

OUTSIDERS LOOKING IN:  
ADVANCING THE IMMIGRANT WORKER MOVEMENT  
THROUGH STRATEGIC MAINSTREAMING

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I. INTRODUCTION

How can subordinated groups best advance their agenda? The recent success of undocumented immigrant youth activists (“DREAMers”) can be instructive, from the creation and extension of the program for deferred action for childhood arrivals (DACA) that provides for temporary immigration relief<sup>1</sup> to the passage of numerous state laws providing for in-state tuition regardless of immigration status.<sup>2</sup> At the same time, those within the movement have questioned the adherence to a DREAMer identity of the successful and culturally integrated student, who endorses mainstream exclusionary immigration norms while undermining the affirmation of a broader immigrant identity of all ages and backgrounds.<sup>3</sup> As a result, some DREAMers have rejected the heavily compromised “comprehensive” immigration reform approach that provides a direct road to U.S. citizenship for some undocumented youth because it also continues to treat “immigrants as criminals.”<sup>4</sup> They have engaged in more assertive civil

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<sup>1</sup> U.S. Citizenship & Immigration Servs., *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. DEP’T OF HOMELAND SEC., <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process>, archived at <http://perma.cc/Q95N-W4M6> (last updated July 21, 2014); Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Security, to Leon Rodriguez, Dir. of U.S. Citizenship and Immigration Services, Thomas S. Winkowski, Acting Dir. Of U.S. Immigration and Customs Enforcement, and R. Gil Kerlikowske, Comm’r of U.S. Customs and Border Protection (Nov. 20, 2014), available at [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf), archived at <http://perma.cc/2L6S-65RC>.

<sup>2</sup> *Maps: State Laws & Policies on Access to Higher Education for Immigrants*, NAT’L IMMIGRATION L. CTR., <http://www.nilc.org/eduaccess toolkit2.html>, archived at <http://perma.cc/SK8B-6LG8> (last updated July 14, 2014).

<sup>3</sup> WALTER NICHOLLS, *THE DREAMERS: HOW THE UNDOCUMENTED YOUTH MOVEMENT TRANSFORMED THE IMMIGRANT RIGHTS DEBATE* 12, 15–16 (2013).

<sup>4</sup> Billie Greenwood, *2013 Immigration Reform Specifics: Statement by National Immigrant Youth Alliance*, ALLVOICES (Dec. 5, 2012, 12:58 PM), <http://www.allvoices.com/contributed-news/13546622-national-immigrant-youth-alliance-affirms-2013-immigration-reform-specifics>, archived at <http://perma.cc/FEN6-QZX6>; see also Border Security,

disobedience tactics, such as “travel[ing] to Mexico and return[ing] to the United States through a legal port of entry, openly declaring their immigration status as a unique form of protest . . . .”<sup>5</sup> The DREAMer movement presents an age-old problem of social movements: whether change should be pursued from the inside or outside. Groups who work from the inside may more realistically have the opportunity to address subordination maintained by the dominant class, but they also find themselves unwittingly acquiescing to an unjust hierarchical system. On the outside, groups can more radically challenge the system by bringing new normative ideals to the fore, an approach that can be both risky and have little chance of success.

The immigrant worker movement confronts this very same dilemma. To a certain degree, the story of the immigrant worker movement today is a familiar tale about law and culture. Law depends on dominant cultural norms, which have constrained the rights of immigrant workers. As a result, immigrant workers, community advocates, and public interest attorneys have been forced to embrace, construct, and perpetuate mainstreaming narratives of immigrant workers in legal cases, public policy campaigns, and grassroots actions. Mainstreaming involves the use of interpretive frames correlated to dominant cultural values that endeavor to create connections to mainstream society.<sup>6</sup> One interpretive frame emphasizes the social identity of immigrant workers who contribute to society through the dignity of their own work. The other interpretive frame focuses on immigrant workers who are victimized by criminal employers who fail to obey the rule of law. In turn, the resulting legal framework begins to reflect these cultural narratives about immigrant workers.

This Article offers one of the first critical examinations of this law-and-culture phenomenon, and how immigrant workers can use cultural narratives to advance the movement. My discussion about “immigrant workers” will be limited to the largest and most vulnerable subclass—those without lawful work authorization.<sup>7</sup> These immigrant workers live as outsiders. Many commentators have reflected on the invisibility, exclusion, or partial inclusion of immigrant

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Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (as passed by Senate, June 27, 2013) (providing differential treatment of immigrants depending on circumstances).

<sup>5</sup> Roque Planas, *Luis Gutierrez Splits with Dreamer Group NIYA*, HUFFINGTON POST (Nov. 5, 2013, 7:11 PM), [http://www.huffingtonpost.com/2013/11/05/luis-gutierrez-niya\\_n\\_4221621.html](http://www.huffingtonpost.com/2013/11/05/luis-gutierrez-niya_n_4221621.html), archived at <http://perma.cc/3JXR-WBBT>.

<sup>6</sup> DONATELLA DELLA PORTA & MARIO DIANI, *SOCIAL MOVEMENTS: AN INTRODUCTION* 75–76 (1999); CHARLES J. STEWART ET AL., *PERSUASION AND SOCIAL MOVEMENTS* 64 (4th ed. 2001).

<sup>7</sup> Immigrant workers are a diverse group who faces considerable challenges. Immigrant workers include those who have lawful authorization to work, such as unskilled workers on temporary H-2A and H-2B visas, high-tech workers on H-1B visas, and lawful permanent residents with “green cards.”

workers who lack full political citizenship as “aliens” within our laws.<sup>8</sup> The collective prejudice of communities can situate immigrants as the “other”—outside of clearly marked “boundaries of who is an accepted member of society.”<sup>9</sup> Inflammatory anti-immigrant rhetoric magnifies this exclusion, depicting immigrants as criminals and invaders bent on conquering and pillaging rather than integrating into U.S. society.<sup>10</sup> Federal immigration enforcement<sup>11</sup> and some state and local policies exacerbate the inhospitable climate that immigrant workers face daily.<sup>12</sup> The courts have limited legal remedies for immigrant workers,<sup>13</sup> and government agencies generally neglect the enforcement of workplace standards.<sup>14</sup>

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<sup>8</sup> 8 U.S.C. § 1101(a)(3) (2012) (defining *alien* as a person who is not a national or citizen of the United States); Kevin R. Johnson, *Hurricane Katrina: Lessons About Immigrants in the Administrative State*, 45 HOUS. L. REV. 11, 43–44 (2008) (describing how immigrants lack a full voice in the political system that administers their rights); Frank W. Munger, *Social Citizen as “Guest Worker”: A Comment on Identities of Immigrants and the Working Poor*, 49 N.Y.L. SCH. L. REV. 665, 674–75 (2004) (describing disparities between immigrant workers and citizens); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 400–02 (2006) (describing that the immigration laws presume nonmembership of immigrants who are otherwise subject to a sliding scale of rights within the United States); *see also* Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 FORDHAM L. REV. 1545, 1568–73 (2011) (reviewing the conceptual metaphor that immigrants are aliens).

<sup>9</sup> Stumpf, *supra* note 8, at 377.

<sup>10</sup> LEO R. CHAVEZ, *THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION* 23–25 (2d ed. 2013); EDIBERTO ROMÁN, *THOSE DAMNED IMMIGRANTS: AMERICA’S HYSTERIA OVER UNDOCUMENTED IMMIGRATION* 17–18 (2013); Kevin R. Johnson, *It’s the Economy, Stupid: The Hijacking of the Debate Over Immigration Reform by Monsters, Ghosts, and Goblins, (or the War on Drugs, War on Terror, Narcoterrorists, Etc.)*, 13 CHAP. L. REV. 583, 608–09 (2010) (noting restrictionist rhetoric characterizing immigrants as invaders).

<sup>11</sup> REBECCA SMITH ET AL., *ICED OUT: HOW IMMIGRATION ENFORCEMENT HAS INTERFERED WITH WORKERS’ RIGHTS* 13–29 (2009) (describing federal immigration enforcement policy with case studies exemplifying how enforcement trumps workers’ rights).

<sup>12</sup> *See, e.g.*, S.B. 590, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011); Utah Illegal Immigration Enforcement Act, H.B. 497, 59th Leg., Gen. Sess. (Utah 2011); The Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, 49th Leg., 2d Sess. (Ariz. 2010); Kevin O’Neil, *Hazelton and Beyond: Why Communities Try to Restrict Immigration*, MIGRATION POL’Y INST. (Nov. 1, 2010), <http://www.migrationinformation.org/Feature/display.cfm?ID=805>, *archived at* <http://perma.cc/URL2-R5FD>.

<sup>13</sup> *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151 (2002); *see infra* Part II.A.1.

<sup>14</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-458T, *WAGE AND HOUR DIVISION’S COMPLAINT INTAKE AND INVESTIGATIVE PROCESSES LEAVE LOW WAGE WORKERS VULNERABLE TO WAGE THEFT* 4 (2009), *available at* [www.gao.gov/new.items/d09458t.pdf](http://www.gao.gov/new.items/d09458t.pdf), *archived at* <http://perma.cc/QY48-ANKE>; *see also* THOMAS MCGARITY ET AL., *WORKERS*

It is within this framework that immigrant workers must determine how they can most effectively advance their movement.

To some extent, this Article assumes generalities across the immigrant worker movement, whereas in reality the movement is more dynamic and plural, with varied agendas for the multiple immigrant movements. Some movements may simply focus on providing redress to immigrant workers. Other movements may seek more broadly to end the exploitation of immigrant workers by addressing the overall decline of workplace standards for immigrant workers.<sup>15</sup>

With these various agendas in mind, the immigrant worker movement could focus on working from outside the system. One possibility is to work to transform the cultural dialogue into a more global conception of immigrant workers grounded in transnational citizenship or universal human rights. While such transformative cultural narratives provide a normative vision for the movement and offer the possibility of changing consciousness incrementally, such narratives are often impractical by themselves to achieve more immediate reform. More radical actions by immigrant workers can more directly challenge dominant culture that is ultimately responsible for their exploitation. They provide important counternarratives to the mainstream discourse about immigrant workers but can also be precarious for immigrant workers subject to deportation and rejected as too extreme. Even with the best efforts to change the mainstream dialogue, immigrant workers are often constrained as outsiders who are essentially trapped within a framework that can be unresponsive to these strategies.

Working from the inside, however, is fraught with well-known perils. Mainstreaming necessarily creates stereotypes and classes of outsiders, resulting in disfavoring immigrant workers who do not fit the role of the “good immigrant”—the iconic hard worker or victim. Interpretive frames associated with dominant groups can also obscure the need for fundamental structural change. On the other hand, given the constraints of the current system, the option of mainstreaming is often more likely to succeed. The use of mainstream narratives is not only more immediate and accessible but also has favorably impacted the legal rights of immigrant workers. And when immigrant workers’ voices power the mainstream narratives, the use of such narratives can empower workers and create solidarity among immigrant workers.

My argument is that because mainstream cultural narratives are often the most viable option, those that are owned, shaped, and cleverly deployed by immigrant workers can best promote the legal rights of immigrant workers while promoting their inclusion into society. This is what I term “strategic mainstreaming.” For strategic mainstreaming to be truly successful, advocates must ensure that

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AT RISK: REGULATORY DYSFUNCTION AT OSHA 1 (2010) (acknowledging that OSHA resources are stretched so thin that the agency’s functioning is strained).

<sup>15</sup> Outside of the context of workplace rights, the blended identity of the immigrant as worker can be connected to the advocacy agenda that seeks to reform the immigration system, from curbing enforcement to creating new pathways to citizenship.

immigrant workers are actively informing, if not leading, such activism. This approach corresponds to a vision of advocacy that respects the voice of subordinated individuals and communities,<sup>16</sup> which maximizes empowerment and solidarity while minimizing the damage created by aligning with the dominant class. Minimizing damage might involve creating alliances with other subordinated groups or incorporating outsider strategies as part of the normative vision for the movement. At the same time, strategic mainstreaming offers a way that immigrant workers can gain political traction and power, often through the use of multifaceted advocacy with local mainstream institutions. The cultural phenomenon of mainstreaming immigrant narratives has proven to be effective in advancing legal rights in a current climate where immigrant workers, as outsiders, will continue to suffer from subordination because they lack traditional political power.<sup>17</sup>

When immigrant workers use strategic mainstreaming, they are furthering their political goal of full membership into mainstream society. While the focus on legal rights may appear to accede to an inherently inequitable legal system, it is a pragmatic strategy for outsiders seeking to achieve a more normative vision of universal rights or full citizenship. Despite its perils, strategic mainstreaming is often the most viable option for achieving the inclusion of immigrants, which over time will help increase familiarity with immigrants as societal members. With such inclusion, immigrant workers will have built the political power to possibly achieve the normative vision for transforming their condition.

To develop my account of how immigrant workers can use cultural narratives to achieve their agenda, I divide this Article into four parts. Part II explores the interplay of law and culture in the immigrant worker movement by reviewing the ways that a variety of protagonists in the areas of litigation, immigration relief, public policy, and direct actions have opted to use mainstream cultural narratives to argue in favor of immigrant workers' rights. Part III examines the political realities of considering alternative cultural narratives that are more transformative or radical for immigrant workers. Part IV addresses the concerns raised by using cultural narratives that correlate to dominant mainstream interests. Part V sets forth the vision of strategic mainstreaming as a viable way forward.

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<sup>16</sup> See, e.g., GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 47–56 (1992); Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 692 (1987–88); Derrick A. Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 512 (1976).

<sup>17</sup> But see Alex Leary, *As America's Fastest-Growing Immigrant Group, Asians Find a Growing Voice*, TAMPA BAY TIMES (Apr. 26, 2013, 6:00 PM), <http://www.tampabay.com/news/politics/national/as-americas-fastest-growing-immigrant-group-asians-find-a-growing-voice/2117633>, archived at <http://perma.cc/HAP9-C6QV>; Julia Preston, *Young Immigrants Say It's Obama's Time to Act*, N.Y. TIMES, Dec. 1, 2012, at A1.

## II. MAINSTREAMING IMMIGRANT WORKERS

As of late, the story of the immigrant worker movement often involves developing cultural narratives that are sympathetic and recognized by mainstream society. This is no coincidence. It reflects the well-known relationship between law and culture where law is “neither objective nor fixed but rather dependent on the relationship law shares with the dominant cultural and social patterns of society.”<sup>18</sup> The politics and ideology derived from dominant cultural values have necessarily created the law that impacts immigrant workers.<sup>19</sup> In order to advance their legal rights, the immigrant worker movement has had to search for openings in which to present cultural narratives that might provide a basis for finding a common ground identity with dominant cultural values. It has done so by the mainstreaming of immigrant workers in the courts, administrative agencies, legislature, and media. As a result, legal decisions, agency practices, public policy, and employer practices reflect these mainstream cultural narratives, which are actively shaping the legal rights of immigrant workers.

Given that immigrant workers are outsiders, social movement theory provides insight into how the immigrant worker movement can advance its agenda through mainstream cultural narratives. Professors Ron Eyerman and Andrew Jamison, for example, argue that a key to the success of social movements is to become a “serious and sympathetic agent of change” by outwardly expressing a collective identity that is familiar to mainstream society.<sup>20</sup> Others like Professors Donatella della Porta and Mario Diani discuss a social movement’s use of interpretive frames, which allows the transformation of the natural into a social or political problem.<sup>21</sup> They explain that the success of a social movement lies in the ability of actors to express their own values and motivations “in order to adapt them in the most efficient manner to the specific orientations of the sectors of public opinion which

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<sup>18</sup> GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY’S END* 114 (1995); see also Alan Hunt, *Foucault’s Expulsion of the Law: Toward a Retrieval*, 17 *LAW & SOC. INQUIRY* 1, 31 (1992) (stating that legal discourses “place limits of possibility on social action and impose specific forms of discursive possibility”); Austin Sarat & Jonathan Simon, *Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 *YALE J.L. & HUMAN.* 3, 19–20 (2001) (noting that legal meanings are not a unidirectional process as individuals “deploy and use meanings strategically to advance interests and goals” by pressing “their understandings in and on law, and, in doing so, invite adaptation and change in legal practices”).

<sup>19</sup> See, e.g., *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151–52 (2002); Annette Bernhardt et al., *An Introduction to the “Gloves-off Economy,”* in *THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA’S LABOR MARKET* 1, 17–18 (Annette Bernhardt et al. eds., 2008); SMITH ET AL., *supra* note 11, at 5.

<sup>20</sup> RON EYERMAN & ANDREW JAMISON, *SOCIAL MOVEMENTS: A COGNITIVE APPROACH* 56, 138–39 (1991).

<sup>21</sup> DELLA PORTA & DIANI, *supra* note 6, at 69.

they wish to mobilize.”<sup>22</sup> A social movement becomes more powerful when the messages of the movement align with the values of mainstream culture, which are “explicitly associated with . . . dominant groups.”<sup>23</sup> This alignment is similar to Professor Derrick Bell’s theory of how the racial equality espoused by *Brown v. Board of Education*<sup>24</sup> was made possible by the convergence of interests between blacks and whites.<sup>25</sup> Professor Richard Delgado has similarly argued that immigrants evoke sympathy by relating to the mainstream and may find power by identifying with familiar categories and linking up with larger groups,<sup>26</sup> while Professor Fatma Marouf explains that one strategy to reduce intergroup bias is to combine members of separate groups into a single more inclusive group; “from ‘us’ and ‘them’ to a more inclusive ‘we.’”<sup>27</sup> To the extent that a social movement can also use the messaging to reaffirm tradition, it provides a link to the cultural heritage and institutions of the country and acquires considerable weight.<sup>28</sup>

When examining the immigrant worker movement through this law-and-culture frame, the interpretative frames of the movement consist of two mainstreaming cultural narratives. The first frame focuses on the universality of being a worker. These are individuals who, like anyone else in the workforce, are seeking the same things out of life through the dignity of their own work<sup>29</sup>—the ability to survive independently and provide a better future for their children. These workers are willing to perform jobs that are dirty, dangerous, and undesirable,<sup>30</sup> which in the popular imagination is a direct counter to the negative

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<sup>22</sup> *Id.* at 68.

<sup>23</sup> *Id.* at 76–77, 80.

<sup>24</sup> 347 U.S. 483 (1954).

<sup>25</sup> Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524–25 (1980).

