

**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**

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ABSTRACT

*This Article reflects upon the political contestation that led to the enactment of the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act, contextualizing the anti-immigration backlash and debates. Further, this Article discusses some of the ways in which immigration advocates sought to respond to that backlash, sometimes controversially. Finally, the Article considers lessons to be learned for contemporary discussions over immigration reform, highlighting the changing political landscape and available paths through which advocates might successfully achieve fair and meaningful immigration reform.*

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## INTRODUCTION

When Congress was considering the legislative proposals that ultimately became the Antiterrorism and Effective Death Penalty Act (“AEDPA”)<sup>1</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”),<sup>2</sup> many politicians and observers—and some immigration advocates, including myself—did not fully understand the full implications of the two laws, particularly in terms of their evisceration of due process, their sweeping grounds of deportability, and their elimination of mechanisms for relief from deportation.<sup>3</sup> But as families began to be ripped apart by the government’s aggressive enforcement of the deportation and detention provisions in the two laws, those consequences quickly became clear to everyone. It was heartbreaking to see how the legal framework ushered in by AEDPA and IIRIRA was destroying the lives of so many immigrants, including many individuals with legal status who had been in the country for decades. It was remarkable and horrifying to see children asking why the government was taking their parents away from them.

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1. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) [hereinafter AEDPA].

2. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) [hereinafter IIRIRA].

3. As another participant in this Symposium, Lucas Guttentag, noted at the time, “Due process is the forgotten issue in the current debate”:

It is forgotten, in part, because it has been subsumed within the “illegal immigration” shibboleth; in part because it is an issue for which the public typically shows little interest or support, and in part because all of us who care about this issue have failed to make it a higher priority.

Lucas Guttentag, *Immigration Legislation and Due Process: The Forgotten Issue*, 19 IN DEFENSE OF THE ALIEN 25, 25 (1996).

As these stories garnered greater attention and the draconian consequences of the AEDPA and IIRIRA became more clear, a broad coalition of organizations launched a campaign called “Fix ‘96,” an effort that sought to roll back some of the harshest provisions in those laws.<sup>4</sup> The Fix ‘96 campaign quickly gained momentum and generated enough pressure to prompt members of Congress in both parties to have second thoughts about the 1996 legislation. In 1999, a bipartisan group of legislators – which included some of the leading proponents of AEDPA and IIRIRA – wrote a letter to Doris Meissner, the Commissioner of the Immigration and Naturalization Service (“INS”), and urged the INS to make greater use of prosecutorial discretion to “alleviate some of the hardships” of AEDPA and IIRIRA, and to refrain from pursuing removals that would be “unfair” and “unjustifiable.”<sup>5</sup> By 2001, members of Congress from both parties had proposed legislation to temper some of the most severe provisions in the 1996 laws.<sup>6</sup> In September 2001, my colleague at the National Immigration Forum, Angela Kelley, was at the Capitol for a meeting in Senator Tom Daschle’s office with legislators and other immigration advocates to discuss the final details of how to achieve the enactment of a legislative fix extending the availability of adjustment of status under § 245(i) of the Immigration and Nationality Act.<sup>7</sup>

However, debates over immigration policy are often akin to a roller coaster ride. Just as that meeting in September 2001 was beginning, the attendees were suddenly directed to evacuate the Capitol because planes were flying into the World Trade Center in New York, and one might be headed toward the Capitol itself. Needless to say, in the wake of the 2001 terrorist attacks, neither the proposals to temper the

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4. See Carol Leslie Wolchok, *Legislative Efforts to Restore Immigrant Rights*, HUM. RTS., Winter 2001, at 27 (discussing “Fix ‘96” campaign).

5. Letter from Rep. Henry J. Hyde et al. to Janet Reno, Att’y Gen., and Doris Meissner, Comm’r, Immigr. & Naturalization Serv. (Nov. 4, 1999), in 79 INTERPRETER RELEASES 1730, 1730–31 (1999), <http://perma.cc/6G98-GP6U>; see Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISCOURSE 58–87 (2015).

6. Wolchok, *supra* note 4; see also Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1954–55 (2000).

7. Mallie J. Kim, *After 9/11, Immigration Became About Homeland Security*, U.S. NEWS & WORLD REPORT (Sept. 8, 2011), <https://www.usnews.com/news/articles/2011/09/08/after-911-immigration-became-about-homeland-security-attacks-shifted-the-conversation-heavily-toward-terrorism-and-enforcement>; Cyrus Mehta, *Reflecting on 9/11 After 10 Years as an Immigration Attorney*, INSIGHTFUL IMMIGR. BLOG (Sept. 10, 2011), <http://blog.cyrusmehta.com/2011/09/reflecting-on-911-after-10-years-as-an-immigration-attorney.html>.

effects of AEDPA and IIRIRA nor the proposal to extend the availability of INA § 245(i) were enacted into law.<sup>8</sup> The politics of immigration, once again, moved in a different direction.

