

# REVISITING THE 1996 EXPERIMENT IN COMPREHENSIVE IMMIGRATION SEVERITY IN THE AGE OF TRUMP

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## INTRODUCTION

During its first months in office in 2017, the new Republican presidential administration led by Donald Trump has undertaken a far-reaching challenge to legal and political norms that have long prevailed in the United States.<sup>1</sup> In countless areas of politics and governance—from the manner in which it managed its presidential transition, to its attacks on federal judges who have ruled against its policies, to its interference with the independence of the Department of Justice, to its dismissiveness of international human rights principles to which the United States has long been committed—the new administration has disregarded norms to which previous administrations of both parties have long adhered.<sup>2</sup> The new administration’s

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1. For running efforts to keep an inventory, see, for example, Eric Levitz, *All the Terrifying Things That Donald Trump Did Lately*, N.Y. MAG.: DAILY INTELLIGENCER (June 9, 2017, 3:20 PM), <http://nymag.com/daily/intelligencer/2017/06/every-terrifying-thing-that-donald-trump-has-done.html> (periodic compilation); *Norms Watch: Democracy, the Trump Administration, and Reactions to It*, JUST SECURITY, <https://www.justsecurity.org/tag/norms-watch/> (weekly compilation).

2. See Mitch Wertlieb & Liam Elder-Collins, *Dartmouth Prof On Trump’s 100 Days: “We Need Both Parties” Defending Our Norms*, VERMONT PUBLIC RADIO (Apr. 28, 2017), <http://digital.vpr.net/post/dartmouth-prof-trumps-100-days-we-need-both-parties-defending-our-norms> (interview with Brendan Nyhan, Professor of Government at Dartmouth College); Letter from John S. Kiernan, President, New York City Bar Association, to Hon. Paul Ryan, Speaker, U.S. House of Representatives, et al., Apr. 28, 2017, [http://s3.amazonaws.com/documents.nycbar.org/files/First\\_100\\_Days\\_INTHUM\\_4.28.17.pdf](http://s3.amazonaws.com/documents.nycbar.org/files/First_100_Days_INTHUM_4.28.17.pdf).

antagonism to these norms also has been reflected in its administrative appointments. Indeed, Trump's chief political strategist has stated that many agency officials were selected in order to carry out nothing short of the "deconstruction of the administrative state."<sup>3</sup>

The Trump administration's aggressive, wide-ranging effort to crack down on immigration—which, unlike some of its other initiatives, most certainly cannot be fairly characterized as seeking to "deconstruct" the administrative state—involves a more complicated relationship with what came before.<sup>4</sup> On the one hand, the new administration's sweeping, high-profile immigration enforcement initiatives—along with its inflammatory anti-immigrant rhetoric—mark the ascendance of immigration restrictionism to the highest levels of the executive branch to an extent that is entirely without modern precedent. On the other hand, the actual strategies that the Trump administration has utilized to carry out this crackdown, to date, have been facilitated by existing legal authority and administrative institutions inherited from its predecessors, both Republican and Democratic.

Perhaps most notably, the Trump administration's immigration strategies have deep roots in the year 1996, when a Democratic president signed into law a series of statutes passed by a Republican-controlled Congress—the Antiterrorism and Effective Death Penalty Act ("AEDPA"), the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), and the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA")—which instituted far-

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3. Philip Rucker, *Bannon: Trump Administration is in Unending Battle for "Deconstruction of the Administrative State,"* WASH. POST (Feb. 23, 2017), <https://www.washingtonpost.com/news/powerpost/wp/2017/02/23/bannon-trump-administration-is-in-unending-battle-for-deconstruction-of-the-administrative-state/> ("If you look at these Cabinet nominees, they were selected for a reason, and that is deconstruction.").

4. See Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017); Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (rescinded on Mar. 6, 2017 by Exec. Order No. 13,780); Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017); Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017); Memorandum from John Kelly, Sec'y, Dep't of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Protection, et al., *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf); Memorandum from John Kelly, Sec'y, Dep't of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Protection et al., *Implementing the President's Border Security and Immigration Enforcement Improvement Policies* (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf); see also Dara Lind, *A Leaked Trump Order Suggests He's Planning to Deport More Legal Immigrants for Using Social Services*, VOX (Jan. 31, 2017), <https://www.vox.com/policy-and-politics/2017/1/31/14457678/trump-order-immigrants-welfare>.

reaching changes to the immigration laws that the Trump administration has relied upon heavily when developing its own immigration control strategies.<sup>5</sup> A particularly prominent dimension of the 1996 laws involved the convergence of immigration control with the norms, institutions, and practices of criminal law enforcement, a convergence that Juliet Stumpf has influentially termed “crimmigration.”<sup>6</sup> For example, the legislation dramatically expanded the criteria for deporting noncitizens based on prior criminal convictions and mandated greater use of detention while their removal proceedings are pending, while simultaneously eliminating their opportunities to seek discretionary relief from removal.

