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Framing and Contesting Unauthorized Work

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FRAMING AND CONTESTING UNAUTHORIZED WORK

ANGELA D. MORRISON*

ABSTRACT

Unauthorized workers face precarity in the workplace and the threat of forced expulsion from their communities. Some of the reasons for that precarity result from how the law frames unauthorized workers. The law views unauthorized workers as lacking full human or civil rights, as “unauthorized,” to the exclusion of their other identities. The legal system also creates a binary that views unauthorized workers as either criminals who are complicit in their exploitation or passive victims for employers to exploit. This Article draws on social movement literature to theorize the processes that result in this framing and to explore how immigrant social movements have contested that framing. That contestation has led to less precarity and greater social membership for unauthorized workers.

First, this Article demonstrates that the law relies on a moral deservedness frame that has contributed to unauthorized work’s precarity and made unauthorized workers’ social membership more tenuous. Second, the Article argues that by contesting the law’s moral deservedness frame, movement actors have decreased workplace precarity and increased social membership. They have called on frames that center on workers’ human and civil rights, and their identities as family members and workers. Movement actors have worked around and through the law to empower unauthorized workers to engage in claims-making and organize worker co-operatives that provide workplace protections. They also have engaged in direct action and acts of civil disobedience that have led to greater mobilization and participation in the movement. Finally, immigrant rights organizations have changed the law by lobbying for policy changes and changes to state laws that benefit unauthorized workers. Besides reducing precarity, the contestation itself can become a source of social

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membership for unauthorized workers. In effect, the contestation allows unauthorized workers to exercise their political voices.

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INTRODUCTION

Millions of noncitizens¹ who lack immigration status live and work in the United States. Recent estimates place the unauthorized population at 10.5

1. This Article uses the term “noncitizen” rather than “alien.” For a discussion of the term “alien” and its use to otherize undocumented migrants, see Fatma E. Marouf, *Regrouping America: Immigration Policies and the Reduction of Prejudice*, 15 HARV. LATINO L. REV. 129, 133–37 (2012). See also D. Carolina Núñez, *War of the Words: Aliens, Immigrants, Citizens, and the Language of Exclusion*, 2013 BYU L. REV. 1517 (2014) (employing corpus linguistics to demonstrate negative connotations of the term “alien” and arguing that using the term serves to dehumanize noncitizens).

million people.² Noncitizens without immigration authorization make up 4.6% of the workforce.³ And the majority of the unauthorized population are long-term residents, with the median duration for length of residence at fifteen years.⁴ This combination means that many individuals who U.S. immigration law deems “unauthorized,” are, in fact, long-term residents with significant ties to the United States.

But noncitizens who lack immigration status face several barriers when it comes to working in the United States. Some people who lack immigration status have work authorization because immigration officials have decided to defer their removal from the United States.⁵ Others do not.⁶ For people who lack work authorization, finding employment is fraught even though working without authorization does not violate any law.⁷ If an employer hires them despite their lack of employment authorization, then, in theory, the employer is the one on the hook for violating federal immigration law and the one who faces potential criminal punishment and civil fines.⁸ But the worker still faces the threat of deportation for being in the United States without immigration status. If the worker obtained work using false documents, the worker not only faces deportation but also criminal sanctions.⁹ Finally, even if an unauthorized worker is able to obtain employment, courts are reluctant to fully recognize workers’ employment rights when employers violate them.¹⁰

In light of the challenges posed by federal immigration laws and policies, immigrant rights movements have mobilized for unauthorized workers’ participation in the labor market despite their lack of immigration status.¹¹ By “Immigrant Rights Movements,” this Article means individuals, groups, and organizations that work to “improve immigrant communities more broadly, and for undocumented immigrants specifically.”¹²

More precisely, this Article focuses on groups that mobilize in two ways: (1) directly mobilizing for better work conditions for unauthorized workers

2. *Unauthorized Immigrant Population Trends for States, Birth Countries and Regions*, PEW RSCH. CTR. (June 12, 2019), <https://perma.cc/VG6Y-STSH>.

3. Jeffrey S. Passel & D’Vera Cohn, *Mexicans Decline to Less Than Half the U.S. Unauthorized Immigrant Population for the First Time*, PEW RSCH. CTR. (June 12, 2019), <https://perma.cc/C9TJ-KHU6>.

4. *Id.*

5. For example, some noncitizens who are here without authorization have applied for and received relief under the Deferred Action for Childhood Arrivals (DACA) program. See Memorandum from Janet Napolitano, Sec’y, Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs and Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship and Immigr. Servs., & John Morton, Dir., U.S. Immigr. and Customs Enf’t, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <https://perma.cc/P472-MNF5>. DACA recipients are eligible for work authorization. 8 CFR § 274a.12(c)(14) (permitting work authorization for deferred action recipients who establish “an economic necessity”).

6. See *infra* Section II.B.1.

7. See *infra* Section II.B.3.

8. See *id.*

9. See *infra* Section II.C.

10. See *infra* Section II.B.2.

11. See *infra* Part III.

12. Paul Engler, *The US Immigrant Rights Movement (2004-ongoing)*, INT’L CTR. ON NONVIOLENT CONFLICT 3–4 (April 2009), <https://perma.cc/6ARZ-4NJW>.

or (2) indirectly advocating for unauthorized workers through changes to immigration law and policy that would benefit unauthorized workers. Day laborer networks and organizations are prime examples of organizations or networks of individuals that directly advocate for unauthorized workers.

Immigrant rights movements' mobilization around immigration status and noncitizens' rights is inherently an effort to advocate for unauthorized workers. For example, organizations such as United We Dream, a national immigrant youth-led immigrant advocacy organization with 100 local groups, advocate for unauthorized workers indirectly.¹³ United We Dream's campaign to regularize the status of unauthorized noncitizens¹⁴ is indirectly linked to worker rights because the regularization would include work authorization and access to the benefits of formal employment relationships.¹⁵

Social movement organizations such as United We Dream use frames to shape narratives to persuade policymakers or the general public to act, to encourage others to join the movement, and to motivate and inspire movement actors.¹⁶ The law offers a set of frames that view unauthorized workers as lacking rights, emphasizes the "unauthorized" aspect of their identities, and relies on a moral deservedness frame which sees unauthorized workers as either criminals or passive victims.¹⁷ That framing makes unauthorized work more precarious.¹⁸ Immigrant rights social movements have contested the law's framing of unauthorized workers.¹⁹ Instead, they have adopted frames that rely on human rights and individuals' identities as workers or family members.²⁰

Although legal scholars have increasingly turned their attention to the law's relationship with social movements,²¹ little has been written in the legal literature about how the law frames unauthorized workers and how

13. *About UWD*, UNITED WE DREAM, <https://perma.cc/M36U-RXSY>.

14. *Id.*

15. As Kate Griffith and Tamara Lee have shown, immigration advocacy is labor advocacy. Kati L. Griffith & Tamara L. Lee, *Immigration Advocacy as Labor Advocacy*, 33 BERKELEY J. EMP. & LAB. L. 73 (2012) (demonstrating that workers' advocacy regarding immigration is protected activity under the National Labor Relations Act). First, immigration law and labor issues have historically intersected through immigration laws' direct incorporation of workplace needs to expand or restrict immigration, through immigration laws' inclusion of workplace protections for guest workers, and IRCA's employment controls. *Id.* at 80–84. Second, many critiques of immigration policy have focused on labor issues. *Id.* at 84–89. In this way, when immigrant rights groups mobilize around immigrant rights, they are also mobilizing around immigrant worker rights because effecting change in the immigration system will effect change in the unauthorized workplace.

16. Paul B. Brewer & Kimberly Gross, *Values, Framing, and Citizens' Thoughts About Policy Issues: Effects on Content and Quantity*, 26 POL. PSYCH. 929, 931 (2005); Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOCIO. 611, 614 (2000).

17. *See infra* Section II.B.

18. *See infra* Section II.C.

19. *See infra* Part III.

20. *Id.*

21. *See generally* Scott L. Cummings, *The Social Movement Turn in Law*, 43 LAW & SOC. INQUIRY 360 (2018) (surveying the literature related to social movements).

immigrant social movements contest the law's framing.²² This Article fills that gap and argues that the contestation has led to less precarity and greater social membership for unauthorized workers.

The Article proceeds in three parts. Part I describes social movements and framing processes and introduces three core frames in the immigrant rights movements: rights framing, identity framing, and moral deservedness framing. Part II argues that the U.S. legal regime has framed unauthorized workers as less morally deserving than their authorized counterparts, resulting in greater workplace precarity for unauthorized workers. Part III demonstrates how immigrant rights movements have contested the law's framing to work around and through the law, to directly contest and challenge the law, and to change the law. The Article concludes that, as challengers to the current legal system, immigrant rights movements have resisted the law's framing of unauthorized work, and have instead developed innovative strategies to combat the legal regime's restrictions. Despite their lack of recognized political power, movement actors have decreased workplace precarity and increased social membership for unauthorized workers.

I. SOCIAL MOVEMENTS, MOBILIZATION, AND FRAMING

A. *Social Movements & Framing*

Social movements are “network[s] of informal interactions between a plurality of individuals, groups and/or organizations, engaged in a political or cultural conflict, on the basis of a shared collective identity.”²³ Social movement groups work across different domains, operate at different levels, and employ various strategies.²⁴ Groups may engage in collective action in the public square, within private organizations, in legislative bodies, across media, or in courts.²⁵ Further, movements can work at different levels of the

22. Scott Cummings thoroughly explores the legal scholarship addressing both the role that social movements have played as “lawmaking actors, reshaping politics and norms in ways that spark constitutional revolutions” and the literature looking at movement lawyering that “make[s] normative points about the appropriate role that legal actors should play in social change processes.” *Id.* at 361–63 (emphasis omitted). The existing scholarship has been particularly interested in how social movements have shaped legal norms or what lawyers' roles should be in advancing the agenda of social movement organizations. In terms of legal scholarship about social movements and immigrant rights, legal scholars have been primarily interested in movement lawyering, that is, what the role of the lawyer is in social movements. *See, e.g.,* Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464 (2017).

23. Mario Diani, *The Concept of Social Movement*, 40 SOCIO. REV. 1, 13 (1992).

24. Kati L. Griffith & Leslie C. Gates, *Milking Outdated Laws: Alt-Labor as a Litigation Catalyst*, 95 CHI.-KENT L. REV. 245, 252 (2020) (citing Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1242 (2010)).

25. Griffith & Gates, *supra* note 24, at 252. Social movement organizations have also engaged in the agency rule-making processes and claims-making in agencies. In 2017, various groups organized campaigns around net neutrality—almost 38% of the 21.7 million submissions during the Federal Communications Commission's comment period could be traced back to organizations. Paul Hitlin, Kenneth Olmstead & Skye Toor, *Public Comments to the Federal Communications Commission About Net Neutrality Contain Many Inaccuracies and Duplicates*, PEW RSCH. CTR. (Nov. 29, 2017), <https://>

state—local, state, and federal.²⁶

In general, social movements engage in three types of mobilization.²⁷ First, social movements may work to effect change through the legal system. Some scholars have referred to this as the “lawyering” approach or as “legal mobilization.”²⁸ This includes educating communities about their legal rights, providing direct legal services, and litigating claims.²⁹ Second, groups may take an “organizing” approach, in which they mobilize members and engage in direct action to effect social change.³⁰ This includes direct resistance and civil disobedience. Third, movements may focus on “lobbying political elites for policy change.”³¹ Often, social movements employ all three types of mobilization.

Even if there is a mobilizing structure, a framing process is needed for mobilization to occur. A framing process is necessary because “[a]t a minimum people need to feel aggrieved and/or threatened by some aspect of their life

perma.cc/MZB3-8EU9. A recent example of claims-making at the agency level is a civil rights complaint filed with the Department of Agriculture by a coalition of groups including the Food Chain Workers Alliance, HEAL Food Alliance, American Friends Service Committee—Iowa, Idaho Organization of Resource Councils, and Forward Latino. David Pitt, *Worker Advocates File Meat Plants Discrimination Complaint*, WASH. POST (July 9, 2020), <https://perma.cc/GV7A-H4LZ>. In the Complaint, the groups alleged that meatpacking plants failed to follow the CDC’s guidance to stop the spread of COVID-19, which had a disparate impact on Black, Latino, and Asian workers, a violation of Title VII. *Id.* Because the plants receive funds through federal contracts, the groups requested that the Department of Agriculture suspend and terminate the contracts. *Id.*

26. Griffith & Gates, *supra* note 24, at 252.

27. *Id.*

28. SHANNON GLEESON, *CONFLICTING COMMITMENTS: THE POLITICS OF ENFORCING IMMIGRANT WORKER RIGHTS IN SAN JOSE AND HOUSTON* 118 (2012) (describing the “lawyering approach”). The legal scholarship about social movements has largely focused on legal mobilization. *See, e.g.*, Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U. PA. L. REV. 85 (2001); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005); Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879 (2007); Jennifer Gordon, *The Lawyer is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CALIF. L. REV. 2133 (2007); Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61 (2011); Scott L. Cummings, *Litigation at Work: Defending Day Labor in Los Angeles*, 58 UCLA L. REV. 1617 (2011); Scott L. Cummings, *Preemptive Strike: Law in the Campaign for Clean Trucks*, 4 U.C. IRVINE L. REV. 939 (2014); Marcy L. Karin & Robin R. Runge, *Toward Integrated Law Clinics that Train Social Change Advocates*, 17 CLINICAL L. REV. 563 (2011); Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011); Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663 (2012); Charles Elsesser, *Community Lawyering—The Role of Lawyers in the Social Justice Movement*, 14 LOY. J. PUB. INT. L. 375 (2013); Griffith & Gates, *supra* note 24. A concern that legal scholars have expressed with legal mobilization as a strategy to effect social or political change is that of cooptation. Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 939 (2007). The critique is based on the idea, first, that legal mobilization is generally ineffective at achieving the goals of social movements, and second, that legal mobilization negatively impacts social movements because it takes over as the primary strategy. *Id.* More specifically, under this critique, legal cooptation is “a process by which the focus on legal reform narrows the causes, deradicalizes the agenda, legitimizes ongoing injustices, and diverts energies away from more effective and transformative alternatives.” *Id.*; *see also* Griffith & Gates, *supra* note 24, at 250–51 (raising critiques of litigation as a source of societal change). In teasing out the specific strands that animate the cooptation critique, Orly Lobel identifies framing and fragmentation as a specific concern. Lobel, *supra*, at 950–52.