This Article reflects upon the political contestation that led to the enactment of AEDPA and IIRIRA, placing the debates over those laws in context and considering some of the lessons to be learned for contemporary discussions over immigration reform today. What were proponents of the legislation seeking, and how did immigration advocates respond? Part I discusses the anti-immigration backlash that rapidly emerged in the early 1990s and led to the enactment of AEDPA and IIRIRA. Part II reflects upon some of the ways in which immigration advocates sought to respond to that backlash, sometimes controversially. Finally, Part III concludes by considering lessons and implications of the struggle over immigration in the 1990s—highlighting ways in which the political landscape has changed since then and the paths by which advocates might successfully achieve fair and meaningful immigration reform.

#### I. BACKLASH POLITICS AND THE ENACTMENT OF THE 1996 IMMIGRATION LAWS

Looking back from today, it can be difficult to understand the politics of immigration in the years leading up to the enactment of AEDPA and IIRIRA. Before the early 1990s, immigration was not the highly visible and salient political issue that it has become today. It was not central to presidential campaigns. There were not huge constituencies mobilized around different sides of the issue the way there are now. To the contrary, immigration was largely a niche issue, primarily of concern to insiders and specialists. Before the 1990s, immigration policy was largely formulated and implemented from the top down—in some instances almost entirely as a result of initiatives taken by individual legislators. For example, when reform of the legal regime for refugee protection became a priority for Senator Ted Kennedy in the late 1970s, he drafted the Refugee Act of 1980 and was the driving force in pushing it through Congress.<sup>9</sup> Similarly, after Congress established the Select Commission on Immigration and Refugee Policy in 1978, also known as the Hesburgh Commission, two young members of Congress who were appointed to that commission, Alan

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8. Kim, *supra* note 7; Mehta, *supra* note 7.

9. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980); see Edward M. Kennedy, *Refugee Act of 1980*, 15 INT'L MIGRATION REV. 141, 143-45 (1981) (discussing legislative history of the Refugee Act of 1980).

K. Simpson and Romano L. Mazzolli, became the leading policy entrepreneurs in Congress behind legislation to implement the Commission's recommendations and the principal sponsors of what ultimately was enacted as the Immigration Reform and Control Act of 1986 ("IRCA").<sup>10</sup>

After IRCA was enacted, Congress turned its attention to proposals to change the system for admitting legal immigrants. This moment marked one of the first instances in which immigration advocates were strong enough to outflank advocates of greater restrictions on immigration, who were seeking to limit the overall level of legal immigration. As a result, advocates were able to push the legislative proposals in a more positive direction, leading to an overall expansion in the level of legal immigration in the Immigration Act of 1990.<sup>11</sup> Advocates were also successful in ensuring that the legislation included generous "family unity" provisions, which facilitated legalization for individuals who were spouses and children of those eligible for legalization under IRCA, but who did not themselves independently qualify for legalization under the 1986 legislation.<sup>12</sup>

Within a few years, however, the country was faced with one of the largest populist, nativist backlashes it had ever experienced. This backlash came as a surprise to many immigration advocates—especially in the wake of the successful achievement of the Immigration Act of 1990. Indeed, the first budget presented by the Clinton administration in 1993 provided for reductions to border control, since immigration policy was not seen to be a significant concern.<sup>13</sup> Nevertheless, immigration restrictionist groups quickly became adept at utilizing the news media to focus attention on what they characterized as an "out of control" border. The major television news networks began to regularly run a drumbeat of stories suggesting that the borders

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10. Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3445 (1986); see DEBRA L. DELAET, *U.S. IMMIGRATION POLICY IN AN AGE OF RIGHTS* 49-76 (2000).

11. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990); see DELAET, *supra* note 10, at 88-91.

12. In the years leading up to the enactment of the Immigration Act of 1990, both the Reagan and Bush administrations instituted "family fairness" programs to grant provisional relief to these same categories of individuals through the executive branch's exercise of enforcement discretion. See Mark Noferi, *When Reagan and GHW Bush Took Bold Executive Action on Immigration*, THE HILL (Oct. 2, 2014), <http://thehill.com/blogs/congress-blog/foreign-policy/219463-when-reagan-and-ghw-bush-took-bold-executive-action-on> (last visited Apr. 14, 2017); Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 119-24 (2015).

