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Moral Judgments, Expressive Functions, and
Bias in Immigration Law

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In a lucid and trenchant style characteristic of Professor Hiroshi Motomura's writing, *Immigration Outside the Law* offers rich descriptive and prescriptive analyses of three major themes underlying debates about unauthorized migration: the meaning of unlawful presence, state and local involvement in the regulation of unauthorized migration, and the integration of unauthorized migrants into American society. This review advances several ideas that I argue are important to understanding these key themes. In brief, I suggest that a more comprehensive understanding of public debates about unauthorized migration requires examining lay moral judgments about unlawful presence, the expressive functions of immigration law, and the nature of contemporary forms of racial and ethnic bias against Latinos. I discuss how considering these ideas in connection with the book's key themes and arguments might extend, strengthen, and complicate the book's analysis and insights.

MORAL JUDGMENTS, EXPRESSIVE FUNCTIONS, AND BIAS IN IMMIGRATION LAW

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Abstract

In a lucid and trenchant style characteristic of Professor Hiroshi Motomura's writing, *Immigration Outside the Law* offers rich descriptive and prescriptive analyses of three major themes underlying debates about unauthorized migration: the meaning of unlawful presence, state and local involvement in the regulation of unauthorized migration, and the integration of unauthorized migrants into American society. This review advances several ideas that I argue are important to understanding these key themes. In brief, I suggest that a more comprehensive understanding of public debates about unauthorized migration requires examining lay moral judgments about unlawful presence, the expressive functions of immigration law, and the nature of contemporary forms of racial and ethnic bias against Latinos. I discuss how considering these ideas in connection with the book's key themes and arguments might extend, strengthen, and complicate the book's analysis and insights.

Introduction

Unauthorized migration and laws governing unauthorized migration are some of the most controversial issues of our time that incite recurring, impassioned, and often acrimonious public debates. How should we understand these debates and how should policymakers respond to unauthorized migration? These are the two key questions that Professor Hiroshi Motomura addresses in his book, *Immigration Outside the Law*.¹

This book cannot come at a more opportune time. For more than a decade, legislative efforts to overhaul the U.S. immigration system have failed. Despite bipartisan consensus on the need for comprehensive

*For helpful conversations and comments, I am deeply grateful to Scott Altman and Hiroshi Motomura. Lisa Splawinski and Ian Day provided exceptional editorial assistance. I am grateful to the University of Cincinnati College of Law for sponsoring the special forum that featured my discussions with Hiroshi Motomura on his book.

¹ HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* (2014).

immigration reform, major sets of legislation passed by the U.S. Senate in 2006 and 2013, respectively, died in the House of Representatives.² In the face of this intractable and seemingly interminable deadlock, President Obama announced in November 2014 his plan for executive action that would provide parents of U.S. citizens and lawful permanent residents temporary relief from deportation, establish new border security priorities, and modify the legal immigration system.³ This announcement immediately triggered a political firestorm of criticism, threats of government shutdown, and lawsuits brought by Republican governors and state attorneys general.⁴ In February of 2015, Judge Hanen of the Southern District of Texas issued a temporary injunction blocking the implementation of President Obama's executive action on immigration.⁵

These recent developments remind us that what the public needs more than ever is a historically informed and clear—yet nuanced—conceptual framework for thinking about unauthorized migration. *Immigration Outside the Law* offers precisely such a framework. I begin by briefly reviewing some of the major analyses and arguments that the book advances.

The Book

In a lucid and trenchant style characteristic of Professor Motomura's writing, *Immigration Outside the Law* offers rich descriptive and prescriptive analyses of the following three major themes underlying debates about unauthorized migration: (1) the meaning of unlawful presence; (2) state and local roles in matters relating to unauthorized migration; and (3) the integration of unauthorized migrants into American society. These themes are drawn from *Plyler v. Doe*, a landmark U.S.

² See Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006); Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013).