29. GLEESON, *supra* note 28, at 113.

30. *Id.*

31. *Id.*

and at least minimally optimistic that, acting collectively, they can redress the problem.”³² Social movements use frames to “inspire and legitimate [their] activities and campaigns.”³³ Movement actors construct frames by identifying a situation in need of change and attributing blame (diagnostic framing), setting out an alternative (prognostic framing), and encouraging others to act collectively to address the situation in need of change (motivational framing).³⁴ Indeed, “[f]rames provide a way to look at an issue that is intended to broaden the number of people who support the goals of a social movement.”³⁵

Social movements use shared frames of reference called value frames to “draw[] ‘an association between a value and an issue that carries an evaluative implication: it presents one position on an issue as being right (and others wrong) by linking that position to a specific core value.’”³⁶ A potential benefit of value framing is that it can “help to promote shared frames of reference for understanding issues.”³⁷ The hope is that the shared frame of reference results in more consideration about policy choices.³⁸ In this respect, a value frame is an “action-oriented set[] of beliefs and meanings.”³⁹ The role that value framing plays in public policy choices means that when social movement actors engage in the framing process, they must consider which values will most effectively “inspire and legitimate” their campaign.⁴⁰

Framing is also a contested process.⁴¹ Framing is “contentious in the sense that it involves the generation of interpretive frames that not only differ from existing ones but that may also challenge them.”⁴² Challenges to frames can come from counterframing by movement opponents or the media, intra-movement disputes over framing, or the “dialectic between frames and events.”⁴³

Proponents and opponents of a particular policy outcome may use the same value to frame the issue.⁴⁴ For example, proponents of a regularization program for noncitizens who arrived in the United States as children may use fairness as a value frame. They could assert that because the noncitizens arrived as children, they share no moral blame for entering the United States

32. Gerald F. Davis & Doug McAdam, *Corporations, Classes, and Social Movements After Managerialism*, 22 RSCH. ORG. BEHAV. 193, 216–17 (2000).

33. Benford & Snow, *supra* note 16, at 614.

34. *Id.* at 615.

35. Ruben J. Garcia, *Transnationalism as a Social Movement Strategy: Institutions, Actors and International Labor Standards*, 10 U.C. DAVIS J. INT’L L. & POL’Y 1, 2–3 (2003). For a discussion of the potential of anti-discrimination provisions in Free Trade Agreements to aid social movements in favorably framing workplace rights for noncitizen workers, see Angela D. Morrison, *Free Trade, Immigrant Workers, and Employment Discrimination*, 67 KAN. L. REV. 237, 274–79 (2018).

36. Brewer & Gross, *supra* note 16, at 931 (quoting Paul R. Brewer, *Value Words and Lizard Brains: Do Citizens Deliberate About Appeals to Their Core Values?*, 22 POL. PSYCH. 45, 46 (2001)).

37. Brewer & Gross, *supra* note 16, at 944.

38. *Id.*

39. Benford & Snow, *supra* note 16, at 614 (referring to collective-action frames in general).

40. *Id.*; see also Brewer & Gross, *supra* note 16, at 944.

41. Benford & Snow, *supra* note 16, at 625.

42. *Id.* at 614.

43. *Id.* at 625.

44. Brewer & Gross, *supra* note 16, at 930–31.

without authorization and it's unfair to hold them accountable for their parents' decisions. In contrast, opponents of the program could use the same value frame—moral deservedness—to argue that the regularization program unfairly lets noncitizens who entered illicitly gain legal status ahead of people who waited outside of the country and did not enter illicitly.⁴⁵

Intra-movement contestation can arise over where to attribute the blame for the problem and the range of potential solutions.⁴⁶ Movement actors may also dispute which value frame will most resonate and lead to greater mobilization.⁴⁷ For instance, as discussed further below, intramovement disputes came up in the immigrant rights movement as movement actors attributed blame; some movement actors assigned blame solely to republican lawmakers, while other movement actors assigned blame to the Obama administration, too.⁴⁸ Disputes over how to frame unauthorized noncitizens who came to the United States as children also arose.⁴⁹ Some movement actors believed that relying on a moral deservedness frame that highlighted the non-citizens as deserving of immigration relief based on their education and contribution to the United State would resonate most with the public.⁵⁰ But other movement actors resisted that frame because it would exclude people from the movement who did not fit that frame.⁵¹

Contestation also occurs as framing impacts mobilization events and mobilization events in turn impact framing.⁵² Initial framing may legitimate and make actions possible that were not possible prior to the framing.⁵³ The actions inform and can even alter the meaning of the initial framing.⁵⁴

B. *Frames in the Immigrant Rights Movement*

With respect to frames, movement scholars have identified elements that animate immigrant rights movements.⁵⁵ The frames involve “elements of family,

45. Many of the accounts of the arguments for and against the DREAM Act, which would have regularized the status of young noncitizens who entered the country when they were children, raised similar points as these. See, e.g., John Hudson, *The Conservative Case Against the DREAM Act*, ATLANTIC (Dec. 1, 2010), <https://perma.cc/3KRV-SPVD>; David J. Bier, *Dream Act Inexplicably Excludes Legal Immigrant Dreamers, Requires Applicants Violate the Law*, CATO INST.: CATO AT LIBERTY (Sept. 15, 2017), <https://perma.cc/E29T-DNXW>; Luis Miranda, *Get the Facts on the DREAM Act*, WHITE HOUSE (Dec. 1, 2010), <https://perma.cc/S4M8-QCSG>.

46. Benford & Snow, *supra* note 16, at 616, 626.

47. *Id.* at 626–27.

48. See *infra* Section III.C, notes 290–305 and accompanying text.

49. See *infra* Section III.B, notes 259–72 and accompanying text.

50. *Id.*

51. *Id.*

52. Benford & Snow, *supra* note 16, at 623.

53. Benford & Snow, *supra* note 16, at 627.

54. *Id.*

55. Maria De Jesus Mora, Rodolfo Rodriguez, Alejandro Zermeño & Paul Almeida, *Immigrant Rights and Social Movements*, 2018 SOCIO. COMPASS 1, 9; see also Irene Bloemraad, Fabiana Silva & Kim Voss, *Rights, Economics, or Family? Frame Resonance, Political Ideology, and the Immigrant Rights Movement*, 94 SOC. FORCES 1647, 1652–54 (2016) (describing three dominant frames in immigrant rights movements—human and civil rights, economic contributions of immigrants, and appeals to family unity).

diligent workers, human rights, indigenous cultures, and appeals to panethnicity.⁵⁶ All of these elements lead to three core value frames that immigrant rights groups use to mobilize: rights, identity, and moral deservedness.

1. *Rights*

Rights framing includes both human and civil rights elements.⁵⁷ The human rights element emphasizes values of fairness and equality to argue that noncitizens' precarious "legal status and situation [is] inhuman."⁵⁸ Immigrant rights movements have used it to show that anti-immigrant policies conflict with democratic ideals because those policies treat some families as lesser.⁵⁹ In this respect, rights framing sees the family element as a human rights value.⁶⁰ Civil rights frames originate in U.S. legal institutions—the Constitution, statutes, and judicial review.⁶¹

A human rights frame may appeal to movement actors as a way to include their family members and other noncitizens who are left out of the discussion around legalization due to moral deservedness framing.⁶² A human rights/injustice-based frame also resonates, in part, because movement actors view it as a way to reach more immigrant populations and recruit more members.⁶³

But because rights are generally linked to citizenship in the minds of the general public, the rights frame is "deeply fraught for noncitizens, who may not be seen as legitimate members of the polity."⁶⁴ So when movement actors choose a rights frame to organize on behalf of unauthorized noncitizens, they run the risk of the general public not buying into the frame.⁶⁵ A recent study of California voters demonstrate its limited appeal.⁶⁶ Instead of appealing widely to voters, the rights frame resonated only with those voters who view themselves as politically moderate.⁶⁷

2. *Identity-based*

Identity-based frames, and particularly intersectional identity-based frames, can assist with building coalitions and increasing solidarity within a movement. They may also resonate with those outside the movement who share a similar identity. Elements of pan-ethnicity and indigenous culture are

56. De Jesus Mora, Rodriguez, Zermeño & Almeida, *supra* note 55, at 9.

57. Bloemraad, Silva & Voss, *supra* note 55, at 1652–53.

58. De Jesus Mora, Rodriguez, Zermeño & Almeida, *supra* note 55, at 10.

59. *Id.* at 9.

60. *Cf.* Kit Johnson, *Theories of Immigration Law*, 46 ARIZ. ST. L.J. 1211, 1244–46 (2015) (noting that U.S. immigration law's favorable treatment of family-based immigration is grounded in individual rights theory).

61. Bloemraad, Silva & Voss, *supra* note 55, at 1652–53.

62. See Fanny Lauby, *Leaving the 'Perfect DREAMer' Behind? Narratives and Mobilization in Immigration Reform*, 15 SOC. MOVEMENT STUD. 374, 382–83 (2016).

63. *Id.* at 383–84.

64. Bloemraad, Silva & Voss, *supra* note 55, at 1653.

65. *Id.*

66. *Id.* at 1660.

67. *Id.*

useful to draw on “commonalities among diverse ethnic subgroups, eventuating in greater levels of solidarity.”⁶⁸ “Family unity” highlights noncitizens’ roles as parents and family members.⁶⁹ And LGBTQ leaders in the immigrant rights movement have “recogni[z]ed and activat[ed] multipl[e] marginalized identities” to “catalyze[] *intersectional mobilization*.”⁷⁰

In one study, identity-based framing focusing on the family element resonated most with California voters, especially with voters who viewed themselves as politically conservative.⁷¹ And the frame also resonated with DREAMer activists.⁷² Activists’ identity as members of their family and community meant that they rejected the moral deservedness frame because it excluded their family and community members.⁷³

3. *Moral Deservedness*

Finally, the moral deservedness frame flows from the economic and other societal contributions of immigrants. For example, the diligent worker element relies on a view of noncitizens as economic contributors because of their role as “workers and consumers in the American economy.”⁷⁴ The idea is that emphasizing immigrants’ status as economic contributors shifts the narrative away from legal status and moves it towards notions of immigrants as “good American[s]” based on their contributions.⁷⁵ Movement actors also hope that it counters narratives about unauthorized immigrants as criminals or as undeserving recipients of “American” jobs and public benefits.⁷⁶ Relatedly, immigrant movement actors have emphasized the educational attainment and law-abiding nature of immigrants to show that immigrants deserve a path to regularization.⁷⁷

As Jennifer Lee has noted, this sort of mainstreaming, if led and informed by immigrant workers, can further workers’ “strategic . . . goal of full membership into mainstream society.”⁷⁸ This is because it can resonate with “mainstream” society and encourage them to see immigrant workers as

68. De Jesus Mora, Rodriguez, Zermeño & Alemeida, *supra* note 55, at 10; *see also* Jennifer Jihye Chun, George Lipsitz, & Young Shin, *Intersectionality as a Social Movement Strategy: Asian Immigrant Women Advocates*, 38 SIGNS 917 (2013).

69. De Jesus Mora, Rodriguez, Zermeño & Alemeida, *supra* note 55, at 9; *cf.* Johnson, *supra* note 60, at 1245–46 (noting that domestic values theory also justifies the favorable treatment because family ties promote community ties).

70. Veronica Terriquez, *Intersectional Mobilization, Social Movement Spillover, and Queer Youth Leadership in the Immigrant Rights Movement*, 62 SOC. PROBLEMS 343, 343 (2015).

71. Bloemraad, Silva & Voss, *supra* note 55, at 1661.

72. Lauby, *supra* note 62, at 382–83.

73. *Id.*

74. Bloemraad, Silva & Voss, *supra* note 55, at 1653.

75. *Id.*

76. *Id.*

77. *See, e.g.,* Lauby, *supra* note 62 at 376–77 (describing those elements in the context of advocacy around the DREAM Act).

78. Jennifer J. Lee, *Outsiders Looking in: Advancing the Immigrant Worker Movement Through Strategic Mainstreaming*, 2014 UTAH. L. REV. 1063, 1067.

societal members.⁷⁹ But the frame may not, in the end, appeal to “mainstream” society and instead may only appeal to immigrant communities. One study found that for unauthorized noncitizens outside the movement, notions of moral deservedness resonated because they believed noncitizens should “earn” their membership in society.⁸⁰ Yet another study found that the moral deservedness frame based on immigrants’ economic contributions did not resonate with California voters.⁸¹

In addition, the moral deservedness frame can contribute to a narrative in which some noncitizens are “deserving” and others are “not deserving.”⁸² Because of this narrative, one study found that movement actors in the DREAMer movement were more likely to reject moral deservedness as a values frame.⁸³

This Article turns next to the law’s framing of unauthorized work. It then argues that immigrant social movements’ contestation of the law’s framing has decreased workplace precarity and increased social membership.

II. THE LAW’S FRAMING OF UNAUTHORIZED WORKERS

A. *The Law as a Framing Device for Social Movements*

In general, the law as a framing device can provide opportunities but also limitations for movement actors. Framing often involves “injustice frames” whereby movements “identify ‘victims’ of a given injustice and amplify their victimization.”⁸⁴ An injustice frame is a “mode of interpretation” that precedes collective action such as protest, noncompliance, or rebellion—justified by the injustice.⁸⁵ As such, the law can provide a good starting point for framing since legal disputes necessarily involve a party who has suffered a legal wrong. But the law offers “a limited and generalizing account of what ought to be considered a ‘problem’” and it attributes the dispute as being between two sides.⁸⁶ For noncitizens that’s problematic because of how it casts those without authorization. For example, legal disputes in immigration court cast unauthorized workers as the “problem” and the state as the wronged party because the noncitizen broke the law.

The law also offers limited solutions—that is, only those solutions that fit within existing legal frameworks.⁸⁷ In immigration court, unauthorized workers have few remedies for legalization and the avenues for relief are narrow.⁸⁸

79. *Id.*

80. Lauby, *supra* note 62, at 382.

81. Bloemraad, Silva & Voss, *supra* note 55, 1660–61.

82. De Jesus Mora, Rodriguez, Zermeño & Alemeida, *supra* note 55, at 9; *see also* Lee, *supra* note 78 at 1066.

83. Lauby, *supra* note 62, at 382–83.

84. Benford & Snow, *supra* note 16, at 615.

85. *Id.*

86. Lobel, *supra* note 28, at 950–51.

87. *Id.* at 951.

