

---

## Transformative Immigration Lawyering

*Jayesh Rathod*

**ABSTRACT.** Movement actors have long sought expansive reforms in U.S. immigration law, but two deep-seated tendencies are obstructing those efforts: incrementalism and path dependence. This Essay recommends that law clinics counter these forces by setting ambitious goals for structural change and by equipping students with knowledge and skills needed for transformative lawyering.

### INTRODUCTION

The movement for immigrants' rights in the United States is at a unique juncture. Despite several decades of diligent organizing and advocacy, progress towards meaningful reform has been slow. Although the immigrant community benefited from some advances during Barack Obama's presidency,<sup>1</sup> the immigrants' rights movement subsequently spent four years in a defensive posture, fighting back a spate of hostile and regressive policies under the Trump Administration.<sup>2</sup> Among these policies were the notoriously far-reaching travel bans,

- 
1. American Immigration Council Staff, *President Obama's Mixed Legacy on Immigration*, IMMIGR. IMPACT (Jan. 20, 2017), <https://immigrationimpact.com/2017/01/20/president-obamas-legacy-immigration> [<https://perma.cc/HAV6-NJFF>] (noting advances such as the Deferred Action for Childhood Arrivals (DACA) program and the implementation of more targeted enforcement priorities, while also acknowledging record-high deportation numbers and the expansion of family detention).
  2. See, e.g., Jessica Bolter, Emma Israel & Sarah Pierce, *Four Years of Profound Change: Immigration Policy Under the Trump Presidency*, MIGRATION POL'Y INST. 1-5 (Feb. 2022), <https://www.migrationpolicy.org/sites/default/files/publications/mpi-trump-at-4-report-final.pdf> [<https://perma.cc/B2NE-53NN>] (describing a "transformation" of U.S. immigration law, including, inter alia, barriers to obtaining benefits, enhanced immigration enforcement, and restrictive border policies).

family separations at the border, and weakened protections for humanitarian migrants.<sup>3</sup> Yet even with the comparatively friendly Biden Administration now in power, the path forward for immigrants' rights remains uncertain. While the Biden White House has undone some of the most painful damage in the immigration field,<sup>4</sup> conditions for noncitizens in the United States are arguably less favorable overall than they were in late 2016. The project of reversing the prior administration's restrictionist agenda remains a work in progress,<sup>5</sup> and major policy reforms have proven elusive, especially at the federal level.<sup>6</sup>

This Essay assesses and critiques the movement for immigrants' rights in the United States and reflects on how law clinics might aid the movement in overcoming entrenched challenges. Specifically, I argue that two deep-seated, inter-related tendencies in U.S. immigration law—incrementalism and path dependence—have hampered the movement's ability to coalesce around more fundamental, systemic change. While these tendencies inhere in the U.S. legal system more broadly, they are especially pronounced in the immigration law and policy space given its massive scale, a tendency towards bureaucratic inertia, the presence of numerous stakeholders, and the charged dynamics of public discourse around immigration. As a result, the advocacy agenda often excludes more uniquely transformative approaches. For example, proposals to overhaul or even eliminate U.S. Immigration and Customs Enforcement (ICE), dramatically expand migration pathways, or allow unfettered access to public benefits by noncitizens receive insufficient consideration and thus are unable to take hold.

Although this Essay focuses on dynamics that surround U.S. immigration-law reform and the movement for immigrants' rights in this country, the twin challenges of incrementalism and path dependence afflict other areas of law. Scholars have identified these tendencies in fields as diverse as constitutional law,

---

3. See, e.g., *id.* at 7, 73, 100.

4. On his first day in office, President Biden issued several immigration-related executive orders, including one lifting the controversial travel bans of the Trump administration, and another strengthening the DACA program. See Ending Discriminatory Bans on Entry to the United States, Proclamation No. 10104, 86 Fed. Reg. 7005 (Jan. 20, 2021); Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA), 86 Fed. Reg. 7053 (Jan. 20, 2021).

5. See Aline Barros, *Biden's First Year Brings Modest Changes to Immigration Policy*, VOA NEWS (Dec. 27, 2021, 5:07 PM), <https://www.voanews.com/a/biden-s-first-year-brings-modest-changes-to-immigration-policy/6367512.html> [<https://perma.cc/P23Y-L3UT>] (observing that “much of the immigration policy architecture of the Trump years endures,” including Title 42 expulsions and the Migrant Protection Protocols).

6. See Claudia Grisales, *In a Blow to Democrats, Senate Official Blocks Immigration Reform in Budget Bill*, NPR (Sept. 19, 2021, 10:30 PM), <https://www.npr.org/2021/09/19/1038776731/in-a-blow-to-democrats-senate-official-blocks-immigration-reform-in-budget-bill> [<https://perma.cc/6FBQ-9NHU>] (describing failed efforts to enact comprehensive immigration reform via the reconciliation process).

intellectual property, and securities regulation.<sup>7</sup> Yet as described in this Essay, the prevalence of these tendencies in the immigration-law space is particularly vexing given immigration law's size, complexity, entrenched practices, and politicization.

Many clinical instructors, myself included, experience frustration when operating within the current immigration system. We feel that our work often involves guiding clients and students through a broken bureaucracy, as opposed to truly advancing justice and human dignity. To be sure, many law clinics have prioritized higher-level change, pursued via impact litigation, policy advocacy, and legislative reform.<sup>8</sup> Several have emphasized the importance of community-centered approaches that involve diverse forms of advocacy and collaborations with movement organizers.<sup>9</sup> However, immigration clinics generally have not focused either practice or instruction on developing and advancing entirely new legal frameworks.<sup>10</sup> Yet clinics, particularly those without funding restrictions, have the freedom to model new approaches that will both support radical law-reform work and appropriately train law students to tackle a more ambitious agenda. Specifically, this Essay recommends that clinics, in consultation with affected communities, set goals for transformative structural change to the U.S. immigration system. To make progress towards these goals, clinics should work collaboratively, leveraging their respective areas of substantive and geographic expertise. At the same time, clinics can implement pedagogical changes that will

- 
7. See, e.g., Michael D. Gilbert, *Entrenchment, Incrementalism, and Constitutional Collapse*, 103 VA. L. REV. 631 (2017) (describing the twin challenges of entrenchment and incrementalism and the difficulties they pose for the evolution of constitutional law); Shyamkrishna Balganesh, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543 (2010) (detailing the value of incrementalism in the development of intellectual-property law, while noting some objections); Stephen J. Choi, *Law, Finance, and Path Dependence: Developing Strong Securities Markets*, 80 TEX. L. REV. 1657 (2002) (explaining how path dependence can impede the adoption of new regulatory models).
  8. See, e.g., *Federal Immigration Litigation Clinic - 7042*, UNIV. MINN., <https://law.umn.edu/course/7042/fall-2016/federal-immigration-litigation-clinic/casper-ben-decker-julia> [<https://perma.cc/98TJ-54PY>] (specializing in federal impact immigration litigation); *Immigrant Rights Clinic*, UNIV. BALT., <http://law.ubalt.edu/clinics/immigrantrights.cfm> [<https://perma.cc/RV7X-MFFK>] (engaging students in policy work focused on "systemic law reform"); *Center for Immigrants' Rights Clinic*, PENN STATE L., <https://pennstatelaw.psu.edu/practice-skills/clinics/center-immigrants-rights> [<https://perma.cc/9TVZ-P69E>] (listing policy work as one of the clinic's three pillars).
  9. See Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355, 389-405 (2008).
  10. I base this observation on my sixteen years of experience as a faculty member teaching in an immigrants' rights clinic. While many immigration clinics do emphasize the need for structural change, I am not aware of any that have made the project of transformative reform the defining principle of the clinic.

equip future lawyers with the knowledge and skills needed to engage in this work.

## I. INCREMENTALISM AND PATH DEPENDENCE

Two closely linked phenomena – incrementalism and path dependence – are inhibiting meaningful change to U.S. immigration law. Below, I briefly summarize both phenomena, describe how they manifest in the U.S. immigration-law system, and identify other notable dimensions of these forces.

### A. Incrementalism

Incrementalism, as used in this Essay, refers to a process in which legal or policy reform occurs via small changes to the status quo, and where significant reforms require multiple, smaller steps. Scholars of policy development have sought to distill the circumstances that give rise to incrementalism and have vigorously debated the utility of various incrementalist theories.<sup>11</sup> Economist Charles Lindblom articulated a theoretical framework for incrementalism in the 1950s and 1960s, arguing that time and resource constraints, along with human cognitive limitations in assimilating information about complex problems, lead policymakers to simplify decision-making and rely on a series of smaller, successive choices.<sup>12</sup> Incrementalism may be attractive because it can defuse conflicts among competing views while producing outcomes that are acceptable to many.<sup>13</sup> Moreover, incremental changes are more easily reversed, should a policy shift prove unwise.<sup>14</sup>

The sheer breadth and complexity of the U.S. immigration system would, per Lindblom's model, make it a prime candidate for incremental decision-making. Indeed, specific attributes of the system have together created an environment where incrementalism can flourish. First, a highly diverse set of stakeholders – including businesses, organized labor, faith-based organizations, civil-

---

11. See, e.g., Michael M. Atkinson, *Lindblom's Lament: Incrementalism and the Persistent Pull of the Status Quo*, 30 POL'Y & SOC'Y 9, 15-16 (2011) (finding support for core features of the theory of incrementalism); Leslie A. Pal, *Assessing Incrementalism: Formative Assumptions, Contemporary Realities*, 30 POL'Y & SOC'Y 29, 38 (2011) (questioning the strength of incrementalism as a theory of policy development).