<sup>26</sup> Richard Delgado, *Rodrigo’s Homily: Storytelling, Elite Self-Interest, and Legal Change*, 87 OR. L. REV. 1259, 1276 (2008) (reviewing STEVEN BENDER, *ONE NIGHT IN AMERICA: ROBERT KENNEDY, CESAR CHAVEZ, AND THE DREAM OF DIGNITY* (2003) and GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2008)) [hereinafter Delgado, *Rodrigo’s Homily*]; cf. Richard Delgado, *Rodrigo’s Reconsideration: Intersectionality and the Future of Critical Race Theory*, 96 IOWA L. REV. 1247, 1263 (2011) (noting that the majority’s voice commands most attention and implying that for smaller minorities to be heard they need to latch on to one of the more dominant categories).

<sup>27</sup> Fatma E. Marouf, *Regrouping America: Immigration Policies and the Reduction of Prejudice*, 15 HARV. LATINO L. REV. 129, 142 (2012) (quoting Richard Crisp, *Prejudice and Perceiving Multiple Identities*, in *THE SAGE HANDBOOK OF PREJUDICE* 510 (John F. Dovidio et al. eds., 2010)).

<sup>28</sup> See DELLA PORTA & DIANI, *supra* note 6, at 75–76.

<sup>29</sup> Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1218–19 (2008).

<sup>30</sup> See, e.g., Elizabeth Dwoskin, *Why Americans Won’t Do Dirty Jobs*, BUSINESSWEEK.COM (Nov. 9, 2011), <http://www.businessweek.com/magazine/why-americans-wont-do-dirty-jobs-11092011.html>, archived at <http://perma.cc/3UGU-ZFVR>; Editorial,

connotations of immigrant workers as criminals, freeloaders, and job stealers.<sup>31</sup> By identifying as a worker, the emphasis is on the similarities between the persuader and the audience.<sup>32</sup> This frame also resonates with mainstream tradition because of the almost mythic status of the United States as a place where hard work will accomplish the American Dream.

The second frame focuses on immigrant workers as victims of criminal employers who fail to obey the rule of law. This interpretive frame resonates with mainstream cultural narratives that seek to criminalize “new or pressing social challenges.”<sup>33</sup> It does so by using “codes and symbols [that] not only form part of the mainstream culture . . . but [that] are also explicitly associated with dominant groups.”<sup>34</sup> As “innocent victims of [actors] out of control,” this narrative also presents “no neutrals[] in the struggle between good and evil.”<sup>35</sup> This frame can argue in favor of the greater good of workers generally, while deemphasizing immigration status to make concepts more politically palatable.

The protagonists of the immigrant worker movement who seek to deploy these mainstream cultural narratives for legal advocacy consist of a varied group operating in a range of forums. In section A, the focus is on immigrant workers who, through public interest attorneys, file litigation to address workplace violations or petition for immigration status based on their exploitation. Section B discusses the coalitions of immigrant workers, community advocates, and public interest attorneys who have advocated with governmental agencies or legislative bodies to reform public policy. Finally, section C examines immigrant workers who have engaged in direct actions against employers in order to obtain legal redress. Protagonists have had to determine the extent to which a particular forum embraces mainstream cultural narratives and whether mainstreaming is the more viable option. While the following discussion provides a taxonomy about how different protagonists operate, it is worth noting that the movement sometimes engages in multifaceted strategies that include legal action, public policy reform,

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*Jobs for the Picking*, N.Y. TIMES, July 18, 2010, at WK7, available at <http://www.nytimes.com/2010/07/18/opinion/18sun3.html>, archived at <http://perma.cc/657J-GRCA>.

<sup>31</sup> Karen Aho, *Immigrants 'Are Taking Our Jobs,'* MSN MONEY (Aug. 16, 2012, 12:00 PM), <http://money.msn.com/main-street-america/immigrants-are-taking-our-jobs-ah-o.aspx>, archived at <http://perma.cc/HZ29-9HL8>; *Feds Caught Promoting Welfare to Illegal Aliens*, TEAPARTY.ORG (Apr. 26, 2013, 9:45 PM), <http://www.teaparty.org/feds-caught-promoting-welfare-to-illegal-aliens-23519/>, archived at <http://perma.cc/9YQ8-4BKU>; *Why Aren't Illegal Immigrants with Criminal Records Being Deported?*, FOX NEWS INSIDER (June 17, 2013, 12:41 PM), <http://foxnewsinsider.com/2013/06/17/why-arent-illegal-immigrants-criminal-records-being-deported>, archived at <http://perma.cc/4GZR-JY82>.

<sup>32</sup> STEWART ET AL., *supra* note 6, at 157.

<sup>33</sup> James Forman, Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible*, 33 N.Y.U. REV. L. & SOC. CHANGE 331, 346–47 (2009).

<sup>34</sup> DELLA PORTA & DIANI, *supra* note 6, at 76.

<sup>35</sup> STEWART ET AL., *supra* note 6, at 68, 161–62.



and direct action, driven by a variety of protagonists that fall outside of these classifications.

*A. Public Interest Attorneys and Their Clients Pursue Traditional Legal Remedies*

With traditional legal remedies, immigrant workers face two obvious constraints derived from the dominant cultural values about immigrants. The first is that immigrant workers, despite their presence within the U.S. territorial borders, are not entitled to the full panoply of rights accorded to U.S. citizens.<sup>36</sup> The second is that immigration law is firmly grounded in the need to restrict the unlimited influx of immigrant workers.<sup>37</sup> Despite these constraints, public interest attorneys<sup>38</sup> and their clients have continued to file traditional legal cases to advance the rights of immigrant workers. They have litigated and filed complaints with administrative agencies to address workplace violations and pursued immigration relief for workplace exploitation.<sup>39</sup> The administrative and judicial forums that adjudicate such complaints have often constrained immigrant workers to mainstream narratives in order to be successful. As a result, immigrant workers have provided new societal images of themselves as hard workers who have otherwise been victimized by their criminal employers. By developing these cultural narratives about immigrant workers, public interest attorneys, along with their clients, have brought about an identity transformation<sup>40</sup> of immigrant workers in the law—one that is both sympathetic and familiar to mainstream society.

*1. Litigating Workplace Exploitation*

A number of favorable court decisions for immigrant workers have embraced the interpretive frames of the knowing employer, the innocent victimized worker, or the universal worker. These decisions reflect an attempt by the immigrant worker movement to limit the holding of *Hoffman Plastic Compounds, Inc. v. NLRB*.<sup>41</sup> The Court in *Hoffman Plastic* held that the National Labor Relations

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<sup>36</sup> Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1401–02 (2009); D. Carolina Núñez, *Fractured Membership: Deconstructing Territoriality to Secure Rights and Remedies for the Undocumented Worker*, 2010 WIS. L. REV. 817, 821 (2010).

<sup>37</sup> Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 196 (2003).

<sup>38</sup> The term “public interest attorneys” is meant broadly to include those who work for nonprofits, take cases pro bono, or recover fees after prevailing in a legal case.

<sup>39</sup> The focus herein is on claims that have been adjudicated by the courts, although there is robust work by public interest attorneys that involves interfacing with administrative agencies. *See infra* Part III.B.

<sup>40</sup> *See* EYERMAN & JAMISON, *supra* note 20, at 166; *see also* Marouf, *supra* note 27, at 177 (discussing the “strategic repertoire” of shifting focus from immigrant to worker identity).

<sup>41</sup> 535 U.S. 137 (2002).

Board (NLRB) could not award an unauthorized worker with back pay as a remedy under the National Labor Relations Act because it was prohibited by the Immigration Reform and Control Act (IRCA).<sup>42</sup> IRCA prohibits the hiring of immigrant workers who lack lawful authorization to work, like employee Jose Castro, who fraudulently obtained employment unbeknownst to the employer.<sup>43</sup> *Hoffman Plastic* sent shock waves about the demise of the ability of immigrant workers to organize and assert their rights and has undoubtedly had some negative impacts.<sup>44</sup>

Despite *Hoffman Plastic*, immigrant workers continue to use a variety of laws to obtain redress for workplace exploitation of immigrant workers, such as the Fair Labor Standards Act (FLSA),<sup>45</sup> Title VII of the Civil Rights Act of 1964 (Title VII),<sup>46</sup> the Trafficking Victims Protection Reauthorization Act (TVPRA),<sup>47</sup> the Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA),<sup>48</sup> and various state equivalents. The balance of courts refuse to extend *Hoffman Plastic* to other laws impacting workers<sup>49</sup> and continue to reaffirm the right of

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<sup>42</sup> *Id.* at 151–52.

<sup>43</sup> *Id.* at 141.

<sup>44</sup> See, e.g., *Mendoza v. Detail Solutions, LLC*, 911 F. Supp. 2d 433, 443 (N.D. Tex. 2012) (prohibiting FLSA retaliation back pay damages for an unauthorized worker); *Sanchez v. Eagle Alloy Inc.*, 658 N.W.2d 510, 520–21 (Mich. Ct. App. 2003) (affirming coverage of unauthorized workers under the state workers' compensation law, but denying back pay for those who had obtained their jobs by use of false documents); *Ulloa v. AI's All Tree Serv., Inc.*, 768 N.Y.S.2d 556, 558 (N.Y. Dist. Ct. 2003) (permitting an unauthorized worker to recover unpaid minimum wages under FLSA but prohibiting any additional wages based in a contract that is "tainted with illegality"); see also Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 919 (2008) (describing how employers denied liability for violations of law by relying on *Hoffman Plastic*); Ruben J. Garcia, *Ten Years After Hoffman Plastic Compounds, Inc. v. NLRB: The Power of a Labor Law Symbol*, 21 CORNELL J.L. & PUB. POL'Y 659, 667–68 (2012) (stating that "there were many employers who used *Hoffman* as a green light for exploitation").

<sup>45</sup> 29 U.S.C. § 216(b) (2012) (enforcement provision).

<sup>46</sup> 42 U.S.C. §§ 2000e to 2000e-17 (2006).

<sup>47</sup> 18 U.S.C. § 1595 (2012) (civil remedy provision).

<sup>48</sup> 29 U.S.C. § 1854(a) (2012) (private right of action).

<sup>49</sup> See Christopher David Ruiz Cameron, *The Borders of Collective Representation: Comparing the Rights of Undocumented Workers to Organize Under United States and International Labor Standards*, 44 U.S.F. L. REV. 431, 432 n.10 (2009); Cunningham-Parmeter, *supra* note 36, at 1363–64 (2009); Daniel Ford et al., *Protecting the Employment Rights and Remedies of Washington's Immigrant Workers*, 48 GONZ. L. REV. 539, 546 (2013); Anne Marie O'Donovan, *Immigrant Workers and Workers' Compensation After Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 30 N.Y.U. REV. L. & SOC. CHANGE 299, 300 (2006); Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 509–11 (2004).

unauthorized workers to access the courts to address their workplace exploitation based on unpaid wages,<sup>50</sup> discrimination,<sup>51</sup> and health and safety violations.<sup>52</sup>

The interpretive frame of the culpable employer, in contrast to the innocent victim, has helped to establish the continued access of immigrant workers to the courts after *Hoffman Plastic*.<sup>53</sup> While immigrant workers may be unlawfully present, court decisions have focused instead on a narrative of “knowing” employers who engage in illegal conduct against workers while violating federal immigration law. In the context of FLSA coverage, where immigrant workers may seek those wages “actually earned,”<sup>54</sup> courts further justify access to FLSA by

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<sup>50</sup> *Almanza v. Baird Tree Serv. Co.*, No. 3:10-CV-311, 2012 WL 4026933, at \*6–7 (E.D. Tenn. Sept. 12, 2012); *Villarreal v. El Chile, Inc.*, 266 F.R.D. 207, 214 (N.D. Ill. 2010) (claiming minimum and overtime wages under FLSA); *Bailon v. Seok AM, # 1 Corp.*, No. C09–05483JRC, 2009 WL 4884340, at \*2 (W.D. Wash. Dec. 9, 2009); *Galdames v. N & D Inv. Corp.*, No. 08-20472-CIV, 2008 WL 4372889, at \*3 (S.D. Fla. Sept. 24, 2008); *Flores v. Amigon*, 233 F. Supp. 2d 462, 463–64 (E.D.N.Y. 2002); *Liu v. Donna Karan Int’l, Inc.*, 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002); *Flores v. Albertsons, Inc.*, No. CV0100515AHM(SHX), 2002 WL 1163623, at \*5 (C.D. Cal. Apr. 9, 2002).

<sup>51</sup> *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064 n.4 (9th Cir. 2004); *EEOC v. Restaurant Co.*, 490 F. Supp. 2d 1039, 1047 (D. Minn. 2007); *Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247, 1286 (N.D. Okla. 2006); *Hirsbrunner v. Martinez Ramirez*, 438 F. Supp. 2d 10, 15–16 (D.P.R. 2006); *Avila-Blum v. Casa de Cambio Delgado, Inc.*, 236 F.R.D. 190, 192 (S.D.N.Y. 2006). While the availability of back pay has been left as an open question, compensatory damages for pain and suffering and punitive damages are available under the antidiscrimination framework. *Rivera*, 364 F.3d at 1067–79; *De La Rosa v. N. Harvest Furniture*, 210 F.R.D. 237, 238–39 (C.D. Ill. 2002).

<sup>52</sup> *See Bollinger Shipyards, Inc. v. Dir., Office of Worker’s Comp. Programs*, 604 F.3d 864, 879 (5th Cir. 2010); *Madeira v. Affordable Hous. Found. Inc.*, 469 F.3d 219, 249 (2d Cir. 2006). The majority of states have held that unauthorized workers are entitled to workers’ compensation coverage, except for two state decisions that have restricted certain benefits based on immigration status. *O’Donovan*, *supra* note 49, at 304–06; *see also Sanchez v. Eagle Alloy Inc.*, 658 N.W.2d 510, 514–16, 521 (Mich. Ct. App. 2003) (affirming coverage of unauthorized workers under the state workers’ compensation law, but denying wage-loss benefits for those who had obtained their jobs by use of false documents from the time that their illegal status became known); *Reinforced Earth Co. v. Workers’ Comp. Appeal Bd.*, 810 A.2d 99, 108–09 & n.12 (Pa. 2002) (affirming coverage of unauthorized workers under the workers’ compensation law, but permitting suspension of benefits when the loss of earning power is caused by immigration status).

<sup>53</sup> Courts arrive at these decisions for reasons apart from mainstream frames. Under the FLSA, for example, courts also consider the legislative history and statutory nature of FLSA, including its broad definition of employee. *See Cunningham-Parmeter*, *supra* note 36, at 1373–79; *see also Jin-Ming Lin v. Chinatown Rest. Corp.*, 771 F. Supp. 2d 185, 190 (D. Mass. 2011) (arguing the court has no discretion under FLSA to determine who is an employee).

<sup>54</sup> The cases are numerous: *see supra* note 50 and accompanying text. Courts also provide deference to the U.S. Department of Labor’s interpretation on the issue. *See Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 324 (D.N.J. 2005); U.S. Dep’t of Labor,

rationalizing that employers have incentives to participate in illegal workplace conduct against workers who are in the United States with “the hope of getting a job [] at any wage.”<sup>55</sup> These same employers cannot then turn around and receive immunity from the same law they have violated. In *Solano v. A Navas Party Production, Inc.*,<sup>56</sup> for example, the court rejected any argument that Plaintiff, as an “illegal immigrant,” could not recover his wages since “Defendants clearly knew of the Plaintiff’s immigration status as they paid him in cash and did not report his wages.”<sup>57</sup> Courts allude to the inherent inequitable result of precluding an award against such a “knowing employer,” particularly noting scenarios when workers may have been “misled by their employer.”<sup>58</sup> Professor Hiroshi Motomura has noted that courts engage in this “comparative culpability,” which justifies recognition of “the rights of an unauthorized worker even when such recognition might seem foreclosed.”<sup>59</sup> Focusing on employer wrongdoing results in the rebalancing of culpability to shift the focus from the *Hoffman Plastic* “con-artist”

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FACT SHEET #48: APPLICATION OF U.S. LABOR LAWS TO IMMIGRANT WORKERS: EFFECT OF HOFFMAN PLASTICS DECISION ON LAWS ENFORCED BY THE WAGE AND HOUR DIVISION (2008), available at <http://www.dol.gov/whd/regs/compliance/whdfs48.pdf>, archived at <http://perma.cc/WZG2-6G6L>.

<sup>55</sup> *Patel v. Quality Inn S.*, 846 F.2d 700, 704 (11th Cir. 1988) (decided pre-*Hoffman Plastic*); see also *Montoya v. S.C.C.P. Painting Contractors, Inc.*, 589 F. Supp. 2d 569, 577 n.3 (D. Md. 2008) (noting employer incentives to hire undocumented workers); *Amigon*, 233 F. Supp. 2d at 464 (permitting abusive exploitation of workers); *Singh v. Jutla & C.D. & R’s Oil, Inc.*, 214 F. Supp. 2d 1056, 1062 (N.D. Cal. 2002) (finding employer incentives to hire and underpay undocumented workers).

<sup>56</sup> No. 09-22847-CIV, 2011 WL 98819 (S.D. Fla. Jan. 12, 2011).

<sup>57</sup> *Id.* at \*2 n.1.

<sup>58</sup> *Chellen v. John Pickle Co.*, 434 F. Supp. 2d 1069, 1099, amended and superseded by 446 F. Supp. 2d 1247 (N.D. Okla. 2006); *Singh*, 214 F. Supp. 2d at 1061. While this emphasis on the “knowing employer” could potentially raise the stakes for unauthorized workers who—like Jose Castro—use false papers to work, no court so far has required that a worker prove employer wrongdoing beyond the nonpayment of wages to have an actionable FLSA claim. The court in *Ulin v. Lovell’s Antique Gallery* found that the plaintiff was entitled to relief under FLSA regardless of whether he used false documents to obtain the job. No. C-09-03160 EDL, 2010 WL 3768012, at \*9 (N.D. Cal. Sept. 22, 2010). Professor Christine Cimini reviews workers’ compensation, tort, and product liability cases where the use of fraudulent documents by immigrant workers affected their ability to recover damages. Christine N. Cimini, *Undocumented Workers and Concepts of Fault: Are Courts Engaged in Legitimate Decisionmaking?*, 65 VAND. L. REV. 389, 412–14 (2012). It is noteworthy, however, that these cases are firmly in the minority. Compare *id.* at 412 nn.99–100 (citing cases where fraudulent immigration documents prohibited employees’ ability to collect worker’s compensation benefits), with *supra* note 52 and accompanying text (cases where courts have held that unauthorized workers are entitled to workers’ compensation coverage).