88. For example, cancellation of removal is one form of relief available to noncitizens who lack immigration authorization but they must show that they (1) have been physically present continuously for at

For unauthorized workers who litigate workplace claims, the law limits their remedies, too, as further described below.⁸⁹

Finally, legal disputes require a unified voice, “flatten[ing] internal debates, fragment[ing] and marginaliz[ing] segments of the broader vision, and obscur[ing] the complexity of interests, needs, and stakes that exist within the social field.”⁹⁰ Nonetheless, as Kate Griffith and Leslie Gates note, “litigation that occurs in conjunction with a broader movement for change may not suffer from the same deficiencies” as social movements that rely on litigation as the primary strategy.⁹¹ In the context of broader organizing strategies, Griffith and Gates assert that litigation wins can energize collective efforts, broaden the scope of claims-making through legal challenges based on re-interpretations of law, and “help make rights real and can work in coalition with others to address any backlashes that litigation wins may spur.”⁹² Moreover, social movements do not require that all members adopt the same strategies or act in unison for a collective movement identity to exist.⁹³ Social movements allow for negotiation between individual actors and organizations within the movement⁹⁴ and across domains.⁹⁵

B. *The Law’s Framing of Unauthorized Workers*

The way in which the law frames unauthorized workers with respect to the three core value frames—rights framing, identity-based framing, and moral-deservedness framing—limits movement actors, too. In the main, the law does not recognize unauthorized workers as possessing civil or human rights that entitle them to full remedy for workplace wrongs or a right to immigration relief. To the extent the law relies on identity-based frames, it emphasizes the “unauthorized” aspect of unauthorized workers’ identities over other identities, such as family membership or membership in protected classes. Ultimately, U.S. immigration law and policy frame unauthorized workers as less morally deserving of protection than workers with authorization.

least 10 years; (2) are a person of “good moral character”; (3) have not been convicted of certain crimes; and (4) their removal would cause a United States citizen or legal permanent resident’s spouse, child, or parent “exceptional and extremely unusual hardship.” 8 U.S.C. § 1229b(b)(1). Further, the relief is discretionary on the part of the immigration judge. *Id.*

89. See *infra* Section II.B.2.

90. Lobel, *supra* note 28, at 951.

91. Griffith & Gates, *supra* note 24, at 251.

92. *Id.*; see also *id.* at 251 nn.14–16, 252 nn.19–21 (citing Manoj Dias-Abey, *Justice on Our Fields: Can “Alt-Labor” Organizations Improve Migrant Farm Workers’ Conditions?*, 53 HARV. C.R.-C.L.L. REV. 167, 179 (2018); Cummings, *supra* note 21, at 362; Daniel J. Galvin, *From Labor Law to Employment Law: The Changing Politics of Workers’ Rights*, 33 STUD. AM. POL. DEV. 50 (2019); and Cummings & NeJaime, *supra* note 24, at 1242).

93. See Diani, *supra* note 23, at 8–9.

94. *Id.* at 9.

95. Griffith & Gates, *supra* note 24, at 252 (citing Cummings & NeJaime, *supra* note 24, at 1242).

1. *Rights Framing*

First, the existing legal regime does not frame unauthorized workers as having human or civil rights that entitle them to access the formal workplace or to regularize their immigration status. The U.S. immigration regime restricts unauthorized workers' access to the formal workplace. It provides some paths to legalization through family relationships or jobs. But the options are severely limited as the law does not recognize an inherent human or civil right to immigration status.⁹⁶

The legal regime denies unauthorized workers access to the formal workplace,⁹⁷ and with it unauthorized workers' access to the rights that flow from being recognized as employees under the law.⁹⁸ In 1986, Congress passed the Immigration Reform and Control Act (IRCA).⁹⁹ IRCA, for the first time at the federal level, made it illegal for employers to hire noncitizens who lack immigration status.¹⁰⁰

The statute imposes civil and criminal sanctions on employers who “knowingly” hire noncitizen workers who do not have employment authorization or continue to employ noncitizen workers who the employer knows are unauthorized.¹⁰¹ Under IRCA, a noncitizen is unauthorized to work if the worker is not a legal permanent resident or otherwise lacks authorization to work.¹⁰²

IRCA's prohibitions, however, do not apply to some workers because they are not considered “employees” under IRCA. There are three main carve-outs from who is an employee under IRCA: (1) independent contractors; (2) self-employed entrepreneurs; and (3) individuals who engage in sporadic, irregular, or intermittent domestic service in a private home.¹⁰³ On the one hand, this means IRCA's prohibition on employing unauthorized workers does not apply to individuals in these carve-out positions. But on the other hand, unauthorized workers in these carve-out positions do not enjoy the rights associated with a formal employment relationship, namely, “minimum

96. The Trump administration imposed even more restrictions on legal immigration. See Sarah Pierce & Jessica Bolter, *Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes under the Trump Presidency*, MIGRATION POL'Y INST. (July 2020), <https://perma.cc/6C4U-LK6S>.

97. See 8 U.S.C. § 1324(a)(1)(A).

98. See *infra* Section II.B.2.

99. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

100. 8 U.S.C. §§ 1324a(a)(1)–(2).

101. 8 U.S.C. § 1324a(a)(1)(A) (“It is unlawful for a person or other entity—(A) to hire, or to recruit or refer for a fee, for employment in the United States [a noncitizen] knowing the [noncitizen] is an unauthorized [noncitizen] . . . with respect to such employment”); 8 U.S.C. § 1324a(a)(2)(1) (“It is unlawful for a person or other entity, after hiring [a noncitizen] for employment in accordance with paragraph (1), to continue to employ the [noncitizen] in the United States knowing the [noncitizen] is (or has become) an unauthorized [noncitizen] with respect to such employment.”) Civil penalties range from \$583, for a first-time offense, to up to \$23,331 for a third offense. 85 Fed. Reg. 119, 37,004, 37,009 (June 19, 2020) (to be codified at 28 C.F.R. pt. 85). Criminal sanctions apply when an employer engages in a pattern or practice of hiring unauthorized workers; the sanctions include up to a \$3,000 fine per each unauthorized noncitizen hired to 6 months imprisonment. 8 U.S.C. § 1324a(f)(1).

102. 8 U.S.C. § 1324a(h)(3).

103. Geoffrey Heeren, *The Immigrant Right to Work*, 31 GEO. IMM. L.J. 243, 245–46 (2017).

wage and overtime, Social Security and other retirement benefits, unemployment insurance, workers' compensation, collective bargaining rights, and the protection of federal antidiscrimination laws."¹⁰⁴ Thus, instead of fully recognizing the workplace rights of unauthorized workers, the law excludes them from the benefits of the formal employment relationship. That means that noncitizens who want authorization to work and desire to receive the full benefits of being an employee must try to obtain work authorization through the laws currently on the books.

Unauthorized workers have been able to regularize their status under a few immigration programs. Notably, IRCA included a legalization program that allowed individuals who had been in the United States since 1982 to regularize their immigration status.¹⁰⁵ As a result, almost three million non-citizens received lawful permanent residence.¹⁰⁶ But Congress has not passed a similar, general legalization program in the almost thirty-five years since.¹⁰⁷ Instead, it has enacted smaller, population-specific programs that do not provide broad-based relief.¹⁰⁸ Unauthorized workers can also seek immigration relief for egregious forms of workplace abuse through the U and T visas.¹⁰⁹ And, unlike immigration authorities' denial of many visas, there may be a limited right to judicial review when immigration authorities deny a U or T visa.¹¹⁰

But, for the most part, unauthorized workers do not have a right to immigration visas or to judicial review of immigration authorities' discretionary denial of immigration benefits or relief.¹¹¹ Immigration law also restricts the

104. *Id.* at 246. Ironically, the over-inclusiveness of who is classified as an independent contractor allows more unauthorized workers to work as independent contractors than more restrictive laws regarding employee classifications do.

105. Immigration Reform and Control Act, 100 Stat. at 3394–404.

106. Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 UNIV. CHI. LEGAL FORUM 193, 194 n.8.

107. Donald M. Kerwin, *More than IRCA: US Legalization Programs and the Current Policy Debate*, MIGRATION POL'Y INST. 5–6 (Dec. 2010), <https://perma.cc/N9NM-JXKF>.

108. An example includes the Nicaraguan Adjustment and Central American Act (NACARA) since IRCA. Nicaraguan Adjustment and Central American Act, Pub. L. 105-100, Title II, 111 Stat. 2193 (1997).

109. Angela D. Morrison, *Executive Estoppel, Equitable Enforcement, and Exploited Immigrant Workers*, 11 HARV. L. & POL'Y REV. 295, 316–19 (2017).

110. *See, e.g.,* Perez Perez v. Wolf, 943 F.3d 853, 867 (9th Cir. 2019) (holding that the statute “establish[es] statutory standards that constrain [DHS]’s U visa determinations . . . [It] prescribe[s] eligibility criteria, application procedures, and agency duties, all of which guide [DHS]’s determination whether to grant or deny U visa petitions. U visa determinations are thus not ‘wholly discretionary’”).

111. *See, e.g.,* Kleindienst v. Mandel, 408 U.S. 753, 762 (1972) (emphasizing that unadmitted and nonresident noncitizens have no constitutional right of entry to the United States); Romero-Torres v. Ashcroft, 327 F.3d 887, 890 (9th Cir. 2003) (holding that the court lacked jurisdiction to review the Board of Immigration Appeal’s discretionary determination that a noncitizen failed to satisfy the requirements for cancellation of removal under 8 U.S.C. § 1229b(b)(1)). Victor Romero has argued that even though the law sometimes may appear to recognize inherent human and dignity rights for noncitizens, it more accurately resembles contract law in which the United States has granted privileges that it can revoke should noncitizens violate the terms of the contract:

While that the law may at times appear to be protective of human rights and dignity (in its refugee and amnesty laws, for instance), and at other times draconian and uncaring (in its denial of judicial review or its expedited deportation procedures), one should appreciate it for what it is—a list of

categories and numbers of visas available, most of which are not available to workers who are already in the United States and working without authorization.¹¹² Noncitizens who hope to immigrate through a family member must have a United States citizen spouse, adult child, parent, or sibling, or a Legal Permanent Resident (LPR) spouse or parent that will sponsor them.¹¹³ Even if a noncitizen has a relative that can sponsor her, the number of visas available in any given year are limited for the spouse and children of LPRs and for the adult children and siblings of United States citizens.¹¹⁴ A family relationship, then, can provide one way to regularize status, but the options are limited and the waits are long. Nor can most unauthorized workers regularize their status based on their employment. Most permanent and temporary work visas are available only to workers with specialized training and high education levels.¹¹⁵ Only a limited number are available to workers who perform “unskilled labor.”¹¹⁶

In addition to the limited categories of visas for permanent residence, the law also caps the number issued per category and the number available to noncitizens from any single country in one year. This results in years-long backlogs on visas. For example, the LPR parent of an adult, unmarried Mexican national would have needed to file the visa petition prior to

rules governing the conditions under which non-citizens may enter and must leave the United States. It is more like a contract than a human rights document, and, in our country, Congress has the near exclusive power to define the terms of that contract.

Victor C. Romero, *United States Immigration Policy: Contract or Human Rights Law?*, 32 NOVA L. REV. 309, 323 (2008).

112. 8 U.S.C. § 1153 (setting out allocation of immigrant visas).

113. *Id.*

114. 8 U.S.C. § 1151(a)(1), (c).

115. Immigrant visas, the category of visas that lead to permanent residence, have five preference categories: (1) persons of extraordinary ability, outstanding professors and researchers, and certain executives and managers of multinational corporations; (2) professionals with advanced degrees and persons with extraordinary ability; (3) professionals, skilled workers, and a limited number of unskilled workers; (4) religious workers; and (5) investors who create job opportunities. 8 U.S.C. § 1153(b). Temporary work visas also have limited categories, they include temporary visas for ambassadors and other consulate employees, trade or investment, fashion models, registered nurses, foreign media, noncitizens with “extraordinary ability,” professionals, executives or managers under the former NAFTA, and specialty occupations (H1-B). 8 U.S.C. § 1101(a)(15). For example, H-1B nonimmigrants must have a bachelor’s degree or higher. 8 C.F.R. § 214.2(h)(4)(i)(A)(1). As an example of evidence of extraordinary ability, the regulations list a Nobel prize. 8 C.F.R. § 214.2(o)(3)(iii)(A). Another category of visa is the diversity visa program, which allows for 50,000 immigrant visas a year. 8 U.S.C. § 1153(c). It is available only to people from countries with low levels of immigration and has educational and career training requirements. *Id.*

116. 8 U.S.C. § 1153(b) (limiting the number of permanent visas for unskilled workers to no more than 10,000 any given year). Only two categories of temporary work visas exist with no specific skill or education requirements: agricultural laborers (H-2A) and unskilled laborers (H-2B). 8 U.S.C. § 1101(a)(15)(H)(ii)(a)–(b). That is not to say that the jobs the workers perform do not require skills or specialized skills, but just that the statute and regulations do not require the employer to demonstrate those skills. In this respect, the categorization of some work as skilled and other work as unskilled perpetuates neoclassical economic assumptions that devalue work performed by people of color and women. *See, e.g.,* Joelle Gamble, *How Economic Assumptions Uphold Racist Systems*, DISSENT (June 9, 2020), <https://perma.cc/C2FG-ZS5G> (using childcare as an example of work that is categorized as unskilled but that actually requires skill to perform); Ronnie J. Steinberg, *Social Construction of Skill: Gender, Power, and Comparable Worth*, 17 WORK & OCCUPATIONS 449, 452–53 (1990) (describing social processes by which work that is primarily performed by women is categorized as unskilled).

December 1, 1998, for the visa to have been available in April 2020—a wait of over two decades.¹¹⁷ For noncitizens from other countries, with the exception of the Philippines, the date by which to file for availability in April 2020 would have been November 1, 2014—a wait of almost six years.¹¹⁸

The backlog on employment-based immigration visas is also long. As of March 2020, over one million noncitizens were waiting for legal resident status, based only on the caps.¹¹⁹ What's more the backlog is expected to get larger: "the current rate of increase in the backlog predicts that it will total more than 2.4 million by 2030."¹²⁰

The INA similarly limits the number of available, temporary visas for some of the work-based categories.¹²¹ The cap for temporary visas for unskilled workers is set at 66,000 per year.¹²² Only 65,000 new specialty occupation visas are available each fiscal year.¹²³ And temporary work visas are limited in duration.¹²⁴ Generally, the noncitizen is expected to leave once the visa expires.

Moreover, the complexity of the process and the long waits make sponsoring an employee for immigration expensive.¹²⁵ The backlogs also mean that employers must project their labor force needs years into the future. So even if noncitizens qualify for a visa, employers may hesitate or be unwilling to sponsor them, given the costs and logistics.

Ultimately, the law does not provide a strong rights-based frame that movement actors can use to mobilize. Instead, American immigration law and policy bar unauthorized workers from formal employment relationships, while at the same time severely restricting unauthorized workers' ability to regularize their status. This means that unauthorized workers' access to formal employment is constrained in the present and into the future. Rather than providing a frame from which movement actors can build, the law restricts and narrows the available solutions based on civil or human rights.

2. Identity Framing

Second, the legal regime overemphasizes unauthorized workers' immigration status and ignores or minimizes their other identities. When unauthorized workers experience workplace violations, the law denies or limits their

117. DEP'T OF STATE, BUREAU OF CONSULAR AFFS., VISA BULLETIN: IMMIGRANT NUMBERS FOR APRIL 2020 (2020), <https://perma.cc/98EF-UWCU>.

118. *Id.*

119. David J. Bier, *Backlog for Skilled Immigrants Tops 1 Million*, CATO INST. 10 (2020), <https://perma.cc/LT2K-CVU3>.

120. *Id.*

121. 8 U.S.C. § 1184(e), (g).

122. 8 U.S.C. § 1184(g)(1)(B), (10). Up to 20,000 noncitizens with master's degrees can be exempt from the cap on H1-B visas if their employers have filed an immigration petition on their behalf. 8 U.S.C. § 1184(g)(5)(C).