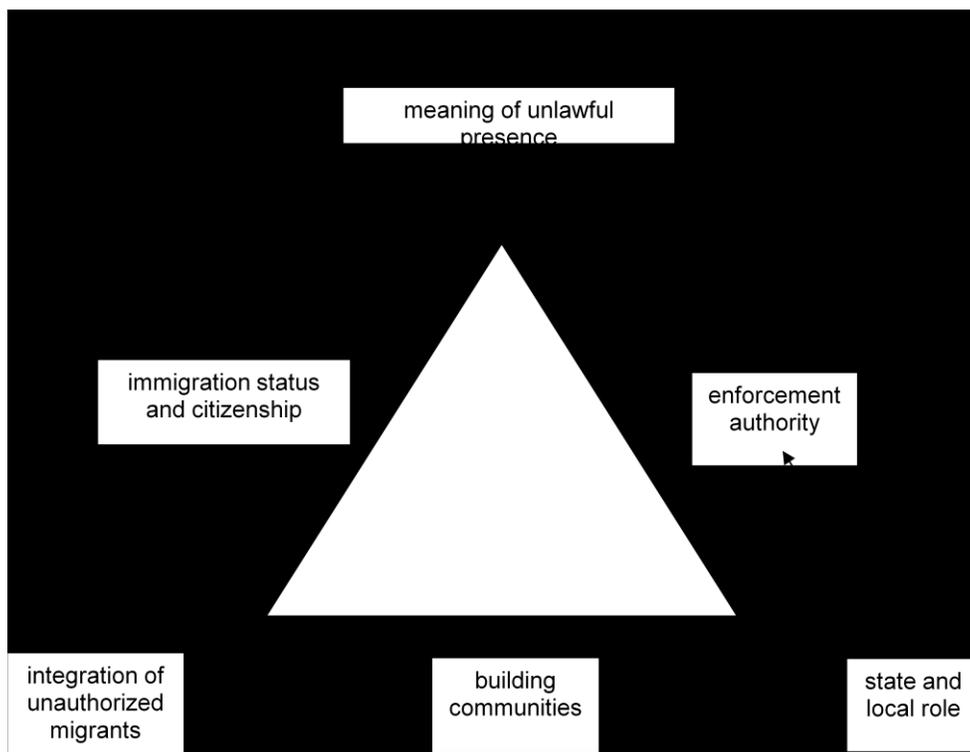
³ See The White House, Office of the Press Secretary, *Fact Sheet: Immigration Accountability Executive Action* (Nov. 20, 2014), <http://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action>.

⁴ See, e.g., David Montgomery & Julia Preston, *17 States Suing on Immigration*, N.Y. TIMES, Dec. 3, 2014, http://www.nytimes.com/2014/12/04/us/executive-action-on-immigration-prompts-texas-to-sue.html?_r=0; *Republicans Weigh Government Shutdown to Stop Obama on Immigration*, REUTERS, Nov. 16, 2014, <http://www.reuters.com/article/2014/11/16/us-usa-immigration-congress-idUSKCN0J00U320141116>.

⁵ *Texas v. United States*, No. CIV. B-14-254, 2015 WL 648579 (S.D. Tex. Feb. 16, 2015).



Supreme Court case striking down a Texas statute that deprived unauthorized children of public education.⁶ Each of the three themes forms the corners of a triangle in Professor Motomura's schematic roadmap of the book; each side of the triangle represents the interrelationship among the three major themes. The book is organized into seven substantive chapters. Professor Motomura examines the three themes in turn in the first three substantive chapters of *Immigration Outside the Law*, and their interrelationships are explored in depth in the subsequent three chapters. The book concludes with a final chapter that analyzes various measures and approaches that policymakers ought to consider in response to unauthorized migration. Figure 1 is a reproduction of Professor Motomura's helpful schematic representation of these major themes and their corresponding book chapters.⁷



The key descriptive claims and prescriptive arguments of the book can be summarized as follows. First, Professor Motomura explains that unlawful status under current U.S. immigration law is changeable, ambiguous, and uncertain: “Immigration status can change, even if it is

⁶ 457 U.S. 202 (1982).

⁷ See MOTOMURA, *supra* note 1, at 16, fig. I.2.

clear. Or status may be in a gray area between lawful and unlawful. And a great many noncitizens whose presence clearly violates immigration law have historically not been apprehended and deported.”⁸ Professor Motomura argues that this fundamentally inconclusive nature of unlawful presence is not by accident, but by design. The long history of U.S. demand for flexible and cheap labor, combined with a highly restrictive admission system, has produced a large unauthorized population that the U.S. government has implicitly tolerated. Moreover, the U.S. government has exercised discretionary, unpredictable, and at times discriminatory, enforcement against this growing population.⁹ Professor Motomura concludes that these aspects of the U.S. immigration system weigh against treating unlawful presence as “deeply immoral” or assigning “serious stigma to unauthorized migrants.”¹⁰

The second essential theme in debates about unauthorized migration that *Immigration Outside the Law* analyzes is the role of state and local governments in regulating immigration and immigrants. Professor Motomura identifies two main dimensions of the vast and growing array of immigration-related laws at the state and local level. The first dimension of subfederal laws is the spectrum between enhancing enforcement of federal immigration law on the one hand, and neutralizing federal enforcement and integrating unauthorized migrants into local communities on the other.¹¹ The second dimension of subfederal laws is the spectrum between direct and indirect engagement with federal immigration enforcement.¹² Professor Motomura places these subfederal laws in their proper historical context and examines federal preemption arguments in an effort to identify the “right decision-maker” for immigration enforcement.¹³ He concludes that local and state enforcement activities ought to be limited in favor of federal enforcement given that the latter “is less likely to lead to discrimination that eludes detection and remedy.”¹⁴

The third key theme in debates about unauthorized migration that *Immigration Outside the Law* analyzes is the integration of unauthorized migrants. First, Professor Motomura argues that unauthorized immigrants ought to be treated as “Americans in waiting”—that is, as future members

⁸ MOTOMURA, *supra* note 1, at 30.