<sup>59</sup> Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1749 (2010).

employee to the exploitative employer who might have real incentives to follow the law—be it FLSA or IRCA—if it is actually enforced.<sup>60</sup>

Cases that use the innocent victim narrative have also managed to facilitate the litigation of immigrant workers' legal claims. Immigrant worker litigants have largely won protective orders to prevent employers who seek to use immigration status as a vehicle to intimidate litigants and sidetrack litigation.<sup>61</sup> Immigrant workers are often reluctant to use litigation strategies because of the fear of retaliation for asserting their rights.<sup>62</sup> Courts have largely rejected employers' attempts to justify the relevancy of immigration status by finding it largely irrelevant,<sup>63</sup> especially as to the credibility of immigrant workers as witnesses.<sup>64</sup> In an effort to rebalance the culpability of actors, courts have noted that immigrant

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<sup>60</sup> Cunningham-Parmeter, *supra* note 36, at 1391–92.

<sup>61</sup> *See, e.g.*, *Bailon v. Seok AM, # 1 Corp.*, No. C09–05483JRC, 2009 WL 4884340, at \*5 (W.D. Wash. Dec. 9, 2009); *Baca v. Brother's Fried Chicken*, Civil Action No. 09-3134-MLCF-SS, 2009 WL 1349783, at \*2 (E.D. La. May 13, 2009); *Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D. 499, 502–03 (W.D. Mich. 2005); *Flores v. Amigon*, 233 F. Supp. 2d 462, 464 (E.D.N.Y. 2002); *Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002); *Flores v. Albertsons, Inc.*, No. CV0100515AHM(SHX), 2002 WL 1163623, at \*6 (C.D. Cal. Apr. 9, 2002); *see also* Chistine N. Cimini, *Ask, Don't Tell: Ethical Issues Surrounding Undocumented Workers' Status in Employment Litigation*, 61 STAN. L. REV. 355, 383–85 (2008) (explaining how immigration status affects litigation for different types of civil remedies). *But see* EEOC v. Evans Fruit Co., No. CV-10-3033 LRS, 2011 WL 2471749, at \*2 (E.D. Wash. June 21, 2011) (finding immigration status and medical records relevant to claims for emotional distress).

<sup>62</sup> There are a variety of factors that make immigrant workers reluctant to proceed with litigation. *See* Jennifer J. Lee, *Private Civil Remedies: A Viable Tool for Guest Worker Empowerment*, 46 LOY. L.A. L. REV. 31, 72–73 (2012). A protective order, in and of itself, will often not change that dynamic. Once immigrant workers decide to proceed with litigation, however, a protective order can be helpful to protect against employer retaliation.

<sup>63</sup> *See, e.g.*, *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1074–75 (9th Cir. 2004); *Reyes v. Snowcap Creamery, Inc.*, 898 F. Supp. 2d 1233, 1235 (D. Colo. 2012); *Almanza v. Baird Tree Serv. Co.*, No. 3:10-CV-311, 2012 WL 4026933, at \*7 (E.D. Tenn. Sept. 12, 2012); *Villareal v. El Chile, Inc.*, 266 F.R.D. 207, 214 (N.D. Ill. 2010); *Sandoval v. Rizzuti Farms, Ltd.*, No. CV-07-3076-EFS, 2009 WL 2058145, at \*3 (E.D. Wash. July 15, 2009); *David v. Signal Int'l, LLC*, 257 F.R.D. 114, 126 (E.D. La. 2009); *Montoya v. S.C.C.P. Painting Contractors, Inc.*, 530 F. Supp. 2d 746, 750 (D. Md. 2008); *Perez-Farias v. Global Horizons, Inc.*, No. CV-05-3061-MWL, 2007 WL 1412796, at \*3 (E.D. Wash. May 10, 2007); *Rengifo v. Erevos Enters., Inc.*, No. 06 Civ. 4266 (SHS)(RLE), 2007 WL 894376, at \*2 (S.D.N.Y. Mar. 20, 2007); *EEOC v. First Wireless Grp., Inc.*, 225 F.R.D. 404, 407 (E.D.N.Y. 2004); *Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002); *Amigon*, 233 F. Supp. 2d at 464; *Liu*, 207 F. Supp. 2d at 193.

<sup>64</sup> *See, e.g.*, *David*, 257 F.R.D. at 124; *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 267 F.R.D. 257, 277 (D. Minn. 2007); *Rengifo*, 2007 WL 894376, at \*3; *Hernandez v. City Wide Insulation of Madison, Inc.*, No. 05C0303, 2006 WL 3474182, at \*1 (E.D. Wis. Nov. 30, 2006); *Avila-Blum v. Casa de Cambio Delgado, Inc.*, 236 F.R.D. 190, 192 (S.D.N.Y. 2006); *Galaviz-Zamora*, 230 F.R.D. at 502.

workers, many of whom “are willing to work for substandard wages in our economy’s most undesirable jobs,” would experience an *in terrorem* effect that would permit countless acts of illegal and reprehensible conduct to go unreported.<sup>65</sup> In *David v. Signal International*,<sup>66</sup> allowing inquiry into plaintiff’s status was “tantamount to a categorical ruling precluding foreign nationals from any protection against the type of abuses alleged.”<sup>67</sup> Courts have also used the innocent victim frame—particularly for immigrant workers who may be fearful, non-English speaking, and unaware of their rights—to facilitate immigrant worker access to FLSA collective actions.<sup>68</sup> In *Leon v. Pelleh Poultry Corp.*,<sup>69</sup> the court justified the equitable tolling of wage claims under FLSA because it found that “immigrant Latino manual workers routinely working longer than ten hours per day and forty hours per week” did not have the opportunity to learn about their rights.<sup>70</sup> In *Suarez v. S & A Painting & Renovation Corp.*,<sup>71</sup> the court authorized the mailing of an opt-in notice to coworkers under the collective action mechanism of FLSA, in part, based on the immigrant class who “did not know enough to complain” and may have been unaware of their rights to overtime pay.<sup>72</sup>

Further, the interpretive frame of the universal worker has also resonated with the courts by connecting the legal plight of immigrant workers to the greater good of all workers. Litigants may be more successful if they advocate policy justifications that consider the impact on workers generally, rather than just on the litigants before the court. Courts, for example, rationalize that denying wage and hour protections for immigrant workers has the perverse result of harming citizen workers by encouraging employers to engage in illegal hiring of unauthorized workers, contrary to IRCA.<sup>73</sup> According to Professor Motomura, this focus on “citizen proxies” can emphasize “the practical ties between unauthorized migrants and other persons.”<sup>74</sup> Courts have also discussed policy justifications that look at the impact of the legal claims by immigrant workers on the workforce more

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<sup>65</sup> *Rivera*, 364 F.3d at 1064–65; *see also Avila-Blum*, 236 F.R.D. at 191 (stating that the disclosure of immigration status would discourage illegal alien workers from litigating unlawful discrimination and other employment-related claims).

<sup>66</sup> 257 F.R.D. 114 (E.D. La. 2009).

<sup>67</sup> *Id.* at 125.

<sup>68</sup> *Gortat v. Capala Bros.*, No. 07 Civ. 3629(ILG)(SMG), 2012 WL 1116495, at \*3 (E.D.N.Y. Apr. 3, 2012); *Ansoumana v. Gristede’s Operating Corp.*, 201 F.R.D. 81, 86 (S.D.N.Y. 2001).

<sup>69</sup> No. 10 Civ. 4719 (GAY), 2011 WL 4888861 (S.D.N.Y. Oct. 13, 2011).

<sup>70</sup> *Id.* at \*3.

<sup>71</sup> No. 08-CV-2984 (CPS)(JO), 2008 WL 5054201 (E.D.N.Y. Nov. 21, 2008).

<sup>72</sup> *Id.* at \*2.

<sup>73</sup> *See, e.g., Villarreal v. El Chile, Inc.*, 266 F.R.D. 207, 214 (N.D. Ill. 2010); *Flores v. Amigon*, 233 F. Supp. 2d 462, 464 (E.D.N.Y. 2002); *Singh v. Jutla & C.D. & R’s Oil, Inc.*, 214 F. Supp. 2d 1056, 1061–62 (N.D. Cal. 2002).

<sup>74</sup> Motomura, *supra* note 59, at 1753–54.

generally. The Ninth Circuit in *Rivera v. NIBCO*<sup>75</sup> emphasized the underlying purpose of private actions brought under Title VII—“to deter future discrimination and vindicate national policy of the highest priority,” which should equally apply to “victims of invidious discrimination” who are immigrant workers.<sup>76</sup> In *Madeira v. Affordable Housing Foundation, Inc.*,<sup>77</sup> the court not only emphasized that “both the illegal employment relationship and the personal injury” were the product of wrongdoing by others but also that a failure to cover immigrant workers with state health and safety laws would seriously undermine the state’s significant interest in promoting workplace safety.<sup>78</sup> By framing the plight of immigrant workers as more universal, litigants are able to provide some courts, which are willing to consider the importance of policies impacting workers more generally, with a rationale to find common ground with the mainstream.

## 2. Immigration Law Remedies

Immigration law is another realm where the very limited benefits available are allocated based on dominant cultural values such as family relationships, high-skilled professions, and clean criminal histories.<sup>79</sup> In particular, the increased intersection of immigration with criminal law<sup>80</sup> has largely resulted in limiting the rights of immigrant workers by increasing the removal of immigrants. While there are very few avenues for low-wage immigrant workers to petition for immigration status through their employer, immigrants may petition for immigration status based on certain kinds of victimization. By focusing on these limited openings, public interest attorneys and their clients—particularly when having to cooperate with Immigration and Customs Enforcement (ICE), the FBI, or local law enforcement—have been essentially constrained to deploying a cultural narrative about criminal employers who victimize immigrant workers in order to be successful. The use of these cultural narratives, however, has managed to expand

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<sup>75</sup> 364 F.3d 1057 (9th Cir. 2004).

<sup>76</sup> *Id.* at 1068.

<sup>77</sup> 469 F.3d 219 (2d Cir. 2006).

<sup>78</sup> *Id.* at 237, 247–48.

<sup>79</sup> Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 819–20, 853 (2007); Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 148, 183–84 (2006).

<sup>80</sup> See, e.g., Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 137 (2009); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th “Pale of Law,”* 29 N.C. J. INT’L L. & COM. REG. 639, 652–55 (2004); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 471 (2007); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 84–85 (2005); Stumpf, *supra* note 8, at 382.

the conceptual framework of these laws so that they apply to a broader number of immigrant workers.<sup>81</sup>

The immigration remedies available to immigrant workers are U visas and T visas, and prosecutorial discretion. For a U visa, a petitioner must show that they are a victim of an enumerated crime, which includes assault, trafficking-related crimes, perjury, obstruction of justice, and extortion.<sup>82</sup> For a T visa, a petitioner must show they are a victim of a severe form of human trafficking, which is defined as “[t]he recruitment, harboring, transportation, provision, or obtaining of a person for labor or services through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”<sup>83</sup> For prosecutorial discretion, an immigrant worker who is in removal proceedings must show that they are involved in a workplace dispute and are not otherwise considered to be a threat to public safety, national and border security, and the integrity of the immigration system.<sup>84</sup>

While each of these remedies has varying requirements, they all require the petitioner to persuade decision makers that the petitioner qualifies for immigration relief. In order to qualify for a U visa, the applicant must receive certification from a “Federal, State, or local law enforcement official,” “a Federal or State judge,” or “Federal, State, or local authorities investigating or prosecuting criminal activity.”<sup>85</sup> A T visa does not require a similar certification, although the applicant must show compliance “with any reasonable request for assistance in the Federal, State, or local investigation or prosecution” and that they have at least sought

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<sup>81</sup> Federally funded legal services organizations are able to represent individuals who qualify for U and T visas as an exception to the general prohibition on representing immigrant workers without lawful immigration status. Aliens Eligible for Assistance Under Anti-Abuse Laws, 79 Fed. Reg. 21,872 (Apr. 18, 2014) (to be codified at 45 C.F.R. § 1626.4).

<sup>82</sup> 8 U.S.C. § 1101(a)(15)(U)(iii) (2012).

<sup>83</sup> 22 U.S.C. § 7102(9) (2012).

<sup>84</sup> ICE will consider: (1) investigations conducted by the Department of Labor, Equal Employment Opportunity Commission, or National Labor Relations Board; (2) legitimate workplace-based claims, such as civil rights or union organizing; or, (3) victims of workplace crimes. *See* Memorandum from John Morton, Dir., U.S. Immigration and Customs Enforcement, to Field Officers, Special Agents in Charge, and Chief Counsel (June 17, 2011), *available at* <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>, *archived at* <http://perma.cc/6HXX-A5GP>; Memorandum from John Morton, Dir., U.S. Immigration and Customs Enforcement, to Field Officers, Special Agents in Charge, and Chief Counsel (June 17, 2011), *available at* <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>, *archived at* <http://perma.cc/AP8S-5TZB>; *Self-Help Guide for a Prosecutorial Discretion Request*, COALITION FOR HUMANE IMMIGRANT RIGHTS OF LOS ANGELES, <http://www.chirla.org/sites/default/files/Prosecutorial%20Discretion%20Pro%20Se%20Packet.pdf>, *archived at* <http://perma.cc/NY26-CSZK> (last visited Oct. 15, 2014).

<sup>85</sup> 8 U.S.C. § 1101(a)(15)(U)(i)(III) (2012).



certification.<sup>86</sup> Prosecutorial discretion requires the agreement of federal prosecutors who are pursuing the immigrant worker's removal.<sup>87</sup>

A successful case, therefore, involves using the cultural narrative of the criminal employer and the innocent victim to convince decision makers to support an application for immigration relief. The need for such an innocent victim narrative may be magnified when working with law enforcement agencies versus working with agencies that have more traditionally focused on labor violations, such as the Equal Employment Opportunity Commission (EEOC) and the Department of Labor.<sup>88</sup> Further, these narratives have been used to push the boundaries of victimization to include immigrant workers who would otherwise not be eligible for relief. For the U visa, such advocacy has sought to expand the conception of workplace crimes by finding alternate ways to characterize workplace exploitation as equivalent to crimes enumerated by the U visa statute.<sup>89</sup> The crimes of extortion or obstruction of justice, for example, may cover retaliatory threats of deportation for the nonpayment of wages,<sup>90</sup> while the crimes of perjury and fraud in foreign labor contracting may cover those who were recruited with false promises from abroad.<sup>91</sup>

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<sup>86</sup> *Id.* § 1101(a)(15)(T)(i)(III)(aa); 8 C.F.R. § 214.11(f)(1) (2014).

<sup>87</sup> In fact, although the program was brought out with much fanfare, it has largely been a disappointment for immigrant worker advocates, as the numbers of cases that have been granted discretion are miniscule and dwindling. *See* Paloma Esquivel, *Deportation Case Closure Rise, but Backlog Continues*, L.A. TIMES BLOG (July 25, 2012, 4:03 PM), <http://latimesblogs.latimes.com/lanow/2012/07/deportation-cases-closed.html>, *archived at* <http://perma.cc/D7B3-9MF8>.

<sup>88</sup> *See* Memorandum from Nancy J. Leppink, Acting Adm'r, U.S. Dep't of Labor, to Regional Adm'rs and District Dirs. (Apr. 28, 2011), *available at* [http://www.dol.gov/whd/FieldBulletins/fab2011\\_1.pdf](http://www.dol.gov/whd/FieldBulletins/fab2011_1.pdf), *archived at* <http://perma.cc/7UDE-5TUF>; Memorandum from Ronald S. Cooper, Gen. Counsel, U.S. Equal Emp't Opportunity Comm'n, to District Dirs. and Reg'l Att'ys, (July 3, 2008), *available at* [http://www.asistahelp.org/documents/resources/EEOC\\_procedures\\_for\\_U\\_visa\\_certific\\_88FAEBF8B7D5E.pdf](http://www.asistahelp.org/documents/resources/EEOC_procedures_for_U_visa_certific_88FAEBF8B7D5E.pdf), *archived at* <http://perma.cc/A249-RBLX>.

<sup>89</sup> Eunice Hyunhye Cho, formerly at the National Employment Law Project, tracked the work of advocates who use U visas for exploited immigrant workers. E-mail from Eunice Hyunhye Cho, Staff Att'y, Nat'l Emp't Law Project (July 8, 2013 1:12 MST) (on file with Utah Law Review). In *Garcia v. Audubon Communities Management, LLC*, for example, advocates were able to get the judge in a civil lawsuit to certify Plaintiffs for U visas for the crimes of involuntary servitude and trafficking based on their allegations of exploitation by their employer, which included consistent underpayment of wages and threats to evict them from housing or call law enforcement when workers complained about the lack of payment. Civil Action No. 08-01291, 2008 WL 1774584, at \*1-4 (E.D. La. Apr. 15, 2008).

<sup>90</sup> In Colorado, advocates used the crime of extortion to cover situations where employers threatened immigrant workers with deportation or calling immigration authorities in order to withhold wages from them. COLO. REV. STAT. § 18-3-207 (1.5).

<sup>91</sup> 8 U.S.C. § 1101(a)(15)(U)(iii) (2012).

T visa advocacy has focused on arguing for a more expansive conception of coercion, by reinforcing that physical force is unnecessary for the crime of forced labor and a victim's particular situation is relevant.<sup>92</sup> Professor Kathleen Kim discusses the legal development of what she calls "situational coercion," which "evaluates all the circumstances surrounding the alleged trafficking scenario, paying special attention to power inequalities and the workers' individual characteristics that may render them vulnerable to exploitation."<sup>93</sup> Around the country, public interest attorneys have used antitrafficking coalitions to increase the receptivity of federal law enforcement agencies to labor trafficking issues, by educating them about the multiple ways in which immigrant workers can be victimized.<sup>94</sup>

The reality is, however, that many immigrant workers will still fail to qualify for these immigration remedies because they cannot otherwise show, despite having suffered workplace exploitation, that the employer's behavior was criminal for purposes of immigration law. Aware of such limitations, advocates are currently seeking legislative reform to increase the kinds of criminal activity tied to workplace abuse or retaliation against immigrant workers that would make them eligible for U visas.<sup>95</sup> In the meantime, federal agencies remain receptive to these claims by immigrant workers, despite the hostile climate of immigration enforcement.<sup>96</sup> Using the cultural narrative of the criminal employer and the victimized worker, public interest attorneys, along with their clients, can continue to expand the conceptual framework of these laws in order to maximize the availability of immigration relief for immigrant workers.

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<sup>92</sup> 18 U.S.C. § 1589(c) (2012). The statutory amendments codify a broader concept of coercion than was discussed in both the original legislative history and several early judicial decisions. H.R. REP. NO. 106-939, at 101 (2000) (Conf. Rep.); *United States v. Bradley*, 390 F.3d 145, 150–51 (1st Cir. 2004); *United States v. Garcia*, No. 02-CR-110S-01, 2003 WL 22956917, at \*4 (W.D.N.Y. Dec. 2, 2003).