123. 8 U.S.C. § 1184(g)(1)(A)(vii).

124. 8 U.S.C. § 1184 (a), (g)(4).

125. Seth R. Leech & Emma Greenwood, *Keeping America Competitive: A Proposal to Eliminate the Employment-Based Immigrant Visa Quota*, 3 ALBANY GOVT. L. REV. 322, 337–40 (2010).

remedy because of their immigration status, despite their membership in a protected class or their identities as workers. And although U.S. immigration law allows for limited immigration based on family or work,¹²⁶ most unauthorized workers cannot regularize their status because they entered unlawfully or worked without authorization. Thus, the law frames unauthorized workers as unauthorized migrants first, devaluing their other identities.

Unauthorized workers who are in the workplace and whom employers have hired despite their immigration status have the right to safe working conditions, the right to organize, the right to minimum wage and overtime, and the right to a workplace free of unlawful discrimination.¹²⁷ Yet the law limits their remedies and denies workplace benefits to them because of their unauthorized status.

Workers without employment authorization are ineligible for several benefits that normally result from a formal employment relationship. Unauthorized workers are not eligible for unemployment benefits, even if they otherwise qualify.¹²⁸ And they are not eligible for social security benefits, even though they pay social security taxes through their employment.¹²⁹ So despite being workers and doing the same work as their authorized counterparts, the law ignores their identity as workers and instead focuses on their unauthorized status.

Likewise, even though the law protects unauthorized workers from discrimination based on their membership in a protected class, it limits workers' remedies because of their unauthorized status. In 2002, the Supreme Court determined that unauthorized workers were not eligible for backpay under the National Labor Relations Act.¹³⁰ In *Hoffman Plastics Compound v. NLRB*, the Court pointed to IRCA to support its decision, writing "allowing the Board to award backpay to [unauthorized noncitizens] would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA."¹³¹ In *Hoffman Plastics*, then, the Court reasoned that the worker's identity as an unauthorized immigrant mattered more than any rights the worker had under the National Labor Relations Act.

126. See *supra* Section II.B.1.

127. Morrison, *supra* note 109, at 302–15.

128. See, e.g., Rebecca Smith, *Immigrant Workers' Eligibility for Unemployment Insurance*, NAT'L EMP. L. PROJECT (Mar. 31, 2020), <https://perma.cc/87EL-UHFC>.

129. Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 5–6 (2006); STEPHEN GOSS, ALICE WADE, J. PATRICK SKIRVIN, MICHAEL MORRIS, K. MARK BYE & DANIELLE HUSTON, SOC. SEC. ADMIN., OFF. OF THE CHIEF ACTUARY, EFFECTS OF UNAUTHORIZED IMMIGRATION ON THE ACTUARIAL STATUS OF THE SOCIAL SECURITY TRUST FUNDS 1, 2 (2013) (finding that, in 2010, unauthorized noncitizens paid \$12 billion excess in tax revenue to the social security trust fund as compared to benefits received).

130. *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

131. *Id.* at 151.

In Title VII¹³² cases, courts have generally adopted the Court's reasoning in *Hoffman Plastics Compound*¹³³ to limit workers' remedies.¹³⁴ Title VII provides for backpay when employers unlawfully discriminate against a worker because of the worker's race, gender, national origin, religion, or color.¹³⁵ And there is a presumption that courts should grant workers backpay when employers have discriminated against them based on their protected class.¹³⁶ In *Albemarle Paper Co. v. Moody*, the Supreme Court stated that courts should deny backpay "only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."¹³⁷ But courts have denied workers backpay because of their unauthorized status, even though denying backpay to workers would frustrate the purposes of eradicating discrimination and making the workers whole.¹³⁸

For example, in *EEOC v. Phase II Investments, Inc.*, the EEOC alleged that the employer had subjected a group of workers to a hostile work environment because of their race.¹³⁹ The employer argued that since the employees were unauthorized, neither the EEOC nor the employees could assert discrimination claims under Title VII.¹⁴⁰ The court rejected the employer's argument for two reasons.¹⁴¹ First, the court reasoned that an employee's unauthorized status does not mean an employer is entitled to harass an employee, and is, in fact, irrelevant to whether the employer discriminated against the employee:

An employer is not entitled to harass an employee with, say, racial epithets and demeaning behavior on the ground that the employee was not very good at her job. The same logic suggests that an employer cannot harass an employee and escape Title VII liability because of the employee's immigration status. In fact, "the immigration status of the plaintiff is usually not relevant to the issue of whether the employer discriminated against the plaintiff in violation of Title VII."¹⁴²

132. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

133. *Hoffman Plastics Compound, Inc.*, 535 U.S. at 137.

134. Angela D. Morrison, *Why Protect Unauthorized Workers? Imperfect Proxies, Unaccountable Employers, and Antidiscrimination Law's Failures*, 72 BAYLOR L. REV. 117, 139–41 (2020) (arguing that the limitation results from courts' misapplication of legal doctrines due to the unauthorized status of workers).

135. 42 U.S.C. § 2000e–5(g)(1).

136. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416–18 (1975).

137. *Id.* at 421.

138. Morrison, *supra* note 109, at 302–15 (arguing that Congress intended that unauthorized workers enjoy full protection under Title VII).

139. *EEOC v. Phase 2 Invs., Inc.*, 310 F. Supp. 3d 550, 555 (D. Md. 2018).

140. *Id.* at 575–76.

141. *Id.* at 578–80.

142. *Id.* at 578 (quoting *EEOC v. Rest. Co.*, 448 F. Supp. 2d 1085, 1087 (D. Minn. 2006)).

Second, the court acknowledged that the history of Title VII and IRCA suggests that an employer violates Title VII when the employer unlawfully discriminates against an employee because of the employee's protected class, even if the employee is unauthorized.¹⁴³ And the court noted that enforcing Title VII when the worker is unauthorized, would "strengthen" the enforcement of IRCA and Title VII.¹⁴⁴ Yet, the court cited to *Hoffman Plastic Compounds* and decided that the EEOC could not seek backpay or other equitable remedies on behalf of workers because of the workers' unauthorized status.¹⁴⁵

As *Phase II Investments* illustrates, the workplace law regime emphasizes unauthorized workers' status as unauthorized over their other identities. Although the workers' unauthorized status was "irrelevant" to whether the employer discriminated based on race, the court still considered the workers' immigration status. Furthermore, the court used the workers' unauthorized status to overcome *Albemarle's* presumption in favor of backpay. And the court did not explain how denying backpay would not frustrate Title VII's purposes of eradicating discrimination and making workers whole. Indeed, the court even acknowledged that allowing unauthorized workers to make claims under Title VII would strengthen the enforcement of Title VII and IRCA. By denying backpay and other equitable remedies, courts are concluding that a worker's identity as an unauthorized immigrant trumps the worker's other protected identities, such as their race, gender, age, or national origin.

Likewise, the immigration system also frames unauthorized workers as unauthorized first and minimizes their other identities. Even if a noncitizen is eligible for a visa based on a family or employment relationship, the noncitizen must still qualify for admission to the United States.¹⁴⁶ The INA has dozens of grounds of inadmissibility and bars to entry.¹⁴⁷ One bar to entry, in particular, shows how the law frames unauthorized workers as unauthorized first to the exclusion of their other identities such as their family membership, identity as a worker, or their ethnicity and race: the three- or ten-year bar on admission for people who have accrued unlawful presence in the United States.¹⁴⁸

The three- and ten-year bars on admission prevents many otherwise eligible noncitizens from qualifying for an immigrant visa and requires an up to ten year wait *outside* of the United States.¹⁴⁹ Since it is a bar on entry, it does

143. *Id.* at 579–80.

144. *Id.* at 580.

145. *Id.*

146. 8 U.S.C. § 1182 (listing grounds of inadmissibility and bars to admission).

147. *Id.*

148. 8 U.S.C. § 1182(a)(9)(B)(i).

149. *Id.* For noncitizens who lived in the United States for six months to a year without authorization, the bar is three years. 8 U.S.C. § 1182(a)(9)(B)(i)(I). For noncitizens who lived in the United States for longer than one year, the bar is ten years. 8 U.S.C. § 1182(a)(9)(B)(i)(II). There are a few exceptions to

not kick in until the noncitizen leaves the United States.¹⁵⁰ This is a problem for most people who are unauthorized, because to receive their visa, they must consular process in their home country.¹⁵¹ That means people who accrued unlawful presence while in the United States face a three- to ten-year wait outside of the country while the bar counts down.¹⁵²

Although some noncitizens can avoid the bar and adjust their status while remaining in the United States,¹⁵³ most unauthorized workers cannot for two reasons. First, the statute prohibits noncitizens who have worked without authorization prior to the application for adjustment or who continue to work without authorization from adjusting their status.¹⁵⁴ Second, even though immediate relatives¹⁵⁵ of United States citizens are excepted from the prohibition, the unauthorized worker must still have been admitted or paroled into the United States at some point.¹⁵⁶

The latter requirement—having entered the United States with some sort of visa—impacts unauthorized workers unequally based on their race, ethnicity, and national origin. Noncitizens who are from countries that the United States allows to participate in the visa waiver program or from countries where it is easier to get a nonimmigrant visa are treated more favorably.¹⁵⁷ On its face, this screening process is not motivated by racial classifications, but because of its reliance on country of origin, it is, in effect, racially-based.¹⁵⁸

To illustrate the less favorable treatment, consider two noncitizens: Matías and Chad. Both are twenty-five, both have been unlawfully in the country for five years, both have worked without authorization, and both have a United States citizen spouse. They differ in one respect—Matías is from Mexico and was unable to get a nonimmigrant visa to enter the United States, so entered

unlawful presence, for example, unlawful presence does not accrue before the age of eighteen. 8 U.S.C. § 1182(a)(9)(B)(iii)(I). And a waiver is available in limited circumstances. 8 U.S.C. § 1182(a)(9)(B)(v).

150. “Any [noncitizen] . . . who has been unlawfully present in the United States for one year or more, and who again *seeks admission* within 10 years of the date of such [noncitizen’s] *departure or removal from the United States*, is inadmissible.” 8 U.S.C. § 1182(a)(9)(B)(i)(II) (emphasis added).

151. 8 U.S.C. §§ 1201, 1202(a), (e) (“Except as may be otherwise prescribed by regulations, each application for an immigrant visa shall be signed by the applicant in the presence of the consular officer, and verified by the oath of the applicant administered by the consular officer.”)

152. 8 U.S.C. §§ 1182(a)(9)(B)(i)(I)–(II).

153. 8 U.S.C. § 1255(a) (allowing adjustment of status for noncitizens who were admitted or paroled into the United States).

154. 8 U.S.C. § 1255(c)(2) (prohibiting adjustment of status for noncitizens who, prior to applying for adjustment of status, worked without employment authorization, unless they are the immediate relative of a United States citizen and entered with inspection).

155. An “immediate relative” is the spouse, child (unmarried and under the age of 21), or parent (the child must be over the age of 21) of a United States citizen. 8 U.S.C. § 1151(b)(2)(A)(i); 8 U.S.C. § 1101(b)(1).

156. 8 U.S.C. § 1255(c)(2).

157. 8 U.S.C. § 1187(c).

158. See Liav Orgad & Theodore Ruthizer, *Race, Religion and Nationality in Immigration Selection: 120 Years After the Chinese Exclusion Case*, 26 CONST. COMMENT. 237, 249, 265 (2010).

without inspection, while Chad is from the United Kingdom and was able to enter under the visa waiver program.¹⁵⁹

Chad, assuming he was otherwise admissible, would be able to adjust status in the United States and so would not be subject to the ten-year bar. Matías, even if he was otherwise eligible, would have to go through the consular process. He would have to wait ten years outside of the United States before he could gain entry.

Thus, the law prioritizes unauthorized workers' status as unauthorized over their identity as a family member or worker to bar their entry into the United States. To the extent that the law recognizes family membership to overcome the bar, it works in ways that discriminate against unauthorized workers based on their race, national origin, and ethnicity.

In sum, the law frames unauthorized workers' identity as unauthorized. It ignores their identities that would otherwise provide them remedy under the law or immigration benefits. Therefore, despite unauthorized workers' racial, ethnic, gender, or family identities, the legal regime treats their unauthorized status as their most important identity.

3. *Moral Deservedness Framing*

Third, U.S. immigration law and policy presents unauthorized workers as less morally deserving than citizen workers or noncitizen workers who have work authorization, despite unauthorized workers' economic and other contributions to the United States. The law has created a perception of unauthorized workers as criminals who have broken U.S. law and so are not deserving of protection under workplace law or deserving of immigration relief.

IRCA does not expressly criminalize working without authorization. Rather, the law's restrictions create a perception that unauthorized work is illegal, "not because it is, but because unauthorized workers are treated as if they had done something illegal."¹⁶⁰ One way that manifests is in how courts apply the after-acquired evidence doctrine in Title VII litigation.¹⁶¹ Employers may limit their liability in Title VII cases if they subsequently discover an employee's employment-related misconduct.¹⁶² The doctrine requires the employer to prove "by a preponderance of the evidence" that it would have taken the employment action against the employee had it known about the misconduct.¹⁶³ But some courts have applied the doctrine without requiring the employer to prove that the worker's unauthorized status would

159. See generally 8 U.S.C. § 1187; *Visa Waiver Program*, DEP'T. OF STATE, <https://perma.cc/8HLD-F3PU>.

160. Heeren, *supra* note 103, at 266.

161. See generally Morrison, *supra* note 134 (arguing courts misapply the after-acquired evidence doctrine to unauthorized work).

162. *Id.* at 140 (citing Christine N. Cimini, *Undocumented Workers and Concepts of Fault: Are Courts Engaged in Legitimate Decisionmaking?*, 65 VAND. L. REV. 389, 445 (2012)).

163. Morrison, *supra* note 134, at 140 (citing *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1070–71 (9th Cir. 2004)).

have resulted in the employer taking the same action.¹⁶⁴ Accordingly, this is one way in which the law works to frame unauthorized workers as morally less deserving of workplace law protections than their authorized counterparts.

The U.S. immigration system also frames unauthorized workers as less deserving of immigration relief than other noncitizens. An inadmissibility ground that impacts unauthorized workers, in particular, is falsely claiming United States citizenship.¹⁶⁵ This includes falsely claiming to be a United States citizen on the employment verification form required by IRCA.¹⁶⁶ Thus, some noncitizens without work authorization resort to falsely representing themselves as United States citizens to obtain work.¹⁶⁷

At the same time, the law incentivizes employers to look the other way when workers present false documents or falsely represent themselves as United States citizens. Under IRCA, employers must verify their employees' identity and work authorization status.¹⁶⁸ An employer must verify that the employee is authorized to work by examining documents that prove the worker's identity and work-authorized status.¹⁶⁹ The employee must also attest that the employee is a United States citizen or national, legal permanent resident, or otherwise authorized to work in the United States.¹⁷⁰

Yet employers are rarely held accountable and enforcement efforts mainly target workers.¹⁷¹ Due to employer lobbying efforts, Congress amended IRCA to give employers cover if they, in good faith, hire an employee based on documents that appear reasonable on their face.¹⁷² So the bulk of the blame for using false documents falls on unauthorized workers.¹⁷³ The result is that many unauthorized workers are inadmissible for falsely misrepresenting their work authorization status or citizenship status. The resulting frame is that the workers are not morally deserving of immigration relief because they falsely claimed to be authorized workers or U.S. citizens to obtain work.