However, the severity embodied in the 1996 immigration legislation swept considerably further than this convergence between immigration control and criminal law. Among other things, for example, the 1996 laws established significant barriers for refugees seeking protection in the United States, limited immigrants’ eligibility for public benefits, restricted the availability of discretionary relief from removal, and established new grounds of removability for support for organizations allegedly involved in terrorism-related activities. The legislation also sharply curtailed procedural safeguards for individuals in removal proceedings and laid the groundwork for the involvement of state and local officials in immigration policing on a wide scale. Taken as a whole, the 1996 statutes approximate the opposite of the comprehensive immigration reform legislation that advocates have sought in recent years, amounting instead to a far-reaching experiment in what may be described as *comprehensive immigration severity*.

With immigration law once again the subject of election year controversy, the *Drexel Law Review* convened a symposium in October 2016 to critically reassess the history and legacy of AEDPA, IIRIRA, and PRWORA. The symposium, *Twenty Years After the 1996 Immigration Laws: Revisiting an Experiment in Comprehensive Severity*, examined the origins and operation of those laws and their broader legacy and significance today. Frank Sharry, the founder and executive director of America’s Voice, was the keynote speaker, and fifteen panelists —

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5. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996); Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996); see also Zoe Lofgren, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL’Y REV. 349 (2005).

6. Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

representing a broad cross-section, from across the country, of the nation's leading scholars, advocates, and government officials — shared their enormous wealth of knowledge and expertise on the 1996 laws and the contemporary state of immigration law and policy.<sup>7</sup> Several symposium participants reflected upon their experiences as leading actors in both the debates leading up to the enactment of the 1996 laws and the legal and political challenges to those laws following their enactment. Other participants assessed the continuing legacy of the 1996 laws and recounted their own experiences and those of others working with immigrant communities to deploy creative strategies to challenge that legacy at the local, state, federal, and international levels.

Five of the papers prepared for the symposium are published in this issue of the *Drexel Law Review*. In an edited version of his keynote remarks, Frank Sharry reflects upon the challenging political climate from which the 1996 laws quickly emerged and the ways in which advocates sought to resist the anti-immigration backlash in Congress.<sup>8</sup> In light of those experiences, he considers the prospects for immigration policy and immigration reform in the years to come, concluding that despite the ascendance to power of the Trump administration, immigrants' rights advocates and immigration reform proponents have good reason to be optimistic that the effects of the Trump administration will be contained and the immigration debate will again move in more progressive and inclusive directions before too long.

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7. The panelists included Eleanor Acer (Human Rights First), T. Alexander Aleinikoff (Columbia Law School), Caitlin Barry (Villanova University Charles Widger School of Law), Jason Cade (University of Georgia School of Law), Jennifer Chacón (University of California, Irvine, School of Law), Angélica Cházaro (University of Washington School of Law), Jill E. Family (Widener University Commonwealth Law School), Lucas Guttentag (Stanford Law School, Yale Law School, and the U.S. Department of Homeland Security), Helen Gym (Philadelphia City Council), Annie Lai (University of California, Irvine School of Law), Nancy Morawetz (New York University School of Law), Alison Parker (Human Rights Watch), Wadie Said (University of South Carolina School of Law), Rebecca Sharpless (University of Miami School of Law), and Michael J. Wishnie (Yale Law School). Claire Thomas (New York Law School and The New School's Zolberg Institute for Migration and Mobility) and Ernie Collette (MFY Legal Services, Inc.) were unable to participate as panelists, but their paper is included in this symposium issue. In addition, four law professors from the Philadelphia area served as moderators: Richard Frankel (Drexel University Thomas R. Kline School of Law), Jennifer J. Lee (Temple University Beasley School of Law), Sarah Paoletti (The University of Pennsylvania Law School), Jaya Ramji-Nogales (Temple University Beasley School of Law). Video of the symposium is available online at <http://klhn.co/DrexelLR16Video>, and the schedule and program for the symposium are available at <http://klhn.co/DrexelLR16>.

8. Frank Sharry, *Backlash, Big Stakes, and Bad Laws: How The Right Went for Broke and the Left Fought Back in the Fight over the 1996 Immigration Laws*, 9 DREXEL L. REV. 269 (2017).

