T-SHSP>]. The Cardozo Immigration Justice Clinic also represents immigrant community-based organizations on litigation and advocacy projects. See *Immigration Justice Clinic*, CARDOZO LAW, <https://cardozo.yu.edu/immigration-justice-clinic> [<https://perma.cc/2TZB-8S4A>] (last visited Feb. 24, 2021).

CONCLUSION

This case study posits an innovative approach for collaborative work between lawyers, organizers, activists, and clients moving forward. In this context, we found that lawyers and activists built a modular, emergent strategy from the ground up through recursive,⁴⁷⁵ interactive, and synergistic play among tools, roles, institutions, and resources. Traditional legal interactions and discourse were constitutive elements in an array of which the movement's relationship with legal rules, roles, and institutions were a byproduct.⁴⁷⁶ Lawyers were intentionally deployed at strategic moments on the micro (client-centered lawyering for the situation), meso (lawyering for the campaign), and macro (lawyering for the movement) levels. The strategy was fluid and adapted as the campaign progressed. Standing shoulder to shoulder, on equal ground, each participant brought their expertise and skills to the table, creating an interactive and synergistic environment to challenge institutional power.

475. The idea being that social movements, institutions, and law all change and are changed in the process, even as each constructs the assumptions on which each is built. See ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY*, *supra* note 27.

476. See MCCANN, *RIGHTS AT WORK*, *supra* note 20; POLLETTA, *IT WAS LIKE A FEVER*, *supra* note 28; Smith, *Order (for Free)*, *supra* note 28.