Congress has also criminalized conduct associated with unauthorized work. And that also frames unauthorized workers as morally undeserving. Workers who use false documents to obtain employment face criminal

164. See Morrison, *supra* note 134, at 140 (citing Cimini, *supra* note 162, at 445–47).

165. See 8 U.S.C. § 1182(a)(6)(C)(ii).

166. See 8 U.S.C. § 1324a.

167. See Sarah B. Horton, *From “Deportability” to “Denounce-ability:” New Forms of Labor Subordination in an Era of Governing Immigration Through Crime*, 39 POLAR: POL. & LEGAL ANTHROPOLOGY REV. 312, 316–17 (2016).

168. 8 U.S.C. § 1324a(b).

169. 8 U.S.C. § 1324a(b)(1).

170. 8 U.S.C. § 1324a(b)(2).

171. Morrison, *supra* note 134, at 124–27.

172. See Leticia M. Saucedo, *The Making of the “Wrongfully” Documented Worker*, 93 N.C. L. REV. 1505, 1513–15 (2015); 8 U.S.C. § 1324a(a); 8 U.S.C. § 1324a(b)(6).

173. See Horton, *supra* note 167, at 316–17. Horton also outlines employer complicity in producing false identity documents. *Id.* She shows how employers use the production of false identities to further subordinate unauthorized workers. *Id.*

penalties under federal identity theft statutes.¹⁷⁴ The federal government heavily prosecutes the identity theft statute.¹⁷⁵ In the past decade and a half, ICE has consistently focused enforcement efforts on employees who violate IRCA's fraudulent document provisions, rather than against employers who violate them.¹⁷⁶ Workplace raids during the Bush administration, the Obama administration, and the Trump administration led mainly to the arrests of workers for using false documents to obtain employment.¹⁷⁷

And it isn't just Congress that has criminalized conduct associated with unauthorized work. States, too, have begun to pass laws aimed at criminalizing unauthorized work.¹⁷⁸ Several states have passed identity theft statutes that criminalize the false use of social security numbers or other identifying information to obtain employment.¹⁷⁹ States also have passed laws that generally make it illegal to provide a false social security number in any context.¹⁸⁰ Further, state legislatures in some instances have explicitly passed these laws to regulate unauthorized work.¹⁸¹

Nor does federal law preempt state laws that criminalize using false information on employment-related forms such as I-9 and W-4 forms. In 2020, the United States Supreme Court decided that federal immigration law did not expressly or impliedly preempt Kansas's application of its state identity-theft statutes to unauthorized workers who used false social security numbers on employment-related forms.¹⁸² The Court acknowledged that it had previously held that IRCA pre-empted state laws that criminalized working without authorization.¹⁸³ Ignoring that workers fill out W-4s at the same time that they fill out I-9s and that prosecutors based their prosecution, in part, on information that the workers provided in their I-9s, the Court reasoned that filling out the W-4 form was not related to work authorization under IRCA and held that IRCA did not preempt Kansas's statute.¹⁸⁴

174. 18 U.S.C. § 1546(b) (“(b) Whoever uses—(1) an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor, (2) an identification document knowing (or having reason to know) that the document is false, or (3) a false attestation, for the purpose of satisfying a requirement of section 274A(b) of the Immigration and Nationality Act, shall be fined in accordance with this title, or imprisoned not more than two years, or both.”)

175. *Criminal Immigration Convictions Drop 20 Percent*, TRAC IMMIGRATION (June 12, 2015), <https://perma.cc/PPG3-FXNL> (noting a 1144% rise in immigration-related criminal prosecutions from 1995–2015).

176. See Morrison, *supra* note 134, at 125.

177. *Id.*

178. See Saucedo, *supra* note 172, at 1529–38.

179. *Id.* at 1529–31.

180. *Id.* at 1534.

181. *Id.* at 1533.

182. *Kansas v. Garcia*, 140 S. Ct. 791 (2020).

183. See *id.* at 806 (acknowledging that the Court had previously held that IRCA “conferred a right to be free of criminal (as opposed to civil) penalties for working [without authorization], and thus a state law making it a crime to [work without authorization] conflicted with [that] right”) (citing *Arizona v. United States*, 567 U.S. 387, 404–07 (2012)).

184. *Kansas v. Garcia*, 140 S. Ct. at 806–07.

As the dissent noted,¹⁸⁵ the Court's decision, in effect, allows states to criminalize working without immigration authorization. That's because "[s]tarting a new job almost always involves filling out tax-withholding forms alongside an I-9."¹⁸⁶ So, employees who use false social security numbers to demonstrate work authorization will have to use that same false information on the tax-withholding forms lest they "give themselves away" to their employers.¹⁸⁷ The result will be more criminal prosecutions based on unauthorized work.

Thus, in the years since Congress passed IRCA, the legal regime has more and more framed unauthorized workers as criminals. Congress moved away from IRCA's initial focus on criminalizing employer conduct to providing safe harbors for employers who violate IRCA's provisions and criminalizing conduct associated with unauthorized work. Law enforcement has focused its efforts on unauthorized workers rather than employers. And, with a green light from the United States Supreme Court, states have started to criminalize conduct associated with unauthorized work.

The actual criminalization of conduct associated with unauthorized work, combined with increasingly restrictive immigration laws have fed into a policy-feedback loop in which a "criminal alien" narrative has taken hold, which then leads to more restrictive immigration laws.¹⁸⁸ It frames immigrants as posing a threat, and presents migrant inflow to the United States as a "violation of American sovereignty by hostile aliens who were increasingly framed as invaders and criminals."¹⁸⁹

Stereotypes based on race and gender about who is a victim and who is a criminal have also led to an increased perception of noncitizen workers as criminals.¹⁹⁰ Accordingly, the "mere act of working [while undocumented], which requires inventing or borrowing a Social Security number" means that unauthorized workers are subject to criminal penalties and perceived as criminals by the public just for working without authorization.¹⁹¹

Taken together, these aspects of immigration law mean that the law relies on moral deservedness as a gauge of who should be granted immigration status, who should be able to work, and who should be protected in the workplace. Under the law's moral deservedness framing, unauthorized workers are not generally morally deserving of protection and are criminalized unless

185. *Id.* at 811 (Breyer, J., dissenting in part).

186. *Id.*

187. *Id.*

188. Douglas S. Massey & Karen A. Pren, *Unintended Consequences of US Immigration Policy: Explaining the Post-1965 Surge from Latin America*, 38(1) POPULATION & DEV. REV. 1, 6 (2012).

189. *Id.* at 4-6.

190. See Morrison, *supra* note 109, at 297-98 (first citing Jennifer Chacón, *Tension and Trade-offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1628-36 (2010); then citing Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409, 415 (2011)).

191. Horton, *supra* note 167, at 314; see also Morrison, *supra* note 134, at 125-26.

they can present themselves as passive victims of less morally deserving employers.¹⁹²

C. *Impact of the Law's Frame, More Precarity*

The law's disregard for unauthorized workers' civil and human rights, focus on workers' unauthorized status to the exclusion of their other identities, and view of unauthorized workers as criminals not morally deserving of protection, make unauthorized work more precarious in three ways. First, because unauthorized workers face removal due to their lack of immigration status or criminal sanctions for conduct associated with unauthorized work, employers have tremendous power to subordinate unauthorized workers. Second, the law sets workers up for "complicity framing," in which workers must present themselves as passive victims of abusive employers to counter employers' argument that workers' unauthorized status means they consented to poor working conditions and pay. Finally, employers face relatively little accountability when they violate workplace rights because the law allows unauthorized workers only limited remedies.

The threat of deportation and the de facto criminalization of unauthorized work make unauthorized work more precarious.¹⁹³ Besides making it unlawful to hire unauthorized workers, IRCA also outsourced primary enforcement of the law to employers through its employment verification requirements.¹⁹⁴ Because employers have a role in the enforcement of immigration law through IRCA's required document verification process, unauthorized workers view their employers as part of the immigration enforcement regime.¹⁹⁵ As a result, employers have more power over unauthorized workers because workers may fear that employers will turn them over to immigration authorities if they object to workplace conditions.¹⁹⁶

Moreover, the criminalization of unauthorized work also means that employers wield power over workers who have used false identity documents to obtain their employment because those workers fear their employers will

192. Jennifer Lee has described this strategy and noted that "[w]hile victimization can render an individual feckless, it can also empower victims if the victimization is addressed wisely." Lee, *supra* note 78, at 1101. She points out that workers can be empowered when they publicly speak about workplace exploitation they experienced because it can have a "cathartic effect" and provide the hope that their speaking out will improve the workplace conditions of others. *Id.* at 1101–02. It also can shift the power dynamic between employees and employers, as the focus shifts to the employer's wrongdoing. *Id.* at 1102.

193. Kati L. Griffith & Shannon M. Gleeson, *The Precarity of Temporality: How Law Inhibits Immigrant Worker Claims*, 39 COMP. LAB. L. & POL'Y J. 111, 121–22 (2017); see also Morrison, *supra* note 134, at 139–45.

194. 8 U.S.C. § 1324a(b).

195. Griffith & Gleeson, *supra* note 193, at 123.

196. See, e.g., *id.*; Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961 (2006); Morrison, *supra* note 134, at 125–27. Even noncitizen workers with authorization suffer precarity in the workplace. For example, most of the temporary work visas tie the noncitizen to the employer who sponsored her, which some scholars have demonstrated leads to greater vulnerability for the worker. See, e.g., Maria L. Ontiveros, *H-1B Visas, Outsourcing and Body Shops: A Continuum of Exploitation for High Tech Workers*, 38 BERKELEY J. OF EMP. & LAB. L. 1, 3 (2017).

report them for criminal prosecution.¹⁹⁷ The fear of prosecution means that employees are afraid to report workplace accidents to supervisors, take breaks, or seek workers' compensation when injured on the job.¹⁹⁸ The result is that employer power in the workplace is increased.¹⁹⁹ Ultimately, the law operates to chill unauthorized workers from bringing claims against their employers, leading to greater precarity.²⁰⁰

Unauthorized work is also more precarious because it forces workers to counter employer narratives that unauthorized workers are criminals and, therefore, less deserving of protection.²⁰¹ To counter that narrative, workers "may have to act the part of the powerless victim to achieve results [in litigation], although that may be contrary to their personal empowerment."²⁰² Both of these narratives feed into the stereotype of the unauthorized worker who will take jobs that authorized workers will not, for less pay and with worse working conditions.²⁰³ Employers can use that stereotype to justify their treatment of unauthorized workers, "casting unauthorized workers as freely consenting to the conditions and lower wages."²⁰⁴

Ultimately, as Daniel Morales has shown, the law dehumanizes unauthorized workers:

The contemporary results of these processes are fences (confirming the social idea that illegal migration is a problem of racial invasion), raids (affirming migrant work as a species of theft), and twelve-million "illegal" human beings (reflecting the imposition of criminal and racial stigma). The "illegal" migrant, then, exists in democracy's shadow, the stigmatized and suppressed construction of our peculiar legal institutions. Conveniently for the United States' economy, migrants toiling in

197. Morrison, *supra* note 134, at 125–27.

198. Horton, *supra* note 167, at 315. Horton, an anthropologist, interviewed unauthorized workers who told her that working with false documents made workers especially vulnerable because employers could hold it over their heads. *Id.*

199. Griffith & Gleeson, *supra* note 193, at 121.

200. Morrison, *supra* note 134, at 142 (citing Griffith & Gleeson, *supra* note 193, at 121–22 (summarizing the literature and citing Shannon M. Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 *LAW & SOC. INQUIRY* 561, 563, 594 (2010); SHANNON M. GLEESON, *PRECARIOUS CLAIMS: THE PROMISE AND FAILURE OF WORKPLACE PROTECTIONS IN THE UNITED STATES* 125–28 (2016); Sunaina Maira, *Radical Deportation: Alien Tales from Lodi and San Francisco*, in *THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT* 298–301 (Nicholas DeGenova & Nathalie Peutz eds., 2010); Leticia M. Saucedo, *Immigration Law Enforcement Versus Employment Law Enforcement: The Case for Integrated Protections in the Workplace*, 38 *FORDHAM URB. L.J.* 303, 310 (2010); 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, 271–75 (2010)).

201. Morrison, *supra* note 134, at 137–38 (citing Kathleen Kim, *Beyond Coercion*, 62 *UCLA L. REV.* 1558, 1580 (2015) (describing "complicity framing")).

202. Morrison, *supra* note 134, at 138 (quoting Lee, *supra* note 78, at 1099).

203. Morrison, *supra* note 134, at 137–38 (citing Lee, *supra* note 78, at 1098–99); *see also* Llezlie Green Coleman, *Procedural Hurdles and Thwarted Efficiency: Immigration Relief in Wage and Hour Collective Actions*, 16 *HARV. LAT. REV.* 1, 6–8 (2013) (showing how immigrant workers experience more severe forms of wage theft).

204. Morrison, *supra* note 134, at 137–38 (citing Kim, *supra* note 201, at 1580).

that shadow become a dehumanized labor input that works, but can credibly demand nothing of the state in return.²⁰⁵

The law, then, relies on a moral deservedness frame that frames unauthorized workers as undeserving of protection and undeserving of full citizenship. That framing creates a more precarious workplace for unauthorized workers.

III. IMMIGRANT RIGHTS MOVEMENTS CONTESTING THE LAW'S FRAMES

Immigrant rights movements have contested the law's frames. They've used human and civil rights frames and called on workers' other identities to frame their mobilization strategies. Movement actors have also drawn on their other identities to build solidarity and inspire new forms of action. That contestation has resulted in less precarity in the workplace and greater social membership.

When immigrant rights movements mobilize, their work can lead to less precarity in the workplace. At times, the mobilization explicitly focuses on the unauthorized workplace, as with efforts to educate unauthorized workers about their workplace rights,²⁰⁶ to form worker co-operatives,²⁰⁷ to call on employers to engage in civil disobedience and hire workers regardless of their immigration status,²⁰⁸ or to lobby state lawmakers to pass laws that allow unauthorized workers to apply for occupational licenses regardless of their immigration status.²⁰⁹ At other times, the mobilization implicitly involves unauthorized workers. Examples include direct action to resist the criminalization of being without immigration status²¹⁰ or lobbying around DACA²¹¹ to reduce the risk that unauthorized workers will face removal for being unauthorized or increase access to the formal workplace through work authorization.