⁹ MOTOMURA, *supra* note 1, at 22.

¹⁰ MOTOMURA, *supra* note 1, at 21.

¹¹ MOTOMURA, *supra* note 1, at 85.

¹² MOTOMURA, *supra* note 1, at 85.

¹³ MOTOMURA, *supra* note 1, at 132.

¹⁴ MOTOMURA, *supra* note 1, at 139.



of American society. In support of this argument, he explores at length two related but distinct ideas: “immigration as contract” and “immigration as affiliation.”¹⁵ Professor Motomura argues persuasively why these ideas, which he originally developed with respect to lawful permanent residents,¹⁶ ought to be extended to unauthorized migrants. Second, Professor Motomura argues that states and local laws and policies already recognize and foster—as they should—integration of unauthorized migrants into local neighborhoods, schools, and workplaces.¹⁷ Finally, Professor Motomura analyzes broad-scale legalization (or amnesty) programs as one essential mechanism of integration, offering compelling historical, political, and moral arguments in support of legalization.¹⁸

In the final chapter called “Finding Answers,” *Immigration Outside the Law* focuses on temporary worker programs, evaluating its various challenges and promises as an effective response to unauthorized migration.¹⁹ This analysis, however, is much broader in scope than temporary worker programs. For example, Professor Motomura calls for a careful consideration of other longer-term responses to unauthorized migration, including international economic development initiatives, and changes to domestic education and domestic economic policy. As Professor Motomura reasons, “focusing on enforcement while ignoring larger forces that lie at the root of migration patterns is just as ineffective as responding to drugs only with more prisons, or to conflict only with more troops.”²⁰

Overall, *Immigration Outside the Law* accomplishes three ambitious goals. The book details historical underpinnings that provide a contextualized basis for understanding the current U.S. immigration system and its paradoxes. The book also offers an insightful analysis of some of the contemporary dynamics underlying current U.S. immigration policies that have produced—by design—a large population of marginalized and exploited workers inside our borders. Finally, the book provides a careful evaluation of how we ought to respond “as a nation committed to a sense of equality and human dignity” to unauthorized migration.²¹ In these ways and more, *Immigration Outside the Law* presents a probing analysis of some

¹⁵ MOTOMURA, *supra* note 1, at 106-12.

¹⁶ See HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2007).

¹⁷ MOTOMURA, *supra* note 1, at 145-71.

¹⁸ See MOTOMURA, *supra* note 1, at 172-207.

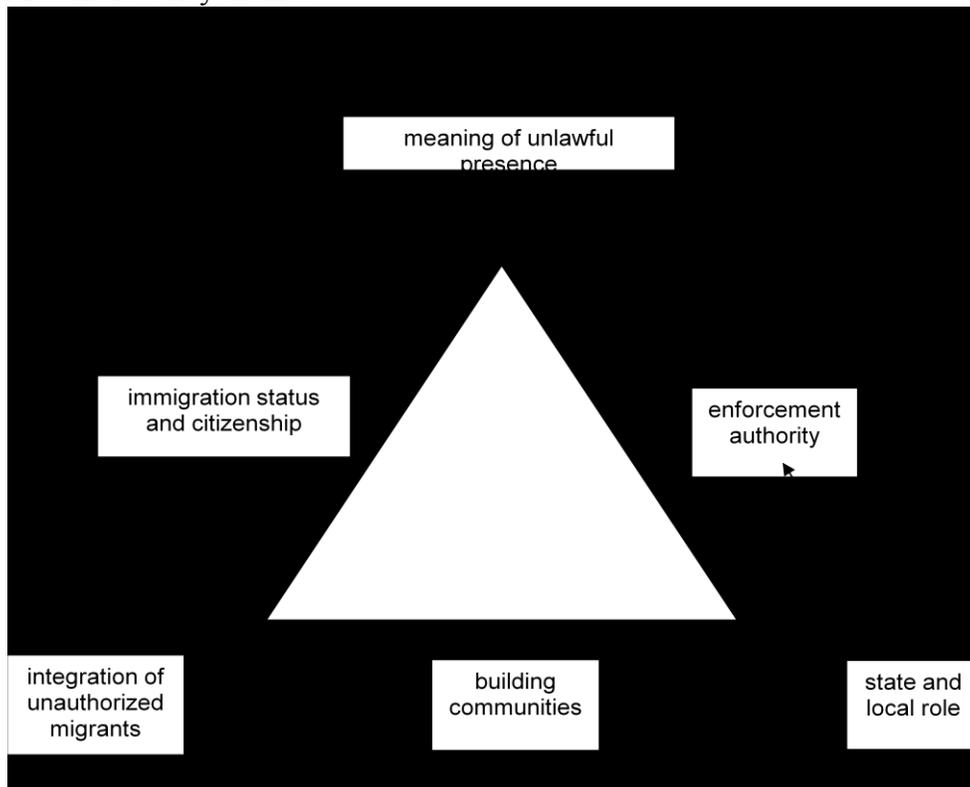
¹⁹ See MOTOMURA, *supra* note 1, at 208-35.