12. Charles E. Lindblom, *The Science of "Muddling Through,"* 19 PUB. ADMIN. REV. 79 (1959).

13. See Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 400 (1981).

14. See Cary Coglianese & Jocelyn D'Ambrosio, *Policymaking Under Pressure: The Perils of Incremental Responses to Climate Change*, 40 CONN. L. REV. 1411, 1416 (2008) (noting that incrementalism allows solutions to be "modified over time").

rights groups, and grassroots entities – all converge in the U.S. immigration policymaking space.<sup>15</sup> With so many parties to appease, policymakers might gravitate towards an incrementalist model, where compromise can be achieved via modest proposals. Second, the enormous substantive breadth of the U.S. immigration system,<sup>16</sup> and the corresponding difficulty of engineering across-the-board reform, is another likely reason why incrementalism has gained favor. Third, the politically charged nature of U.S. immigration law today is an additional force enabling incrementalism. Systemic change – particularly via federal legislation – is a delicate topic for many legislators, given possible backlash by opponents or interest groups.<sup>17</sup> In particular, national-security and criminality concerns tend to seep into immigration-policy discussions and fuel partisan attacks.<sup>18</sup>

- 
15. See DEBRA L. DELAET, U.S. IMMIGRATION POLICY IN AN AGE OF RIGHTS 3-4 (2000) (describing the growing influence of interest groups, including faith-based entities, ethnic groups, and civil rights organizations); Philip Martin & Martin Ruhs, *Labor Shortages and U.S. Immigration Reform: Promises and Perils of an Independent Commission*, 45 INT'L MIGRATION REV. 174, 186 (noting the role of the business sector and unions in immigration-policy discussions).
  16. The five titles of the Immigration and Nationality Act cover topics as diverse as the power and duties of various federal agencies, refugee and asylum procedures, temporary visas, permanent residence, grounds for exclusion and deportation, immigration enforcement and removal procedures, employment of noncitizens, and citizenship and naturalization. See *Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 10, 2019), <https://www.uscis.gov/laws-and-policy/legislation/immigration-and-nationality-act> [<https://perma.cc/TWP8-65DK>]. Moreover, as a field, immigration law intersects with several other bodies of law, including criminal law, employment law, family law, and social welfare. See Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1565 & n.27 (2008).
  17. See, e.g., Tatishe M. Nteta & Douglas Rice, *Driving a Wedge? Republicans, Immigration, and the Impact of Substantive Appeals on African American Vote Choice*, 74 POL. RSCH. Q. 228, 228-29 (2021) (providing one example of how immigration is deployed as a wedge issue in U.S. politics); Christopher Parker, *The (Real) Reason Why the House Won't Pass Comprehensive Immigration Reform*, BROOKINGS INST. (Aug. 4, 2014), <https://www.brookings.edu/blog/fixgov/2014/08/04/the-real-reason-why-the-house-wont-pass-comprehensive-immigration-reform> [<https://perma.cc/XR5L-3JHS>] (claiming House Republicans would not support the 2013 Senate comprehensive immigration bill due to their constituents' anxiety that immigrants could "take over the country").
  18. See Emily M. Farris & Heather Silber Mohamed, *Picturing Immigration: How the Media Criminalizes Immigrants*, 6 POL., GROUPS & IDENTITIES 814, 815-16 (2018) (noting conservatives' emphasis on "amnesty" as well as "illegality and criminality" in congressional debates); Daniel J. Tichenor, *Populists, Clients, and US Immigration Wars*, 53 POLITY 418, 431 (2021) (describing a restrictionist immigration proposal offered in Congress for "national security" reasons); Annie Karni & Luke Broadwater, *G.O.P. Memo Shows Road Map for Attacking Democrats on Immigration*, N.Y. TIMES (Apr. 21, 2022), <https://www.nytimes.com/2022/04/21/us/jim-jordan-republicans-memo-immigration.html> [<https://perma.cc/986C-2KNF>] (detailing a Republican Party memo with "misleading and provocative talking points" about immigrant criminality).

Given these dynamics, changes often occur incrementally via rulemaking or executive action, somewhat occluded from the public eye, as compared to a visible and inerasable vote of Congress. The Biden Administration has advanced several executive-branch changes, including accelerating the review process for U-visa applications submitted by crime victims<sup>19</sup> and facilitating employment authorization for Special Immigrant Juveniles<sup>20</sup> trapped in a visa backlog.<sup>21</sup> The Obama Administration's renewed emphasis on prosecutorial discretion (including the launch of the Deferred Action for Childhood Arrivals (DACA) program)<sup>22</sup> and reforms to guest-worker programs<sup>23</sup> similarly improved conditions for a significant number of persons with the use of executive-branch action.<sup>24</sup>

Considering the delicate political dynamics, along with the sheer scale of the immigration-law field and the abundance of stakeholders, some might argue that incrementalism is a necessary, if imperfect, approach to policymaking. Accordingly, the logic proceeds, those in the immigrants' rights movement should

- 
19. See *U Visa and Bona Fide Determination Processes for Victims of Qualifying Crimes*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Oct. 20, 2021), <https://www.uscis.gov/outreach/notes-from-previous-engagements/u-visa-and-bona-fide-determination-process-for-victims-of-qualifying-crimes> [<https://perma.cc/UQU7-5G9M>].
  20. Special Immigrant Juveniles are persons who have been approved for a specific status within the U.S. immigration system after applying (while under the age of 21, unmarried, and physically present in the United States) and providing documentation from a juvenile court, including a finding “that family reunification is no longer a viable option” and “that it would not be in the [petitioner’s] best interest to be returned to the country of nationality or last habitual residence of the [petitioner] or of his or her parent or parents.” 8 C.F.R. § 204.11(a)-(b), (c)(1)-(3), (d)(1)-(3). Special Immigrant Juveniles may apply for adjustment of status to lawful permanent residence. 8 U.S.C. § 1255(i) (2018).
  21. *USCIS to Offer Deferred Action for Special Immigrant Juveniles*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 7, 2022), <https://www.uscis.gov/newsroom/alerts/uscis-to-offer-deferred-action-for-special-immigrant-juveniles> [[https://perma.cc/T\]35-QGGF](https://perma.cc/T]35-QGGF)].
  22. Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/3RKK-VTEH>].
  23. Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6884 (Feb. 12, 2010); Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 80 Fed. Reg. 24041 (Apr. 29, 2015).
  24. See, e.g., *Immigration Court Cases Closed Based on Prosecutorial Discretion*, TRAC IMMIGR. (July 31, 2017), [https://trac.syr.edu/immigration/prosdiscretion/activecourts\\_latest.html](https://trac.syr.edu/immigration/prosdiscretion/activecourts_latest.html) (reporting that 67,482 immigration court cases had been closed per prosecutorial discretion initiatives as of July 31, 2017); Rachel Luban, *For the First Time, Guestworkers Get Crucial Legal Protections Under New Rules*, IN THESE TIMES (May 8, 2015), <https://inthesetimes.com/article/h2b-visa-protections> (describing important worker protections contained in a 2015 rule, including a “guarantee of three-fourths of the contract hours” and “reimbursements for travel and visa costs”).

advocate modest changes to existing policies and embrace those changes as victories.<sup>25</sup>

Yet the focus on incrementalism also has costs for noncitizens and their advocates in the United States. Apart from prolonging the pace of change, incrementalism artificially circumscribes the universe of possible solutions. Key players in immigration reform reflexively exclude proposals that might be seen as politically controversial and thus unachievable.<sup>26</sup> Given time and resource constraints, many who engage in this work may not even have the bandwidth to imagine alternate systems. But transformative change in immigration law is possible. Although some might argue that the existing government bureaucracy is too entrenched to undergo a radical transformation, a major overhaul in the U.S. immigration system occurred a mere twenty years ago, with the establishment of the U.S. Department of Homeland Security (DHS) in 2002.<sup>27</sup> While the creation of DHS came on the heels of the September 11 attacks and thus was buoyed by political and societal momentum in favor of immigration restrictions, conditions can also align to enable progressive reform.<sup>28</sup> Indeed, they have in the past:

- 
25. *The Alliance for a New Immigration Consensus*, NAT'L IMMIGR. F., <https://immigrationforum.org/article/the-alliance-for-a-new-immigration-consensus> [<https://perma.cc/X68X-U58M>]; Isabel Anadon, *A New Strategy for Immigration Reform: What Can an Incremental Agenda Look Like?*, LATINO POL'Y F. (Mar. 19, 2015), <https://www.latinopolicyforum.org/blog/a-new-strategy-for-immigration-reform-what-can-an-incremental-agenda-look-like> [<https://perma.cc/RTM7-EMCY>].
  26. See, e.g., Karen Yuan & Caroline Kitchener, *The Case Against Abolishing ICE*, ATLANTIC (Aug. 6, 2018), <https://www.theatlantic.com/membership/archive/2018/08/the-case-against-abolishing-ice/566912> [<https://perma.cc/AW9S-ZWQP>] (reporting that several Democratic staffers considered the movement to abolish ICE to be “unrealistic”).
  27. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified at 6 U.S.C. §§ 101-557). Prior to the creation of DHS, processing of immigration benefits, border security, and enforcement were all functions that had been overseen by the Immigration and Naturalization Service for nearly seventy years. See *Our History*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 24, 2020), <https://www.uscis.gov/about-us/our-history> [<https://perma.cc/2G3T-MZC4>]. When DHS was established, however, these functions were separated into three distinct immigration agencies: Immigration and Customs Enforcement (ICE) and Customs and Border Protection, both overseeing “immigration enforcement and border security,” and U.S. Citizenship and Immigration Services, overseeing adjudication of immigration benefits. *Id.*
  28. See *infra* notes 93-100 and accompanying text. Also, even after twenty years, significant deficits exist in DHS's operations. See *20 Years After 9/11: Transforming DHS to Meet the Homeland Security Mission: Hearing Before the H. Subcomm. on Oversight, Mgmt. & Accountability of the H. Comm. on Homeland Sec.*, 117th Cong. 3 (2021) (statement of Rep. Lou Correa, Chairman, H. Subcomm. on Oversight, Mgmt. & Accountability) (“But ensuring the Department's many components work in tandem is a daily effort and there is still much progress to be made.”). Some might argue that given the politically charged nature of immigration policy, *enhanced* restrictions on noncitizens are much easier to achieve than the converse. Yet even restrictionist initiatives, depending on how they are pursued, may encounter agency path dependence or resistance from bureaucrats. See *infra* Section I.B; Bijal Shah, *Civil Servant Alarm*, 94 CHI-

the 1965 Immigration Act significantly restructured the U.S. immigration system, eliminating discriminatory national-origin quotas that had been in place for decades, and introducing a new preference system that prioritized family reunification.<sup>29</sup>

Defenders of incrementalism should also consider that many of the federal immigration policies implemented during the Trump years were far from incremental. While the Trump Administration effectuated policies via multiple methods, it effectively dismantled the asylum system, particularly for those arriving at the southern border.<sup>30</sup> The first iteration of the 2017 travel ban was similarly breathtaking in its scope and unapologetic in its vision for fundamental change.<sup>31</sup> At a minimum, these changes reveal that nonincremental change is achievable in the immigration-policy space. Certainly, these measures were possible in part because the Administration had wrapped them in a thin veneer of legality. But progressives need not abandon the rule of law; legal integrity and transformative ambition can coexist. Indeed, the antirestrictionist project could emulate the resolve, if not the substance, of the restrictionist approach. Defaulting to incrementalism will only prolong the process of repairing damage wrought by the Trump Administration and will stoke frustration among stakeholders who have been advocating for more sweeping reforms.<sup>32</sup>

Along these lines, incrementalism also generates tensions between the community-based actors in the immigrants' rights space and other players in the movement. For several decades now, immigrant community members and local organizations have worked to build power among noncitizens, highlighting noncitizens' importance in society and creating space for them to step forward

---

KENT L. REV. 627, 631-47 (2019) (cataloging examples of bureaucratic resistance to immigration-policy changes).

29. Catherine Lee, *Family Reunification and the Limits of Immigration Reform: Impact and Legacy of the 1965 Immigration Act*, 30 SOCIO. F. 528, 529 (2015).
30. Sarah Pierce & Jessica Bolter, *Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes Under the Trump Presidency*, MIGRATION POL'Y INST. 64 (July 2020), <https://www.migrationpolicy.org/research/us-immigration-system-changes-trump-presidency> [<https://perma.cc/R27C-7NLV>].
31. Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Michael D. Shear & Helene Cooper, *Trump Bars Refugees and Citizens of 7 Muslim Countries*, N.Y. TIMES (Jan. 27, 2017), <https://www.nytimes.com/2017/01/27/us/politics/trump-syrian-refugees.html> [<https://perma.cc/V3E6-2GDF>].
32. See Sean Sullivan & Nick Miroff, *Amid Furor over Border Images, Biden Faces Democratic Backlash on Immigration*, WASH. POST (Sept. 21, 2021, 10:55 PM), [https://www.washingtonpost.com/politics/biden-immigration-democratic-backlash/2021/09/21/4de126b8-1adf-11ec-a99a-5feazb2da34b\\_story.html](https://www.washingtonpost.com/politics/biden-immigration-democratic-backlash/2021/09/21/4de126b8-1adf-11ec-a99a-5feazb2da34b_story.html) [<https://perma.cc/5853-GXEA>] (describing Democrats' frustrations with Biden Administration immigration policies and the failure to enact broader reforms).



to lead change.<sup>33</sup> A defining principle for this work is that the needs and priorities of immigrant community members – not outside players – should guide reform.<sup>34</sup> Unsurprisingly, given the profound personal investment of these community members in immigration debates, grassroots efforts have generated calls for transformative reforms, including the abolition of ICE<sup>35</sup> and a moratorium on deportations.<sup>36</sup> Yet these proposals encounter the artificial ceiling of incrementalism and are dismissed or heavily diluted in favor of more moderate “wins.”<sup>37</sup> As calls for reform grow stronger and as the dignitary harms of the status quo continue to mount, adherence to incrementalism is likely to drive an even greater wedge between different segments of the movement.

Incrementalism also tends to reinforce narratives that privilege “good” or “deserving” immigrants, such as DACA beneficiaries, who tend to occupy the limited slots for newly created benefits. All too often, incrementalist policymaking prioritizes immigrants who are viewed as morally blameless, upstanding members of society. DACA beneficiaries perfectly epitomize this narrative: they are portrayed as flawless and hardworking, and their unlawful status is attributed to a choice that someone else made.<sup>38</sup> Other common subtypes include

- 
33. Immigrant worker centers have been important sites for these efforts. See JANICE FINE, *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* 248–50 (2006).
  34. Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 *CLINICAL L. REV.* 333, 345 (2009).
  35. See Peter L. Markowitz, *Abolish ICE . . . and Then What?*, 129 *YALE L.J.F.* 130, 130–31 (2019) (explaining that the Abolish ICE movement emerged from years of grassroots organizing).
  36. See Walter J. Nicholls, Justus Uitermark & Sander van Haperen, *The Networked Grassroots. How Radicals Outflanked Reformists in the United States’ Immigrant Rights Movement*, 42 *J. ETHNIC & MIGRATION STUD.* 1036, 1036–37 (2016) (describing the Not 1 More Campaign launched by the National Day Laborer Organizing Network).
  37. Erin M. Adam, *Intersectional Coalitions: The Paradoxes of Rights-Based Movement Building in LGBTQ and Immigrant Communities*, 51 *LAW & SOC’Y REV.* 132, 138, 143 (2017) (acknowledging a “divide between mainstream and marginalized organizations” within the immigrants’ rights movement, and noting the view “that the pursuit of legal rights ‘wins’ marginalizes the interests of [disadvantaged groups] by limiting the imaginations of those who advocate for social change within these communities”); see Christine Cimini & Doug Smith, *An Innovative Approach to Movement Lawyering: An Immigrant Rights Case Study*, 35 *GEO. IMMIGR. L.J.* 431, 466–67 (describing a “splinter in the immigrant rights movement” between “national, Beltway CIR advocates” and “‘in the field’ advocates” regarding the trade-offs that should be made in pursuit of immigration reform).
  38. This narrative has been associated with DACA recipients since the program’s inception. The day the program was introduced, then-President Obama offered remarks, asking attendees to put themselves in the shoes of someone who had “studied hard, worked hard,” and “done everything right [for their] entire life.” Barack Obama, President of the U.S., Remarks by the President on Immigration at the Rose Garden (June 15, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration> [https://perma.cc/CY3S-9UN3]; see also Editorial, *The ‘Dreamers’ Are Saved—But Still Vulnerable*, *WASH.*

young people, crime victims, and others who can similarly be depicted as vulnerable, needing protection, and thus not a harm to society.<sup>39</sup> As Elizabeth Keyes has observed, this dichotomy is already well ingrained in immigration decision-making<sup>40</sup> and has fueled impossibly high standards of worthiness to gain even a modicum of protection.<sup>41</sup> The narrative also fuels a politics of respectability, which some argue is counterproductive for the immigrants' rights movement.<sup>42</sup> Incrementalism enables and perpetuates these troublesome trends.

Furthermore, many of the affirmative incremental changes that the Biden Administration has advanced focus on employment authorization via temporary status, deferred action, or accelerated processing.<sup>43</sup> While important, these

---

POST (June 18, 2020), [https://www.washingtonpost.com/opinions/the-dreamers-are-saved-but-still-vulnerable/2020/06/18/d5a28236-b190-11ea-8758-bfd1do45525a\\_story.html](https://www.washingtonpost.com/opinions/the-dreamers-are-saved-but-still-vulnerable/2020/06/18/d5a28236-b190-11ea-8758-bfd1do45525a_story.html) [<https://perma.cc/J5MQ-GXG7>] (describing DACA recipients as persons “who have done nothing wrong, [and] who grew up as Americans and contribute to the only country they know as home”). Notably, many DREAMers resist this characterization, noting the adverse consequences it can generate for the immigrant community. See Helge Schwartz, *Transformations of the Undocumented Youth Movement and Radical Egalitarian Citizenship*, 20 CITIZENSHIP STUD. 610, 611 (describing undocumented youth's rejection of the narrative dichotomy between “good” and “bad” immigrants).