<sup>93</sup> Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409, 457 (2011).

<sup>94</sup> Telephone Interview with Patricia Medige, Former Co-Chair, Freedom Network (May 29, 2014) (on file with Utah Law Review).

<sup>95</sup> Title III of the Border Security, Economic Opportunity, and Immigration Modernization Act has incorporated the POWER Act provisions. S. 744, 113th Cong. §§ 3101, 3201 (as passed by Senate, June 27, 2013).

<sup>96</sup> Ming H. Chen, *Where You Stand Depends on Where You Sit: Bureaucratic Politics in Federal Workplace Agencies Serving Undocumented Workers*, 33 BERKELEY J. EMP. & LAB. L. 227, 249 (2012) (recounting agency cooperation despite restrictive government policies); Stephen Lee, *Workplace Enforcement Workarounds*, 21 WM. & MARY BILL RTS. J. 549, 556–57 (2012) (citing examples of the willingness of the Obama Administration to provide greater opportunities for relief to immigrant workers).

*B. Coalitions Reform Public Policy*

Beyond the anti-immigrant climate created by federal, state, and local policies, immigrant workers also suffer from the general decline of workplace standards for low-wage workers and the general neglect of governmental agencies providing oversight of low-wage industries.<sup>97</sup> These policies reflect the dominant cultural trends of the past decades. As such, workplace exploitation abounds for immigrant workers. With the recognition that effective public policy advocacy provides an opening for direct change, coalitions of immigrant workers, community advocates,<sup>98</sup> and public interest attorneys have come together to affirmatively create local legislative changes and advocate for change with local agencies.<sup>99</sup> This opening provided by elected officials and agency personnel is largely dependent on locality.<sup>100</sup> It is also constrained by a governmental culture that can contain actors that are both anti-immigrant and probusiness. In order to succeed, therefore, coalitions have often chosen to embrace cultural narratives that focus on the criminality of employers, while emphasizing the social identity of the hard worker. By emphasizing the dichotomy between the evil employer and the virtuous victimized worker, the symbolic struggle aligns with the mainstream value of fighting crime.<sup>101</sup> By promoting the identity of the hard worker and downplaying immigration status, coalitions manage to create a familiar character within American mythology while creating a connection more broadly across all low-wage workers.<sup>102</sup> Coalitions, therefore, deliberately use these frames to strategically persuade decision makers, who are assessing public policy alternatives, to elect the option that resonates with mainstream values.

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<sup>97</sup> Rebecca Smith, *Human Rights at Home: Human Rights as an Organizing and Legal Tool in Low-Wage Worker Communities*, 3 STAN. J. C.R. & C.L. 285, 288–89 (2007); see also Bernhardt et al., *supra* note 19, at 13, 17–18 (describing how the decline in government enforcement from 1975 to present has negatively impacted low-wage workers); Munger, *supra* note 8, at 672–75 (noting how governmental policies that have reduced regulation and downsized the welfare state have resulted in the convergence between immigrants and the indigenous working poor in their exclusion from social citizenship).

<sup>98</sup> The use of community advocates refers to a wide range of staff from community-based organizations, such as immigrant rights organizations, unions, worker centers, and faith-based institutions.

<sup>99</sup> This section focuses on advocacy work with domestic agencies. As such, it does not cover the advocacy with foreign consulates in the United States that provide support to immigrant workers who are their nationals. See SHANNON GLEESON, *CONFLICTING COMMITMENTS: THE POLITICS OF ENFORCING IMMIGRANT WORKER RIGHTS IN SAN JOSE AND HOUSTON* 15 (2012); Peter J. Spiro, *The (Dwindling) Rights and Obligations of Citizenship*, 21 WM. & MARY BILL RTS. J. 899, 910 (2013).

<sup>100</sup> See Jennifer Gordon, *The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CAL. L. REV. 2133, 2136–37 (2007).

<sup>101</sup> See STEWART ET AL., *supra* note 6, at 166–67, 270.

<sup>102</sup> GLEESON, *supra* note 99, at 18.

In their public policy campaigns, coalitions have focused on a variety of issues that plague immigrant workers,<sup>103</sup> including wage theft (i.e. the nonpayment of wages) and the misclassification of workers.<sup>104</sup> The prevalence of wage theft violations among low-wage immigrant workers is enormous—a recent report found that more than two-thirds of low-wage workers surveyed in New York, Chicago, and Los Angeles had experienced a pay violation in the past workweek.<sup>105</sup> Of the thousands of workers surveyed for this report, seventy percent were foreign-born workers.<sup>106</sup> The misclassification of low-wage workers is on the

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<sup>103</sup> See, e.g., A.B. 263, Reg. Sess. (Cal. 2013) (addressing employer retaliation); S.B. 666, Reg. Sess. (Cal. 2013) (suspending or revoking licenses for violations of law, including threatening to report immigration status); A.B. 524, Reg. Sess. (Cal. 2013) (including the threat of reporting an individual's immigration status as part of the wrongful use of force, fear, or under color of official right); A.B. 241, Reg. Sess. (Cal. 2013) (enacting domestic worker labor standards); Domestic Bill of Workers Rights, S.B. 535, 27th Legis., Reg. Sess. (Haw. 2013) (codified at Haw. Rev. Stat. §§ 378-1, -2); Domestic Worker Bill of Rights, A1470B/S2311E, 2010 Reg. Sess. (N.Y. 2010). Immigrants are forty-six percent of domestic workers. LINDA BURNHAM & NIK THEODORE, NAT'L DOMESTIC WORKERS ALLIANCE, HOME ECONOMICS: THE INVISIBLE AND UNREGULATED WORLD OF DOMESTIC WORK 11 (2012), available at <http://www.domesticworkers.org/sites/default/files/HomeEconomicsEnglish.pdf>, archived at <http://perma.cc/YL68-NJ34>. Even the U.S. Department of Labor has recently reformulated its regulations with respect to domestic workers. 78 Fed. Reg. 60,453 (Oct. 1, 2013) (to be codified at 29 C.F.R. Pt. 552).

<sup>104</sup> In 2013, for example, there were groups in Washington D.C., Chicago, North Carolina, Colorado, Texas, and Oregon working on some form of legislation to address wage theft or misclassification at the local and state level. Wage Theft/Misclassification/Remedies, H.B. 826, Gen. Assemb. Reg. Sess. (N.C. 2013) (not enacted); Josh Eidelson, *Big Win for Labor in Chicago*, SALON (Jan. 18, 2013, 9:34 AM), [http://www.salon.com/2013/01/18/big\\_win\\_for\\_labor\\_in\\_chicago/](http://www.salon.com/2013/01/18/big_win_for_labor_in_chicago/), archived at <http://perm.a.cc/9TSF-U36X>; Nathan Gilles, *Oregon Lawmakers Pass Anti-Wage-Theft Bill*, PORTLAND MERCURY BLOGTOWN (June 25, 2013, 3:44 PM), <http://www.portlandmercury.com/BlogtownPDX/archives/2013/06/25/oregon-lawmakers-pass-anti-wage-theft-bill>, archived at <http://perma.cc/T8AB-L7RU>; James Jeffrey, *Worker Wage Protection Bill Gets Senate OK*, AUSTIN BUS. J. (Mar. 20, 2013, 1:57 PM), <http://www.bizjournals.com/austin/blog/obj-at-the-capitol/2013/03/worker-wage-protection-bill-gets.html?page=all>, archived at <http://perma.cc/HU9R-JFZK>; Aldo Svaldi, "Wage Theft" Bill Tabled by Colorado House, DENVER POST (Mar. 19, 2013, 7:05 PM), [http://www.denverpost.com/ci\\_22827164/wage-theft-bill-tabled-by-colorado-house](http://www.denverpost.com/ci_22827164/wage-theft-bill-tabled-by-colorado-house), archived at <http://perma.cc/9XH2-SWB8>; *Victory! DC Council Passes Stronger Protections Against Wage Theft*, EMP'T JUST. CTR., (June 27, 2013), <http://www.dcejc.org/2013/06/27/dc-council-passes-protections-against-wage-theft/>, archived at <http://perma.cc/6DE8-2DAH>.

<sup>105</sup> ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 5 (2009). Forty-three percent of the workers surveyed had experienced retaliation after having tried to form a union or complained about a workplace issue. *Id.* at 3.

<sup>106</sup> *Id.* at 14.

rise with employers seeking to exclude workers from employment protections.<sup>107</sup> By misclassifying workers as independent contractors, larger companies try to insulate themselves from liability as employers. Employers may also establish a structure where the workers appear to be solely employed by a contractor, staffing, or temporary leasing agency.<sup>108</sup> Historically, this contingent structure was commonly found in agricultural work and the garment industry, but in recent decades is expanding to other industries.<sup>109</sup>

Across the country, coalitions have campaigned around the issue of wage theft by advocating for local legislative changes.<sup>110</sup> They emphasize that immigrant workers are necessary to the U.S. economy and that they seek to better their lives, as everyone else, through honest hard work.<sup>111</sup> One worker stated, “It’s hard enough to get by in this economy, [but] it’s shameful that employers would steal

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<sup>107</sup> Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMPL. & LAB. L. 1, 17 (2010); Andrea J. Vaughn, *Identifying Misclassified Workers: Lessons Learned from Maryland’s Workplace Fraud Act*, CLEARINGHOUSE REV., July–Aug. 2012, at 142, 143.

<sup>108</sup> Bernhardt et al., *supra* note 19, at 8–10.

<sup>109</sup> Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 994–95, 997–98 (1999). Subcontracting has expanded to other industries such as janitorial work, industrial laundry (for hospitals and hotels), and food sales. Bernhardt et al., *supra* note 19, at 9–10.

<sup>110</sup> There are a number of good resources that cover these campaigns. *See, e.g.*, KIM BOBO, WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID—AND WHAT WE CAN DO ABOUT IT 196–229 (2d ed. 2011); JANICE FINE, WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF A DREAM 171–79 (2006); NAT’L EMP’T LAW PROJECT, WINNING WAGE JUSTICE: AN ADVOCATE’S GUIDE TO STATE AND CITY POLICES TO FIGHT WAGE THEFT 17–20 (2011) [hereinafter NELP, WINNING WAGE JUSTICE]; NIK THEODORE, THE MOVEMENT TO END WAGE THEFT: A REPORT TO THE DISCOUNT FOUNDATION 8–22 (2011), available at [http://www.discountfoundation.org/sites/all/files/Wage\\_Theft\\_Report\\_2011\\_Oct.pdf](http://www.discountfoundation.org/sites/all/files/Wage_Theft_Report_2011_Oct.pdf), archived at <http://perma.cc/CD7F-FSLQ>. In New Mexico, efforts began with Somos Un Pueblo Unido, a statewide membership-based immigrant rights organization. BOBO, *supra* at 197. In New York, Make the Road New York, an organization that fights for economic opportunity for and civic participation of immigrants, led the coalition that would take the local wage theft campaigns to the state level. *Id.* at 199–200; Deborah Axt et al., *The Campaign to Pass New York’s Wage Theft Prevention Act*, CLEARINGHOUSE REV., July–Aug. 2001, at 154, 154. In Seattle, Casa Latina, a community-based immigrant rights organization led the charge to get the city ordinance enacted. BOBO, *supra* at 222; THEODORE, *supra* at 17.

<sup>111</sup> *See, e.g.*, *Los Angeles Coalition Against Wage Theft*, KOREATOWN IMMIGRANT WORKERS ALLIANCE, <http://kiwa.org/campaigns/la-wage-theft-ordinance/>, archived at <http://perma.cc/332A-VZEU> (last visited Aug. 7, 2014) (“People are working incredibly hard to pay their rent and purchase groceries and school supplies.”).

money from our families and our children.”<sup>112</sup> Another recounted, “I worked hard and did my part but my employer didn’t want to pay what he owed me. It was really hard on my family; I could barely buy food and clothes for my kids.”<sup>113</sup> By focusing on the criminality of employers, campaigns have increased the political salience of the mistreatment of these workers by fitting neatly with the American appetite to fight crime. Coalitions have transformed wage theft from a traditionally civil issue of nonpayment of wages into a criminal act.<sup>114</sup> Language choice, by describing the way to see the world, is a well-known strategy in political communication because the control of language is “more likely to successfully translate belief into policy.”<sup>115</sup> In New York, one of the wage theft bill sponsors would begin public appearances by stating, “There is a crime spree in this neighborhood.”<sup>116</sup> The messaging in New York was that law-abiding employers have nothing to fear where, in fact, criminal employers are gaining an unfair competitive advantage over lawful employers.<sup>117</sup> In Miami, ethical employers were approached to provide individual letters of support for the ordinance against wage theft.<sup>118</sup> Coalitions have also framed the issue of misclassification of workers as payroll fraud against the government.<sup>119</sup> In Illinois, for example, passage of the Employee Classification Act created civil penalties for misclassifying employees in the construction trades and created a private right of action by aggrieved employees.<sup>120</sup> Similar to the arguments made in favor of preventing wage theft, proponents of regulating misclassification argue that law-abiding employers are disadvantaged by their counterparts who fail to play by the rules, resulting in fraud against the government. These lost governmental revenues are especially salient in times of local and state budget crises.<sup>121</sup>

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<sup>112</sup> UNM Study: *NM Employers Steal Wages from 1 in 4 Mexican Immigrant Workers*, KRWG (Aug. 22, 2013, 12:27 PM), <http://krwg.org/post/unm-study-nm-employers-steal-wages-1-4-mexican-immigrant-workers>, archived at <http://perma.cc/EU2K-CKHN>.

<sup>113</sup> William Rogers, *Texas Tightens Wage Theft Laws*, LEFT LAB. REP. (June 6, 2011, 12:27 PM), <http://leftlaborreporter.wordpress.com/2011/06/06/texas-tightens-wage-theft-law/>, archived at <http://perma.cc/792D-JPYW>.

<sup>114</sup> See Axt et al., *supra* note 110, at 156. The terminology of wage theft, for example, is a relatively recent phenomenon, where “a review of major newspapers and print sources reveals that the term ‘wage theft’ did not appear at all in the press until 2005.” THEODORE, *supra* note 110, at 22. In the span of just six years, news stories using this frame have increased from eight in 2005 to nearly 200 in 2010. *Id.*

<sup>115</sup> KATHLEEN HALL JAMIESON & PAUL WALDMAN, *THE PRESS EFFECT: POLITICIANS, JOURNALISTS, AND THE STORIES THAT SHAPE THE POLITICAL WORLD*, at xiv (2003); Andrea DeCapua, *The Use of Language to Create Realities: The Example of Good Bye, Lenin!* 166 SEMIOTICA 69, 70 (2007).

<sup>116</sup> Axt et al., *supra* note 110, at 156.

<sup>117</sup> *Id.*

<sup>118</sup> BOBO, *supra* note 110, at 220.

<sup>119</sup> NELP, *WINNING WAGE JUSTICE*, *supra* note 110, at 85.

<sup>120</sup> Employee Classification Act, 820 ILL. COMP. STAT. 185/1–185/999 (2008).

<sup>121</sup> BOBO, *supra* note 110, at 238–39; Vaughn, *supra* note 107, at 144.

Coalitions have used these same narratives to actively advocate with local governmental agencies to improve enforcement policies. Local agency personnel become more sympathetic toward immigrant workers when they can show that their employer is comparatively engaged in serious wrongdoing. In New York, Make the Road New York,<sup>122</sup> in collaboration with the Retail, Wholesale, and Department Store Union, has partnered with the New York Department of Labor in targeted-enforcement efforts.<sup>123</sup> Professor Nik Theodore describes this collaboration as “[m]odeled after neighborhood watches that are designed to reduce street crime, this program—New York Wage Watch—targeted commercial districts for workplace sweeps, sending investigators into worksites to check for violations, and educating employers, workers, and neighborhood residents about employment laws.”<sup>124</sup> By targeting the worst actors in certain industries, this initiative focused on a more systematic method of collecting wages while also improving overall compliance and strengthening deterrence.<sup>125</sup>

The Workers Defense Project,<sup>126</sup> formerly Casa Marianella, worked with the Austin Police Department and the local county attorney’s office to file criminal charges against employers who, through the crime of theft of service, have demonstrated an “intent not to pay” wages.<sup>127</sup> This collaboration provided the local community with serious leverage in convincing employers that unpaid wages carried serious consequences.<sup>128</sup> Most recently, other cities in Texas are attempting to replicate the use of criminal charges against employers who fail to pay wages, particularly given the recent state amendment to close the loophole for employers who have made a partial payment.<sup>129</sup>

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<sup>122</sup> Make the Road New York builds the power of Latino and working class communities to achieve dignity and justice through organizing, policy innovation, transformative education, and survival services. *Who We Are*, MAKE THE ROAD NEW YORK, <http://www.maketheroad.org/whoweare.php>, archived at <http://perma.cc/AR4K-V75K> (last visited Aug. 7, 2014).

<sup>123</sup> THEODORE, *supra* note 110, at 18–19.

<sup>124</sup> *Id.* at 19.

<sup>125</sup> *Id.*

<sup>126</sup> Workers Defense Project (WDP) is a membership-based organization that empowers low-income workers to achieve fair employment through education, direct services, organizing, and strategic partnerships. *Who We Are*, WORKERS DEF. PROJECT <http://www.workersdefense.org/about-us/>, archived at <http://perma.cc/7CZF-BJXY> (last visited Aug. 7, 2014).

<sup>127</sup> Julien Ross, *A Fair Day’s Pay: The Problem of Unpaid Workers in Central Texas*, 10 TEX. HISP. J.L. & POL’Y 117, 144–46 (2004).

<sup>128</sup> FINE, *supra* note 110, at 88.

<sup>129</sup> Haleigh Svoboda, *Enforcement Is Next Task for Law on Wage Theft*, N.Y. TIMES, Oct. 29, 2011, at A25; Priscilla Mosqueda, *El Paso Becomes Second City to Indict Employer for Wage Theft*, TEXAS OBSERVER (Apr. 26, 2013, 4:04 PM), <http://www.texasobserver.org/el-paso-becomes-second-city-to-indict-employer-for-wage-theft/>, archived at <http://perma.cc/6MHU-4U3M>.