One way in which contestation can increase social membership is that contesting the law's negative frames can ameliorate those frames. Emily Ryo has shown that exposure to anti-immigrant laws results in negative perceptions of Latine²¹² people as law-breaking.²¹³ Ryo posits that the negative perceptions can be attributed to the law's ability "to prime negative racial attitudes by

205. Daniel Ibsen Morales, *In Democracy's Shadow: Fences, Raids, and the Production of Migrant Illegality*, 5 STAN. J. C.R. & C.L. 23, 27 (2009).

206. *Infra* Section III.A.

207. *Id.*

208. *Infra* Section III.B.

209. *Infra* Section III.C.

210. *Infra* Section III.B.

211. *Infra* Section III.C.

212. This Article adopts the term Latine as a gender-inclusive way to describe people of Latin American descent. Some people may not consider themselves Latine and use a different term. See Jose A. Del Real, '*Latinx*' hasn't even caught on among Latinos. It never will, WASH. POST (Dec. 18, 2020), <https://perma.cc/BN6S-VU9V> (discussing the use of the term "Latinx" and its detractors, as well as discussing why people may not use Latine).

213. Emily Ryo, *On Normative Effects of Immigration Law*, 95 STAN. J. C.R. & C.L. 95, 120–22 (2017).

making ingroup/outgroup boundaries salient.”²¹⁴ Although Ryo also found that exposure to pro-immigration laws does not result in positive perceptions of Latine people,²¹⁵ research has shown that contesting frames through counter-framing can attenuate the effects of the initial frame.²¹⁶ That could create a shared frame of reference between movement actors and the public at large, leading to more social inclusion.²¹⁷

Additionally, contestation can broaden and build the movement, leading to more involvement by more actors, thereby increasing social membership.²¹⁸ “Diversity in goals and tactics is likely to attract new kinds of participants with different sorts of identities, loyalties and politics.”²¹⁹ Thus, as contestation occurs both within and without the movement, new strategies and actions result, leading to “beneficial effects on movement vitality and movement outcomes.”²²⁰

Finally, the process of contestation itself can also work to increase social membership. Immigrant rights movements’ contestation of the law’s frames presents a paradox: many movement actors are themselves outside the law due to their lack of immigration status yet subject to the law because of their presence in the United States. As noncitizens, immigrants and in particular, immigrants without authorization, do not have the same recognized political rights as citizens. Because noncitizens lack political rights such as the right to vote in all but a few local elections or the ability to run for office, noncitizens may not be seen as legitimate political actors as compared to citizens.²²¹ Immigrants are “challengers” in the U.S. political system and “are more likely to be pushed to contentious collective action to get their political aims met.”²²² That contestation, in turn, can become a source of social membership for noncitizens, especially noncitizens without immigration status.²²³ In effect, the contestation allows noncitizens to exercise their political voice.

Immigrants rights movements have contested the law’s frames and worked through and around the law, directly confronted and challenged the law, and

214. *Id.* at 125. Scholars have traced “the cognitive origins of prejudice and bias” to the “fundamental and normal psychological process called social categorization.” *Id.*

215. *Id.* at 122.

216. Paul B. Brewer & Kimberly Gross, *supra* note 16, at 942–43.

217. *Id.* at 944.

218. Terriquez, *supra* note 70, at 354 (describing how the “coming out identity strategy” contributed to increased mobilization within the DREAMer movement).

219. Susan Olzak & Emily Ryo, *Organizational Diversity, Vitality and Outcomes in the Civil Rights Movement*, 85 SOC. FORCES 1561, 1562 (2007).

220. *Id.* at 1562.

221. Irene Bloemraad & Kim Voss, *Movement or Moment? Lessons from the Pro-Immigrant Movement in the United States and Contemporary Challenges*, 46 J. OF ETHNIC & MIGR. STUD. 683, 690 (2020).

222. *Id.*

223. Rebecca Torres, Rich Heyman, Solange Munoz, Lauren Apgar, Emily Timm, Cristina Tzintzun, Charles R. Hale, John McKiernan-Gonzalez, Shannon Speed & Eric Tang, *Building Austin, Building Justice: Immigrant Construction Workers, Precarious Labor Regimes and Social Citizenship*, 45 GEOFORUM 145, 153 (2013) (using mobilization around the workplace in Austin as an example of how workers who lack immigration authorization are able to access social citizenship).

changed the law. As the Article shows next, that contestation has resulted in less workplace precarity and greater social membership for unauthorized workers.

A. *Working Through and Around the Law*

Though the law frames unauthorized workers as lacking full civil or human rights, immigrant social movements have contested that framing. Instead, movement actors have worked through the law and around the law to provide access to the formal workplace, to promote greater social membership, and to encourage claimsmaking.

First, immigrant rights advocates have mobilized to educate and assist unauthorized workers with forming worker co-operatives. Worker co-operatives allow workers to access the labor market despite the law barring workers without authorization from formal employment relationships.²²⁴ Moreover, worker co-operatives provide a form of political rights for workers through their democratic governance structure.²²⁵

Movement actors have mobilized to encourage unauthorized workers to form worker co-operatives.²²⁶ Worker co-operatives are a legal entity in which the firm is “democratically owned and managed by its workers.”²²⁷ Worker-members provide the equity investment for the co-operative.²²⁸ The co-operatives then distribute any profit earned “based on some combination of job position, hours worked, seniority, and salary.”²²⁹ As owners, each worker-member has a share and vote in the co-op’s operation.²³⁰

Because the workers are owners and not employees, they usually fall within IRCA’s carve-outs for self-employed entrepreneurs.²³¹ And though entrepreneurs generally do not enjoy the same protections as employees in formal employment relationships,²³² worker co-operatives provide some of the same benefits and many advantages over a traditional employment relationship. Workers who belong to a worker co-operative enjoy protection from wage theft and, often, higher wages than other workers.²³³ A worker co-

224. See *supra* notes 218–23 and accompanying text.

225. Eric Franklin Amarante, *Criminalizing Immigrant Entrepreneurs (and Their Lawyers)*, 61 B.C. L. REV. 1323, 1352 (2020) (describing the democratic governance structure of worker co-operatives).

226. Minsun Ji & Tony Robinson, *Immigrant Worker Owned Cooperatives: A User’s Manual*, COMMUNITY-WEALTH.ORG 4–6 (2012), <https://perma.cc/HE29-2GHT>.

227. Amarante, *supra* note 225, at 1352.

228. *Business Structure Comparison*, UW CTR. FOR COOPERATIVES, <https://perma.cc/EG5Q-5254> (last visited Feb. 4, 2022).

229. *Id.*

230. Ariana Levinson, *Founding Worker Cooperatives: Social Movement Theory and The Law*, 14 NEV. L. J. 322, 360 (2014).

231. Amarante, *supra* note 225, at 1362–67.

232. Geoffrey Heeren, *The Immigrant Right to Work*, 31 GEO. IMM. L. J. 243, 245–46 (2017).

233. Janice Nittoli, *Reducing Income Inequality Through Democratic Worker-Ownership*, THE CENTURY FOUNDATION 11 (Aug. 10, 2016), <https://perma.cc/U89S-SCKQ> (reporting that workers in worker co-operatives earned anywhere from 25% to 40% more than other workers in traditional firms, even some that are unionized).

operative protects “formerly vulnerable workers from exploitation by providing greater negotiating power.”²³⁴ For example, a person who might otherwise withhold payment by threatening the worker with calling immigration authorities would probably be less likely to do so when the payment is due to “a business entity with the power to resort to legal action to enforce its rights.”²³⁵ Many co-ops provide workers with access to health care, paid vacations and sick leave, and retirement plans.²³⁶ They also lead to increased occupational safety by setting safety standards for employers and training workers on safety.²³⁷

Additionally, worker co-operatives provide benefits that working as an employee in a formal employment relationship does not. Because the co-operative is not run by investors or managers who are primarily interested in increasing profit margins, members of a co-operative are less likely to experience wage cuts or lay-offs.²³⁸ Members also learn and use business management skills since they run the business—skills that they likely would not learn if they continued to work for an employer.²³⁹

Further, the democratic governance structure provides a form of political rights for unauthorized workers even though the immigration system denies them the right to regularize their status and ultimately gain recognized political rights as citizens.²⁴⁰ Besides addressing economic deficits that result from a lack of access to the formal workplace, worker co-operatives can address political deficits.²⁴¹ For marginalized populations like unauthorized workers, the democratic governance structure can “give them a sense of political efficacy.”²⁴² The co-operatives can act as “schools of democracy” since they expose workers to democratic governance and participation.²⁴³ This can lead to significant spill-over effects as workers feel more able to participate in the life of their communities.²⁴⁴ Worker co-operatives can mediate the impact of the legal system’s exclusion of unauthorized workers from the formal workplace and its denial of their civil and political rights.

Second, despite that the legal regime views unauthorized workers as unauthorized first to the exclusion of their other identities, movement actors contest that frame. They emphasize moral deservedness based on their identities

234. Amarante, *supra* note 225, at 1352.

235. *Id.* at 1354 (quoting Scott L. Cummings, *Developing Cooperatives as a Job Creation Strategy for Low-Income Workers*, 25 N.Y.U. REV. L. & SOC. CHANGE 181, 187 (1999)).

236. See, e.g., Shaila Dewan, *Who Needs a Boss?*, N.Y. TIMES MAG. (Mar. 25, 2014), <https://perma.cc/37NY-VZLL>.

237. See, e.g., M. Anne Visser, *A Floor to Exploitation? Social Economy Organizations at the Edge of A Restructuring Economy*, 31(5) WORK, EMP. & SOC’Y 782, 788–89 (2017).

238. Amarante, *supra* note 225, at 1353–54.

239. *Id.* at 1353.

240. See *supra* Section II.A.

241. Mark J. Kaswan, *Developing Democracy: Cooperatives and Democratic Theory*, 6 INT’L J. OF SUSTAINABLE URB. DEV. 190, 202–03 (2014).

242. *Id.* at 202.

243. *Id.* at 197.

244. *Id.* at 200.

as workers and their human and civil rights. For example, day laborers have mobilized around their identity as workers. They have formed worker centers that litigate workers' wage theft claims under the Fair Labor Standards Act (FLSA),²⁴⁵ workers compensation claims under state workers compensation laws,²⁴⁶ retaliation claims under the NLRA,²⁴⁷ and discrimination claims under Title VII.²⁴⁸ Indeed, a 2009 study of 139 worker centers around the United States found that, on average, each worker center collected between \$100,000 to \$200,000 in back wages for workers, and “[s]everal centers ha [d] won million-dollar lawsuits for workers.”²⁴⁹ The Worker’s Defense Project, an organization made up of construction industry workers in Texas, has “[r]ecovered more than \$2 million in back wages or injury compensation for more than 1,900 low-wage workers through legal and direct action.”²⁵⁰ As one study concluded, groups like the Worker’s Defense Project are “critical in helping workers to negotiate the landscape of precarious labor regimes in the construction industry.”²⁵¹

Because many employers of day laborers are not covered by the FLSA and state labor agencies are not positioned to protect the workplace rights of unauthorized workers, worker centers provide direct assistance to workers who must file their wage theft claims in other ways.²⁵² In Houston, one worker center helps workers send demand letters to employers that detail the laws that the employers have violated.²⁵³ The center also provides support for workers if they decide to file in small claims court.²⁵⁴ The center helps the worker fill out a fee waiver request and an advocate from the center attends court hearings with the worker.²⁵⁵ And if the worker is able to get a settlement, the center has the employer sign an agreement that sets out the terms of the settlement, and the center will set up a repayment plan.²⁵⁶

245. Fair Labor Standards Act of 1938 (FLSA), Pub. L. 75–718, (codified as amended at 29 U.S.C. § 203).

246. See, e.g., ALASKA STAT. ANN. § 23.30.215 (West 2021); ARIZ. REV. STAT. ANN. § 23-901 (2021); ARK. CODE ANN. § 11-9-102 (West 2021); CAL. LABOR CODE § 335 (West 2021); COLO. REV. STAT. ANN. § 8-40-202 (West 2021); HAW. REV. STAT. ANN. § 386-1 (West 2021); NEV. REV. STAT. ANN. § 616A.105 (West 2021); N.Y. WORKERS’ COMP. LAW § 2 (McKinney 2021); TEX. LAB. CODE ANN. § 401.012 (West 2021); UTAH CODE ANN. § 34A-2-104 (West 2021).

247. 29 U.S.C. §§ 151–169; Kati L. Griffith, *Worker Centers and Labor Law Protections: Why Aren’t They Having Their Cake?*, 36 BERK. J. OF LAB. & EMPL. 331, 335–37, 339–40 (2015) (describing cases in which worker centers have brought retaliation claims under the NLRA on behalf of workers).

248. 42 U.S.C. § 2000e-2; see Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y.L. SCH. L. REV. 417 (2006) (stating worker centers have litigated claims under the FLSA, state worker compensation laws, and Title VII).

249. Fine, *supra* note 248, at 432.

250. *Impact*, WORKER’S DEFENSE PROJECT, <https://perma.cc/BA4C-DSTD?type=image> (last visited Feb. 4, 2022).

251. Torres, Heyman, Munoz, Apgar, Timm, Tzintzun, Hale, McKiernan-Gonzalez, Speed & Tang, *supra* note 223, at 153.

252. GLEESON, *supra* note 28, at 136–37.

253. *Id.* at 135.

254. *Id.*

255. *Id.* at 136.

256. *Id.* at 137.

The Worker's Defense Project draws on members' identity as workers as a frame through which workers are seen as morally deserving of protection:

Immigrant workers are the backbone of the construction industry. Without them, our cities would not grow and our neighborhoods would cease to be built. Not only does the work of construction workers impact the way communities function, but their labor is essential to healthy economies at both the city and state level. However, despite their incredible importance, immigrant construction workers are routinely treated as disposable and disrespected.

By creating a community-led organization for workers' rights, we seek to stop this cycle of negligence and empower construction workers to secure the basic workplace rights they are entitled to, from paid sick leave to humane working conditions. We nurture a community that can protect its own and ultimately change the way the construction industry is run. In doing so, we work each day to create a more just system that recognizes the power that construction workers hold.²⁵⁷

The worker center in Houston that assists day laborers with their wage theft claims also relies on frames of human rights and empowerment. When the director of the center described the success of the center's efforts with respect to recovering wages, he told a researcher:

They [employers] see that we've taken it this far . . . they know we're serious. . . . They know that we're going to continue to pursue the case . . . and sometimes it doesn't take us going to court. . . . Getting a letter from an organization that's supporting the worker [shows] that the worker isn't alone. . . . They know that this guy's not by himself!²⁵⁸

Contesting the law's framing of rights and remedies belonging mostly or exclusively to authorized workers has led movement actors to work around and through the law to develop new frames that cast workers as empowered. Though the law denies unauthorized workers the right to access the formal workplace, worker co-operatives provide some of the protections that a formal employment relationship provides. And though the law provides no right to regularization, worker co-operatives provide a frame through which unauthorized workers can exercise a form of political rights. Finally, worker centers reject the law's limitations on remedies and instead emphasize workers' moral deservedness and empowerment based on their common identity as workers.