39. See *supra* notes 19–21 and accompanying text (describing incremental reforms favoring crime victims and Special Immigrant Juveniles). Jayashri Srikantiah has explored this dynamic in the realm of antitrafficking law. See Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 187 (2007) (describing how antitrafficking regulations “envision a prototypical victim” who passively awaits rescue by law enforcement).
40. See Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207 (2012) (analyzing how narratives of “good” and “bad” infiltrate discretionary decision-making).
41. See Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101, 141–55 (2013) (describing the dangers inherent in the “worthiness” narrative advanced by some within the DREAM movement).
42. Angélica Cházaro, *Beyond Respectability: Dismantling the Harms of “Illegality,”* 52 HARV. J. ON LEGIS. 355, 357–58 (2015).
43. See U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 19; U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 21 (announcing deferred-action grants, and thus access to employment authorization, for U Visa applicants and Special Immigrant Juveniles); USCIS Announces New Actions to Reduce Backlogs, Expand Premium Processing, and Provide Relief to Work Permit Holders, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 29, 2022), <https://www.uscis.gov/newsroom/news-releases/uscis-announces-new-actions-to-reduce-backlogs-expand-premium-processing-and-provide-relief-to-work> [<https://perma.cc/8WWA-F86Q>] (announcing various steps to improve access to employment authorization documents); *Temporary Protected Status: An Overview*, AM. IMMIGR. COUNCIL 2–3 (2022), [https://www.americanimmigrationcouncil.org/sites/default/files/research/temporary\\_protected\\_status\\_an\\_overview.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/temporary_protected_status_an_overview.pdf) [<https://perma.cc/68TL-VWSU>] (noting access to work authorization as a key feature of Temporary Protected Status (TPS) and listing several TPS designations made under the Biden Administration).

measures largely circumscribe noncitizens' role: noncitizens can participate economically, but not politically as they might with a pathway to citizenship. For example, DACA beneficiaries may obtain a work permit, but they occupy a liminal legal space with no immigration status *per se*.<sup>44</sup> Given the challenge of enacting substantial changes to U.S. immigration laws, policymakers have instead defaulted to incrementally expanding access to employment authorization. This reliance on employment authorization, however, spotlights the productive value of noncitizens, as opposed to the many other tangible and intangible ways they contribute to society.<sup>45</sup> Noncitizens in the United States make substantial social, political, and cultural contributions, including engagement with civic organizations, support of important causes, and involvement in the arts.<sup>46</sup>

Applying the lens of critical legal theory, incrementalism in the immigrants' rights space arguably serves the interests of more powerful, established interests—both inside and outside the movement—at the expense of marginalized communities. Critical theorists have explored the role of the law in perpetuating racial hierarchies and undergirding systems of social control.<sup>47</sup> Laws can also create systems of tiered personhood, relegating persons of color, including noncitizens, to a type of second-class status.<sup>48</sup> Viewing the incremental advances in U.S. immigration law through these frames reveals a tendency to reinforce a circumscribed, subordinate role for noncitizens. When advocates and lawmakers call for extending work authorization to noncitizens, narratives often emphasize

---

44. See 8 C.F.R. § 274a.12(a)(11), (c)(8), (10), (18) (2021) (authorizing issuance of work permits to persons without formal status in the United States).

45. Cházaro, *supra* note 42, at 382 (“The language of ‘hard workers’ centers immigrants’ contributions to the economy as the primary reason to recognize their humanity, and thus a reason to provide them with lawful status.”); cf. Muncer I. Ahmad, *Beyond Earned Citizenship*, 52 HARV. C.R.-C.L. L. REV. 257, 279, 282 (noting the oversized role of “economic performance” in earned citizenship discussions and observing that this emphasis upends traditional conceptions of social citizenship). To be fair, the immigrants’ rights movement itself has consistently framed noncitizens as morally worthy in part because of their economic contributions to the United States. See Angela D. Morrison, *Framing and Contesting Unauthorized Work*, 36 GEO. IMMIGR. L.J. 651, 660 (2022).

46. See Charles Hirschman, *The Contributions of Immigrants to American Culture*, 142 DAEDALUS 26 (2013) (describing the contributions of immigrants to creative fields, including science, the arts, and other cultural pursuits); see also, e.g., Craig McGarvey, *Immigrants and Civic Engagement*, 94 NAT’L CIVIC REV. 35, 35-37 (2005) (providing examples of impactful civic engagement by noncitizens).

47. See Laura E. Gómez, *Understanding Law and Race as Mutually Constitutive: An Invitation to Explore an Emerging Field*, 6 ANN. REV. L. & SOC. SCI. 487, 491 (2010).

48. See Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. RACIAL & ETHNIC JUST. 163 (2010) (arguing that state and local anti-immigrant laws lead to the segregation, exclusion, and degradation of Latinos, creating “tiered personhood”).

the importance of the immigrant workforce to the economy,<sup>49</sup> without acknowledging immigrants' broader importance to society. Incrementalism in the form of work authorization thus allows policymakers to acknowledge the private sector's concerns without providing noncitizens a transformative pathway to permanent legal status. Many restrictionists view the latter as unacceptable, as it would generate too many future voters and thereby upset conservatives' hold on levers of power.<sup>50</sup> Moreover, incrementalism reinforces power dynamics within the immigrants' rights movement itself: by calling for only modest change, "inside-the-Beltway" organizations that depend on government access for their influence can remain on good terms with the White House.<sup>51</sup>

Incrementalism has become a familiar and accepted approach in U.S. immigration policymaking. Various factors, including the multiplicity of stakeholders in the field and its politically charged nature, sustain this approach. While incrementalism might seem inevitable, the historical record confirms that transformative changes to U.S. immigration law are, indeed possible. Additionally, closer

- 
49. See, e.g., *Immigration Relief Could Keep Millions of Families Together and Boost the U.S. Economy by Billions*, FWD.US (Nov. 2, 2021), <https://www.fwd.us/news/immigration-relief> [<https://perma.cc/5S9U-3JH6>] (noting that "immigrants with work authorization are able to increase their economic contributions significantly"); Press Release, Susan Collins, Collins, Sinema Introduce Bill to Help Asylum Seekers Obtain Jobs More Quickly (Feb. 17, 2022), <https://www.collins.senate.gov/newsroom/collins-sinema-introduce-bill-to-help-asylum-seekers-obtain-jobs-more-quickly> [<https://perma.cc/3MB4-BUDR>] (offering that proposed legislation to speed access to work authorization "would permit these individuals to work and contribute to the local economy"). Some industries and their allies have consistently advocated for work authorization and temporary visas, citing the importance of noncitizen workers for the industries' very survival. See, e.g., Jeremy Cox, *Worker Shortage Threatens Maryland Crab Industry Again, Officials Say*, BAY J. (March 14, 2022), [https://www.bayjournal.com/news/fisheries/worker-shortage-threatens-maryland-crab-industry-again-officials-say/article\\_6278ebb2-a3cc-11ec-950e-8f95b10a4306.html](https://www.bayjournal.com/news/fisheries/worker-shortage-threatens-maryland-crab-industry-again-officials-say/article_6278ebb2-a3cc-11ec-950e-8f95b10a4306.html) [<https://perma.cc/C2VT-KSWA>] (citing concerns about the lack of H-2B temporary workers for the Maryland crab industry).
50. See *Immigration Attitudes and Conspiratorial Thinkers: A Study Issued on the 10th Anniversary of the Associated Press-NORC Center for Public Affairs Research*, ASSOCIATED PRESS, May 9, 2022, <https://apnorc.org/projects/immigration-attitudes-and-conspiratorial-thinkers> [<https://perma.cc/2V7E-KR9F>] (finding nearly one in three adults "express concern that an increase in immigration is leading to native-born Americans losing economic, political, and cultural influence"); Tucker Carlson, Opinion, *The Truth About Demographic Change and Why Democrats Want It*, FOX NEWS (Apr. 12, 2021, 10:36 PM), <https://www.foxnews.com/opinion/tucker-carlson-immigration-demographic-change-democrats-elections> [<https://perma.cc/PQJ5-97XG>] (arguing that the Biden Administration sees "the millions of foreigners breaking our laws to live here" as "future Democratic voters").
51. See Alfredo Gutierrez, Marisa Franco & Michelle Chen, *The Outside-Inside Game*, 62 DISSENT 42, 44 (2015) (offering that "[a]dvocates for immigrant rights inside Washington have access to funding, enjoy national media exposure, and even have the special attention of the president").

examination of incrementalist practices reveals that they tend to circumscribe noncitizens' role to the economic sphere, reinforce troublesome dichotomies between "good" and "bad" immigrants, and marginalize solutions from grassroots activism. These critiques highlight the importance of exploring distinct, more ambitious approaches to reforming U.S. immigration law.

*B. Path Dependence*

In addition to embracing incrementalism, many within the immigrants' rights movement tend to gravitate towards existing structures to the exclusion of truly different – and arguably superior – proposals for how the U.S. immigration system (or its components) might be organized. This gravitation reflects a strong tendency toward *path dependence*. The concept of path dependence was first elaborated by scholars in the field of economics who sought to understand why market competitors failed to adopt the most efficient technology.<sup>52</sup> These scholars observed that prior decisions and investments in a specific approach can be difficult to reverse, thus leading industry to be "lock[ed] in" to a suboptimal system.<sup>53</sup> In the public-policy and legal literature, the theory of path dependence is used to explain how "institutional inertia," linked to a series of choices made in the past, can stand in the way of significant reforms.<sup>54</sup> In short, once an agency has been operating along a particular path, the costs of switching to a new approach become too great.<sup>55</sup>

One can easily imagine how U.S. immigration agencies, operating under the same basic statutory structure for decades, have made budget and personnel decisions that are difficult to unravel. Along these lines, César Cuauhtémoc García Hernández has explored the relevance of path-dependence theory to the practice of immigration imprisonment, noting how long-standing resource allocations, internal metrics of success, and agency culture all reinforce the use of detention as an enforcement tool.<sup>56</sup> Given the prior choices made, government actors – including those within the relevant agencies – will often be resistant to change

---

52. Jacob Torfing, *Rethinking Path Dependence in Public Policy Research*, 3 CRITICAL POL'Y STUD. 70, 72 (2009).

53. Paul A. David, *Clio and the Economics of QWERTY*, 75 AM. ECON. REV. 332, 333-36 (1985) (describing forces that led to continued use of the QWERTY keyboard).