At times, these coalitions have deemphasized immigration status to make concepts more politically palatable by deliberately using an interpretative frame that fits all workers. Wage theft campaigns have managed to reshape the public imagination about immigrant workers and frame their exploitation within the greater context of the government's failure to protect all low-wage workers. The passage of laws addressing immigrant worker exploitation has occurred, in part, because coalitions have come together with labor unions to push such legislation.<sup>130</sup> In New York, the ability to project unanimous labor support was an important factor as unions had historical ties to legislative leaders that immigrant worker groups did not have at that time.<sup>131</sup> In Miami, while the coalition consisted of unions such as Service Employees International Union (SEIU) and UNITE HERE, it reached out to the southern American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) to gain even broader labor support.<sup>132</sup> In Washington, Casa Latina joined the Washington State Labor Council to more effectively press for governmental change.<sup>133</sup> In the 1990s, there was a marked shift by unions to affirmatively recruit and organize immigrant workers based on the recognition of shared interests and the need to revive life in declining unions.<sup>134</sup> While the support of labor has been crucial for building power, it has also provided these coalitions with the broader stamp of legitimacy by reframing the issue away from immigrants to its impact on all workers.<sup>135</sup>

Coalitions have framed their campaigns to resonate with mainstream culture, whether it is by transforming the social identity of immigrant workers, minimizing immigration status by focusing on the greater good of all workers, or seeking to

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<sup>130</sup> In New Mexico, for example, a broad coalition of advocates for day laborers, immigrants, and the homeless pushed for legislation to protect day laborers from employer exploitation by increasing civil and criminal penalties. Rebecca Smith, *Day Labor Legislative Victories*, CLEARINGHOUSE REV., Jan.–Feb. 2006, at 546, 547. A survey by advocacy groups was used to show that not only half the workers identified themselves as U.S. citizens but also nearly three-quarters of the respondents were homeless. *Id.*

<sup>131</sup> Axt et al., *supra* note 110, at 157.

<sup>132</sup> BOBO, *supra* note 110, at 220.

<sup>133</sup> THEODORE, *supra* note 110, at 9.

<sup>134</sup> RUTH MILKMAN, L.A. STORY: IMMIGRANT WORKERS AND THE FUTURE OF THE U.S. LABOR MOVEMENT 2–3 (2006). As a result of this shift, unions have taken on immigrant rights advocacy. Kati L. Griffith, Symposium, *Undocumented Workers: Crossing the Borders of Immigration and Workplace Law*, 21 CORNELL J.L. & PUB. POL'Y 611, 638 (2012).

<sup>135</sup> See Kim Moody, *Immigrant Workers and Labour/Community Organisations in the United States*, in COMMUNITY UNIONISM: A COMPARATIVE ANALYSIS OF CONCEPTS AND CONTEXTS 139, 157 (Jo McBride & Ian Greenwood eds., 2009); see also Michelle A. Travis, *Toward Positive Equality: Taking the Disparate Impact Out of Disparate Impact Theory*, 16 LEWIS & CLARK L. REV. 527, 564 (2012) (arguing that “non-group-conscious regulation of particular employment practices currently enjoys greater political viability than attempts to expand the list of legally protected social identity groups”).



criminalize these “new” social challenges.<sup>136</sup> They do so by using mainstream symbols that are familiar to dominant groups making decisions about public policy.<sup>137</sup> Campaigns are complicated organisms so that without deconstructing the unique and localized political context,<sup>138</sup> it may be hard to tell exactly how any one accomplishment was achieved. A collective examination across these diverse campaigns has revealed, however, that coalitions have consistently used these common cultural narratives in order to take advantage of the limited opportunities that have been created by the dominant cultural framework. Thus, the mainstreaming of immigrant workers, which has become reflected in reformed public policies, plays a role in advancing immigrant workers’ rights.

### C. Direct Actions by Immigrant Workers

Given the limitations created by traditional venues such as the courts, administrative agencies, and the legislature, immigrant workers have sometimes turned to direct actions. Immigrant workers may picket, protest, or take other highly visible action to highlight the issue of workplace exploitation. Through these actions, immigrant workers are forced to choose among the interpretive frames that would most effectively achieve their goals. Many times immigrant workers take this opportunity to provide cultural narratives that shame employers by exposing the ways in which they defy the rule of law, while shifting the narrative from immigrants as criminals to immigrants as hard workers employed in undesirable jobs. Both of these narratives become almost necessary in altering perceptions of a mainstream audience, whether it is employers, consumers, or the public at large. These narratives tell a story, which becomes a primary means of creating identification between the narrator and audience.<sup>139</sup> By using these cultural narratives, immigrant workers are actively reshaping the legal practices of employers.

Immigrant workers capture the attention of employers with lively pickets that target foot traffic, impact commercial reputation, and garner media coverage.<sup>140</sup> One group picketing in an employer’s residential neighborhood used a flyer recounting the worker’s story of exploitation: “[S]he suffered a variety of abuses including working without payment, working without meal or rest breaks, being transported from one client’s home to another in dangerous vehicles, being forced to clean homes on her knees and use pure bleach without any safety equipment,

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<sup>136</sup> Forman, *supra* note 33, at 346–47.

<sup>137</sup> DELLA PORTA & DIANI, *supra* note 6, at 76.

<sup>138</sup> See GLEESON, *supra* note 99, at 17 (describing the concept of “political field,” which requires an examination of an individual’s actions in relation to other actors and the context in which they occur).

<sup>139</sup> STEWART ET AL., *supra* note 6, at 55, 250.

<sup>140</sup> FINE, *supra* note 110, at 81–82.

and suffering regular verbal harassment and humiliation by the [employer].”<sup>141</sup> Another flyer distributed by picketers in front of the employer’s business stated: “We worked 10–12 hours per day, in dirty, unsafe factories.”<sup>142</sup> After an employer refused to comply with the court order, immigrant workers picketed an employer’s house with highly visible copies of the judgment that had been enlarged.<sup>143</sup> Instead of the foreignness of workers, these actions emphasize the foreign nature of unscrupulous employers conducting business in an otherwise “lawful” society of commerce.<sup>144</sup>

Direct actions are especially suitable at revealing the criminality of employers by exposing the secrecy that typically accompanies employment relationships in low-wage industries.<sup>145</sup> The Domestic Workers United (DWU) has been at the forefront of exposing the privacy of domestic work and the unlawful coercion that can occur behind closed doors for immigrant workers who provide services, such as childcare, housekeeping, or elder care.<sup>146</sup> DWU has engaged in regular gatherings in front of employer homes in demonstrations of shame.<sup>147</sup> In one action, DWU held press conferences, picketed, and drew attention to the plight of an immigrant worker who “cared for a disabled child while also cleaning, cooking, ironing, sweeping, and hand washing clothes for the entire household” and worked “six days a week for less than \$2.00 an hour and was forced to sleep in a sewage-filled basement.”<sup>148</sup> The renowned Fair Food Program by the Coalition of Immokalee Workers (CIW) has similarly succeeded in publicly exposing how market mechanics manage to exploit farm workers.<sup>149</sup> Because of CIW’s historic work in uncovering six human trafficking operations in Florida, CIW continues to link their Fair Food Program to slavery where its flyers remind the public that in

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<sup>141</sup> REBECCA SMITH, NAT’L EMP’T LAW PROJECT, ENGAGING IN DIRECT ACTION CAMPAIGNS WITHOUT GETTING SLAPP’ED: TAKE ACTION AGAINST WAGE THEFT!, at XV (2007).

<sup>142</sup> *Id.* at XVII.

<sup>143</sup> FINE, *supra* note 110, at 81.

<sup>144</sup> Ironically, the “evil” employers are often foreign themselves, which raises questions both about the difficulty of enforcing laws against mainstream employers, see Lee, *supra* note 62, at 48–49, and the kind of message that is sent about worker exploitation by foreign cultures, see Leti Volpp, *Migrating Identities: On Labor, Culture, and Law*, 27 N.C. J. INT’L L. & COM. REG. 507, 510–11 (2002).

<sup>145</sup> See THEODORE, *supra* note 110, at 13.

<sup>146</sup> Eileen Boris & Premilla Nadasen, *Domestic Workers Organize!*, 11 WORKINGUSA: THE J.L. & SOC’Y 413, 426–27 (2008).

<sup>147</sup> *Id.* at 427.

<sup>148</sup> *Id.* at 428.

<sup>149</sup> See Greg Asbed & Sean Sellers, *The Fair Food Program: Comprehensive, Verifiable and Sustainable Change for Farmworkers*, 16 U. PA. J.L. & SOC. CHANGE 39, 43–45 (2013). The CIW’s movement is imbued with basic human rights principles for farm workers. *Id.* at 48. To the extent that CIW is targeting other progressive groups—ethical consumers, students, and faith-based communities—human rights as an interpretive frame can serve well to recruit these groups to their cause. *Id.* at 43.

the most extreme cases, workers have “been forced to labor against their will through the use or threat of physical violence.”<sup>150</sup> Companies that refuse to join the Fair Food Program are failing to “ensure slavery is not in its supply chain.”<sup>151</sup> The terminology of “slavery” is a perfect example of how a movement transforms perceptions with a slogan that “encapsulate[s] an intolerable situation in a few striking, memorable words.”<sup>152</sup>

Direct actions may be used in conjunction with litigation or other legal efforts.<sup>153</sup> The Restaurant Opportunities Centers United (ROC), which organizes restaurant workers (some of them immigrant workers), uses direct action in combination with litigation and public policy reform to advance the rights of such workers.<sup>154</sup> It uses “workplace justice” campaigns to hold “low-road” actors publicly accountable.<sup>155</sup> In one such campaign, workers engaged in weekly protests for its campaign against the Andiamo chain of restaurants in Michigan.<sup>156</sup> Andiamo was a particularly bad actor that was exposed for failing to pay wages, engaging in national origin discrimination (including calling its workers “wetbacks”), and acting in a retaliatory manner.<sup>157</sup> Their direct action strategy was accompanied by federal litigation and complaints filed with the NLRB.<sup>158</sup> As a

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<sup>150</sup> COALITION OF IMMOKALEE WORKERS, *Wendy's: Old Fashioned Exploitation*, available at <http://ciw-online.org/wp-content/uploads/13WendysFlyer.pdf>, archived at <http://perma.cc/6PZW-BXDE> (last visited Aug. 7, 2014). CIW tells a story of workers trying hard to get by: a “worker needs to pick 2.5 tons of tomatoes to earn minimum wage in a typical 10-hour workday.” *Id.*

<sup>151</sup> WALK FREE, *Wendy's: Help End Slavery in Florida's Tomato Fields*, <http://e-activist.com/ea-action/action?ea.client.id=1786&ea.campaign.id=22853&forwarded=true>, archived at <http://perma.cc/4NH3-T83H> (last visited Aug. 7, 2014) (CIW links to this petition); see Holly Burkhalter, *Opinions, Fair Food Program Helps End the Use of Slavery in the Tomato Fields*, WASH. POST (Sept. 2, 2012), [http://www.washingtonpost.com/opinions/fair-food-program-helps-end...fields/2012/09/02/788f1a1a-f39c-11e1-892d-bc92fee603a7\\_story.html](http://www.washingtonpost.com/opinions/fair-food-program-helps-end...fields/2012/09/02/788f1a1a-f39c-11e1-892d-bc92fee603a7_story.html), archived at <http://perma.cc/6R3B-CDEB>.

<sup>152</sup> STEWART ET AL., *supra* note 6, at 176.

<sup>153</sup> See, e.g., JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* 201–02 (2005); Victor Narro, *¡Sí Se Puede! Immigrant Workers and the Transformation of the Los Angeles Labor and Worker Center Movements*, 1 L.A. PUB. INT. L.J. 65, 90–91 (2009).

<sup>154</sup> *Workplace Justice*, REST. OPPORTUNITIES CTR. UNITED, <http://rocunited.org/our-work/workplace-justice/>, archived at <http://perma.cc/YXJ9-CH99> (last visited Aug. 7, 2014).

<sup>155</sup> *Id.*

<sup>156</sup> Paul Abowd, *Restaurant Workers Launch Multi-City Campaign to Transform Low-Wage Industry*, LAB. NOTES (Feb. 4, 2010), <http://www.labornotes.org/2010/02/restaurant-workers-launch-multi-city-campaign-transform-low-wage-industry>, archived at <http://perma.cc/3D2T-8X2E>.

<sup>157</sup> *Id.*

<sup>158</sup> News Hits Staff, *Cleared Plate: Dispute Between Andiamo Dearborn and Employees Finds Resolution*, METRO TIMES (Mar. 9, 2011), <http://metrotimes.com/news/cleared-plate-1.1116126>, archived at <http://perma.cc/VXK8-8D3Q>.

result of these efforts, the workers ultimately reached a resolution of “innovative anti-discrimination measures, complaint-resolution procedures, training, hiring, break, uniform and equipment policies, along with translation of employee materials for non-English speakers.”<sup>159</sup> These multifaceted efforts may represent the best integration of legal strategy with grassroots movements.<sup>160</sup>

Given the constraints of traditional legal strategies, direct actions are sometimes the only available way to advance the legal rights of workers.<sup>161</sup> Through these direct actions, immigrant workers have often embraced mainstream cultural narratives through storytelling, transcending the negative stereotypes of immigrants while focusing on the criminal acts of the employer. This storytelling affects public perceptions and brings about changes in thinking, feeling, and acting.<sup>162</sup> Employers’ legal practices may begin to respond to such cultural narratives.<sup>163</sup> By using these cultural narratives, immigrant workers have communicated a message that connects to a mainstream audience and have helped to establish themselves as serious and sympathetic agents of change.

### III. ALTERNATIVES TO MAINSTREAMING

There are alternative approaches to mainstreaming to choose from. In an ideal world, a more transformative or radical approach from the outside alone would persuasively alter the hostile environment for immigrant workers. For this reason, it is worthwhile to examine alternative cultural narratives that provide for consciousness raising and a more comprehensive vision for addressing fundamental structural inequities. The movement sometimes frames immigrant workers as global citizens or as universal rights holders. In the alternative, an even more radical cultural narrative could be produced from acts of civil disobedience

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<sup>159</sup> *Id.* The Andiamo campaign also involved reaching out to larger groups, such as United Auto Workers, who supported the campaign as a struggle by workers regardless of “industry or union membership.” Nathan Skid, *Andiamo Restaurant Group Reaches Agreement in Worker Dispute*, CRAIN’S DETROIT BUS. (Mar. 1, 2011, 5:18 PM), <http://www.crainsdetroit.com/article/20110301/free/110309994/andiamo-restaurant-group-reaches-agreement-in-worker-dispute>, archived at <http://perma.cc/CCH9-U2X2>.

<sup>160</sup> See THEODORE, *supra* note 110, at 12–14; Scott L. Cummings, *Hemmed in: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 1, 5–6 (2009).

<sup>161</sup> See FINE, *supra* note 110, at 81; see also Glenn Omatsu, *Immigrant Workers Take the Lead: A Militant Humility Transforms L.A. Koreatown*, in IMMIGRANT RIGHTS IN THE SHADOWS OF CITIZENSHIP 266, 275 (Rachel Ida Buff ed., 2008) (describing how immigrant workers turned to direct action because of the bureaucratic delay of claims filed with government agencies).

<sup>162</sup> See Delgado, *Rodrigo’s Homily*, *supra* note 26, at 1276; STEWART ET AL., *supra* note 6, at 20.

<sup>163</sup> See, e.g., REST. OPPORTUNITIES CTR. UNITED, *Restaurants Advancing Industry Standards in Employment (RAISE)*, <http://rocunited.org/our-work/high-road/raise/>, archived at <http://perma.cc/NJ4N-W5KG> (last visited Aug. 7, 2014).

that seek to reject the existing political and social order responsible for the exploitation of immigrant workers. While these alternatives may provide for a normative vision for the movement, they must also be considered within the existing framework where immigrant workers lack traditional political power. Given this significant reality for immigrant workers who are roused to fight and win, they may ultimately be forced to embrace aspects of mainstreaming strategies to succeed.<sup>164</sup>

Many scholars have explored ways to address the inherent contradiction between the employment of immigrant workers and the failure, based on their lack of immigration status, to accord them equal rights. Some proposals conceive of citizenship rights beyond the territorial boundaries of the United States. Professor Jennifer Gordon offers a new immigration status of “‘transnational labor citizenship,’ which would entitle the holder to come and go freely between the sending country and the United States, and to work in the United States without restriction.”<sup>165</sup> Professor Linda Bosniak suggests a universal citizenship that extends beyond the boundaries of a nation-state.<sup>166</sup> Others propose the use of international law as a way to conceive of immigrant workers as universal rights holders. For instance, Professor Ruben Garcia advocates for the use of international human rights in framing immigrant worker rights.<sup>167</sup> In fact, these proposals, in many respects, represent the normative ideal for immigrant workers. The cultural narrative of the universal rights holder, for example, serves as a rallying cry for internally organizing workers themselves because it provides individuals with a sense of empowerment as being endowed basic rights as human beings.<sup>168</sup> To the extent that movements work on these transformative possibilities, they provide important counter narratives to the mainstream culture by raising consciousness.

These interpretive frames are not dissimilar to the mainstreaming tactics in that they also create a narrative that seeks to be inclusionary of immigrant workers into mainstream society. The difference, however, is that the use of international

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<sup>164</sup> See FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE’S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* 36 (1977).

<sup>165</sup> Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 563 (2007).

<sup>166</sup> See Linda Bosniak, *Universal Citizenship and the Problem of Alienage*, 94 NW. U. L. REV. 963, 981 (2000); see also Núñez, *supra* note 37, at 870 (discussing a postterritorial approach to immigrant workers where their rights accorded in the employment sphere are based on membership rather than the immigration status of workers).

<sup>167</sup> RUBEN J. GARCIA, *MARGINAL WORKERS: HOW LEGAL FAULT LINES DIVIDE WORKERS AND LEAVE THEM WITHOUT PROTECTION* 131–32, 137 (2010); see also Beth Lyon, *Changing Tactics: Globalization and the U.S. Immigrant Worker Rights Movement*, 13 UCLA J. INT’L L. & FOREIGN AFF. 161, 169, 194–95 (2008) (stating that the immigrant worker movement could use international law advocacy to set a “rights tone” with the general public).

<sup>168</sup> See Lyon, *supra* note 167, at 193–94; Smith, *supra* note 97, at 313–14.

law framing as a cultural narrative has generally not persuaded mainstream institutions to help move reform efforts forward.<sup>169</sup> This is because the universal rights holder frame has generally failed to resonate with the values of mainstream culture, which diverge from international human rights norms.<sup>170</sup> Further, any interpretive frame about universal citizenship lacks widespread appeal, based on the extremely contentious debate about the comparatively modest proposals to legalize some immigrants. Recent legislation proposed by Congress is being exacted at a substantial price, which is intended to ensure that lawful status is earned as an entitlement.<sup>171</sup> Those who cannot qualify for such status in the first instance will be left vulnerable to become part of the new underclass of immigrant workers. Further, the realization of citizenship in and of itself will not solve many of the ills faced by immigrant workers.<sup>172</sup>

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<sup>169</sup> See GARCIA, *supra* note 167, at 130–32; Lyon, *supra* note 167, at 173; see generally Jaya Ramji-Nogales, *Undocumented Migrants and the Failures of Universal Individualism*, 47 VAND. J. TRANSNAT'L L. 699 (2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2321728](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2321728), archived at <http://perma.cc/Z6L3-QNTA> (noting that international human rights law fails to live up to its promise of providing protection for vulnerable migrants).