257. *About Us*, WORKER'S DEFENSE PROJECT, <https://perma.cc/2FYU-ZPPY> (last visited Jan. 28, 2021).

258. GLEESON, *supra* note 28.

B. *Confronting and Directly Challenging the Law*

Immigrant social movements also promote greater social membership and reduce workplace precarity through acts of civil disobedience to confront and directly challenge the law. Inspired by LGBTQ activists' use of human rights and identity frames, activists have encouraged noncitizens without authorization to "come out" as undocumented to contest the law's framing of unauthorized workers without human rights because they lack of immigration status.²⁵⁹ They also challenge the use of the moral deservedness frame within the movement.²⁶⁰ Through acts of civil disobedience, movement actors contest moral deservedness frames both within and without the movement.²⁶¹

One example of movement actors directly contesting the law's framing of unauthorized noncitizens is the work of activists in the DREAMer²⁶² movement to encourage people without authorization to "come out." They also came out to contest the immigrant rights movement's initial moral deservedness framing of DREAMers. Beginning in 2001, mainstream immigrant rights movements developed an image of DREAMers as young noncitizens who "were exceptionally good immigrants and particularly deserving of legalization."²⁶³ This image relied on three messages—DREAMers had assimilated to national culture and values, would make important economic contributions, and were "innocent" because they had been brought to the country through "no fault of their own."²⁶⁴ The strategy resulted in more support for DREAMers; by 2010, 54% of Americans supported legalization for DREAMers.²⁶⁵ But it left out noncitizens who did not fit within the movement's narrative of the "deserving" immigrant.²⁶⁶ After the DREAM Act²⁶⁷ failed in 2010, the activists joined with groups such as the National Day Laborer Organising Network (NDLON) and increasingly shifted their attention to decriminalizing unauthorized migration, ending federal programs that allow state and federal cooperation on immigration, and challenging state and local anti-immigrant laws.²⁶⁸

259. See REBECCA M. SCHREIBER, *THE UNDOCUMENTED EVERYDAY: MIGRANT LIVES AND THE POLITICS OF VISIBILITY* 239 (2018).

260. See *id.* at 241; see also Shannon Gleeson & Preena Sampat, *Immigrant Resistance in the Age of Trump*, 27 *NEW LABOR F.* 86, 87, 89 (2017) (describing protests related to the arrests of noncitizens under the Trump administration).

261. See SCHREIBER, *supra* note 259, at 245 (describing staged arrests to protest the Obama administration's arrests of noncitizens).

262. This Article uses the term DREAMer to refer to noncitizens who would have been eligible for legalization under the DREAM Act. Generally, this includes young adult and teenage noncitizens who arrived in the United States at a young age, and who currently lack immigration status.

263. SCHREIBER, *supra* note 259, at 239.

264. Walter J. Nicholls & Tara Fiorito, *Dreamers Unbound: Immigrant Youth Mobilizing*, 24 *NEW LABOR F.* 86, 87 (2014).

265. See *id.* at 88.

266. See *id.*

267. Development, Relief, and Education for Alien Minors Act, S. 3827, 111th Cong. (2010).

268. See SCHREIBER, *supra* note 259, at 245. For example, the groups mobilized in response to Arizona's S.B. 1070 bill, which included several anti-immigrant provisions. See *id.* at 241. The law made "willful failure to complete or carry an alien registration document . . . in violation of 8 United States

Young activists who were critical of the mainstream narrative of deserving immigrants organized and pushed new framing and strategies.²⁶⁹ Groups such as the Immigrant Youth Justice League in Chicago, the National Immigrant Youth Alliance, and United We Dream encouraged noncitizens without immigration status to “come out” as undocumented.²⁷⁰ This strategy increased undocumented youth’s visibility and became “central” to their self-representation.²⁷¹ They also discovered that “coming out as undocumented could serve as a form of protection for undocumented youth who wanted to participate in direct actions.”²⁷²

In response to an Obama administration policy, announced in 2011, in which the administration deprioritized the prosecution and deportation of DREAMers,²⁷³ movement actors staged and publicized their arrests.²⁷⁴ DREAMers in Chicago, Los Angeles, San Francisco, New York, and other cities rejected the strategy of “large and peaceful protests saturated with American flags.”²⁷⁵ Instead, they focused on confrontational forms of direct action, including occupations and hunger strikes.²⁷⁶ Activists also recorded videos of themselves getting arrested or being interrogated by ICE officials to demonstrate that ICE was not using prosecutorial discretion on the ground.²⁷⁷ And they developed a strategy to “infiltrate immigration centers to inform undocumented migrants of their rights, as well as to gather information to help release those detained.”²⁷⁸ Activists publicized their actions to show that the administration was inconsistently implementing the prosecutorial discretion guidelines.²⁷⁹

Even under the Trump administration, movement actors continued to publicize and protest immigration arrests. For example, in 2017, ICE arrested

Code section 1304(e) or 1306(a)” a state misdemeanor crime. Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010). It also made it a state crime for “an unauthorized [noncitizen] to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor” in Arizona. *Id.* at § 5(C). The law allowed police to arrest, without a warrant, anyone for whom the police had probable cause to believe had committed an offense that would make the person removable. *Id.* at § 6. It also required police to make a “reasonable attempt . . . to determine the immigration status” of any person they stop, detain, or arrest if “reasonable suspicion exists that the person is a [noncitizen] and is unlawfully present in the United States.” *Id.* at § 2 (B). In *Arizona v. United States*, the Supreme Court struck down all but § 2(B) as preempted by federal law. *See Arizona v. United States*, 567 U.S. 387 (2012). *See also* Nicholls & Fiorino, *supra* note 264, at 90 (describing the role that various organizations played in the movement post-2010).

269. SCHREIBER, *supra* note 259, at 239.

270. *Id.* at 239–40; Nicholls & Fiorino, *supra* note 264, at 86, 89; Gleeson & Sampat, *supra* note 260, at 87, 91.

271. SCHREIBER, *supra* note 259, at 240.

272. *Id.*

273. *Id.* at 245; *see also* Memorandum from John Morton, Dir., Immigration & Customs Enf’t, to All Field Office Dirs., All Special Agents in Charge, and All Chief Counsel of ICE (June 17, 2011), <https://perma.cc/RJX3-4BXF>.

274. SCHREIBER, *supra* note 259, at 245.

275. Nicholls & Fiorino, *supra* note 264, at 89.

276. *Id.*

277. SCHREIBER, *supra* note 259, at 244–45, 251–57.

278. *Id.* at 252.

279. *Id.* at 254.

and detained activist Daniela Vargas after she spoke at a Mississippi Immigrant Rights Alliance event.²⁸⁰ Vargas had received DACA, but it had expired.²⁸¹ Despite the Trump administration's rescission of the Obama administration's policy to deprioritize the removal on DREAMers, immigration rights groups were able to secure Vargas's release through community protests and a social media campaign.²⁸² The social media campaign relied, in part, on emphasizing that Vargas had been a recipient of DACA to show that her detention was unjust.²⁸³ The campaign called on people to sign a petition to then-Secretary of the Department of Homeland Security, John Kelly, to release Vargas: "DACA should have protected Dany from deportation . . . We are asking you, Secretary Kelly, to release Daniela immediately, grant her DACA renewal and declare to your agents in no uncertain terms that DACA will remain the strong protection from deportation."²⁸⁴

After the Trump administration moved to repeal DACA, immigrant rights movements also called on employers to engage in civil disobedience and defy the law's restrictions on unauthorized work.²⁸⁵ Likewise, immigrant rights groups have urged employers to organize around workplace raids.²⁸⁶ Groups have suggested actions such as training employees to deny ICE agents access to workplaces when the ICE agents do not have a warrant, changing workplace policies to allow for rehire if workers are able to regularize their status, providing separation pay for workers who lose their jobs after a raid, providing references for unauthorized employees in the future, and donating to immigrant rights funds.²⁸⁷

Immigrant rights groups' organizational strategies, then, have contested the law's moral deservedness frame. First, besides introducing a new frame that embraced "coming out," young activists also emphasized "their lack of fear ('undocumented and unafraid'), and their multiple identities ('undocuqueers')." ²⁸⁸ This frame explicitly rejects the law's moral deservedness frame and embraces human rights and noncitizens' other identities. In turn, they

280. Gleeson & Sampat, *supra* note 260, at 89.

281. Christine Hauser, *Woman Detained After Speaking About Deportation Fears Released*, N.Y. TIMES (Mar. 10, 2017), <https://perma.cc/KB6K-8LLR>.

282. Gleeson & Sampat, *supra* note 260, at 89.

283. *Release DACA Recipient Daniela Now! #FreeDany*, UNITED WE DREAM, <https://perma.cc/Q2FS-VJ6S>, (last visited Feb. 4, 2022).

284. *Id.*

285. Sam Levin, *Airbnb Vows to Be First Company to Defy Trump and Keep Employing Dreamers*, THE GUARDIAN (Sept. 7, 2017), <https://perma.cc/MJ4D-QYCE> ("Immigrants' rights advocates in Silicon Valley argued that the tech executives—who have earned widespread media coverage and praise from liberals for opposing the White House—should take a more meaningful stand and pledge to continue employing Dreamers regardless of Trump's repeal of their rights."); see Bill Ong Hing, *Beyond DACA—Defying Employer Sanctions Through Civil Obedience*, 52 U.C. DAVIS L. REV. 299, 305 (2018) (arguing that employers should "defy employer sanctions laws as a matter of civil disobedience if DACA comes to an end").

286. *E.g.*, *A Guide for Employers: What to Do if Immigration Comes to Your Workplace*, NAT'L IMMIGRATION LAW CTR. (July 2017), <https://perma.cc/3RLU-XBMP>.

287. *Id.*

288. Nicholls & Fiorito, *supra* note 264, at 89.

broaden the movement to further mobilize other unauthorized noncitizens to “become involved in the struggle against restrictive anti-immigrant laws.”²⁸⁹

Second, in calling on employers to engage in direct action, immigrant rights groups also reimagine the law’s framing of unauthorized workers as criminals or passive victims that employers may exploit. Movement actors have rejected the narrative that framed the problem as the worker’s unauthorized status, and instead framed the problem as the law itself. The call for employers to engage in direct action also expands the movement by involving new actors in the movement.

Therefore, movement actors’ resistance to the law’s moral deservedness frames has led to new organizational strategies, that have consequently led to additional routes for direct action. In this way, movement actors’ contestation of the law’s frames has promoted greater social membership and less precarity for unauthorized workers.

C. *Changing the Law*

Contesting the law’s moral deservedness frames and challenging frames within the movement has also resulted in multiple lobbying strategies that aim to change the law. First, framing contests within and without the movement led to the Deferred Action for Childhood Arrivals (DACA) program.²⁹⁰ DACA allows some young noncitizens who are present in the United States without authorization to apply for work authorization and an agreement from the Department of Homeland Security not to deport them.²⁹¹ And further campaigns led to Deferred Action for Parents of Childhood Arrivals (DAPA), which would have allowed a broader group of noncitizens to apply for work authorization and an agreement from DHS not to deport them.²⁹² Second, immigrant rights actors have rejected the law’s framing of unauthorized workers as criminals and have lobbied state legislatures to pass pro-immigrant laws, including laws that allow unauthorized workers to obtain occupational licenses, driver’s licenses, and the like.²⁹³

In the first decade of the twenty-first century, most immigration rights groups believed that the best way to achieve reform was to focus their lobbying efforts on federal lawmakers.²⁹⁴ They pushed for comprehensive

289. SCHREIBER, *supra* note 259, at 244–49.

290. Walter J. Nicholls, Justus Uitermark & Sander van Haperen, *Going National: How the Fight for Immigrant Rights Became a National Social Movement*, 46 J. ETHN. MIGR. STUD. 705, 722 (2020).

291. Memorandum from Janet Napolitano, Sec’y Dep’t of Homeland Sec., to David V. Aguilar, Alejandro Mayorkas & John Morton, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <https://perma.cc/C8B9-VXVC>.

292. Nicholls, Uitermark & van Haperen, *supra* note 290, at 722–23. The United States Fifth Circuit Court of Appeals issued a preliminary injunction against the program because the court determined the Obama administration violated the APA when it implemented DAPA. *Texas v. United States*, 809 F.3d 134, 146–49 (5th Cir. 2015), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam). Accordingly, DAPA never went into effect.

293. See discussion *infra* notes 305–35 and accompanying text.

294. Nicholls, Uitermark & van Haperen, *supra* note 290, at 712.

immigration reform and passage of the DREAM Act, focusing on the moral deservedness of DREAMers.²⁹⁵ Youth activists in the National Immigrant Youth Alliance started to challenge that initial framing. They began “to push back on the Obama administration’s deportation policies, whereas the leading immigrant rights organizations continued to target Republican lawmakers in Congress.”²⁹⁶ They critiqued the attempt “to make the current laws less harsh through prosecutorial discretion” through the administration’s 2011 guidelines on deportation priorities,²⁹⁷ because it was “an administrative technology of individual subjection, which [was] also based on the exclusion of those who are deemed to be ‘undeserving.’”²⁹⁸ The efforts led to DACA, a formal program that protected DREAMers from deportation and provided them with work authorization.²⁹⁹

Other groups such as NDLOJ also lobbied the administration. As part of its #Not1More campaign,³⁰⁰ NDLOJ pressured the Obama administration to stop mass deportations and sought protection not just for DREAMers under the DACA program but also for other people who were in the United States without authorization.³⁰¹ The campaign contributed to the administration’s decision to create the DAPA program.³⁰² Indeed, “the radical flank of the immigrant youth movement is increasingly rejecting the notion that legalization for some must come at the cost of the criminalization of many others.”³⁰³

Activists also emphasized their family identities in their lobbying efforts for DAPA and rejected federal legislation that would leave out some noncitizens from regularization programs. For example, in 2017, the Orange County Immigrant Youth United group issued a call to continue to fight for DACA but critiqued the program for its reliance on the moral-deservedness frame: “We will continue to fight for our community members with criminal convictions and will not throw our parents under the bus to make ourselves more deserving.”³⁰⁴ Thus, the challenge to the law’s moral deservedness framing

295. *See id.*

296. Nicholls & Fiorito, *supra* note 264, at 89.

297. SCHREIBER, *supra* note 259, at 245; Memorandum from John Morton, Dir., Immigration & Customs Enf’t, to All Field Office Dirs., Special Agents in Charge, Chief Counsel, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), <https://perma.cc/J9N5-EZEN>.

298. SCHREIBER, *supra* note 259, at 246.

299. Nicholls, Uitermark & Haperen, *supra* note 290, at 722.

300. *Id.*

301. *Id.* at 722–23.

302. *Id.* at 722.