54. *Id.* at 70-71.

55. Udi Sommer, Katie Zuber, Victor Asal & Jonathan Parent, *Institutional Paths to Policy Change: Judicial Versus Nonjudicial Repeal of Sodomy Laws*, 47 LAW & SOC'Y REV. 409, 414 (2013).

56. César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449, 1499-1500, 1505 (2015).

that upends existing systems and practices.<sup>57</sup> In turn, path dependence likely shapes the views and behavior of immigration advocates, who are aware of the difficulty in shifting agency policies. Some advocates may also wish to preserve the positions of expertise and influence that they enjoy under existing structures.<sup>58</sup>

Path dependence is a particularly formidable challenge in the U.S. immigration system because of the system's sheer size, embedded bureaucracy, and significant fiscal investments in its operational structure. With over 200,000 employees, DHS is one of the largest cabinet-level agencies.<sup>59</sup> Multiple other federal agencies undertake immigration-related functions,<sup>60</sup> creating additional bureaucratic stickiness and sites of entrenchment. Additionally, consistent budgetary inflows to support specific immigration operations have institutionalized existing, suboptimal operations. The immigration-detention bed quota—whereby ICE receives a budgetary appropriation for the cost of a certain number of detention beds, regardless of the need for those beds—perfectly encapsulates this phenomenon.<sup>61</sup>

The tendency towards path dependence may also be an inescapable feature of the U.S. legal system, where proposals or arguments are often measured vis-à-vis an existing baseline norm. The common-law system requires advocates to compare a set of facts and arguments to established precedent. Accordingly, when seeking to improve a flawed system, a mind habituated to legal analytical thought will start from the existing system and conceive of modifications. Even when advocates attempt to imagine entirely new possibilities, the legal mind often gravitates towards successful models from other jurisdictions. For example, advocates will occasionally identify immigration programs adopted by economic

---

57. See, e.g., Anjali S. Dalal, *Shadow Administrative Constitutionalism and the Creation of Surveillance Culture*, 2014 MICH. ST. L. REV. 61, 105 (“Path dependency captures the instincts of government officials to opt for the path of least resistance . . .”).

58. Lucian Arye Bebchuk and Mark J. Roe provide a helpful analogy from the area of corporate law, suggesting that interest group politics may foment path dependence when particular groups enjoy positional advantages due to prior legal enactments. See Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 131 (1999).

59. *Secretary of Homeland Security*, U.S. DEP'T HOMELAND SEC., <https://www.dhs.gov/topics/secretary-homeland-security> [<https://perma.cc/PMQ3-9MXZ>].

60. Megan Davy, Deborah W. Meyers & Jeanne Batalova, *Who Does What in U.S. Immigration*, MIGRATION POL'Y INST. (Dec. 1, 2005), <https://www.migrationpolicy.org/article/who-does-what-us-immigration> [<https://perma.cc/A63R-ZS67>].

61. See García Hernández, *supra* note 56, at 1503; Anita Sinha, *Arbitrary Detention: The Immigration Detention Bed Quota*, 12 DUKE J. CONST. L. & PUB. POL'Y 77, 85-88 (2016).

competitors of the United States and suggest they be replicated in this country.<sup>62</sup> Developing new models from scratch is rarely part of the practice.

Like incrementalism, path dependence is part of how law and legal institutions become vehicles for entrenching the status quo rather than agents of transformative change. For those individuals and institutions benefiting from the current structure, path dependence is a convenient tendency, as it, by definition, largely preserves the status quo. In the immigration-law space, path dependence likely favors knowledgeable insiders who have a longer institutional memory. One can imagine how individuals who are newer to the movement, including those engaged through organizing work, might easily be sidelined in discussions that require familiarity with past efforts. While there is certainly value in knowledge and expertise, outsiders can offer a unique perspective and question long-existing practices.<sup>63</sup>

Moreover, incrementalism and path dependence are not independent forces. The path dependence that manifests in U.S. immigration law fosters incrementalism: because of the force of institutional inertia, changes proposed by politicians and mainstream advocacy organizations are typically tweaks to familiar, existing systems—for example, increasing the number of visas in a particular category, extending the time for a particular benefit, or modifying a statutory definition to expand the universe of beneficiaries.<sup>64</sup> In turn, recurring incrementalism reinforces path dependence.<sup>65</sup> When advocates do conceive of larger-scale change, they often assimilate their proposals within existing systems and frameworks. For example, many of the most lauded changes in recent years involve expanded use of deferred action, a concept that has existed in U.S. immigration

---

62. See, e.g., RAY MARSHALL, VALUE-ADDED IMMIGRATION: LESSONS FOR THE UNITED STATES FROM CANADA, AUSTRALIA, AND THE UNITED KINGDOM 194-221 (2011) (recommending reforms to U.S. employment-based immigration policies based on analysis of other countries' policies).

63. See Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 121 (2015) (observing that “leveraging outsiders’ expertise” is a way to achieve “cognitive diversity” and that outsiders “add value by offering a fresh perspective, challenging the status quo, and injecting new information into the discussion”).

64. See, e.g., Arturo Castellano-Canales, *Fact Sheet: Unused Green Card Recapture*, NAT’L IMMIGR. F. (Oct. 1, 2021), <https://immigrationforum.org/article/fact-sheet-unused-green-card-recapture> [<https://perma.cc/EC6P-9QBB>] (recommending the “recapture” of unused green cards from prior years as a way to address backlogs); *Fact Sheet: Section 245(i) Adjustment*, NAT’L IMMIGR. F. (Aug. 10, 2021), <https://immigrationforum.org/article/fact-sheet-section-245i-adjustment> [<https://perma.cc/PW7C-2G9W>] (suggesting that Congress amend an existing statutory provision to provide a pathway to permanent residence and citizenship for noncitizens).

65. See Saul Levmore, *Judging Deception*, 74 U. CHI. L. REV. 1779, 1780 (2007) (suggesting that judges’ incrementalist tendencies may make the law more path dependent).

law since at least 1975,<sup>66</sup> and which confers a very limited benefit.<sup>67</sup> In short, incrementalism and path dependence combine to strongly disincentivize fundamental change.

To be sure, time and resource constraints or a perception of impracticality can inhibit the type of expansive thinking needed to counter incrementalism and path dependence. Advocates who are juggling multiple priorities may be loath to craft ambitious proposals that deviate from established models of policymaking. As discussed more fully below, however, law-school immigration clinics are well positioned to help actors within the movement tackle larger-scale goals and to engage in the structured thinking needed to plan and execute a fresh, transformative vision.

## II. ON THE ROLE OF LAW CLINICS

While incrementalism and path dependence present formidable obstacles for those seeking transformative reforms of the U.S. immigration system, law clinics are poised to challenge these tendencies. Clinics already are actively involved in litigation and advocacy around immigration and are recognized players in the eyes of government representatives, advocates, and community members.<sup>68</sup> Clinics offer a unique mix of substantive expertise and institutional legitimacy, along with an insider-outsider perspective, that will allow them to credibly address these challenges. By strategically selecting their advocacy and representational priorities and adopting instructional content designed to encourage creativity and transformative thinking, clinics can help students and movement actors imagine and achieve radical change.

In formulating an optimal way for clinics to intervene, one must consider the diverse structures and priorities that immigration law and immigrants' rights clinics in the United States have embraced. Many scholar-teachers, including

---

66. See Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 248 (2010).

67. Memorandum from the Off. of Legal Couns. to the Sec'y of Homeland Sec. and the Couns. to the President 27-28 (Nov. 19, 2014), <https://www.justice.gov/file/179206/download> [<https://perma.cc/ZU7A-LRPL>] (describing deferred action as "sharply limited in comparison to the benefits Congress has made available through statute" as it provides no pathway to permanent residence or citizenship).

68. See, e.g., Memorandum from David A. Neal, Director, Exec. Off. for Immigr. Rev., Encouraging and Facilitating Pro Bono Legal Services (Nov. 5, 2021), <https://www.justice.gov/eoir/book/file/1446651/download> [<https://perma.cc/2P6B-8M8E>] (noting the important service that law-school clinics provide in immigration courts); Lindsay M. Harris, *Learning in "Baby Jail": Lessons from Law Student Engagement in Family Detention Centers*, 25 CLINICAL L. REV. 155, 197, 199 (2018) (describing partnerships between law clinics and advocacy organizations for work on behalf of immigrant detainees).