<sup>170</sup> See Michael Ignatieff, *Introduction: American Exceptionalism and Human Rights*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 1, 10–11 (Michael Ignatieff ed., 2005).

<sup>171</sup> The bill requires that those with registered provisional immigrant (RPI) status maintain a more or less solid work trajectory for ten years to earn lawful permanent residency (LPR). S. 744, 113th Cong., § 2102 (as passed by Senate, June 27, 2013). This requirement creates a potentially exploitative dynamic between employers and immigrant workers desperate to hold on to their jobs at any price. RPIs, who are low-wage workers, will have difficulty meeting the minimum income requirements to show that they will not become a “public charge” to qualify for LPR. *Id.* §§ 2101, 2323. Further, RPIs are ineligible for any benefits, including access to affordable health insurance. *Id.* §§ 2101–2102.

<sup>172</sup> Victor Narro, *Immigration Reform Alone Will Not End Workplace Violations*, HUFFINGTON POST (Apr. 8, 2013, 12:32 PM), [http://www.huffingtonpost.com/victor-narro/immigration-reform-alone-\\_b\\_3038061.html](http://www.huffingtonpost.com/victor-narro/immigration-reform-alone-_b_3038061.html), archived at <http://perma.cc/CHX2-2VTZ>. Immigrant workers, even those with authorization to work, may continue to remain reluctant in reporting workplace violations. Jayesh M. Rathod, *Beyond the “Chilling Effect”*: *Immigrant Worker Behavior and the Regulation of Occupational Safety & Health*, 14 EMP. RTS. & EMP. POL'Y J. 267, 268 n.6, 293–94 (2010). They will also continue to face the problems associated with working in low-wage industries that structurally provide for degraded workplace standards. At best, there is mixed evidence about the impact of legalization on improving the wages of low-wage U.S.-born workers. Michael Greenstone & Adam Looney, *What New Immigrants Could Mean for American Wages*, BROOKINGS BLOGS (Aug. 2, 2013, 11:28 AM), <http://www.brookings.edu/blogs/jobs/posts/2013/08/02-immigration-wages-greenstone-looney>, archived at <http://perma.cc/8KV6-JBWP>; see also Asbed & Sellers, *supra* note 149, at 40 (noting that the “crisis that immigrant farmworkers face” is not only about their immigration status).

As an alternative, movements can choose a more radical cultural narrative to challenge mainstream institutions. In the United States, the somewhat fragmented Occupy Wall Street movement has taken on the cause of immigrant workers, finding a common theme of exploitation by the one percent.<sup>173</sup> The movement has garnered international attention while engaging in actions ranging from civil disobedience to more combative tactics that have led to clashes with the police.<sup>174</sup> In Brazil, workers who were furious about living and working conditions set fire to the worksite during a twenty-six day strike at the Jirau Dam.<sup>175</sup> While dam workers have won some concessions from prior strikes, the most recent uprisings have been attributed to “vandals,” resulting in the arrival of military police to keep order and to prevent discouraged workers from quitting.<sup>176</sup>

These more radical actions can bring attention to an intolerable situation. The problem is that they can be written off by the mainstream as radical or criminal elements. At times, unlawful acts alone have been shown to thwart a movement, while an approach that is conducted within the established rules of the game may more easily gain an audience.<sup>177</sup> They also carry risks to the participants, which can include the imposition of criminal charges and deportation for immigrant workers. Immigrant workers may recognize their economic power as workers,<sup>178</sup> although the ability to wield such power to affect labor market dynamics may be complicated by their immigration status as well as the underlying structure of employment relationships for low-wage workers.<sup>179</sup> The 2006 immigrant marches raised the possibility of mass resistance, but have yet to be replicated on that sort

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<sup>173</sup> David Bacon, *Unions and Immigrants Join Occupy Movements*, TRUTHOUT (Dec. 6, 2011, 8:31 AM), <http://www.truth-out.org/news/item/5417:unions-and-immigrants-join-occupy-movements>, archived at <http://perma.cc/Q9CF-SSHW>.

<sup>174</sup> Ryan Devereaux, *Occupy Wall Street: There's a Militant Animosity Built by Direct Action*, GUARDIAN (Feb. 3, 2012, 2:57 PM), <http://www.theguardian.com/world/2012/feb/03/occupy-wall-street-animosity-direct-action>, archived at <http://perma.cc/6M5Q-Q7TN>.

<sup>175</sup> Simon Romero, *Amid Brazil's Rush to Develop, Workers Resist*, N.Y. TIMES, May 5, 2012, at A6.

<sup>176</sup> *Id.*; Mario Osava, *Worker Revolts Delay Mega-Projects in Brazil*, INTER PRESS SERV. NEWS AGENCY (Apr. 25, 2012), <http://www.ipsnews.net/2012/04/worker-revolts-delay-mega-projects-in-brazil/>, archived at <http://perma.cc/Y7AD-NFVE>.

<sup>177</sup> See STEWART ET AL., *supra* note 6, at 74, 235–37.

<sup>178</sup> Immigrant workers dominate certain workplaces: “[f]oreign-born workers accounted for 40% of workers in farming, fishing, and forestry; 36% in cleaning and maintenance; 26% in construction and extraction; and 23% in food preparation and serving, according to the U.S. Bureau of Labor Statistics.” IMMIGRATION POL’Y CTR., *Strength in Diversity: The Economic and Political Power of Immigrants, Latinos, and Asians*, AM. IMMIGRATION COUNCIL (Jan. 19, 2013), <http://www.immigrationpolicy.org/just-facts/strength-diversity-economic-and-political-power-immigrants-latinos-and-asians>, archived at <http://perma.cc/N9TJ-NNBW> [hereinafter IMMIGRATION POL’Y CTR., *Strength in Diversity*].

<sup>179</sup> FINE, *supra* note 110, at 257–58; Moody, *supra* note 135, at 155.

of scale.<sup>180</sup> The rise of contingent work and subcontracting among immigrant workers, as among all low-wage jobs, makes the efficacy of stopping production less realistic, unless it otherwise resembles a fictionalized universe depicted in the film *A Day Without a Mexican*.<sup>181</sup> To the extent that there are immigrant workers who are willing to engage in even more radical tactics, they should continue to do so as such grassroots uprisings not only contribute diverse counter narratives in the public discourse<sup>182</sup> but also embolden other immigrant workers into political action. The vast majority of immigrant workers, however, will disfavor such strategies because they do not wish to jeopardize the lives they have built for themselves and their families in the United States. It is also unclear that the use of coercive tactics alone against the dominant class is a winning strategy to convince the mainstream that change is necessary to advance the rights of immigrant workers.

Given the limited resources available to create, organize, and maintain social movements, the pragmatic question becomes, therefore, how to develop a strategy that advances rights within the current political reality. A consistent cultural narrative is that immigrants are people who will not and cannot become “American.”<sup>183</sup> They not only lack full political citizenship but also experience outright prejudice created by anti-immigrant hostility.<sup>184</sup> As a result, the reality for immigrant workers is that they live as subordinated members of U.S. society. As outsiders, immigrant workers practically need mainstream narratives to transform their situation into a social or political problem for the dominant class. The development of immigrant worker rights’ usually becomes possible not because of any local consensus about the normative ideals associated with universal citizenship or human rights but rather based on the movement’s ability to construct cultural narratives to address political realities.<sup>185</sup> Immigrant workers are a

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<sup>180</sup> The 2006 immigrant marches were in response to pending federal legislation that sought to tighten borders, accelerate deportations, and criminalize immigrants. These national marches were “the largest effort by immigrants to influence policy in recent memory.” Rachel L. Swarns, *Immigrants Rally in Scores of Cities for Legal Status*, N.Y. TIMES, Apr. 11, 2006, at A1.

<sup>181</sup> *A Day Without a Mexican* (Altavista 2004). The satirical film presents the consequences of what one day would look like in California after all the Mexicans disappear into a mysterious pink fog. *Id.*

<sup>182</sup> The civil disobedience by the nine activists who left the United States and sought reentry without lawful authorization garnered media attention and presented a diverse view on the issue of immigration reform. See e.g., Cindy Carcamo, *Immigrant Rights Activists at Odds Over ‘Dream 9,’* L.A. TIMES, Aug. 10, 2013, at A10; Julia Preston & Rebekah Zemansky, *Demonstration at Arizona Border Divides Supporters of Immigration Overhaul*, N.Y. TIMES, Aug. 4, 2013, at A10.

<sup>183</sup> See CHAVEZ, *supra* note 10, at 44–45 (referencing the public discourse about Latinos, especially Mexican immigrants and their descendants).

<sup>184</sup> See *id.* at 28–38; ROMÁN, *supra* note 10, at 17–18.

<sup>185</sup> See PIVEN & CLOWARD, *supra* note 164, at 35; Motomura, *supra* note 59, at 1759 (noting the appeal of pragmatic versus moral arguments in making legal or public policy



politically unpopular group with little political voice. Working within established institutions such as the courts, administrative agencies, media, and legislature, therefore, often becomes a better way to address political realities.

While the focus on the use of law, particularly on individual legal rights, could be equated with accepting the unjust hierarchical social structure,<sup>186</sup> it provides immigrant workers with a realistic opportunity to address their subordination maintained by the mainstream.<sup>187</sup> Outsiders, like immigrant workers, cannot so easily reject working within the contours of the system as legal rights provide them with tangible gains to address their condition. While identifying harms created for immigrants who seek to attain mainstream “respectability” may be helpful,<sup>188</sup> it fails to acknowledge that immigrants themselves may seek to be respected and understood within U.S. society. Nor do such critiques about immigrants seeking conformity with U.S. society ultimately offer a practical alternative, short of a complete transformation of the existing political and social order.<sup>189</sup> Addressing legal rights incrementally with an eye towards political ends<sup>190</sup> may be preferable to a wholesale rejection of the existing order with radical or transformative strategies, if a more radical approach will likely result in failure. Depending on the particular forum, locality, or goal, alternative strategies that are more transformative or radical may run alongside of or may even be preferable to mainstreaming. An approach that is conducted within the established rules of the game, however, is most commonly what is required by the constraints of the mainstream cultural narratives,<sup>191</sup> providing the potential to change the situation of immigrant workers.

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claims) (citing Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555, 558 (1996)).

<sup>186</sup> See MINDA, *supra* note 18, at 115 (“The goal of such work was to illustrate how legal doctrine, as a manifestation of the ideology of liberalism, contributed to an unjust, hierarchical social structure.”).

<sup>187</sup> See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1384–85 (1988).

<sup>188</sup> Lisa Marie Cacho, *The Rights of Respectability: Ambivalent Allies, Reluctant Rivals, and Disavowed Deviants*, in IMMIGRANT RIGHTS IN THE SHADOWS OF CITIZENSHIP, *supra* note 161, at 190, 198–99.

<sup>189</sup> See, e.g., Monisha Das Gupta, *Rights in a Transnational Era*, in IMMIGRANT RIGHTS IN THE SHADOWS OF CITIZENSHIP, *supra* note 161, at 402, 419 (arguing for an abandonment of the discourse of civil rights and citizenship and engaging in a “thoroughgoing and historicized analysis of current forms of colonialism that gird the subjugation and displacement of indigenous people and migrants”).

<sup>190</sup> Gary Bellow, *Steady Work: A Practitioner’s Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297, 300 (1996).

<sup>191</sup> STEWART ET AL., *supra* note 6, at 235–37. Even with direct actions, immigrant workers are careful to confine their persuasive efforts to actions that are protected by the First Amendment. See, e.g., SMITH, *supra* note 141, at xix–xx (discussing tips for picketing at a private business or home).

## IV. RESPONSES TO THE PERILS OF MAINSTREAMING

How should the immigrant worker movement manage the tradeoffs raised by mainstream cultural narratives? The perils of mainstreaming are well known—they include the creation of disadvantaged out-groups and group-based stereotypes. The strong identification with mainstream norms can also become an obstacle limiting the capacity to create more structural changes. The various forums where immigrant workers seek to advance their rights, such as the courts, administrative agencies, and legislatures, vary in the extent to which they are wedded to the dominant cultural framework. When immigrant workers are forced to embrace mainstreaming in these forums, the immediate benefits are more appreciable and hold promise to help empower and build the movement of immigrant workers. A closer examination of the costs helps to clarify the risks for immigrant workers, community advocates, and public interest attorneys. The way for movements to manage the use of mainstream cultural narratives is to proceed “with their eyes open”—where protagonists construct a more thoughtful strategy that seeks to minimize the costs. They can do so by focusing on connections between similarly subordinated groups, even those with different agendas, to collectively challenge underlying structural inequities that help maintain a normative vision for the movement.

The public narrative of the iconic hard-working immigrant can create a class of outsiders who are neither sympathetic nor any familiar embodiment of mainstream values. The interpretive frame of the hard-working immigrant worker is the counterpoint to the lazy unemployed worker who subsists on government benefits. Those who subsist on welfare entitlements are seen as outcasts of society who individually lack work ethic that is embedded in the U.S. tradition. There is a persistent fear that immigrants come to the United States to drain public resources,<sup>192</sup> even though they are barred from most public benefits. Immigration reform proposals epitomize this fear by barring those who obtain lawful immigration status from any federal means-tested benefit or subsidy provided by the Affordable Care Act.<sup>193</sup>

Similarly, by emphasizing the victimization of immigrant workers, criminal immigrants become an out-group. Much of the criticism pertaining to T visas, for example, is devoted to the narrowness with which the government has implemented the mandate of the statute, particularly in viewing who is considered a “worthy” victim.<sup>194</sup> Prosecutorial discretion similarly continues this unseemly

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<sup>192</sup> R. Cort Kirkwood, *Illegal Aliens a Drain on U.S. Taxpayers, Report Says*, NEW AM. (Aug. 13, 2012, 9:52 AM), <http://www.thenewamerican.com/usnews/immigration/item/12431-illegal-aliens-a-drain-on-us-taxpayers-report-says>, archived at <http://perma.cc/QY83-8GFJ> (discussing results of survey performed by the Center for Immigration Studies).

<sup>193</sup> See S. 744, 113th Cong., §§ 2101, 2323 (as passed by Senate, June 27, 2013).

<sup>194</sup> See, e.g., Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3022–23 (2006) (asserting that “[i]mmigration law has long categorized individuals who have been

focus on rewarding immigrants who are “worthy” of immigration status while leaving behind the “unwanted” immigrants who are considered a “threat to public safety.”<sup>195</sup> And although the U and T visas have fairly generous waivers for past

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exploited in the workforce as criminals rather than victims”); Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1615 (2010) (“[S]ome efforts to address the problem of trafficking within the framework of heightened border restrictions have the perhaps unintended effect of reinforcing migrants’ vulnerability to exploitation.”); Grace Chang & Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 STAN. J. C.R. & C.L. 317, 325 (2007) (noting that illegal immigrants trafficked to Los Angeles are exploited in many fields, including domestic, agricultural, and industrial and factory work, and arguing that law enforcement focuses too much on sex trafficking exploitation while ignoring exploitation in the workplace); Joyce Koo Dalrymple, *Human Trafficking: Protecting Human Rights in the Trafficking Victims Protection Act*, 25 B.C. THIRD WORLD L.J. 451, 473 (2005) (arguing that the Trafficking Victims Protection Act (TVPA) should—which it does not currently do—“grant protection to victims of all forms of trafficking, so that they are not dissuaded from seeking assistance or are left without relief”); Ankita Patel, *Back to the Drawing Board: Rethinking Protections Available to Victims of Trafficking*, 9 SEATTLE J. FOR SOC. JUST. 813, 828–29 (2011) (“[T]he law presents Immigrations [sic] and Customs Enforcement (ICE) with a conflict of interest; the agency is responsible for detaining and deporting undocumented immigrants while also identifying and providing trafficking victims with the certification necessary to obtain a T-visa.”); Hussein Sadruddin et al., *Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 STAN. L. & POL’Y REV. 379, 395 (2005) (discussing weaknesses and limitations of the TVPA); Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 201 (2007) (comparing and distinguishing illegal immigrants from sex trafficking victims); Robert Uy, *Blinded by Red Lights: Why Trafficking Discourse Should Shift Away from Sex and the “Perfect Victim” Paradigm*, 26 BERKELEY J. GENDER L. & JUST. 204, 207–08 (2011) (contending that there is too much focus on trafficking only as a “sex” issue and not a labor issue); see also Marouf, *supra* note 27, at 174 (identifying more generally the problems associated with victim-based immigration relief).

<sup>195</sup> Prosecutorial discretion, for example, is disfavored for those deemed to have a lengthy criminal record, gang membership, immigration violations (including unlawful re-entry and immigration fraud), felony convictions, or misdemeanor violations involving violence, sexual abuse, driving under the influence, and drug distribution. *Prosecutorial Discretion by U.S. Immigration and Customs Enforcement (ICE) in Cases Involving Immigrant Workers*, NAT’L EMP’T L. PROJECT (Jan. 2012), <http://www.nelp.org/page/-/Justice/2012/ProsecutorialDiscretionImmigrantWorkers.pdf?nocdn=1?nocdn=1>, archived at <http://perma.cc/R7LZ-QVYE>; see also *Prosecutorial Discretion and Immigrant Workers: Recommendations for Implementation*, NAT’L IMMIGRATION L. CTR. (Mar. 2012), <http://nilc.org/PDImmworkers.html>, archived at <http://perma.cc/4AT2-S7QF> (“[C]ertain immigrant workers may qualify for prosecutorial discretion, including individuals cooperating with federal, state or local law enforcement authorities.”) (citation omitted) (internal quotation marks omitted).

criminal history,<sup>196</sup> the relief is discretionary, requiring immigrant workers to create a sympathetic portrayal of themselves as victims. The meaning of public safety is already distorted by the immigration laws, where those who have committed minor crimes can face severe consequences under the immigration system.<sup>197</sup> The emphasis on worthy victims potentially raises the stakes for viewing those immigrant workers who have used fraudulent documents to obtain work as criminals.<sup>198</sup> Overall, it can help feed the criminalization hysteria that surrounds immigrants.<sup>199</sup>

Further, the interpretive frame of the hard-working or victimized immigrant, or the “good immigrant,”<sup>200</sup> may help to support stereotypes about immigrant workers in mainstream culture. These generalizations can fuel intergroup bias by relying on simple stereotypes rather than a more complex understanding of individuals. Immigrants, for example, become essentialized workers who are divorced from their individual characteristics as human beings.<sup>201</sup> Professor Leticia

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<sup>196</sup> See 8 U.S.C. § 1182(d)(3) (2012).