²⁰ See MOTOMURA, *supra* note 1, at 231.

²¹ See MOTOMURA, *supra* note 1, at 235.

of the most difficult issues that unauthorized migration and regulation of unauthorized migration raise.

In the remainder of this review, I briefly present three related ideas that are not directly or systematically addressed in *Immigration Outside the Law*, and explain why and how these additional ideas might be important to more fully understanding the book's three key themes. Figure 2 visually illustrates how each of these additional ideas relates to Professor Motomura's key themes.



In short, I suggest that lay moral judgments about unlawful presence are fundamental to public debates about unauthorized migration.²² I also argue that public controversies about laws relating to unauthorized

²² Whether and to what extent nation states have a moral obligation to accept noncitizens into their political communities is a related but analytically distinct question. For scholarly debates on the ethics and morality of state policies restricting international migration, see, for example, JOSEPH H. CARENS, *ETHICS OF IMMIGRATION* (2013); CHRISTOPHER HEATH WELLMAN & PHILIP COLE, *DEBATING THE ETHICS OF IMMIGRATION: IS THERE A RIGHT TO EXCLUDE?* (2011); RYAN PEVNICK, *IMMIGRATION AND THE CONSTRAINTS OF JUSTICE* (2011); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983).

migration and unauthorized migrants are often not only debates about the instrumental effects of those laws, but also their expressive effects. Finally, I propose that contemporary forms of racial/ethnic bias against Latinos may substantially limit the efficacy of Professor Motomura's policy proposals, particularly policies relating to integration of unauthorized migrants into the American society. I explore how incorporating each of these ideas into the framework presented in *Immigration Outside the Law* might extend, strengthen, and complicate the book's analysis and insights.

Moral Judgments About Unlawful Presence

In an earlier set of empirical studies, I analyzed the centrality of moral agency of unauthorized migrants in their decisions to engage in legal noncompliance.²³ In those studies, I found that the current and prospective unauthorized migrants' general legal attitudes, perceived morality about violating U.S. immigration law, views about the legitimacy of U.S. authority, and norms about border crossings are significant determinants of their migration decisions, above and beyond economic or instrumental factors.²⁴ I thus concluded that we cannot fully understand decisions to migrate illegally without considering individuals' underlying values and norms. Although these findings and conclusions did not strike me as especially controversial, a recent *L.A. Times* column that featured the work produced a great deal of emotionally-charged and value-laden responses from its readers.²⁵ For example, readers debated whether unauthorized migrants were "dishonest, lying, cheating law-breaking persons," or hardworking individuals who risked everything to support their families through economic hardship.²⁶

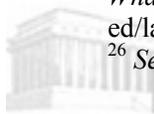
This debate mirrors the broader public discourse on unauthorized migration that is rooted in moral judgments about unlawful presence. More specifically, this broader public discourse is marked by widely divergent moral evaluations of unauthorized migration and migrants. On one side of

²³ Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 UCLA L. REV. 622 (2015) (examining the prospective and current unauthorized migrants' neutralization techniques that justify their decisions to engage in unauthorized migration); Emily Ryo, *Deciding to Cross: Norms and Economics of Unauthorized Migration*, 78 AM. SOC. REV. 574 (2013) (examining the rational choice and normative theories of legal noncompliance in immigration context).

²⁴ *Id.*

²⁵ See Patt Morrison, *Column: Why Do People Cross the Border Illegally? It's Not What You Think*, L.A. TIMES, Nov. 25, 2014, <http://www.latimes.com/opinion/oped/la-oe-morrison-ryo-immigration-20141126-column.html#page=1>.

²⁶ *See id.*



the debate, some observers insist that “illegal immigration is very much an issue that needs harsh moral judgment. . . . Anyone who knows the difference between right and wrong knows the difference between legal and illegal conduct.”²⁷ On the other side of the debate are observers who argue that “when persons cannot find employment in their country of origin to support themselves and their families, they have a right to find work elsewhere in order to survive. . . . Regardless of their legal status, migrants, like all persons, possess inherent human dignity that should be respected.”²⁸ Both sets of beliefs are grounded in basic assumptions about the “right” or “ethical” conduct required under the circumstances.