Sameer Ashar, Susan L. Brooks, and Rachel E. López, have encouraged law clinics to model and teach lawyering approaches that decenter the attorney and instead focus on collaborating with community-based entities and reversing traditional power dynamics.<sup>69</sup> This approach generally aligns with movement lawyering,<sup>70</sup> which understands that working for transformative social change is a long-term endeavor.<sup>71</sup> By contrast, other immigrants' rights clinics focus on representing individual clients on discrete matters and equipping students with the canon of traditional lawyering skills, such as interviewing, counseling, and trial advocacy.<sup>72</sup> Several clinics, including my own, have adopted hybrid structures that incorporate both community-based lawyering and traditional direct legal representation.

To some extent, these diverse approaches map onto a broader debate within the clinical community regarding the core purpose of law clinics and the appropriate balance between clinics' pedagogical and advocacy goals. Some argue that clinics should fully embrace the unique strengths and resources they bring to advocacy work and participate actively in legal reform efforts.<sup>73</sup> Under this model, clinics openly support specific advocacy goals and participate actively in coalition work.<sup>74</sup> Some of these clinics have even embraced significant law-reform efforts and have begun to counter the forces of incrementalism and path dependence.<sup>75</sup> By contrast, others consider pedagogy and skills instruction to be the primary goals of clinics and contend that "smaller" cases, where students can

---

69. See Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464 (2017); Susan L. Brooks & Rachel E. López, *Designing a Clinic Model for a Restorative Community Justice Partnership*, 48 WASH U. J.L. & POL'Y 139, 139 (2015).

70. Scott L. Cummings has defined movement lawyering as "a model of practice in which lawyers accountable to marginalized constituencies mobilize law to build power to produce enduring social change through deliberate strategies of linked legal and political advocacy." Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1652-53.

71. See *id.* at 1653.

72. See, e.g., *Immigration Law Clinic*, CHI.-KENT COLL. L., <https://www.kentlaw.iit.edu/academics/jd-program/practical-skills-training/legal-clinics/immigration-clinic> [<https://perma.cc/7PR9-WH9B>].

73. See, e.g., Marcy L. Karin & Robin R. Runge, *Towards Integrated Law Clinics That Train Social Change Advocates*, 17 CLINICAL L. REV. 563, 586 (2011).

74. See Hina Shah, *Notes from the Field: The Role of the Lawyer in Grassroots Policy Advocacy*, 21 CLINICAL L. REV. 393, 406-12 (2015) (describing how the Women's Employment Rights Clinic at Golden Gate University School of Law served as legal counsel to the California Domestic Worker Coalition).

75. See, e.g., *Immigration Justice Clinic*, CARDOZO L., <https://cardozo.yu.edu/immigration-justice-clinic> [<https://perma.cc/ZW53-BXWM>] (describing ongoing efforts to extend state citizenship to undocumented persons in New York).

take full responsibility, maximize student learning.<sup>76</sup> Proponents of the latter approach might argue that advocacy can distract from the core purpose of student learning and that students can easily get sidelined in complicated, long-term advocacy initiatives.<sup>77</sup> But this smaller-scale approach, while defensible from a pedagogical perspective, may unwittingly reinforce dynamics that inhibit transformative change.<sup>78</sup>

Of course, these two models are not mutually exclusive. Clinics can (and frequently do) accomplish both advocacy and pedagogical goals.<sup>79</sup> Furthermore, the instructor's precise instructional objective may be immersing students in coalition work and advocacy. The clinical experience, regardless of its precise design, is so rich with learning opportunities that any structure is likely to enhance students' professional development. Moreover, given the diverse post-law-school career paths that law students pursue, it is increasingly difficult to defend a narrow canon of skills that instructors must transmit in a clinic semester or year.

Consistent with the range of approaches in immigration clinics, this Essay offers both larger, advocacy-oriented strategies and classroom-focused skills instruction that can address incrementalism and path dependence.

#### A. *Strategic Engagement to Overcome Entrenched Challenges*

To help overcome the force of both incrementalism and path dependence, clinics can (1) set broader, more ambitious goals for transformative legal reform; (2) normalize radical change; and (3) work with other clinics to achieve these goals.

First, immigration clinics, in collaboration with stakeholders from affected communities, can intentionally and transparently set goals for transformative change within U.S. immigration law. This represents a departure from typical

---

76. David F. Chavkin, *Spinning Straw into Gold: Exploring the Legacy of Bellow and Moulton*, 10 CLINICAL L. REV. 245, 265 (2003) ("The preferred educational approach is built around a small-case model in which students can competently handle a small caseload and have time to reflect critically about their experiences."); see Katherine R. Kruse, *Biting Off What They Can Chew: Strategies for Involving Students in Problem-Solving Beyond Individual Client Representation*, 8 CLINICAL L. REV. 405, 407-08 (2002).

77. See Chavkin, *supra* note 76, at 263-65.

78. See Deborah N. Archer, *Political Lawyering for the 21st Century*, 96 DENV. L. REV. 399, 400 (2019) (observing that the clinical model focused on individual representation of clients in more straightforward cases "does not effectively prepare students to address and combat structural or chronic inequality").

79. See Jayashri Srikantiah & Jennifer Lee Koh, *Teaching Individual Representation Alongside Institutional Advocacy: Pedagogical Implications of a Combined Advocacy Clinic*, 16 CLINICAL L. REV. 451 (2009) (exploring the pedagogical dimensions of a hybrid approach).

approaches to case selection in clinics and will require clinics to consider thoughtfully the goal-setting process and the weight to be given to faculty, student, and community perspectives.

Case and project selection in clinics is usually guided by a range of factors, including the instructor's interests and pedagogical goals, student interests and expectations, community needs, and practical considerations, such as the ability to complete a case in a semester or an academic year.<sup>80</sup> Some clinics also have made a long-term commitment to a particular area within immigration – for example, working with detainees or victims of trafficking.<sup>81</sup> Additionally, clinics often identify specific populations they wish to serve. For example, several immigration clinics have devoted resources to cases involving Afghan migrants, given the large numbers of Afghans who were paroled into the United States after American troops withdrew from Afghanistan in August 2021.<sup>82</sup>

To help overcome the culture of incrementalism, however, clinics could adopt a different approach to case selection and set ambitious, transformative goals for their work – whether over the course of a specific semester, an academic year, or several years.<sup>83</sup> For example, a clinic handling migrant-worker issues might commit to creating a visa system that allows for full visa portability and does not tether workers (and their status) to a particular employer. Another clinic might set a goal of allowing noncitizens to access public benefits in their state. This goal could be communicated externally and would become the defining principle for selecting matters for the clinic to handle. Instructors could still consider other factors, but the core imperative would be progress towards the desired transformative reform. Articulating such a goal could telegraph an explicit rejection of path dependence, along with a desire to move beyond incrementalism.

Setting the goal for reform, however, will require a careful and consultative process. As noted above, many clinics already consider the needs of their local

---

80. See Adrienne Jennings Lockie, *Encouraging Reflection on and Involving Students in the Decision to Begin Representation*, 16 CLINICAL L. REV. 357, 362-76 (2009).

81. See, e.g., *Detainee Rights Clinic – 7844*, UNIV. MINN., <https://law.umn.edu/course/7844/fall-2022/detainee-rights-clinic/chan-linus-wilson-laura> [https://perma.cc/TK2J-ZPJX]; *Immigrants' Rights & Human Trafficking Program*, BOS. UNIV. SCH. L., <https://www.bu.edu/law/current-students/jd-student-resources/experiential-learning/clinics/immigrants-rights-human-trafficking-clinic> [https://perma.cc/9PDP-S2QM].

82. See Posting of Shoba Sivaprasad Wadhia, ssw11@psu.edu, to iclinic@list.msu.edu (Feb. 20, 2022) (on file with author) (summarizing a call among immigration clinics working on Afghan cases and describing the work that specific clinics intend to undertake).

83. Some clinicians have articulated long-term goals for their clinics, if not specific policy outcomes. See, e.g., Deborah Archer, *Open to Justice: The Importance of Student Selection Decisions in Law School Clinics*, 24 CLINICAL L. REV. 1, 13-14 (2017) (noting that “fighting for social and racial justice” are the clinic’s “ambitious goals”).

communities when selecting cases. The voices and perspectives of affected communities should similarly guide the goal-setting process. Clinics will necessarily grapple with a series of challenging questions: Who are appropriate community representatives? Should clinics anchor this work by taking on an organizational client to guide goal setting and strategy? Should they focus on nationwide reform or on subfederal initiatives?<sup>84</sup> If community members articulate multiple needs, how should clinics prioritize them? What if the articulated priorities are modest in scale? What role should instructors and law students play in the selection process? While this Essay does not endeavor to prescribe an exact process, a core value underlying this proposal is the pursuit of ambitious structural reform to U.S. immigration law that will have a positive and transformative impact on the lives of noncitizens. Clinics can, of course, choose a goal that both satisfies this criterion and aligns with faculty and student objectives.