13. See JAMES G. GIMPEL & JAMES R. EDWARDS, JR., *THE CONGRESSIONAL POLITICS OF IMMIGRATION REFORM 199* (1999) (noting that "President Clinton took no particular interest in immigration upon assuming office in January 1993").

were “out of control.”<sup>14</sup> The nature of the coverage was often sensationalized—for example, repeatedly showing footage of a soccer field in Tijuana, Mexico, where individuals would gather and run across the border.<sup>15</sup> This rise in attention to border control and immigration enforcement also came in the wake of an economic recession that contributed to the anti-immigrant backlash.<sup>16</sup> Meanwhile, immigration advocates in Washington were still largely inattentive to the rising backlash, still contemplating the possibility of positive change with the new Clinton administration and specifically focusing their attention on protection of Haitian refugees.<sup>17</sup>

Then in 1993, the World Trade Center was attacked. Two of the individuals implicated in that attack had applied for asylum in the United States.<sup>18</sup> On the Sunday immediately following the attack—in an interview with CBS News reporter Lesley Stahl, airing in a twenty-minute, prime-time segment on *60 Minutes*—Dan Stein of the Federation of American Immigration Reform, a leading anti-immigration organization, asserted that simply by saying “two magic words: political asylum,” any would-be terrorist could enter the United States and kill innocent Americans.<sup>19</sup> Politically, the broadcast had a profound and immediate effect, creating a panic over asylum-seekers and providing momentum for proposals to curtail due process and create significant obstacles for individuals seeking asylum.<sup>20</sup> At the time, the political focus remained largely on asylum, rather than other aspects of immigration policy, but it appeared that Congress might

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14. See BROOKINGS INST. & USC ANNENBERG SCHOOL FOR COMMUNICATION, A REPORT ON MEDIA AND THE IMMIGRATION DEBATE 1, 17–18 (2008) (discussing “spike in coverage” of immigration by news media in 1993, owing to “a series of unrelated, highly dramatic events”).

15. See John Wilkens, ‘Soccer Field,’ Once-Busy Border Crossing, Now Quiet, SAN DIEGO UNION-TRIB. (May 7, 2016), <http://www.sandiegouniontribune.com/news/border-baja-california/sdut-border-wall-soccer-field-2016may07-story.html>.

16. See, e.g., Robert Reinhold, *A Welcome for Immigrants Turns to Resentment*, N.Y. TIMES, Aug. 25, 1993, at A12 (reporting on the ways in which the economic downturn was contributing to anti-immigration sentiment in Southern California).

17. See generally Arthur C. Helton, *The United States Government Program of Intercepting and Forcibly Returning Haitian Boat People to Haiti: Policy Implications and Prospects*, 10 N.Y.L. SCH. J. HUM. RTS. 325, 345–48 (1993).

18. PHILIP G. SCHRAG, A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA 40 (2000).

19. *How Did He Get Here?* 60 MINUTES (CBS television broadcast, Mar. 14, 1993) (transcript on file with Drexel Law Review); SCHRAG, *supra* note 18, at 42–43.

20. SCHRAG, *supra* note 18, at 43 (“Within two days, the broadcast transformed asylum procedure from an arcane subject of interest only to those who followed administration of the immigration laws into a hot political issue.”); David A. Martin, *Making Asylum Policy: The 1994 Reforms*, 70 WASH. L. REV. 725, 738 (1995) (“Hearings proliferated on what was suddenly being portrayed as an asylum crisis.”).

enact legislation that would significantly limit the ability to seek asylum. Yet the Clinton administration was effective in coopting the mantle of asylum reform, instituting regulations that preserved the basic elements of the asylum process while avoiding and fending off the harsh and more restrictive legislation that was being pushed by both Republicans and Democrats in Congress.<sup>21</sup>

But then, Proposition 187—a California voter initiative that proposed to prohibit undocumented immigrants from accessing non-emergency medical care, social services, and education within the state, and to require state and local officials to report individuals suspected of being undocumented to federal immigration officials—was qualified for the ballot.<sup>22</sup> The Governor of California, Pete Wilson, who was facing a difficult campaign for reelection in the wake of the recession, legitimated and added fuel to the anti-immigrant sentiment underlying Proposition 187 by placing his support for the initiative at the heart of his reelection campaign, which was ultimately successful.<sup>23</sup> I took a leave of absence from my position in Washington as Executive Director of the National Immigration Forum to work in California on the campaign against Proposition 187. I could not believe the legitimization of hate that came when a governor stood up and said, “The problems in this state are because of *those* people, and they keep coming.”<sup>24</sup> It was a terrifying thing.

It also became clear to me that we, as advocates in the field of immigration, were not built for the fight in which we suddenly found ourselves. We were policy experts, trying to figure out how we could work the inside, with our champions and friends in Washington, to get improvements in policy. Meanwhile, anti-immigrant groups were working the media and election campaigns to drive an aggressive backlash that was overwhelming our politics. It is remarkable to think about California now as having become one of the most pro-immigration states in the nation—a state that has gone from purplish to

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21. Martin, *supra* note 20, at 741–54 (discussing Clinton administration regulations); SCHRAG, *supra* note 18, at 43–56 (discussing asylum restrictions proposed by Representatives Bill McCollum, Romano Mazzoli, and Charles Schumer).

22. Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1558–68 (1995); see ANDREW WROE, *THE REPUBLICAN PARTY AND IMMIGRATION POLITICS: FROM PROPOSITION 187 TO GEORGE W. BUSH 53–94* (2008); ROBIN DALE JACOBSON, *THE NEW NATIVISM: PROPOSITION 187 AND THE DEBATE OVER IMMIGRATION* (2008).

23. WROE, *supra* note 22, at 55.

24. See NATALIE MASUOKA & JANE JUNN, *THE POLITICS OF BELONGING: RACE, PUBLIC OPINION, AND IMMIGRATION 156–57* (2013) (discussing Wilson campaign advertisement that “showed a grainy video of people running across the US-Mexico border checkpoint with the ominous voice-over ‘They keep coming.’”).

blue in part because of the negative reaction to Proposition 187.<sup>25</sup> Back then, when Proposition 187 passed in the November 1994 election, it did so by a decisive, 59 to 41 percent margin.<sup>26</sup>

The 1994 election also ushered in the Gingrich Republican revolution, which resulted in new chairs of the Senate and House subcommittees with primary jurisdiction over immigration: Senator Alan Simpson and Representative Lamar Smith.<sup>27</sup> Each of them proposed a slightly different legislative vehicle intended to achieve the same overarching objective: namely, the elimination of legal immigration in the United States altogether, an Americanized version of what restrictionists in Europe referred to at the time as a “zero immigration” policy.<sup>28</sup> On top of all of this, President Clinton appointed former Congresswoman Barbara Jordan—a civil rights icon who had been the first African American member of Congress elected from Texas after Reconstruction—to chair the U.S. Commission on Immigration, which had been created by the Immigration Act of 1990.<sup>29</sup> Given the mounting political backlash, the Commission, apparently believing that anti-immigrant legislation would inevitably be enacted in some form, sought to ride the anti-immigrant wave while simultaneously attempting to hold it back a little bit. The Commission proposed significant reductions in the overall number of legal immigrants, elimination of visa preference categories for extended family members, mandatory electronic verification of employment eligibility, and more aggressive border control measures.<sup>30</sup>

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25. See GABRIELLA VILLAREAL, CALIFORNIA IMMIGR. POL’Y CTR., THE CALIFORNIA BLUEPRINT: TWO DECADES OF PRO-IMMIGRANT TRANSFORMATION (2015), <https://www.caimmigrant.org/wp-content/uploads/2015/05/The-California-Blueprint-1.pdf> (summarizing thirty pro-immigrant laws adopted in recent years across a range of policy areas); Nicole Hemmer, *Republican Nativism Helped Turn California Blue. Trump Could Do the Same for the Whole Country*, VOX (Jan. 20, 2017), <http://www.vox.com/the-big-idea/2017/1/20/14332296/reaction-trump-democrats-organize-hispanic-turnout-prop187>; see also Jennifer M. Chacón, *The 1996 Immigration Laws Come of Age*, 9 DREXEL L. REV. 297, 321–22 (2017).

26. WROE, *supra* note 22, at 92–93.

27. See GIMPEL & EDWARDS, JR., *supra* note 13, at 212–16.

28. Immigrant Control and Financial Responsibility Act of 1995, S. 269, 104th Cong. (1995–1996) (sponsored by Sen. Alan Simpson); Immigration in the National Interest Act, H.R. 1915, 104th Cong. (1995) (sponsored by Rep. Lamar Smith); see GIMPEL & EDWARDS, JR., *supra* note 13, at 222–29, 238–44.

29. Immigration Act of 1990, § 141, Pub. L. No. 101-649, 104 Stat. 4978, 5001 (1990); Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733 (1991); see Carlos Ortiz Miranda, *United States Commission on Immigration Reform: The Interim and Final Reports*, 38 SANTA CLARA L. REV. 645, 646 n.9 (1998); GIMPEL & EDWARDS, JR., *supra* note 13, at 198–99, 216–21.

30. U.S. COMMISSION ON IMMIGRATION REFORM, LEGAL IMMIGRATION: SETTING PRIORITIES (1995); U.S. COMMISSION ON IMMIGRATION REFORM, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY (1994); GIMPEL & EDWARDS, JR., *supra* note 13, at 217–21.