In other words, moral judgments play a key role in public debates about unauthorized migration. Explicitly recognizing and addressing this fundamental aspect of public debates about unauthorized migration will extend *Immigration Outside the Law*’s current analysis in significant ways. Recall the book’s discussion on the meaning of unlawful presence. Professor Motomura explains that the meaning of unlawful presence is inconclusive—and furthermore, that it is inconclusive by design. He offers this illuminating discussion to ultimately argue that there are strong moral reasons against treating unauthorized migrants as immoral and deserving of social stigma. We might thus understand one of the book’s key—albeit implicit—aims as countering lay moral judgments about unlawful presence.

But faulty assumptions about the legal/illegal divide that Professor Motomura elegantly refutes in his book are not the only factors that shape people’s moral judgments about unlawful presence. On the contrary, these lay moral judgments are likely shaped by a variety of social forces, including the media, social movement framings, and political rhetoric, to name only a few. For example, politicians often compete to persuade the public of their particular moral vision—both about who unauthorized migrants are and who we are as Americans in our treatment of unauthorized migrants. Consider President Obama’s November 2014 speech announcing his deferred action plan, in which he argued that enforcement should focus

²⁷ *Immigration: A Moral Issue*, WASH. TIMES, Nov. 18, 2004, <http://www.washingtontimes.com/news/2004/nov/18/20041118-093818-9288r/>.

²⁸ United States Conference of Catholic Bishops, *Strangers No Longer: Together on the Journey of Hope*, ¶¶ 35, 38, available at <http://www.usccb.org/issues-and-action/human-life-and-dignity/immigration/strangers-no-longer-together-on-the-journey-of-hope.cfm> (Jan. 22, 2003).

only on “[f]elons, not families. Criminals, not children.”²⁹ Implicit in this statement is the idea that not all unauthorized migrants are equally deserving of condemnation by virtue of their lack of legal status. In ending his speech, President Obama made an even more direct appeal to his audiences’ moral sensibilities by urging empathy rather than condemnation: “Scripture tells us that we shall not oppress a stranger, for we know the heart of a stranger—we were strangers once, too. My fellow Americans, we are and always will be a nation of immigrants. We were strangers once, too.”³⁰

What are the other forces that influence lay moral judgments about unlawful presence? How malleable are these judgments? How do these judgments interact with our political, social, and religious beliefs and value systems? These questions call for delineating more comprehensively the origins and the nature of existing moral judgments about unlawful presence. Ultimately, systematically addressing these questions will not only offer a fuller account of the nature of debates about unauthorized migration in general and the meaning of unlawful presence in particular, but also allow us to identify the most effective means of transforming the basic terms of those debates.

Expressive Functions of Immigration Law

So far, I have suggested that fundamental to debates about unauthorized migration are moral judgments about unlawful presence. A related but distinct argument I now advance is that controversies about laws relating to unauthorized migration are often debates about the expressive content of these laws. By expressive content, I mean social or symbolic “statements” that certain laws might convey about the legitimacy of certain attitudes, values, or norms.³¹ I offer a brief overview of expressive theories of law and discuss why expressive functions of immigration law might be important to understanding debates about unauthorized migration. I then illustrate how expressive theories might lend additional support to *Immigration Outside the Law*’s analysis of state and local regulations of immigration and immigrants.

²⁹ “*We Were Strangers Once, Too*”: *The President Announces New Steps on Immigration*, THE WHITE HOUSE BLOG (Nov. 20, 2014), <http://www.whitehouse.gov/blog/2014/11/20/we-were-strangers-once-too-president-announces-new-steps-immigratio>.

³⁰ *Id.*

³¹ See generally Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022-25 (1996).

Though varying models of expressive theories of law exist,³² two key ideas are common across these theories. First, expressive theories posit that laws can and often do “say something” or “send a message” to the community about the importance of certain social values or social commitments. For example: “A State may communicate its contempt for blacks by requiring the racial segregation of public facilities. Racial segregation sends the message that blacks are untouchable, a kind of social pollutant from which ‘pure’ whites must be protected.”³³ Likewise, criminal law scholars have long recognized that criminal punishment serves a uniquely expressive function—a moral condemnation of the community—which is distinct from other justifications for punishment such as deterrence and retribution.³⁴ The second key idea underlying expressive theories of law is that “legal expressions about appropriate evaluative attitudes”³⁵ have the power to shape people’s personal attitudes, values, and social norms.³⁶ Laws might have this influence because people are motivated to seek the approval and esteem of others, and laws presumably provide signals about what others in society or the community approve.³⁷

What kind of authoritative expressions might be common among state and local laws relating to unauthorized migration? Professor

³² See generally Yuval Feldman, *The Expressive Function of Trade Secret Law: Legality, Cost, Intrinsic Motivation, and Consensus*, 6 J. EMP. LEGAL STUD. 177 (2009).

³³ Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1528 (2000).