By naming an ambitious goal to anchor the clinic's work, clinics can also play an important role in normalizing radical change. When advocates—particularly grassroots organizers and community members—push for transformative change in the immigration system, their proposals are often dismissed as unrealistic.<sup>85</sup> There is an assumption that these proposals ignore the political and economic realities that constrain legal reform. Accordingly, perhaps because of the innate conservatism of much of the legal profession (and the risk aversion of the legal professoriate), attorneys engaged in legislative and policy work may be reluctant to embrace these proposals, lest one be perceived as an outlier who fails to understand the rules of the game. For example, a proposal to eliminate ICE, or to dramatically expand the pathways for permanent immigration, might be seen as a political nonstarter.<sup>86</sup> Yet clinics have the power to help move ideas like these from the periphery to the center of the conversation. Clinics could bolster such proposals with interdisciplinary, academic perspectives and could even undertake their own research to strengthen the case for reform. For better or for worse, the institutional legitimacy and gravitas that clinics bring to advocacy debates can help shift the terrain of the discourse. This type of intervention by

---

84. Achieving state-level reform can be deeply impactful and transformative. Depending on the precise advance, however, a “victory” in one jurisdiction can have an adverse spillover effect in another. For example, after advocates in Maryland secured the enactment of a law that disallowed immigration detention in state and local government facilities, ICE simply transferred detainees to the neighboring state of Pennsylvania, complicating the work of Maryland-based advocates. See Daniel Zawodny, *Maryland Lawmakers Passed Dignity Not Detention to Protect Immigrants. So ICE Detains Them Elsewhere*, BALT. BREW (July 28, 2022, 11:09 AM EST), <https://baltimorebrew.com/2022/07/28/maryland-lawmakers-passed-dignity-not-detention-to-protect-immigrants-so-ice-detains-them-elsewhere> [https://perma.cc/2W7A-YA76].

85. See *supra* note 26 and accompanying text.

86. *Id.*

clinics could productively disrupt policy conversations, where few proposals stray beyond the structure of the existing system.

Finally, transformative legal change will be difficult for an individual clinic to effect on its own. Accordingly, clinics can continue a long-standing tradition of working collaboratively to advance justice.<sup>87</sup> Currently, immigration clinics share information and experiences with one another and occasionally work in partnership on a specific dimension of practice or on behalf of a particular population.<sup>88</sup> Intensive and structured collaborations across institutions, however, are not the norm. To implement the vision laid out in this Essay, a cohort of clinics could embrace a specific transformative objective and work intentionally, across different jurisdictions and with different strategies, to achieve that goal. For example, imagine an abolitionist goal to end immigration detention. Clinics across various states could push for state-level decarceral policies or pursue creative litigation to undermine the growth of detention centers. Alternatively, clinics might leverage their respective strengths—legislative advocacy, impact litigation, community-based coalition work, etc.—to pursue their goal via multiple approaches.

Some transformative projects will be more challenging than others. Projects aimed at large-scale change will necessarily face greater obstacles. A proposal to abolish immigration detention, for example, will require significant restructuring of the immigration system and a rollback of long-standing congressional budgetary appropriations, and it will likely trigger harsh counternarratives about immigrant criminality and dangerousness. Arguably, however, an abolitionist project is even more worthy of pursuit precisely because advocates could confront so many entrenched forces. Others might approach the endeavor more pragmatically, reasoning that fewer points of resistance might indicate an easier path to success. These various considerations could be explored during the goal-setting process.

Although the undertaking will be difficult, clinics are optimally situated to disrupt incrementalism and to challenge path dependence in immigration policymaking. The very act of embracing an ambitious, transformative goal—and

---

87. See, e.g., Cynthia L. Dahl & Victoria F. Phillips, *Innovation and Tradition: A Survey of Intellectual Property and Technology Legal Clinics*, 25 CLINICAL L. REV. 95, 146-47 (2018) (describing various forms of cross-clinic collaboration); Davida Finger, Laila Hlass, Anne S. Hornsby, Susan S. Kuo & Rachel A. Van Cleave, *Engaging the Legal Academy in Disaster Response*, 10 SEATTLE J. SOC. JUST. 211, 214-232 (2011) (describing a nascent network of clinics engaged in disaster-response work in the U.S. South).

88. For example, in the past, clinical instructors have worked in tandem to help meet the immigration legal needs of noncitizen adults and youth in family-detention facilities. See Harris, *supra* note 68, at 158.

diligently pursuing that goal with the unique combination of resources, perspective, and expertise that clinics offer—will signal a departure from established practices in the advocacy community. By pursuing this approach, clinics can elevate proposals that have frequently languished at the margins of the debate. A clear focus on community needs will ground this work, and a collaborative structure will enhance the likelihood of success.

### *B. Instructional Enhancements*

Along with the strategic interventions described above, immigration clinics can alter the instructional content of the seminar or other learning space to (1) acknowledge that incrementalism and path dependence may stand in the way of the transformative change that community-oriented clinics seek, and (2) transmit knowledge, skills, and approaches that will allow future lawyers to engage in the challenging work of large-scale change-making. This pedagogical shift could include deeper classroom engagement regarding the conditions that permit transformative change: examining the work of scholars who have developed theories regarding such change and analyzing case studies of radical change in the law. Clinics can also elevate the importance of creative thinking and problem-solving in the work of lawyers, and they can relay strategies to deploy these skills. Finally, clinical instructors and students can apply lenses from critical theory to explore how conventional approaches to reforming U.S. immigration law do little to remedy the structural subordination and dehumanization that noncitizens experience.

The classroom component of law clinics typically focuses on skills instructions, case discussions, substantive law, and—to a lesser extent—simulation exercises, procedural law, and ethics.<sup>89</sup> To better prepare students for advancing radical reform, law clinics should incorporate new topics in the clinic seminar. First, law students would benefit from historical and theoretical grounding in the conditions that permit transformative change. For example, immigration clinics can study the circumstances that gave rise to the U.S. immigration laws in the 1960s—which substantially transformed the then-existing system—and the role that lawyers, legal institutions, and social movements played in bringing about that change.<sup>90</sup> This study need not be limited to immigration law but could encompass other areas of law or even case studies from other jurisdictions.

---

89. CENTER FOR THE STUDY OF APPLIED LEGAL EDUCATION, 2019-20 SURVEY OF APPLIED LEGAL EDUCATION 35 (2020).

90. See, e.g., MARGARET SANDS ORCHOWSKI, *THE LAW THAT CHANGED THE FACE OF AMERICA: THE IMMIGRATION AND NATIONALITY ACT OF 1965*, at 44-50 (2015).

As a complement to studying these historical examples, law clinics can also explore theories from the social sciences that explain how transformative change comes about. For example, John W. Kingdon's multiple-streams approach, which has gained traction in the public-policy literature, posits that significant policy change may be achieved when a publicly recognized problem, feasible solution, and political support converge.<sup>91</sup> Under this theory, external events can create opportunity for change, as can the work of "policy entrepreneurs" both inside and outside of government.<sup>92</sup> Punctuated-equilibrium theory is a related concept that originated in evolutionary biology and has been applied to multiple disciplines, including law.<sup>93</sup> Under this theory, periods of relative stasis are interrupted by episodes of rapid change.<sup>94</sup> Legal scholars have applied punctuated-equilibrium theory to explain developments in constitutional law and environmental law, among other fields.<sup>95</sup> Importantly, scholars have begun to name the conditions that permit substantial change to occur, including significant events that pierce the societal consciousness and the presence of a sufficiently powerful movement to overcome established interests.<sup>96</sup> The events that disrupt the equilibrium can take many forms—including disasters, economic swings, and technological change—and can co-occur.<sup>97</sup> One can easily imagine a vigorous discussion amongst clinical law students about these theories and the role of

- 
91. See generally JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (1984) (explaining how change takes place through agenda-setting processes in the United States). See also Daniel Béland & Michael Howlett, *The Role and Impact of the Multiple-Streams Approach in Comparative Policy Analysis*, 18 J. COMP. POL'Y ANALYSIS 221, 222 (2016) (providing an overview of Kingdon's proposal).
92. Béland & Howlett, *supra* note 91, at 222-23. Various scholars have built upon Kingdon's work, detailing the attributes and approaches of successful policy entrepreneurs. See, e.g., Evangelia Petridou & Michael Mintrom, *A Research Agenda for the Study of Policy Entrepreneurs*, 49 POL'Y STUD. J. 943, 944 (2021); Paul Cairney, *Three Habits of Successful Policy Entrepreneurs*, 46 POL'Y & POL. 199, 200 (2018).
93. David F. Prindle, *Importing Concepts from Biology into Political Science: The Case of Punctuated Equilibrium*, 40 POL'Y STUD. J. 21, 22 (2012); Rob Robinson, *Punctuated Equilibrium and the Supreme Court*, 41 POL'Y STUD. J. 654, 654-55 (2013).
94. Mark C. Niles, *Punctuated Equilibrium: A Model for Administrative Evolution*, 44 J. MARSHALL L. REV. 353, 353-54 (2011).
95. See generally PUNCTUATED EQUILIBRIUM AND THE DYNAMICS OF U.S. ENVIRONMENTAL POLICY (Robert Repetto ed., 2006) (explaining changes in environmental policy); Walter Dean Burnham, *Constitutional Moments and Punctuated Equilibria: A Political Scientist Confronts Bruce Ackerman's We the People*, 108 YALE L.J. 2237 (1999) (responding to Bruce Ackerman's account of U.S. constitutional development).
96. Niles, *supra* note 94, at 357-58.
97. *Id.*; Nestor M. Davidson & Rashmi Dyal-Chand, *Property in Crisis*, 78 FORDHAM L. REV. 1607, 1616 (2010).

lawyers, community members, and other stakeholders in bringing about transformative reforms.