303. Gleeson & Sampat, *supra* note 260, at 92. Walter Nicholls and Tara Fiorito reviewed statements attributed to DREAMers in the New York Times in 2014 and found that of 24 statements, “only one mentions the exceptional qualities of undocumented youths All other statements reflected a general push to pressure the Obama administration to extend administrative relief to the general undocumented population.” Nicholls & Fiorito, *supra* note 264, at 91. They conclude that this represents a shift in their public framing “from stressing the attributes that made youths uniquely deserving of legality to frames stressing why all undocumented immigrants deserve a right to reside in the country.” *Id.*

304. Gleeson & Sampat, *supra* note 260, at 93 (citing Orange County Immigrant Youth United, *OCIYU: Save DACA and Expand Deportation Relief*, OC WEEKLY (June 18, 2017), <https://perma.cc/877K-RT7S>).

and the movement's initial capitalization on that frame put pressure on the Obama administration to take formalized administrative action.

Immigrant rights groups also have contested the law's framing as they lobby for changes to state laws. Examples of this are the "California Package" and the "Utah Solution." The "California package" is a group of pro-immigrant laws that the California state legislature has passed over the last two decades.³⁰⁵ The laws include provisions that allow in-state tuition for unauthorized students, provide driver's licenses for unauthorized noncitizens, permit unauthorized noncitizens to obtain occupational licenses, make health care accessible to unauthorized noncitizens, reduce criminal penalties to lessen the effect of a state criminal conviction on immigration status, and restrict state and local cooperation with federal immigration enforcement.³⁰⁶

Prior to the mid-2000's, immigrant rights groups focused their local and state efforts on combatting local and state anti-immigrant laws.³⁰⁷ In California, immigrant rights groups had mobilized in response to Proposition 187.³⁰⁸ Proposition 187 was a ballot initiative that Californians passed and became effective in 1994.³⁰⁹ The anti-immigrant initiative required law enforcement, social service agencies, health care and public education employees to: verify the immigration status of everyone with whom they came in contact, notify people who lack immigration status that they must obtain immigration status or leave the United States, report people without immigration authorization to state and federal officials, and deny them social services, health care, and education.³¹⁰ Several immigrants rights organizations filed suit because it was unconstitutional.³¹¹ And the court invalidated most of the law within months of it passing.³¹² The organizational efforts in response to Proposition 187 resulted in stronger organizational capacity among immigrant rights groups in California.³¹³

When the DREAM Act failed to pass in 2010, immigrant rights organizations in California recognized "the futility of federal reform" and shifted their

305. S. Karthick Ramakrishnan & Allan Colbern, *The California Package: Immigrant Integration and the Evolving Nature of State Citizenship*, 6 POL'Y MATTERS 1, 2 (2015).

306. *Id.*; see Leticia M. Saucedo, *States of Desire: How Immigration Law Allows States to Attract Desired Immigrants*, 52 U.C. DAVIS L. REV. 471, 507–11 (2018) for a discussion of how states use these types of laws to attract noncitizens.

307. SCHREIBER, *supra* note 259, at 241 (describing mobilization efforts post-2010 that focused on local anti-immigrant laws); Allan Colbern & S. Karthick Ramakrishnan, *Citizens of California: How the Golden State Went from Worst to First on Immigrant Rights*, 40 NEW POL. SCI. 353, 363 (2020); Ramakrishnan & Colbern, *supra* note 305, at 19.

308. Ramakrishnan & Colbern, *supra* note 305, at 360–63; Illegal Aliens. Ineligibility for Public Services. Verification and Reporting. Cal. Proposition 187 (1994) [hereinafter Prop. 187] (enacting CAL. EDUC. CODE §§ 48215, 66010.8 (West 1995); CAL. GOV'T CODE § 53069.65 (West 1995); CAL. HEALTH & SAFETY CODE § 130 (West 1995); CAL. PENAL CODE §§ 113–14, 834b (West 1995); and CAL. WELF. & INST. CODE § 10001.5 (West 1995)).

309. *See* Prop. 187.

310. *Id.*

311. *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 763 (C.D. Cal. 1995).

312. *Id.*

313. Ramakrishnan & Colbern, *supra* note 305, at 361.

attention to reforming state policy.³¹⁴ Subsequently, immigrant rights organizations in California began to lobby for progressive changes to state law rather than react to proposed anti-immigrant measures or organize to repeal anti-immigrant legislation. Early efforts included worker protections and emergency access to public benefits, both of which benefitted noncitizens without immigration authorization.³¹⁵ A “robust network of immigrant advocacy groups” lobbied state legislators, who introduced pro-immigrant reforms, and those reforms passed with the help of the immigrant advocacy groups.³¹⁶ This resulted in an acceleration of pro-immigrant policies in California, including AB 1236 and AB 1074.³¹⁷ AB 1236 prohibits state, county, city, and special districts from participating in the federal government’s E-verify employment program, except where required by law or required to receive federal funds.³¹⁸ AB60 provides that noncitizens without immigration status are eligible for law licenses.³¹⁹

The “Utah Solution” provides another example of how immigrant rights actors lobbied for favorable changes to state law. The “Utah Solution” was a slate of bills that the Utah legislature passed in 2011.³²⁰ The bills were largely symbolic as most of the provisions were likely federally pre-empted.³²¹ The legislation authorized the state to designate all current unauthorized workers

314. *Id.* at 363 (citing PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, *THE NEW IMMIGRATION FEDERALISM* 121 (2015)); *cf.* SCHREIBER, *supra* note 259, at 241–42 (tracing undocumented youth activists’ turn from focusing on national policy change to focusing on changes to state and local policies to the failure of the DREAM Act in 2010).

315. Ramakrishnan & Colbern, *supra* note 305, at 362 (describing the lobbying efforts that led to the passage of AB 633 in 1999, a law that allowed a cause of action against any companies involved in the supply chain (e.g., manufacturers, retailers, and contractors) for labor violations and lobbying efforts to provide state-level public benefits in the wake of federal passage of the Personal Work Opportunity and Reform Act of 1996, which took away access to public benefits for most noncitizens).

316. *Id.* at 361.

317. *Id.* at 364. AB 1236, CAL. STATS. 2011, Ch. 691, was codified in CAL. LAB. CODE § 2812. AB 1074, CAL. STATS. 2013, Ch. 573 was codified at CAL. BUS. & PROF. CODE § 6064(b).

318. The statute provides:

Except as required by federal law, or as a condition of receiving federal funds, neither the state nor a city, county, city and county, or special district shall require an employer to use an electronic employment verification system, including under the following circumstances:

- (a) As a condition of receiving a government contract.
- (b) As a condition of applying for or maintaining a business license.
- (c) As a penalty for violating licensing or other similar laws.

Cal. Lab. Code § 2812 (2020).

319. The statute provides:

(b) Upon certification by the examining committee that an applicant who is not lawfully present in the United States has fulfilled the requirements for admission to practice law, the Supreme Court may admit that applicant as an attorney at law in all the courts of this state and may direct an order to be entered upon its records to that effect. A certificate of admission thereupon shall be given to the applicant by the clerk of the court.

Cal. Bus. & Prof. Code § 6064(b) (2020).

320. Peggy Petrzeka & Paul Jacobs, *Why Utah? The “Reddest of Red States” and Inclusive Immigration Reform*, 53 *Soc. Sci. J.* 156, 156 (2016).

321. *Order Granting Preliminary Injunction at 2, Utah Coal. of La Raza v. Herbert*, No. 2:11-CV-401 (D. Utah May 11, 2011).

as guest workers,³²² created a pilot program with the Mexican state of Nuevo Leon to allow foreign-born guest workers to migrate to Utah,³²³ and authorized Utah citizen-residents, including employers, to sponsor unauthorized immigrants.³²⁴ But the legislation also included a provision that authorized local law enforcement officials to investigate people's immigration status, detain and arrest people for immigration violations, and new state-law criminal offenses, such as "harboring" people without immigration status.³²⁵

Nonetheless, in the years since the "Utah Solution," the legislature has passed other pro-immigrant legislation. The legislation includes an amendment that ensures noncitizens who commit a misdemeanor won't be categorized as "aggravated felons" under federal immigration law and subject to automatic deportation,³²⁶ and a revision permitting state officials to issue occupational licenses to individuals who lack immigration status.³²⁷

Just as in California, immigrant advocates in Utah initially mobilized in response to anti-immigrant legislation. Arizona had just passed SB1070, which, among other things, included provisions limiting employment of people without authorization, requiring noncitizens to carry proof of their immigration status, and giving local police tremendous power to enforce federal immigration laws.³²⁸ Moreover, in 2008, the Utah legislature had passed legislation requiring employers to verify workers' authorized status, permitting local law enforcement to check the immigration status of people it encountered, requiring sheriffs to check the immigration status of individuals booked into jail, and making it illegal to transport someone who was undocumented more than 100 miles.³²⁹

Immigration advocates organized with business leaders, religious leaders, and other nonprofits to draft a "compact" that would guide legislators about immigration policy.³³⁰ Through the compact, the coalition hoped to shift the policy narrative around immigration.³³¹ The compact emphasized five principles some of which encapsulate the three core values frames: 1) federal responsibility for immigration policy; 2) law enforcement should focus on

322. H.B. 116, 2011 Leg., 59 Gen. Sess. (Ut. 2011).

323. H.B. 466, 2011 Leg., 59 Gen. Sess. (Ut. 2011).

324. H.B. 469, 2011 Leg., 59 Gen. Sess. (Ut. 2011).

325. H.B. 497, 2011 Leg., 59 Gen. Sess. (Ut. 2011).

326. H.B. 244, 63d Leg., Gen. Sess. (Ut. 2019).

327. Occupational Therapy License Amendments, H.194, 61st Leg. Gen. Sess. (Ut. 2015).

328. Petrzelka & Jacobs, *supra* note 320, at 159; Support Our Law Enforcement and Safe Neighborhoods Act, S. 1070 (SB 1070), 49th Leg., 2d Reg. Sess. (Ariz. 2010). The Supreme Court struck down almost all of the provisions in the law as federally pre-empted. *Arizona v. United States*, 567 U.S. 387 (2012).

329. Petrzelka & Jacobs, *supra* note 320, at 159. After the U.S. Congress enacted the REAL ID Act, the state created "driving privilege cards" that allow people without immigration authorization to legally drive in the state. Public Safety Driving Privilege and Identification Card Amendments, S.B. 227, 56th Leg., Gen. Sess. (Ut. 2005).

330. Petrzelka & Jacobs, *supra* note 320, at 160-62; Paul Jacobs, Elizabeth Keister, Christy Glass, & Peggy Petrzelka, *Bringing Them "Out of the Shadows": Analyzing the Movement to Reframe the Immigration Policy Narrative in Utah*, 3 J. SOCIO. & SOC. WORK 52, 57-58 (2015).

331. Jacobs, Keister, Glass, & Petrzelka, *supra* note 330, at 53.

criminal violations rather than civil violations (moral deservedness); 3) the economic benefits of immigration (moral deservedness); 4) family unity (rights/identity); and 5) immigration policy should be humane (rights).³³²

In a study that looked at which values resonated most with signatories to the compact, researchers found that economic contributions resonated with business and political leaders the most, and treating noncitizens humanely resonated with advocates and religious leaders the most.³³³ Yet, in a subsequent study, researchers determined one of the decisive factors in successfully lobbying for favorable legislation were identity-based values frames—specifically, religious identity (and its emphasis on family unity).³³⁴ Indeed, organizers attributed their success to the Church of Jesus Christ of Latter Day Saints, the predominant religion in Utah’s, endorsement of the compact that led to the inclusive legislation.³³⁵

Immigrant rights groups’ lobbying efforts have challenged the law’s moral deservedness frame. And that contestation has resulted in less workplace precarity and greater social membership. First, DACA recipients receive work authorization, which allows them to access the formal workplace and its attendant benefits, despite that they lack immigration status. Similarly, in states that allow unauthorized noncitizens to obtain occupational licenses, noncitizens with those license are able to work as independent contractors or entrepreneurs in their field of licensure. These immigrant rights groups’ efforts also counter the framing of unauthorized workers as criminals by reducing criminal penalties or decriminalizing activities associated with working without authorization.

Second, youth activists who challenged the moral deservedness framing broadened the movement, increasing the number of people engaged and thereby strengthening their social membership. The changes to state laws also increased social membership through measures like permitting unauthorized noncitizens to apply for driver’s licenses.

Movement actors have contested the law’s framing of unauthorized work as less deserving of workplace protections and community membership. That contestation has led immigrant rights advocates to work around and through the law to provide access to the formal workplace, protections in the workplace, and membership in the community. Similarly, movement actors’ confrontation of and direct challenges to the law’s framing has resulted in new organizational strategies that have delivered more avenues for direct action. Direct action has promoted greater social membership and less precarity for unauthorized workers. Finally, immigrant rights groups’ lobbying efforts

332. Petrzela & Jacobs, *supra* note 320, at 157.

333. Jacobs, Elizabeth Keister, Christy Glass, & Peggy Petrzela, *supra* note 330, at 59.

334. Petrzela & Jacobs, *supra* note 320, at 163.

335. *Id.*

have changed the law, leading to less workplace precarity and a more robust political voice.

CONCLUSION

This Article has looked at how immigrant rights movements' contestation of the law's frames has led to greater social membership and less precarity for unauthorized workers. Critiques of the law's role in social movements have focused primarily on the role that lawyers should play in a movement's overall strategy or how legal mobilization impacts the movement's overall effectiveness. This Article has brought a new perspective to bear on law and social movements. Specifically, it looked at the law's role in framing—both values framing and process framing—and social movements' challenge to that framing.

The law as a framing device sets up a values frame that emphasizes moral deservedness as a basis for legal reform or protection. That the law excludes unauthorized workers from the formal employer/employee relationship severely limits who can legally immigrate and criminalizes conduct associated with unauthorized work. This illustrates how the law operates to increase workplace precarity for unauthorized workers. To accept the law as a frame results in the dehumanization of unauthorized workers. Their lack of recognized political rights exacerbate this.

Immigrant rights groups have contested the law's moral deservedness frames and have worked through and around the law, directly challenged the law, and changed the law. This Article has explored examples of each. Movement actors have called on frames that emphasize workers' rights and identities as workers to organize workers' co-operatives that work around the law to provide some of the same protections to unauthorized workers that the formal workplace would. Likewise, day laborer groups have worked to educate workers about their rights as workers and human beings to safe and fair workplaces.

Immigrant rights movements also challenged and directly contested the law through direct action and acts of civil disobedience. They protested and staged arrests to contest the Obama administration's deportation policies, and they called on employers to resist workplace raids and to engage in acts of civil disobedience in response to the Trump administration's policies.

Finally, movement actors changed the law. They lobbied for DACA and DAPA, allowing some noncitizens without authorization to receive work authorization, and they lobbied state legislatures to pass laws that benefitted unauthorized workers.

Ultimately, by contesting the law's framing, immigrant rights movements have engaged in actions that decrease precarity and increase social membership for unauthorized workers.