³⁴ See generally Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996); Bernard E. Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship Between the Moral Limits of the Criminal Law and the Expressive Functions of Punishment*, 5 BUFF. CRIM. L. REV. 145 (2001). Examples of other laws possessing these types of expressive characteristics are common. See, e.g., Wibren van der Burg, *The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues*, 20 LAW & PHIL. 31 (2001); N. Scott Arnold, *Postmodern Liberalism and the Expressive Function of Law*, 17 SOC. PHIL. & POL’Y 87 (2000).

³⁵ See Sunstein, *supra* note 31, at 2025.

³⁶ See generally Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998); Robert Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1 (2000); Emanuela Carbonara et al., *Lawmakers as Norm Entrepreneurs*, 4 REV. L. & ECON. 779 (2008).

³⁷ Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000). For a review of other theories about the specific mechanisms through which laws might change attitudes, values, and social norms, see Maggie Wittlin, *Buckling Under Pressure: An Empirical Test of the Expressive Effects of Law*, 28 YALE J. ON REG. 419, 424-27 (2011).

Motomura distinguishes between state and local laws that enhance enforcement of federal immigration law versus those that seek to neutralize federal enforcement and integrate unauthorized migrants.³⁸ Broadly speaking, enforcement-focused laws might express hostility and contempt toward unauthorized migrants, conveying a message that emphasizes these migrants' purportedly inferior moral, social, and political standing.³⁹ In contrast, integrationist laws might impart a message of societal commitment to equality, tolerance, and inclusion. These messages embody conflicting and opposing viewpoints about the nature of group identity, political membership, and social belonging; thus, debates about unauthorized migration are often disagreements about the expressive content of these laws. For example, Governor Jerry Brown, speaking about the California law providing unauthorized immigrants driver's licenses,⁴⁰ noted: "No longer are undocumented people in the shadows. They are alive and well and respected in the state of California."⁴¹ Other observers pointed to equally non-instrumental reasons for their opposition of the law; Kern County Sheriff Donny Youngblood, for instance, argued: "I just think that if someone is in the country illegally, for us to give them a legal ability to drive makes absolutely no sense. That . . . really bothers me."⁴²

Why might it be important to consider expressive theories of law in the context of *Immigration Outside the Law's* analysis of the state and local involvement in immigration regulation? Professor Motomura argues that federal preemption ought to apply to limit the immigration authority of state and local governments, as they are more likely than the federal government to engage in enforcement-related discrimination that eludes detection and remedy.⁴³ In contrast, he argues that state and local integrationist measures

³⁸ MOTOMURA, *supra* note 1, at 85.

³⁹ Existing studies of subfederal legislative activity have focused on the related but distinct question of what factors motivate state and local governments to engage in immigration policymaking. For a review of this literature, see Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074 (2013).

⁴⁰ Ca. A.B. 60, Driver's Licenses: Eligibility: Required Documentation (2013).

⁴¹ Jaqueline Hurtado & Catherine E. Shoichet, *New California Law Gives Undocumented Immigrants Driver's Licenses*, CNN, (Oct. 3, 2013, 9:35 p.m.), <http://www.cnn.com/2013/10/03/us/california-undocumented-immigrant-drivers-licenses/index.html>.

⁴² Richard Winton, Kate Mather & Hector Becerra, *California's Immigrant Driver's License Bill Is Driving Debate*, L.A. TIMES, Sept. 13, 2013, <http://www.latimes.com/local/la-me-immigrant-drivers-license-20130914-story.html#page=1>.

⁴³ MOTOMURA, *supra* note 1, at 139-42.

do not pose the same risk of harm and thus should not be preempted.⁴⁴ Insofar as one of the major concerns about enforcement-focused state or local measures is the heightened risk of discrimination, expressive theories of law provide additional reasons for concern.

First, to the extent laws shape and mold attitudes, values, and social norms, as expressive theories posit, the discriminatory effects of local enforcement-focused laws might be much more diffuse and broader than we might otherwise expect. Attitudinal effects of law are no less important than direct behavioral effects; a large body of research shows that attitudes can diffuse into people's judgments and decisions to produce interpersonal bias and discriminatory behavior.⁴⁵ Empirical studies applying expressive theories to immigration law are rare,⁴⁶ but emerging research suggests that immigration laws can produce attitudinal shifts. René Flores, for example, finds that the exclusionary immigration-related ordinance in Hazleton, Pennsylvania, had the effect of increasing anti-immigrant activism and hardening ethnic boundaries in the short-term.⁴⁷

Second, to the extent laws affect attitudes by signaling community norms, expressive theories predict that local laws will have a greater influence on attitudes than national laws because "most [social] approval and disapproval occur locally, where others observe us."⁴⁸ In other words, expressive effects of enforcement-focused measures that raise concerns about discrimination might be magnified at the local level. In these ways, a consideration of expressive theories of law in general and expressive

⁴⁴ MOTOMURA, *supra* note 1, at 152.