In taking this position, the Commission ultimately legitimized the structure of the legislative strategies of Simpson, Smith, and congressional Republicans—even as its members argued that they were trying to restrain those efforts to some extent.<sup>31</sup> For example, Smith’s proposal in the House had a “sunset” and reauthorization provision, which would have ended authorization for legal immigration after five years unless Congress affirmatively voted to reauthorize it—which it could then do only for another five-year period.<sup>32</sup> This mechanism, anti-immigrant groups hoped, would increase the likelihood that Congress would end legal immigration altogether at some point, which was their ultimate goal and top priority. While the Commission’s recommendations did not go that far, they did nevertheless propose to curtail legal immigration by forty percent—still a drastic reduction—and eliminate preference categories for extended family members.<sup>33</sup>

In addition, congressional Republicans and anti-immigrant groups pushed hard for a mandatory employment eligibility verification system, what has evolved since then into what is referred to today as mandatory E-Verify.<sup>34</sup> As part of a broader effort to restrict access to welfare benefits more generally—which resulted in enactment of the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”)—congressional Republicans also sought to eliminate welfare and social service benefits for immigrants.<sup>35</sup> With both of these initiatives, a key goal was to make day-to-day life for undocumented immigrants as difficult as possible, in hopes of driving them out of the country in a process that restrictionists later came to describe as “attrition through enforcement”—or as Mitt Romney somewhat infamously put it during the 2012 presidential campaign, “self-deportation.”<sup>36</sup>

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31. GIMPEL & EDWARDS, JR., *supra* note 13, at 220 (noting that “[m]any of the Commission’s recommendations sounded similar to the legislation Smith and Simpson had been moving forward,” leading observers to “wonder[] if Simpson and Smith had influenced the Commission’s findings and recommendations”).

32. H.R. 1915, § 504.

33. GIMPEL & EDWARDS, JR., *supra* note 13, at 217–21.

34. *Id.* at 226, 235–36; see Juliet P. Stumpf, *Getting to Work: Why Nobody Cares About E-Verify (And Why They Should)*, 2 U.C. IRVINE L. REV. 381 (2012).

35. Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996); see 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); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 511–18 (2001); GIMPEL & EDWARDS, JR., *supra* note 13, at 283–84.

36. Amy Gardner & Rosalind S. Helderman, *Gingrich Mocks Romney’s “Self-Deportation” Plan for Illegal Immigrants*, WASH. POST (Jan. 25, 2012), <http://articles.washingtonpost.com/>

Congressional Republicans and anti-immigration groups also renewed their earlier efforts to limit the number of refugees and asylum-seekers, including a proposed a cap of 50,000 refugee admissions per year.<sup>37</sup> In the wake of the Oklahoma City bombing by Timothy McVeigh in 1995, members of Congress “took advantage of the public outrage” over that *domestic* terrorist attack when drafting AEDPA to include a number of severe immigration-related restrictions.<sup>38</sup> While members of Congress characterized AEDPA as an antiterrorism bill, the legislation’s restrictionist immigration-related provisions—including expansions in the criminal grounds of deportability, elimination of procedural protections in the deportation process, and severe restrictions on the ability to apply for asylum—“had minimal or no relationship to the prevention of terrorism.”<sup>39</sup>

By this point, immigration advocates had already largely lost the arguments about border enforcement. While its first budget proposed to decrease the resources devoted to border enforcement, the Clinton administration decided relatively soon after that to substantially increase the resources devoted to border enforcement. In Texas, the head of the Border Patrol’s El Paso sector, Silvestre Reyes (who later successfully ran for Congress) initiated “Operation Blockade,” an aggressive and high-profile set of measures intended to prevent individuals from entering the United States in that sector.<sup>40</sup> The Border Patrol soon instituted similar initiatives in other sectors along the border, and the idea quickly took hold in political discourse that aggressive border enforcement could be effective.<sup>41</sup> The Clinton administration strongly embraced that idea, regularly touting its tough border enforcement policies as being among its successes.<sup>42</sup>

Somewhat less visibly, congressional Republicans and anti-immigrant groups also worked diligently to curtail the availability of mechanisms for legalization and discretionary relief from removal,

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2012-01-25/politics/35440222\_1\_cayman-island-accounts-illegal-immigrants-obama-level-fantasy; MARK KRIKORIAN, CTR. FOR IMMIGR. STUDIES, DOWNSIZING ILLEGAL IMMIGRATION: A STRATEGY OF ATTRITION THROUGH ENFORCEMENT 3 (2005); see also Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 25, 67-68 (2015).

37. See SCHRAG, *supra* note 18, at 60, 68.

38. Ella Dlin, *The Antiterrorism and Effective Death Penalty Act of 1996: An Attempt to Quench Anti-Immigration Sentiments*, 38 CATH. LAW. 49, 51-52 (1998); see also PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* 142-43 (1998).

39. Dlin, *supra* note 38, at 51-52.

40. Joel Brinkley, *A Rare Success at the Border Brought Scant Official Praise*, N.Y. TIMES, Sept. 14, 1994, at A1; PETER ANDREAS, *BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE* 89-93 (2000). The initiative was later renamed “Operation Hold-the-Line.” *Id.* at 92.