<sup>197</sup> See, e.g., COMM. FOR PUB. COUNSEL SERVS. IMMIGRATION IMPACT UNIT, IMMIGRATION CONSEQUENCES OF MASSACHUSETTS CRIMINAL CONVICTIONS 3 (2012), available at [http://www.nationalimmigrationproject.org/legalresources/cd\\_so\\_Chart%20-%20Massachusetts%20Offenses%20-%20updated%20August%202012.pdf](http://www.nationalimmigrationproject.org/legalresources/cd_so_Chart%20-%20Massachusetts%20Offenses%20-%20updated%20August%202012.pdf), archived at <http://perma.cc/Y3V2-Z6JF> (“Convictions for minor criminal offenses can have disastrous and irrevocable consequences to noncitizen[s].”).

<sup>198</sup> Under the proposed Border Security, Economic Opportunity, and Immigration Modernization Act, the act of entering unlawfully or working with a false social security number is converted from a civil violation into a federal crime. S. 744, 113th Cong., §§ 3102, 3704 (as passed by Senate, June 27, 2013); see also Cimini, *supra* note 58, at 412–13 (identifying cases where courts barred employees from remedies because of IRCA-related fraud).

<sup>199</sup> States have been charging immigrant workers with felonies for using false documents to work. See, e.g., Roxana Hegeman, *Topeka Illegal Immigrant Sentenced to Identity Theft*, TOPEKA CAPITAL J., (Mar. 25, 2013, 3:49 PM), <http://cjonline.com/news/2013-03-25/topeka-illegal-immigrant-sentenced-identity-theft>, archived at <http://perma.cc/9C33-38AJ> (reporting illegal immigrant’s arrest and sentencing for identity theft); Jude Joffe-Block, *Criminal Charges Against Unauthorized Immigrant Workers Questioned*, FRONTERAS (Jan. 7, 2013), <http://www.fronterasdesk.org/content/criminal-charges-against-unauthorized-immigrant-workers-questioned>, archived at <http://perma.cc/DP4R-GFE7> (describing illegal-immigrant workers in Arizona that were charged with felonies for using fraudulent Social Security Numbers and documents). A former client of mine, a farm worker and mother of four children with no prior criminal history, was charged with multiple felonies for using false documents to work in Colorado.

<sup>200</sup> Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 213–22 (2012) (describing the use of the binary narrative of the “good” and “bad” immigrant in immigration law cases).

<sup>201</sup> The current H-2A visa program, for example, is designed to provide captive immigrant labor to employers, living in employer-owned housing where the annoyance of real life (e.g., families) does not intrude on their ability to work long hours. See

Saucedo explains how a cultural mythology exists about immigrant workers being well suited for low-wage work with little reward because of their complacency and pliability.<sup>202</sup> Immigrant workers may have to act the part of the powerless victim to achieve results, although that may be contrary to their personal empowerment. Professor Leti Volpp explains that the victimization of immigrants risks characterizing them as passive, where the dangerous intersection of culture and victim status can lead to a portrayal of immigrants who lack the wherewithal to act for themselves without the intervention of “the largesse of the benign state.”<sup>203</sup>

The conception of the “good immigrant” also sets native-born individuals against immigrants, creating divisions among subordinated groups, often along racial lines. In particular, this narrative reinforces the out-group status of African Americans.<sup>204</sup> The hard-working immigrant is easily contrasted with those who subsist on welfare entitlements, who in the public imagination are often African-American.<sup>205</sup> The emphasis on the innocent immigrant is pitted against the common conception of the criminality of African-Americans.<sup>206</sup> The problem may also become magnified by workers themselves, where immigrant workers seek to ally themselves with Whites by being “not Black,” and African-American workers seek to emphasize their similarities with Whites as “citizens.”<sup>207</sup>

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FARMWORKER JUST., NO WAY TO TREAT A GUEST: WHY THE H-2A AGRICULTURAL VISA PROGRAM FAILS U.S. AND FOREIGN WORKERS 17, 32–34 (2011). Employers who “import” such temporary workers may treat them as commodities, indicating a lack of a personal relationship with workers whom they have worked alongside for years. See Jennifer J. Lee, *The Shepherd Project: Systemic Change for Marginalized Workers*, CLEARINGHOUSE REV., Mar.–Apr. 2012, at 472, 475; Mary Lee Hall, *Defending the Rights of H-2A Farmworkers*, 27 N.C. J. INT’L L. & COM. REG. 521, 528–29 (2002).

<sup>202</sup> See Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 970 (2006).

<sup>203</sup> Volpp, *supra* note 144, at 509.

<sup>204</sup> The forgotten group among these categorizations is immigrants from Africa. Zachery Williams et al., *A History of Black Immigration into the United States Through the Lens of the African American Civil and Human Rights Struggle*, in IMMIGRANT RIGHTS IN THE SHADOWS OF CITIZENSHIP, *supra* note 161, at 159, 160.

<sup>205</sup> See, e.g., Leland Ware & David C. Wilson, *Jim Crow on the “Down Low”*: Subtle Racial Appeals in Presidential Campaigns, 24 ST. JOHN’S J. LEGAL COMMENT. 299, 311 (2009) (describing the subtle racial appeal of Reagan’s attack on the food stamps program illustrated by an able-bodied African American who was taking advantage of the system).

<sup>206</sup> See Eunice Hyunhye Cho, *Beyond the Day Without an Immigrant: Immigrant Communities Build a Sustainable Movement*, in IMMIGRANT RIGHTS IN THE SHADOWS OF CITIZENSHIP, *supra* note 161, at 94, 113; see generally Aliya Saperstein & Andrew M. Penner, *The Race of a Criminal Record: How Incarceration Colors Racial Perceptions*, 57 SOC. PROBS. 92, 96 (2010) (describing people’s stereotypical association of African Americans and crime).

<sup>207</sup> Gordon & Lenhardt, *supra* note 29, at 1226–27; see also Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 LAW & SOC. INQUIRY 561, 590 (2010) (discussing how Latino immigrants seek to identify

Finally, these interpretive frames overall defuse focus from structural inequalities that facilitate the exploitation of such workers. They do so by creating a strong identification with certain mainstream norms and values that can limit the capacity for fundamental change of structural inequities in the workplace that contribute to immigrant worker exploitation.<sup>208</sup> This public narrative of the quintessential immigrant worker, who is willing to work long hours in dead-end jobs for low wages, perpetuates the notion that unemployment is the result of lazy individuals who refuse to be gainfully employed. It ignores the significant reality that a social safety net is required because of the underlying structural inequalities that not only create unemployment but also merge low-wage work with poverty.<sup>209</sup> The allegedly organic phenomenon of low-wage industries dominated by immigrant workers belies the extreme degradation of workplace standards that make it so that no native-born workers will do such jobs,<sup>210</sup> obfuscating the underlying need to address systemic issues related to raising the overall workplace standards of low-wage workers.<sup>211</sup> Immigrant workers have suffered because of overall governmental policies related to low-wage jobs and immigration. By addressing the evil perpetrated by individual employers, however, the mainstream perception becomes that the exploitation of immigrant workers is entirely the result of private actions.<sup>212</sup>

The on-the-ground reality faced by immigrant workers, however, requires real solutions to their problems. Immigrant workers, community advocates, and public interest attorneys have used mainstream cultural narratives to push the boundaries of existing law and advance the legal rights of immigrant workers. In the litigation realm, public interest attorneys push the envelope by using strategies such as wage liens and traditional collections to become more effective at recovering monetary judgments.<sup>213</sup> Cases continue to harness the “joint employment doctrine” to hold

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themselves as “good” workers, distinguishing themselves from the “hypercriminalized stereotype of African Americans”).

<sup>208</sup> See DELLA PORTA & DIANI, *supra* note 6, at 68.

<sup>209</sup> Len Burman, *Note to Newt: Many Food Stamp Families Are Working*, FORBES (Feb. 4, 2012, 5:13 PM), <http://www.forbes.com/sites/leonardburman/2012/02/04/note-to-newt-many-food-stamp-families-are-working/>, archived at <http://perma.cc/PN57-AVPN>; Mark R. Rank, *Poverty in America is Mainstream*, N.Y. TIMES OPINIONATOR (Nov. 2, 2013, 2:30 PM), [http://opinionator.blogs.nytimes.com/2013/11/02/poverty-in-america-is-mainstream/?src=me&ref=general&\\_r=0](http://opinionator.blogs.nytimes.com/2013/11/02/poverty-in-america-is-mainstream/?src=me&ref=general&_r=0), archived at <http://perma.cc/9679-BCYC>.

<sup>210</sup> Shepherd jobs in the United States, for example, are dominated by immigrant workers because of the job terms and conditions. In Colorado, for \$650 per month, 24 hours per day, 7 days per week, workers are expected to live in housing without running water, bathroom facilities, or electricity. MIGRANT FARM WORKER DIV., COLO. LEGAL SERVS., *OVERWORKED AND UNDERPAID: H-2A HERDERS IN COLORADO* 4–6 (2010).

<sup>211</sup> See Saucedo, *supra* note 202, at 975–76.

<sup>212</sup> The fear is that any efforts to placate the movement can transform the climate, which nourishes the protest into one where the movement is co-opted by mainstream power. PIVEN & CLOWARD, *supra* note 164, at 29–32.

<sup>213</sup> NELP, *WINNING WAGE JUSTICE*, *supra* note 110, at 113–15.

larger companies liable under a maze of subcontracting<sup>214</sup> and to seek broader workplace relief through collective or class actions.<sup>215</sup> The POWER Act proposal has sought to vastly expand the definition of immigrant workers who would qualify for victim visas.<sup>216</sup> Coalitions advocating for public policy reform have had unprecedented success in advocating for the expansion of legal rights related to the nonpayment of wages, misclassification of workers, and retaliation by employers. Direct action campaigns have engaged private employers to obtain redress and reform. Multifaceted campaigns that tactically combine these strategies provide for some of the most successful efforts to effectuate change for immigrant workers.<sup>217</sup> As a result, the use of mainstream cultural narratives in framing these legal rights have resulted in immediate benefits for real people, whether it is the receipt of monetary compensation, immigration status, or workplace reform.

The framing of mainstream cultural narratives can lead to personal empowerment, if immigrant workers own their narratives. The careful construction of such cultural narratives to give voice to the lived experiences of immigrant workers can lead to empowerment by giving them a way to define themselves and resist their definition by dominant society.<sup>218</sup> Work “provides people with dignity, achievement, and personal identity” by allowing immigrant workers to provide for their families and advance economically.<sup>219</sup> While victimization can render an individual feckless, it can also empower victims if the victimization is addressed wisely.<sup>220</sup> Workers have come forward to speak publicly about their experiences

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<sup>214</sup> *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 69 (2d Cir. 2003); *Garcia-Celestino v. Ruiz Harvesting Inc.*, No. 2:10-cv-542-FtM-38DNF, 2013 WL 3816730, at \*13 (M.D. Fla. Jul. 22, 2013); *Ruiz v. Fernandez*, 949 F. Supp. 2d 1055, 1071 (E.D. Wash. 2013); *Rodriguez v. SGLC, Inc.*, No. 2:08-cv-01971-MCE-KJN, 2012 WL 5704403, at \*10 (E.D. Cal. Nov. 15, 2012). *But see Layton v. DHL Express (USA), Inc.*, 686 F.3d 1172, 1181 (11th Cir. 2012) (declining to find liability under a joint employment theory because, under the totality of the circumstances, the employee was not economically dependent on that employer).

<sup>215</sup> See Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2689 (2008) (identifying the ways in which employment law can, in fact, function as a substitute form of labor law).

<sup>216</sup> See *supra* note 95.

<sup>217</sup> See *supra* sources cited note 153.

<sup>218</sup> See Lara Karaian, *The Troubled Relationship of Feminist and Queer Legal Theory to Strategic Essentialism: Theory/Praxis, Queer Porn, and Canadian Anti-discrimination Law*, in *FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS* 375, 378–79 (Martha Albertson Fineman et al. eds., 2009) (discussing the theory of “strategic essentialism” where subordinated groups can be empowered if provided “a means to self-define, as opposed to being defined by those who would oppress them”).

<sup>219</sup> *Cunningham-Parmeter*, *supra* note 36, at 1411; *Gordon & Lenhardt*, *supra* note 29, at 1194.

<sup>220</sup> See *Volpp*, *supra* note 144, at 509.

not only for the cathartic effect<sup>221</sup> but also with the underlying motivation to impact the lives of existing and future workers. Criminalization of employers helps to rebalance the power between employers and employees, particularly given the usual focus of criminalizing immigrants.

Those who work with immigrant workers, however, need to ensure that the workers themselves power the narratives. Otherwise the narratives reflect a form of myth making by outsiders, which results in the (sometimes unwitting) subordination of individuals by advocates. Many of the public policy campaigns include immigrant workers precisely because community advocates recognize that the voices of immigrant workers should supply the narratives and lead campaign strategy.<sup>222</sup> Others have amply criticized the regnant mode of lawyering where traditional attorneys work on behalf of rather than with client communities.<sup>223</sup> Instead, lawyers should empower clients by privileging their narratives and providing them with political agency.<sup>224</sup> Public interest attorneys, in particular, need to consider how to enable immigrant workers to tell their own stories within their legal case and engage in choices about legal remedies. In this way, victims can pursue legal remedies, while possessing the agency to vindicate their rights. They can be empowered by the positive impact their actions can have on the lives of existing workers or future employees,<sup>225</sup> including those who more broadly are members of the mainstream.<sup>226</sup> Given the vulnerability and outsider status of immigrant workers, this empowerment is necessary for mobilizing the movement.

While these strategies, for the most part, advocate for the legal rights of individual immigrant workers, the construction of a common outward identity among immigrant workers can also create a collective identification that promotes solidarity.<sup>227</sup> By linking the messaging with the subjective experience of an individual, it enables such immigrant workers to see across the movement to link between themselves and others with common interests, values, and histories.<sup>228</sup> The construction of common narratives by telling stories<sup>229</sup> allows some immigrant

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<sup>221</sup> See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2437 (1989).

<sup>222</sup> FINE, *supra* note 110, at 249; Interview with Lisa Duran, Exec. Dir., Derechos Para Todos/Rights for All People, in Denver, Colo. (July 18, 2013) (on file with Utah Law Review). *But see* Moody, *supra* note 135, at 155 (The immigrant worker movement tends to be dependent on staffers who are frequently, though not exclusively drawn from the educated middle class, so that “skill often substitutes for mass social power” needed for effective movements.).

<sup>223</sup> LÓPEZ, *supra* note 16, at 23–24 (1992); Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 861–62 (1990).

<sup>224</sup> LÓPEZ, *supra* note 16, at 39–40; White, *supra* note 223, at 887.

<sup>225</sup> Lee, *supra* note 62, at 68.

<sup>226</sup> See Cunningham-Parmeter, *supra* note 36, at 1409.

<sup>227</sup> DELLA PORTA & DIANI, *supra* note 6, at 109.

<sup>228</sup> *Id.*

<sup>229</sup> Delgado, *supra* note 221, at 2437.



workers to erase the shame and more readily take action to advance their legal rights.<sup>230</sup> Worker centers or other community-based organizations that work with immigrant workers can assist in the formation of this collective identity, particularly for immigrant workers in industries that have decentralized workplaces, such as domestic workers and day laborers.<sup>231</sup> They can create solidarity among workers by ultimately connecting individual issues to the larger systemic problem, while serving as a springboard for organizing and empowering immigrant workers to address workplace issues.<sup>232</sup>

These mainstream narratives also offer a way to identify with larger groups, such as the “new” working poor that will be necessary to create power.<sup>233</sup> To the extent that the workplace is an arena for the public interaction of different groups, it has the potential to create a common bond and experience between groups.<sup>234</sup> Within the labor movement, divisions along race and immigration status remain, which can undermine the possibility of a broader solidarity among low-wage workers.<sup>235</sup> At the same time, there are concrete examples of worker solidarity across race and immigration status lines.<sup>236</sup> Such cooperation potentially provides for the creation of narratives that may more broadly encompass all low-wage workers, relating to the common sentiment of a certain powerlessness vis-à-vis their employer. The welfare-to-work policies of the 1990s managed to push out large swaths of the poor into low-wage jobs whose economic situations have often worsened since leaving welfare.<sup>237</sup> The connection across traditionally divided

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<sup>230</sup> Telephone Interview with Marco A. Nuñez, Exec. Dir., El Centro Humanitario para los Trabajadores (July 8, 2013) (on file with Utah Law Review).

<sup>231</sup> See Pegg R. Smith, *Laboring for Child Care: A Consideration of the New Approaches to Represent Low-Income Service Workers*, 8 U. PA. J. LAB. & EMP. L. 583, 585 (2006).

<sup>232</sup> See *id.* Marco Nuñez, Executive Director of El Centro Humanitario para los Trabajadores, has described how the process of sharing wage theft experiences helps workers strip away the individual shame, see how it is linked to a more systemic issue, and follow through with their complaint. Nuñez, *supra* note 230; see also GORDON, *supra* note 153, at 186 (describing how a legal clinic can help explain the link between the individual claims and the systemic issues).

<sup>233</sup> GORDON, *supra* note 153, at 288–89; see GLEESON, *supra* note 99, at 197.

<sup>234</sup> Cunningham-Parmeter, *supra* note 36, at 1412; Gordon & Lenhardt, *supra* note 29, at 1195 (citing Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 543 (1997)).

<sup>235</sup> Marion Crain & Ken Matheny, “*Labor’s Divided Ranks*”: *Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542, 1610–11 (1999); see also Ruben J. Garcia, *New Voices at Work: Race and Gender Identity Caucuses in the U.S. Labor Movement*, 54 HASTINGS L.J. 79, 92–113 (2002) (reviewing the development of race and gender identity caucuses in the labor movement).

<sup>236</sup> Gordon & Lenhardt, *supra* note 29, at 1234–35.