⁴⁵ For a review, see Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143 (2004); Lincoln Quillian, *New Approaches to Understanding Racial Prejudice and Discrimination*, 32 ANN. REV. SOC. 299 (2006); John F. Dovidio et al., *Understanding Bias Toward Latinos: Discrimination, Dimensions of Difference, and Experience of Exclusion*, 66 J. SOC. ISSUES 59 (2010).

⁴⁶ Moreover, the few existing studies on expressive functions of immigration law are largely theoretical. See, e.g., Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CAL. L. REV. 373, 397 (2004) (discussing expressive harms that citizens might suffer from "immigration laws that regulate membership in the national community in ways that allegedly conflict with our constitutional traditions"); Pratheepan Gulasekaram, *Why a Wall?*, 2 U.C. IRVINE L. REV. 147, 149 (2012) (arguing that "the [border] fence may provide significant symbolic and expressive benefits to politicians and the polity, even though it only provides marginal deterrence").

⁴⁷ René D. Flores, *Living in the Eye of the Storm: How Did Hazleton's Restrictive Immigration Ordinance Affect Local Interethnic Relations?*, 58 AM. BEHAV. SCIENTIST 1743 (2014).

⁴⁸ McAdams, *supra* note 37, at 341.

functions of immigration law in particular has the significant potential to extend and strengthen Professor Motomura's analysis of local and state laws on unauthorized migration and migrants.

The Role of Racial/Ethnic Bias

Finally, I suggest that understanding public debates about unauthorized migration requires a close examination of the nature of contemporary forms of racial/ethnic bias against Latinos given that they constitute the largest segment of the unauthorized population in the U.S.⁴⁹ My discussion here draws on emerging social psychological research on contemporary forms of racial/ethnic bias against Latinos. This scholarship differs in two key respects from the large body of historical and legal scholarship on racial and ethnic exclusion in U.S. immigration and citizenship law on which *Immigration Outside the Law* relies.⁵⁰ First, the nascent scholarship on contemporary forms of racial/ethnic bias against Latinos is built on broader research on racial bias that distinguishes "old-fashioned" or explicit racism/ethnic bias from modern, implicit forms of racism/ethnic bias. Second, the emerging body of research employs social scientific methods to interrogate the nature of contemporary racism/ethnic bias against Latinos.

Research on racial attitudes, which has been largely dominated by studies of White-Black relations,⁵¹ makes an important distinction between implicit and explicit attitudes. An implicit attitude is an attitude that can be activated without conscious awareness and, when so triggered, influences judgments and actions.⁵² In contrast, an explicit attitude is one that is self-reported, which is "controllable, intended, [and] made with awareness."⁵³ The distinction between implicit and explicit attitudes has been critical in

⁴⁹ Bryan Baker & Nancy Rytina, ESTIMATES OF THE UNAUTHORIZED POPULATION RESIDING IN THE UNITED STATES: JANUARY 2012, U.S. Department of Homeland Security (2013), available at https://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf.

⁵⁰ See, e.g., MOTOMURA, *supra* note 1, at 96-103.

⁵¹ See, e.g., ON THE NATURE OF PREJUDICE: FIFTY YEARS AFTER ALLPORT (John F. Dovidio et al., eds., 2005); HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS (1997).

⁵² See Russell H. Fazio & Michael A. Olson, *Implicit Measures in Social Cognition Research: Their Meaning and Use*, 54 ANN. REV. PSYCHOL. 297 (2003); Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4 (1995).

⁵³ Brian A. Nosek, *Implicit-Explicit Relations*, 16 CURRENT DIRECTIONS IN PSYCHOL. SCI. 65, 65 (2007).

theories that seek to explain new forms of racism that have emerged in the United States post-civil rights movement.⁵⁴ These theories—such as theories of symbolic racism, aversive racism, and laissez-faire racism—share in common the basic idea that much of modern racism toward Blacks is now subtle and covert, often characterized by explicit or conscious expressions of egalitarian attitudes that belie negative unconscious, or implicit, racial attitudes.⁵⁵

Consistent with research on new racism, the emerging social psychological research on Latinos suggests that people are reluctant to expressly voice negative attitudes toward Latinos unless they can do so in ways that cannot be attributed to ethnic bias. Robert Short and Lisa Magaña, for example, show that subjects in an experimental study were significantly more likely to express anti-immigrant attitudes when the unauthorized migrant was described as a Mexican who had accumulated parking tickets compared to when the immigrant was described as an English Canadian who had accumulated parking tickets.⁵⁶ Similarly, Todd Hartman and colleagues find that study subjects took significantly greater offense to transgressions such as being in the country illegally, “working under the table,” and rejecting symbols of American identity, when the perpetrating immigrant was Latino rather than White (or unspecified).⁵⁷ In short, prejudice toward Latinos might be “coded” and expressed through

⁵⁴ David O. Sears & P. J. Henry, *The Origins of Symbolic Racism*, 85 J. PERSONALITY & SOC. PSYCHOL. 259 (2003).