41. See ANDREAS, *supra* note 40, at 92-100, 106-12.

42. *Id.* at 106-07.

such as § 245(i) of the INA, which allowed certain categories of individuals to adjust to lawful permanent resident status without needing to leave the United States, and § 212(c) of the INA, which provided an avenue for discretionary relief for deportation for many individuals.<sup>43</sup> Immigration advocates themselves may have inadvertently contributed to the enactment of the three- and ten-year bars for unlawful presence, which create prospective bars on admissibility for individuals who have departed the United States after having been unlawfully present for specified periods of time.<sup>44</sup> To resist efforts to fortify and militarize border enforcement, immigration advocates had started to highlight the fact that approximately forty percent of the undocumented population did not, in fact, consist of individuals who surreptitiously crossed the U.S.-Mexico border, but rather consisted of individuals who had entered the country lawfully and then overstayed their visas.<sup>45</sup> While intended as a means of resisting efforts to militarize the border, this argument did not prompt anti-immigration politicians to back away from their support for aggressive border enforcement. Instead, it only motivated congressional Republicans and anti-immigrant groups to develop additional interior enforcement proposals, such the three- and ten-year bars, to go along with their proposals to fortify the border.<sup>46</sup> The episode ultimately illustrated how ridiculous the immigration debate had become—but also how naïve we were as advocates.

## II. THE CONTROVERSIAL RESPONSES TO BACKLASH

In short, immigration advocates were in a very tough battle and we were not prepared for it. Faced with this sudden anti-immigrant backlash—and losing ground on many issues—immigration advocates, starting with me, made some very controversial decisions. In March 1996, the House passed an amended version of Smith's original bill by a margin of 333 to 87, with almost all Republicans and an unhealthy number of Democrats voting for it.<sup>47</sup> Then, in May 1996, the Senate passed a bill focused primarily on unauthorized immigration by a margin of 97 to 3.<sup>48</sup> At the time, pro-immigration members of Congress and their staff members told immigration advocates that

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43. 8 U.S.C. § 1182(c) (repealed 1996); 8 U.S.C. § 1255(i).

44. *Id.* § 1182(a)(9)(B)(i)(I)–(II); see Kristi Lundstrom, Note, *The Unintended Effects of the Three- and Ten-Year Unlawful Presence Bars*, 76 LAW & CONTEMP. PROBS. 389, 389 (Nos. 3 & 4, 2013).

45. See Kalhan, *supra* note 36, at 19–20.

46. See Lundstrom, *supra* note 44, at 409.

47. See GIMPEL & EDWARDS, JR., *supra* note 13, at 263.

48. *Id.* at 268.

we were seen as out of touch from the debate, and that nobody was listening to us. We were seen as irrelevant, marginalized, and insufficiently pragmatic, and were told that when we spoke up, we actually undermined pro-immigration politicians. We were told that we did not have enough political strength, and that the other side was dominating the debate.

In framing our advocacy, our message had been premised on the idea that the backlash against immigration was based largely on ignorance—that while immigrants are good for the economy and the nation, politicians and leaders of the anti-immigration movement, operating on the basis of racism and xenophobia, nevertheless were scapegoating immigrants. We assumed that if we were sufficiently effective in speaking truth to power, and if we helped people learn the real facts about immigration, the backlash would then subside.

At the time, my organization, the National Immigration Forum, began to conduct public opinion research, which we had never done before. Through that public opinion research, we came to realize that people were not listening to us. Our message resonated with approximately ten percent of the population. The messages by anti-immigration groups also resonated with approximately ten percent of the population. The remaining eighty percent of the public were divided evenly, in terms of whether they leaned towards supporting or opposing immigration—and our message did not resonate with them. The analysis that I recall to have been given about our message by a progressive communications professional was stark:

Frank, I'm going to give it to you straight. You should be working for the other side. For every one person you motivate, you are losing three to the other side. You have completely ceded the middle to the other side. So when anti-immigrant groups talk about reform, control, fixing, they win the majority of the American people, because the majority of the American people think something is wrong and something is not working with our immigration system. And when you say they are stupid, they are racist, they don't understand, it doesn't resonate with many people—and may even be pushing people away.

As a result, we decided to reorient our approach. This was a very difficult decision, and one that continues to be seen as controversial to this day. We decided to be pragmatic and engage in triage, to do what we could to blunt this huge nativist backlash—which had two prominent members of Congress driving it, and a civil rights icon riding shotgun for it, along with a President who was weakened and

triangulated. We sought to focus more narrowly on those issues for which we thought we could gain the most traction.