<sup>237</sup> JOEL F. HANDLER & YEHESEKEL HASENFELD, *THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA* 199 (1991); Juliet M. Brodie, *Post-Welfare*

groups by ethnicity,<sup>238</sup> race, or immigration status may become possible because of the commonality of this experience.<sup>239</sup>

The aspiration is by engaging all low-wage workers in a communicative relationship, the narrator and listener create a “we” through their identification, which provides for group identification<sup>240</sup> and can help lessen the stereotyping of immigrant workers.<sup>241</sup> And while the focus on private employers may appear to avoid systemic issues, the reform of law governing the workplace holds the promise of addressing some of these social inequities.<sup>242</sup> In this regard, the identification of the immigrant worker movement with the larger labor movement can help fight against complacently accepting incremental reforms while devising ways to raise the normative standards for all low-wage workers.<sup>243</sup> The support by national unions of immigrant workers opens up the possibility of broader reform for low-wage workers.<sup>244</sup> The deployment of such mainstream cultural narratives that encompass all low-wage workers, therefore, can help transform perceptions to make dominant forces understand that structural changes to the private industry are necessary, becoming a significant tool for contributing to future change.

Despite the perils of mainstreaming, the use of mainstream cultural narratives is a way for immigrant workers to gain much-needed benefits. A better approach to mainstreaming, however, will require minimizing the harm created by aligning with dominant groups, while also grappling with how to be inclusive of all members.<sup>245</sup> Immigrant workers can best inform themselves of these potential harms by creating connections with similarly subordinated groups—be it

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*Lawyering: Clinical Legal Education and a New Poverty Law Agenda*, 20 WASH. U. J.L. & POL’Y 201, 216 (2006).

<sup>238</sup> Cho, *supra* note 206, at 109–10.

<sup>239</sup> The recent movement among workers in the fast-food industry has brought together a diverse group of workers. *See, e.g.*, Alan Feuer, *Life on \$7.25 an Hour*, N.Y. TIMES, Dec. 1, 2013, at MB 1; *see also* Fred Tsao, *Building Coalitions for Immigrant Power*, in IMMIGRANT RIGHTS IN THE SHADOWS OF CITIZENSHIP, *supra* note 161, at 329, 338–39 (describing connections made between Illinois Coalition for Immigrant and Refugee Rights and the African American community in Chicago based on “bolstering wages and working conditions for all workers”).

<sup>240</sup> STEWART ET AL., *supra* note 6, at 250.

<sup>241</sup> Marouf, *supra* note 27, at 139, 142.

<sup>242</sup> Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 235 (2013).

<sup>243</sup> *See* Narro, *supra* note 153, at 105; *see also* MILKMAN, *supra* note 134, at 2–3 (highlighting the central role of immigrants in revitalizing labor in southern California in the 1990s).

<sup>244</sup> Griffith, *supra* note 134, at 638.

<sup>245</sup> On the other hand, members of out groups may belong to other in groups, such as parents or churchgoers, which provide them with membership in local communities.

immigrants from different ethnicities or native-born workers of different races<sup>246</sup>—although significant challenges remain to create such alliances.<sup>247</sup> Immigrant workers themselves should power the cultural narratives used by the movement to reflect their real experiences. Only then will such narratives result in empowering workers and open up the possibility of strengthening a common identification among workers to engage in collective action.

## V. STRATEGIC MAINSTREAMING

Through strategic mainstreaming, the immigrant worker movement can advance its agenda. This approach requires that immigrant workers inform, shape, and lead multifaceted approaches with local institutions that can minimize harm while leading to the increased acceptance of immigrant workers. In the previous Part, the discussion notes the importance of having immigrant workers owning mainstream narratives and the positive impact it can have on empowerment and on collective identification. It also acknowledges the need to reach out to similarly subordinated groups to minimize the risks of aligning with the mainstream while watching against the complacency associated with incremental gains that can operate to disarm a movement. As the costs impact their own communities and futures, immigrant workers as participants in—if not leaders of—these strategies will simply have a better opportunity to gauge what approaches might minimize these risks.<sup>248</sup> Minimizing these risks requires a connection to the outsider vision, both as an internal organizing principle and a long-term goal. Strategic mainstreaming ultimately recognizes that given the constraints of the current system, opting for mainstream cultural narratives can more pragmatically serve the goal of incorporating immigrant workers into dominant society and can serve as the precursor to building movements with political power.<sup>249</sup>

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<sup>246</sup> See, e.g., Omatsu, *supra* note 161, at 277–78 (recounting immigrant worker leaders with Korean Immigrant Worker Advocates who were able to bridge the racial divide among workers promoted by their employers).

<sup>247</sup> See Cho, *supra* note 206, at 110.

<sup>248</sup> Omatsu, *supra* note 161, at 277–78.

<sup>249</sup> An instructive comparison might come from the recent success of the LGBT movement, from *United States v. Windsor*, 133 S.Ct. 2675 (2013), to the legality of marriage of same-sex couples in a now growing number of states. Erik Eckholm, *Oklahoma's Ban on Gay Marriage Is Unconstitutional, Judge Rules*, N.Y. TIMES (Jan. 14, 2014), <http://nyti.ms/1eRb1JS>, archived at <http://perma.cc/6SML-E5B6>. Critics, however, have bemoaned the adherence to the marriage agenda, which endorses mainstream heterosexual norms while undermining the affirmation of gay identity and the validation of nonmarital relationships. Jessica R. Feinberg, *Avoiding Marriage Tunnel Vision*, 88 TUL. L. REV. 257, 272–73 (2013); Elizabeth M. Glazer, *Civil Union Equality*, 2012 CARDOZO L. REV. DE NOVO 125, 138–39; see also Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1541 (1993) (finding that a pro-

By deploying a multifaceted approach, strategic mainstreaming maximizes its success. This approach, referred to by professor Scott Cummings as a “legal pluralist” approach, involves attacking the problem from various angles through the judiciary, legislature, and executive, as well as public opinion, taking advantage of how employer and employee activities intersect with the law in multiple ways.<sup>250</sup> Use of litigation is effective, for example, because the courts can be a better recourse in light of failed governmental institutions,<sup>251</sup> and litigation can be used to assist with organizing efforts for the underlying movement.<sup>252</sup> Advocacy with administrative agencies can favorably impact immigrant workers because regulations are continually reinterpreted by the agency. Both the judiciary<sup>253</sup> and executive are more removed from the direct political process, which provides immigrant workers with potential advantages. On the other hand, coalitions have, at times, managed to navigate the legislative process despite the lack of traditional political power, resulting in the enactment of favorable laws protecting workers.<sup>254</sup> Direct actions by immigrant workers can help sway public opinion while effectively changing employer practices, often when traditional legal strategies are stalled. Further studies are needed to better measure the relative efficacy of different strategies in advancing the legal rights of immigrant workers, as factors beyond cultural narratives play a role in making a particular strategy successful.<sup>255</sup> But each of these strategies commonly uses mainstream cultural narratives to resonate with the values of dominant society.

Another clever approach to maximize the success of strategic mainstreaming is to “go local.” The use of strategic mainstream narratives to advance the rights of immigrant workers have had more success at the local level in traditionally progressive jurisdictions, given the large geographic diversity of the United States and the fairly divergent politics of different regions.<sup>256</sup> Using local relationships

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marriage position would accept, rather than challenge, the current institution of marriage, which would be profoundly destructive to the lesbian and gay community).

<sup>250</sup> Cummings, *supra* note 160, at 5.

<sup>251</sup> E. Tammy Kim, *Lawyers as Resource Allies in Workers’ Struggles for Social Change*, 13 N.Y. CITY L. REV. 213, 222 (2009); Lee, *supra* note 62, at 67.

<sup>252</sup> Cummings, *supra* note 160, at 6.

<sup>253</sup> Scott L. Cummings, *Litigation at Work: Defending Day Labor in Los Angeles*, 58 UCLA L. REV. 1617, 1621 (2011) (finding that the underlying conditions point in favor of a litigation-based approach for day laborers in Los Angeles, not only because they are politically weak but also because they possess a strong legal right to solicit work in public that, if protected, is self-enforcing); *see also* Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737, 750 (2002) (“In a larger sense, the judicial system is the primary setting to challenge social conditions that bear oppressively on those without means.”).

<sup>254</sup> *See sources cited supra* note 103.

<sup>255</sup> *See supra* note 138 and accompanying text.

<sup>256</sup> Scott L. Cummings, *Critical Legal Consciousness in Action*, 120 HARV. L. REV. F. 62, 69 (2009). It is worth noting that national organizations, such as the National Employment Law Project and National Day Laborer Organizing Network, provide critical

makes sense where mainstream culture in certain urban corridors, for example, may have more interaction with immigrant workers as employees, neighbors, and community members.<sup>257</sup> Local culture shapes the particularities of any given strategy, informing immigrant workers of the possible openings and alliances needed to achieve their agenda.<sup>258</sup> The devolution of issues impacting immigrants to the local level may be a result of the lack of national consensus towards immigration at the federal level,<sup>259</sup> or simply the natural response of local communities adapting to demographic changes.<sup>260</sup> Regardless of the cause, a number of scholars, such as Peter Spiro and Rick Su, have recognized this trend of devolution as a potentially favorable trend for immigrants.<sup>261</sup> Localities not only have more firsthand experience with the demographic change but are also more intimately familiar with the legal and cultural assumptions that shape how communities are structured and organized.<sup>262</sup> Successful relationships with local agencies have led to investigatory and enforcement resources favoring immigrant workers and expanded interpretations of workplace exploitation that qualifies as criminal activity for victim-based immigration relief. In 2013, using these local relationships, there were an unprecedented number of local laws enacted that restored rights to immigrants, such as laws concerning access to drivers' licenses and higher education.<sup>263</sup>

Further, a multifaceted and local strategy actually lends itself to the integration of immigrant workers to inform, shape, and lead such approaches. Rather than the traditional problems associated with litigation strategies that

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support to local efforts by immigrant workers. *E.g.*, *Immigrant Workers' Rights and Remedies*, NAT'L EMPLOY. L. PROJECT, [http://www.nelp.org/content/content\\_issues/category/immigrant\\_workers\\_rights\\_and\\_remedies](http://www.nelp.org/content/content_issues/category/immigrant_workers_rights_and_remedies), archived at <http://perma.cc/42G2-PE9H> (last visited Oct. 21, 2014); *About Us*, NAT'L DAY LABORER ORGANIZING NETWORK, <http://www.ndlon.org/en/about-us>, archived at <http://perma.cc/656B-WQA3> (last visited Oct. 21, 2014).

<sup>257</sup> Jesse Newmark, *Legal Aid Affairs: Collaborating with Local Governments on the Side*, 21 B.U. PUB. INT. L.J. 195, 206–07 (2012); Rick Su, *The Promise and Peril of Cities and Immigration Policy*, 7 HARV. L. & POL'Y REV. 299, 310 (2013).

<sup>258</sup> Gordon, *supra* note 100, at 2136–37.

<sup>259</sup> Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 608–09, 617 (2008).

<sup>260</sup> Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1624–25 (2008).

<sup>261</sup> Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. L. F. 57, 59 (2007); Peter J. Spiro, *Formalizing Local Citizenship*, 37 FORDHAM URB. L.J. 559, 564–65 (2010); Su, *supra* note 257, at 311; Rodríguez, *supra* note 259, at 608–09.

<sup>262</sup> Rodríguez, *supra* note 259, at 605; Su, *supra* note 260, at 1624.

<sup>263</sup> NAT'L IMMIGRATION L. CTR., INCLUSIVE POLICIES ADVANCE DRAMATICALLY IN THE STATES: IMMIGRANTS' ACCESS TO DRIVER'S LICENSES, HIGHER EDUCATION, WORKERS' RIGHTS, AND COMMUNITY POLICING 1 (2013), available at <http://www.nilc.org/pubs.html>, archived at <http://perma.cc/92VG-JU4V>.

disempower clients,<sup>264</sup> multifaceted approaches provide public interest attorneys with the opportunity to not only collaborate within varied interdisciplinary coalitions but to also get involved in community efforts where immigrant workers are active participants. Such multifaceted work diminishes the inherent risk of having outsiders (even “benevolent” ones) construct narratives for subordinated individuals. Using local relationships also provides immigrant workers, who are likely to be more involved and engaged at the local level; employees; neighbors; and community members to play an active role. Strategic mainstreaming requires this kind of engagement by immigrant workers.

In the long term, the choice of strategic mainstreaming—reframing immigrants as workers or victims—can help immigrant workers with the political goal of becoming full members of society, even though they may not have formal citizenship status. Immigrant workers may also be consumers, church members, students,<sup>265</sup> or parents who are engaged in actions that serve to incorporate them into mainstream society. The workplace, however, still remains one of the most important arenas for the interaction of groups leading to the opportunity to engage in a shared experience.<sup>266</sup> A critical mass of low-wage immigrant workers in a community can lead to the partial incorporation in the body politic, because there is a practical need for communities to adapt to the presence of immigrant workers. Work helps to incorporate immigrant workers into the polity over time and serves as a pathway to significant components of citizenship.<sup>267</sup> While recognizing the divisions that exist between immigrant and native-born workers, by exercising their workplace rights, immigrant workers have the potential to create loyalty between these groups where “all residents have opportunities to invest in the community . . . .”<sup>268</sup> Regardless of the fact that many immigrant workers cannot formally vote, they have exercised their political power in public policy campaigns by petitioning or engaging elected officials or in direct actions against employers.<sup>269</sup> When immigrant workers use mainstream cultural narratives in

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<sup>264</sup> 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, 545 (1987–88).

<sup>265</sup> The DREAMers, for example, have campaigned on a sympathetic portrayal of young people who want to obtain higher education to be gainfully employed. *See, e.g.*, Julia Lurie, *Living the DREAM: Undocumented Youth Build Lives in America*, ATLANTIC (Apr. 9, 2012, 11:15 AM), <http://www.theatlantic.com/national/archive/2012/04/living-the-dream-undocumented-youth-build-lives-in-america/255611/>, archived at <http://perma.cc/TBS8-SN8G>. Immigrant workers might also benefit from the simultaneous use of interpretive frames representing their multiple identities.

<sup>266</sup> Cunningham-Parmeter, *supra* note 36, at 1411–12; Gordon & Lenhardt, *supra* note 29, at 1191; Stephen Lee, *Screening for Solidarity*, 80 U. CHI. L. REV. 225, 241 (2013).

<sup>267</sup> Gordon & Lenhardt, *supra* note 29, at 1219.

<sup>268</sup> Cunningham-Parmeter, *supra* note 36, at 1412.

<sup>269</sup> Nonvoters may wield influence in other ways, such as through their children. Currently 22.7% of all children in the United States had parents who were immigrants. IMMIGRATION POL’Y CTR., *Strength in Diversity*, *supra* note 178. “New Americans,” which

litigation, public policy, or direct action campaigns, whether they fail or succeed, they are exercising political power<sup>270</sup> and facilitating their inclusion into mainstream society. This inclusion increases familiarity with immigrant workers as individuals, which can improve mainstream attitudes about social policy impacting immigrant workers.<sup>271</sup> Societal incorporation through mainstream cultural narratives, therefore, can eventually help immigrant workers build the political power necessary to effectuate changes in public policy to achieve a more normative vision.

Immigrant workers are increasingly coming out of the shadows energized by the possibility of change. While these movements are still at a nascent stage, legitimation in mainstream society will not end the social and economic struggles of immigrant workers.<sup>272</sup> In this sense, the broader strategies of universal citizenship or human rights for immigrant workers play a significant role in organizing workers and providing a more normative vision for the struggle. The dominant class needs to be able to find a corresponding identity with immigrant workers that assist with this gradual integration process. With the immediate reality of immigrant workers as outsiders, the movement's continued articulation of a collective identity that resonates with the mainstream will be a necessary choice to fundamentally alter the willingness of the broader society to recognize the need for change.

## VI. CONCLUSION

The immigrant worker movement has the power to change law through cultural narratives. This power, however, is significantly constrained because dominant cultural values delineate the available opportunities. The law generally disadvantages immigrant workers because it embodies mainstream cultural narratives of immigrants as outsiders, criminals, and job stealers. In response, a more transformative or radical conception of immigrant worker rights is a strategy that can fail to connect with the mainstream culture, and at times, be antagonistic.

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includes immigrants and children of immigrants, account for one in ten registered voters. *Id.* It is ultimately this demographic shift that may help address some of the more difficult issues facing the out groups of immigrants. Tsao, *supra* note 239, at 336–37 (describing the Illinois Coalition for Immigrant and Refugee Rights strategy of moving naturalized citizens and the U.S.-born children of immigrants towards voting and civic engagement); *see also* Spiro, *supra* note 99, at 909–10 (noting the ways in which nonvoting immigrants may exert political influence).

<sup>270</sup> GORDON, *supra* note 153, at 278–79.

<sup>271</sup> Social psychology research supports that increased intergroup contact can improve attitudes about social policy. THOMAS F. PETTIGREW & LINDA R. TROPP, *WHEN GROUPS MEET: THE DYNAMICS OF INTERGROUP CONTACT* 171–72 (2011).

<sup>272</sup> *See* Das Gupta, *supra* note 189, at 403 (criticizing full citizenship as an end, in and of itself, because it “reinscribes the policing functions of borders that territorialize racialized, ethnicized, and gendered notions of belonging”).

On the other hand, the movement has, at times, successfully opted for cultural narratives that resonate with mainstream interests to advance their rights. In turn, these successes are reshaping the legal landscape for immigrant workers.

My conclusion that strategic mainstreaming is a worthwhile enterprise, therefore, is ultimately informed by pragmatism. Given that immigrant workers are politically unpopular, mainstream cultural narratives offer a way to gain political traction and wield power most effectively. If advances can be made at the local level that have an immediate impact on lives, then immigrant workers should take advantage of those openings. Protagonists involved in shaping these narratives, particularly public interest attorneys and community advocates, need to carefully consider how to use the voices of immigrant workers to power the narratives to maximize empowerment and solidarity. Immigrant workers, in alliance with other subordinated groups, need to be informing, shaping, and leading such strategies to ensure that they minimize unintended consequences for disfavored groups while continuing to fight for outsider reforms.

The hope is that mainstream cultural narratives will help with the incorporation of immigrant workers into mainstream society. This incorporation process is generally significant not only to create increased familiarity with immigrants as societal members but to also increase their political power. Over time, the shift of demographics or increasing impact of globalization may change the legal framework. An increasing number of native-born U.S. citizens live in households with immigrants,<sup>273</sup> which may help realize a more normative vision for immigrant workers. Globalization may reveal the salience of a more universal conception of human rights or citizenship. In the meantime, immigrant workers will continue to need mainstream cultural narratives to advance their agenda.

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<sup>273</sup> See *supra* note 269 and accompanying text.