Additionally, law clinics could teach more robust, theoretically grounded approaches to creative solution generation and problem-solving. A fundamental tenet of lawyering is to first understand the goals of the client or community and then identify strategies to achieve those goals.<sup>98</sup> Yet time and resource constraints, or the lawyer's own sense of realpolitik, may constrain the universe of both goals and solutions. By cultivating the habit of creative thinking and fostering the conditions where it can occur, law clinics can empower students to imagine out-of-the-box approaches. As Janet Weinstein and Linda Morton describe, law schools rarely emphasize the skill of creative thinking, focusing instead on analogical reasoning.<sup>99</sup> Yet students need creative thinking, and an understanding of the cognitive processes that inhibit and enable it, to transcend established patterns of thinking and practice.<sup>100</sup> With an expanded universe of possibilities, students – along with the clients and the communities they serve – can make more intentional choices between incrementalist and radical approaches.

Creative thinking is an integral component of problem-solving, a skill that the profession has deemed to be a critical part of lawyering.<sup>101</sup> Although law students must regularly solve problems in clinics, clinics infrequently teach problem-solving as an independent skill. Various scholars have put forth helpful models of problem-solving, which typically include identifying and defining the problem, collecting relevant facts and information (including the goals and perspectives of stakeholders), naming and implementing strategies, and revising one's approach as needed.<sup>102</sup> For complex, community-based problems, Andrea Seielstad has proposed a more robust problem-solving approach,<sup>103</sup> and several

---

98. See STEFAN H. KRIEGER, RICHARD K. NEUMANN, JR. & RENÉE M. HUTCHINS, *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS* 303-05 (6th ed. 2020).

99. Janet Weinstein & Linda Morton, *Stuck in a Rut: The Role of Creative Thinking in Problem Solving and Legal Education*, 9 *CLINICAL L. REV.* 835, 836 (2003).

100. See *id.* at 844-47.

101. A groundbreaking American Bar Association report from 1992, known as the MacCrate Report, names problem-solving as a fundamental skill for lawyers. *Legal Education and Professional Development – An Educational Continuum*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR, TASK FORCE ON LAW SCHOOLS & THE PROFESSION 141-51.

102. See, e.g., Anna E. Carpenter, *The Project Model of Clinical Education: Eight Principles to Maximize Student Learning and Social Justice Impact*, 20 *CLINICAL L. REV.* 39, 73 (2013); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 *UCLA L. REV.* 754, 801-17 (1984); Kruse, *supra* note 76, at 422-23.

103. See Andrea M. Seielstad, *Community Building as a Means of Teaching Creative, Cooperative, and Complex Problem Solving in Clinical Legal Education*, 8 *CLINICAL L. REV.* 445, 490-512 (2002).



scholars have outlined specific pedagogical tools to foment creative problem-solving among law students.<sup>104</sup> Charles Lindblom himself outlined a cohesive solution-generating strategy, called comprehensive rationality, as an alternative to incrementalism.<sup>105</sup> These various approaches can be integrated intentionally into the seminar components of immigration clinics and applied concomitantly to students' representational or advocacy work.

Finally, consistent with the trend in clinical education towards integrating critical perspectives, law clinics can encourage students to reflect on how conventional liberal law-reform efforts—which tend to operate in incremental and path-dependent ways and which many clinics embrace—fail to support vulnerable communities adequately and instead entrench existing power differentials.<sup>106</sup> While the existing U.S. immigration system does provide opportunities for individual and familial betterment, it gives significant weight to the needs and preferences of the private sector.<sup>107</sup> It has also embraced a punitive and carceral approach that both draws from and perpetuates structural racism.<sup>108</sup> If one examines the immigration-law developments from the late 1990s to the present, it is apparent that the prevailing approaches have done little to alter the fundamental dynamics that noncitizens experience—a baseline of hostility, social and economic disadvantage, and second-class status.<sup>109</sup>

These two approaches—strategic interventions and pedagogical innovations—are likely to be mutually reinforcing. Clinical educators often seek to align

---

104. See, e.g., Linda Morton, *Teaching Creative Problem Solving: A Paradigmatic Approach*, 34 CAL. W. L. REV. 375, 384-86 (1998).

105. Diver, *supra* note 13, at 395-400.

106. See Kevin R. Johnson & Amagda Perez, *Clinical Legal Education and the U.C. Davis Immigration Law Clinic: Putting Theory into Practice and Practice into Theory*, 51 SMU L. REV. 1423, 1454-56 (1998).

107. See, e.g., Roxanne Lynne Doty & Elizabeth Shannon Wheatley, *Private Detention and the Immigration Industrial Complex*, 7 INT'L POL. SOCIO. 426, 435-39 (2013) (describing the influence that the private sector has wielded in the area of immigration detention); Giovanni Facchini, Anna Maria Mayda & Prachi Mishra, *Do Interest Groups Affect US Immigration Policy?*, 85 J. INT'L. ECON. 114, 126 (2011) (finding that the presence of active business lobbies is associated with lower barriers to migration and greater number of visas).

108. See Amada Armenta, *Racializing Crimmigration: Structural Racism, Colorblindness, and the Institutional Production of Immigrant Criminality*, 3 SOCIO. RACE & ETHNICITY 82, 92-93 (2016).

109. See, e.g., Raquel E. Aldana, *Introduction: The Subordination and Anti-Subordination Story of the U.S. Immigrant Experience in the 21st Century*, 7 NEV. L.J. 713, 715 (2007).

their case and project selections with content covered in the classroom component of the clinic.<sup>110</sup> As students learn new information and skills, they can deploy that knowledge in their casework. Even for educators who are reluctant to take on projects involving large-scale change, some of the pedagogical innovations alone are likely to have a spillover effect on case selection within clinics. For example, new instructional content focused on creative problem-solving may spark interest in advocacy projects where students could pursue discrete but impactful law-reform work.

Importantly, these changes will show students a refined vision of what the next generation of immigrants' rights lawyers needs. The traditional canon of clinical legal education appropriately emphasizes thoughtful interviewing, structured counseling, and careful fact investigation.<sup>111</sup> Building on that foundation, immigration clinics that have prioritized community-based and cross-disciplinary work in recent decades have generated a cohort of lawyers with greater sensibility to grassroots engagement and interdisciplinary collaborations.<sup>112</sup> By beginning to address the barriers to transformative change and by embracing more ambitious projects, clinics can further elevate their work to meet the challenges of the current moment.

In making these strategic-engagement and pedagogical-reform recommendations, I recognize the difficulties in implementing this vision, including time constraints, preexisting commitments, and institutional expectations for the kind of work the clinic will be doing. As I have observed over the course of my career, instructors may, in addition to their clinical work, be balancing other teaching or administrative responsibilities, along with service obligations both within their institutions and in the community at large. Nearly all clinicians have existing client obligations that will continue to occupy part of the clinic's docket. Embracing a new approach will also mean that clients who would otherwise be served by clinics will have to be turned away. Furthermore, clinicians who rely on grants or government funding may be subject to explicit or implied limitations on their work; along these lines, clinicians at public institutions or who lack security of position may be particularly susceptible to political pressures and

---

110. See Susan Bryant & Elliott Milstein, *The Clinic Seminar: Choosing the Content and Methods for Teaching in the Seminar*, in SUSAN BRYANT, ELLIOTT S. MILSTEIN & ANN C. SHALLECK, TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY 35-38 (2014) (articulating the value of aligning the seminar and fieldwork components of a clinic).

111. See, e.g., David A. Binder & Paul Bergman, *Taking Lawyering Skills Training Seriously*, 10 CLINICAL L. REV. 191, 197 (2003) (naming the lawyering skills emphasized by leading textbook authors).

112. See, e.g., Ashar, *supra* note 9, at 397-403.

may face intense external scrutiny.<sup>113</sup> Given these forces, I recognize that initial forays into the project of transformation may, ironically enough, be incremental in nature. But through structured collaborations and a genuine willingness to reimagine what is possible, meaningful reform of the U.S. immigration system may be within reach.

## CONCLUSION

The movement for immigrants' rights in the United States has spent decades agitating for changes to the law that will provide some stability for the lives of noncitizens. Yet most of the proposals that have gained momentum do not contemplate fundamental structural reform of the U.S. immigration system. Rather, the twin forces of incrementalism and path dependence have generated a dynamic where modest, periodic advances have become the norm under immigrant-friendly administrations. While helpful in many respects, these improvements do not significantly alter the forces that subordinate noncitizens.

Law clinics are well positioned to challenge this dynamic by working in collaboration with affected communities to develop and center proposals for transformative change. Instead of continuing to operate within advocacy circles that are reflexively – if understandably – constrained by incrementalism and path dependence, law clinics and their partners can imagine radically different possibilities for the U.S. immigration system and structure the clinics' work around achieving these goals. At the same time, clinics can introduce complementary bodies of knowledge and skill to ensure law students are prepared to tackle the project of transformative change. While this endeavor is likely to be challenging and may need refinement, alternate models will only enrich immigrant advocacy and clinical instruction, both critically important spaces.

*Professor of Law and Director of the Immigrant Justice Clinic at American University Washington College of Law. Many thanks to Saba Ahmed, Cori Alonso-Yoder, Michelle Assad, David Baluarte, Priya Baskaran, Sarah Paoletti, Reena Parikh, Ragini Shah, Anita Sinha, and the editors of the Yale Law Journal for helpful comments on earlier drafts of this Essay. Adam Domitz and Sarah Cossman provided invaluable research assistance.*

---

113. See, e.g., Peter A. Joy, *Political Interference in Clinical Programs: Lessons from the U.S. Experience*, 8 INT'L J. CLINICAL LEGAL EDUC. 83, 88-94 (2005) (cataloging interference by state officials in the work of law clinics at public universities).