What gained the most traction, first and foremost, was the idea that we should distinguish between legal and illegal immigration. In the tactical jargon of the legislative fight, the goal was to “split-the-bill” – to separate provisions addressing legal immigration from those addressing illegal immigration in order to save legal immigration from being eviscerated.<sup>49</sup> As Philip Schrag has described, “splitting the bill” was a “high priority tactic for immigration advocates”:

[A] bill to combat illegal immigration seemed certain to pass in the 104th Congress, probably by a wide margin. If a single bill also included a retrenchment of the legal immigration quotas, that less popular measure could be swept into law on the back of the illegal immigration controls, without full consideration of its own merits. . . . [In addition], the high-tech industries, particularly computer, software, and pharmaceutical firms, relied heavily on foreign-born scientists and engineers. These firms would not lobby to preserve quotas for immigrants' relative, but they did want Congress to preserve existing quotas for skilled workers. A split-the-bill strategy would draw the fault line between legal and illegal immigration, not between family and business immigration. It therefore offered the possibility that business groups would help to preserve family immigration, and vice versa.<sup>50</sup>

Splitting-the-bill also facilitated our ability to argue that even with respect to illegal immigration, there were better and worse approaches to addressing the issue.<sup>51</sup> We thought that if we conceded some ground on border enforcement, where we already appeared to be losing ground any event, we might gain some traction to resist other new and excessive interior enforcement initiatives within the United States.

Through these strategies, we were able to achieve some positive results, or at least to fend off some potentially terrible results. With respect to legal immigration, anti-immigrant groups were hoping to slash the overall level of immigration by forty percent and to sunset

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49. GIMPEL & EDWARDS, JR., *supra* note 13, at 244–49 (discussing advocates' “split-the-bill” strategy).

50. SCHRAG, *supra* note 18, at 74–75.

51. *See id.* at 75 (“[E]ven the provisions designed to control illegal immigration included what the immigration advocates regarded as excesses . . . . But as long as the organizations had to concentrate on preserving opportunities for their constituents' relatives to immigrate, they were certain to be less effective in trying to control those excesses.”).

legal immigration after five years unless Congress affirmatively voted to reauthorize it.<sup>52</sup> However, helped by the strategy of “splitting the bill,” the proposals to curtail legal immigration were ultimately defeated.<sup>53</sup> Efforts to implement a cap on refugee admissions were also ultimately defeated.<sup>54</sup> With respect to asylum, while the final version of IIRIRA included a series of pernicious provisions that place major barriers for individuals applying for asylum, advocates were successfully able to temper the extreme versions of those provisions that were originally proposed by Smith and Simpson.<sup>55</sup>

The effort to “split-the-bill” also facilitated the development of an unusual left-right coalition in opposition to some of the provisions in the proposed legislation.<sup>56</sup> In particular, allies on the right, including Grover Norquist, Stephen Moore, and current House Speaker Paul Ryan (at the time a young staffer working for pro-immigration conservatives Jack Kemp and William Bennett), played an important role in organizing Republican opposition not only to the proposals to curtail legal immigration, but also to the proposal to create a mandatory electronic system for employment eligibility verification, which at the time was immigration advocates’ most important concern with respect to interior enforcement.<sup>57</sup> To vividly illustrate their arguments against mandatory electronic employment eligibility verification—which a number of conservatives saw as a first step toward a mandatory national identification card—Grover Norquist and other conservative advocates put barcodes on their wrists and went around to newly-elected, libertarian-leaning, Republican House members to ask them, “Are you going to vote for *this*?”<sup>58</sup> It was crude—and effective. The House Republican Majority Leader, Dick Armey, told Lamar Smith to work out a deal with the National Federation of Independent

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52. See Immigration in the National Interest Act, H.R. 1915, 104th Cong. § 504 (1995) (sponsored by Rep. Lamar Smith); GIMPEL & EDWARDS, JR., *supra* note 13, at 217–21.

53. GIMPEL & EDWARDS, JR., *supra* note 13, at 249, 260–62; SCHRAG, *supra* note 18, at 123, 127, 139–41, 165–66; see also SCHUCK, *supra* note 38, at 145 (“[E]ven the IIRIRA’s recklessness and unfairness should not obscure a fundamental fact about immigration politics: Challenges to the high levels of legal immigration . . . all failed.”).

54. SCHRAG, *supra* note 18, at 66–67, 135–39, 229.

55. See *id.* at 229–31.

56. See *id.* at 75–76; GIMPEL & EDWARDS, JR., *supra* note 13, at 243–49, 255.

57. See Robert Costa, *Paul Ryan’s Immigration Play*, NAT’L REV. (Apr. 24, 2013), <http://www.nationalreview.com/article/346546/paul-ryans-immigration-play-robert-costa> (discussing Paul Ryan’s work for Jack Kemp during the 1990s).

58. See also SCHRAG, *supra* note 18, at 80 (noting that business and conservative groups “strongly opposed” mandatory electronic employment eligibility verification and characterized the proposed system as “1-800-BIG BROTHER”).