⁵⁵ See generally Adam R. Pearson et al., *The Nature of Contemporary Prejudice: Insights from Aversive Racism*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 314 (2009); John F. Dovidio & Samuel L. Gaertner, *Aversive Racism*, 36 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 1 (2004).

⁵⁶ Robert Short & Lisa Magaña, *Political Rhetoric, Immigration Attitudes, and Contemporary Prejudice: A Mexican American Dilemma*, 142 J. SOC. PSYCHOL. 701 (2002). See also Sahana Mukherjee et al., “Reasonable Suspicion” About Tough Immigration Legislation: Enforcing Laws or Ethnocentric Exclusion? 19 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 320, 327 (2013) (finding that “support for tough immigration legislation reflects ethnocentric exclusion rather than identity-neutral law enforcement.”).

⁵⁷ Todd K. Hartman et al., *Decoding Prejudice Toward Hispanics: Group Cues and Public Reactions to Threatening Immigrant Behavior*, 36 POL. BEHAV. 143 (2014). These results are consistent with another study examining attitudes toward immigration and immigrants more generally, rather than attitudes toward unauthorized migration and unauthorized migrants more specifically. See Ted Brader et al., *What Triggers Public Opposition to Immigration? Anxiety, Group Cues, and Immigration Threat*, 52 AM. J. POL. SCI. 959 (2008) (finding that news reports about the costs of immigration increase White opposition to immigration far more when the reports feature Latino immigrants, rather than European immigrants).

“the race-neutral language of concern over the threatening behavior of immigrants.”⁵⁸

The foregoing discussion complicates *Immigration Outside the Law*'s analysis in at least two ways. First, no matter how historically grounded, logically coherent, and morally compelling Professor Motomura's policy proposals are for addressing unauthorized migration, the ultimate persuasiveness of those proposals will likely be limited by our implicit racial/ethnic biases against Latinos. Efrén Pérez's study is instructive on this point; he finds that implicit attitudes toward Latino immigrants mold individual preferences for illegal and legal immigration policies.⁵⁹ Thus, transparent and principled debates about policy proposals on unauthorized migration may be difficult in the absence of widely-shared public recognition and understanding about the nature of contemporary forms of racial/ethnic bias against Latinos.

Second, even if Professor Motomura's policy proposals are accepted, the coded and implicit nature of our ethnic/racial bias against Latinos will likely pose significant challenges to successfully implementing those proposals on the ground. For example, Professor Motomura argues eloquently about the need to integrate unauthorized migrants into our local communities in order to reconcile the fundamental tension between national borders and our national commitment to equality.⁶⁰ Applying this argument to temporary workers, he explains that the following measures are critical to these workers' integration: citizenship for their children born in the U.S., allowing their spouses and children to come with them and work, and allowing the workers pathway to lawful permanent residency.⁶¹ Granting formal legal rights to migrants is undoubtedly the basic first step toward their integration, but countering contemporary forms of racial/ethnic biases that shape interpersonal interactions may be an equally important and urgent task in achieving meaningful integration. On the latter front, the

⁵⁸ Hartman, *supra* note 57, at 161.

⁵⁹ Efrén O. Pérez, *Explicit Evidence on the Import of Implicit Attitudes: The IAT and Immigration Policy Judgments*, 32 POL. BEHAV. 517 (2010). See also Christina Reyna et al., *The Complexity and Ambivalence of Immigration Attitudes: Ambivalent Stereotypes Predict Conflicting Attitudes Toward Immigration Policies*, 19 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 342 (2013) (examining the nature of stereotypes about immigrants and how those stereotypes relate to attitudes toward immigration policies).

⁶⁰ See MOTOMURA, *supra* note 1, at 165 (“Integration allows borders to coexist with equality by offering immigrants some access to equality.”).

⁶¹ See MOTOMURA, *supra* note 1, at 226.

emerging research on implicit bias reduction might offer relevant and helpful insights.⁶²

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I have painted in broad strokes a number of additional ideas that we ought to consider in the context of *Immigration Outside the Law*'s major themes and arguments. These additional ideas relate to lay moral judgments about unlawful presence, expressive functions of immigration laws, and contemporary forms of racial/ethnic bias against Latinos. These ideas deserve greater attention and systematic scrutiny, as they promise to deepen our understanding about the past, present, and future of public debates about unauthorized migration.

⁶² See, e.g., Patricia Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267 (2012); SAMUEL L. GAERTNER & JOHN F. DOVIDIO, REDUCING INTERGROUP BIAS: THE COMMON INTERGROUP IDENTITY MODEL (2000).