Jennifer Chacón traces the relationship between the 1996 immigration laws and the anti-immigration politics that ultimately fueled the Trump presidential campaign twenty years later.<sup>9</sup> She argues that by overcriminalizing immigrant communities, facilitating widespread immigration policing at the subfederal level, and causing large numbers of migrants to live under increasingly vulnerable and liminal legal statuses, the 1996 legislation consolidated a legal regime and political discourse that created fertile ground for the normalization and routinization of racialized, anti-immigrant politics. Nevertheless, like Sharry, she, too, concludes on a hopeful note, predicting that—like the shift in California from immigration restrictionism in the early 1990s to immigrant inclusion in recent years—the national backlash against immigration under the Trump administration may, too, contain “the seeds of its own destruction” and give way to reform in the face of a strong movement seeking a more just immigration system.<sup>10</sup>

Rebecca Sharpless examines some of the complicated statutory interpretation issues arising from the 1996 legislation, focusing in particular on the relationship between the principles for deference to agency interpretations of statutory provisions under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>11</sup> and its progeny, on the one hand, and administrative deportation decisions under the immigration laws’ criminal deportability provisions, on the other.<sup>12</sup> She notes that the Supreme Court has largely not developed principles addressing whether and to what extent courts should defer to immigration agency interpretations of civil immigration statutes that incorporate criminal law terms and principles, declining most recently to address this set of questions in *Esquivel-Quintana v. Sessions*.<sup>13</sup> Based on the principles underlying *Chevron* itself, concerns arising from the institutional position of the Attorney General, and the importance of the criminal and immigration rules of lenity, Sharpless argues that courts largely should not defer to the immigration agency’s interpretations of these criminal law-infused provisions.

Highlighting one of the ways in which the severity embodied in the 1996 legislation extends well beyond the convergence of immigration control with criminal law enforcement, Claire Thomas and Ernie Col-

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9. Jennifer M. Chacón, *The 1996 Immigration Laws Come of Age*, 9 DREXEL L. REV. 297 (2017).

10. *Id.* at 322.

11. 467 U.S. 837 (1984).

12. Rebecca Sharpless, *Zone of Nondeference: Chevron and Deportation for a Crime*, 9 DREXEL L. REV. 323 (2017).

13. 137 S. Ct. 1562 (2017).

lette examine the manner in which PRWORA's restrictions on noncitizens' eligibility for public benefits have caused food insecurity and other negative consequences for immigrants facing domestic violence.<sup>14</sup> They draw attention to the tension between these restrictions and other immigration law provisions, which seek to promote the well-being of noncitizens facing domestic abuse by facilitating their ability to obtain lawful immigration status. In light of these provisions—and given the severe economic effects that domestic violence causes to survivors—Thomas and Collette urge Congress and state legislatures to take steps to ensure that immigrant survivors of domestic violence are fully able to access public benefits programs that provide healthy food options and basic financial assistance.

Finally, Jill Family examines the legal provisions providing for relief from removal—which were significantly curtailed by the 1996 legislation—as a lens through which to assess the state of immigration law more generally.<sup>15</sup> She describes the ways in which the 1996 legislation constricted the availability of relief from removal, even as it simultaneously subjected larger numbers of individuals to its harsh grounds of deportability—giving rise to a legal regime that is overly broad, harsh, and complicated. Family discusses a series of proposals for reform inspired by principles in family law, international law, and immigration law itself that would restore proportionality principles that are largely missing from the current legal regime's deportability grounds and narrow relief provisions. She concludes by highlighting the ways in which flaws in these provisions for relief from removal reveal flaws in the immigration law regime more generally, including its mixed signals about whether immigrants are valued and welcomed, the dysfunctions it has produced in the administrative system for adjudicating removal cases, and its continuing relationship to nineteenth century ideas of national sovereignty that warrant contemporary reexamination.

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Convening only two weeks before the 2016 presidential election, the symposium participants could not specifically anticipate the aggressive immigration enforcement strategies that would be instituted

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14. Claire R. Thomas & Ernie Collette, *Barring Survivors of Domestic Violence From Food Security: The Unintended Consequences of 1996 Welfare and Immigration Reform*, 9 Drexel L. Rev. 353 (2017).

15. Jill E. Family, *The Future Relief of Immigration Law*, 9 DREXEL L. REV. 393.

during the first week of the new presidential administration in January 2017. Indeed, like many other Americans, many of the symposium participants did not accurately foresee the result of the presidential election itself. At the same time, the participants were clear-eyed about the legacy of the 1996 immigration laws, recognizing that regardless of the outcome of the election, the legal and administrative regime established by AEDPA, IIRIRA, and PRWORA – and subsequently expanded and consolidated under both Republican and Democratic administrations – almost certainly would continue to cast a long shadow over immigration policy for years to come.

As some of the contributors to this symposium observe, the prospects for meaningful immigration reform in the years to come might ultimately be greater than they have initially appeared in the early months following the 2016 election. Nevertheless, while contestation over the 1996 legislation has been fierce – and social movements and immigrant communities have continued to forcefully advocate reform – the 1996 laws have enabled the creation of a “formidable machinery” of immigration enforcement that has grown and become deeply consolidated.<sup>16</sup> Whatever various forms that future immigration reform efforts take in the years to come, they inevitably will need to contend directly with the legacy of the 1996 experiment in comprehensive immigration severity.

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16. DORIS MEISSNER ET AL., *MIGRATION POL'Y INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY* (2013).