Business, and they came up with a proposal to authorize a pilot project under which electronic employment verification would be voluntary, rather than mandatory.<sup>59</sup>

There was one final fight: the Gallegly Amendment. Elton Gallegly was a Congressman from California who wanted, in effect, to federalize Proposition 187 – and directly challenge the Supreme Court’s 1982 decision in *Plyler v. Doe* – by expressly purporting to give states authority to bar undocumented children from schools.<sup>60</sup> The Gallegly Amendment started to gain momentum, and in response we ultimately decided to facilitate a sign-on letter by law enforcement organizations in opposition to the proposal.<sup>61</sup> We enlisted the assistance of a police union and asked whether a one of its members might be willing to wear a uniform and attend a press conference on this issue. A police officer from Baltimore did, and I will never forget it. A number of people covering the press conference asked, “Why is a cop talking about immigration?” He read a statement that pointedly questioned the wisdom of kicking children out of school, as Gallegly’s proposal contemplated. He said that “[c]hildren should be in nurturing, protective structures, not out on the streets,” and that he worked every day to ensure that children are not vulnerable to predators or hanging out on street corners getting into trouble.<sup>62</sup> He questioned why members of Congress were pursuing to make his job more difficult by suggesting that children spend their days roaming the streets where they are vulnerable, more likely to get into trouble, and more likely to be victims of crime.<sup>63</sup>

Not everybody liked this strategy. But within approximately six weeks, virtually every major police organization in the United States had come out in opposition to the Gallegly Amendment.<sup>64</sup> This opposition was not rooted in a humanitarian desire to save the children. Rather, it was rooted an impulse more along the lines of, “How dare you be stupid, members of Congress, in making the lives of our police

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59. GIMPEL & EDWARDS, JR., *supra* note 13, at 291.

60. See *Plyler v. Doe*, 457 U.S. 202 (1982); GIMPEL & EDWARDS, JR., *supra* note 13, at 257–60 (discussing Gallegly Amendment).

61. Jorge A. Banales, *Police Enter Immigration Debate*, UNITED PRESS INT’L, Jul. 29, 1996, <http://www.upi.com/Archives/1996/07/29/Police-enter-immigration-debate/5375838612800/>.

62. *Id.* (quoting Col. Donald Shinnamon of the Baltimore County Police Department).

63. *Id.*

64. See *id.* (discussing police groups’ concerns that the Gallegly Amendment “would turn educators into law enforcement agents and put more kids on the streets”); see also Marc Lacey, *Bill’s Support Marked by Contradiction*, L.A. TIMES, July 6, 1996, [http://articles.latimes.com/1996-07-06/news/mn-21616\\_1\\_law-enforcement-officers](http://articles.latimes.com/1996-07-06/news/mn-21616_1_law-enforcement-officers) (noting that “virtually every major police organization, including the nation’s largest, has opposed Gallegly’s proposal”).

officers more difficult.” We knew we were winning when the law enforcement group affiliated with the National Rifle Association came out in *favor* of the Gallegly Amendment—and was the only law enforcement group to do so.<sup>65</sup> When the fight over the Gallegly Amendment became seen as one between twenty-five police organizations and police chiefs on one side, and a marginal law enforcement front group associated with the NRA on the other, it became clear that we had framed and won the argument. In fact, after President Clinton pledged to veto the bill if it included the Gallegly Amendment, some advocates even quietly hoped that Gallegly would *succeed* in getting the final bill to include his amendment—in order to give Clinton an excuse to veto the legislation and to make the political fight entirely about Gallegly’s proposal, rather than all of the other issues with which we were having much more difficulty.<sup>66</sup> Unfortunately, at least for purposes of that strategy, while the Gallegly Amendment eventually received a show vote in the House, where it passed, it ultimately was stripped from the final bill in conference.<sup>67</sup>

The strategies that we undertook in response to the anti-immigrant backlash in Congress were difficult and controversial. Advocates in communities near the U.S.-Mexico border, for example, rightfully objected that we had thrown their concerns under the bus, and an aggressive, militarized approach to border enforcement quickly solidified. In addition, we were unsuccessful in blocking either restrictions on eligibility for welfare benefits or the evisceration of due process protections for immigration proceedings. These setbacks led some to argue that our strategies made things worse. Without question, the measures adopted by Congress were draconian. The 1996 laws included provisions that, among other things, significantly (and retroactively) expanded the criminal grounds of deportability,<sup>68</sup> sharply curtailed opportunities for discretionary relief from removal,<sup>69</sup> required detention of certain categories of individuals while removal

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65. Lacey, *supra* note 65 (noting that the only law enforcement group to support the Gallegly Amendment was the Law Enforcement Alliance of America, which “was founded in 1991 with financial help from the National Rifle Association in an effort to show that many officers part company with mainstream police groups over gun control legislation”).

66. *Clinton Vows Veto of Immigration Bill If Gallegly Amendment Is Included*, 73 INTERPRETER RELEASES 1111, 1111 (1996).

67. GIMPEL & EDWARDS, JR., *supra* note 13, at 257–59, 269, 272–74.

68. See Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 111–13 (1998); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 482–86 (2007).

69. Morawetz, *supra* note 69, at 113–15; Jill E. Family, *The Future Relief of Immigration Law*, 9 DREXEL L. REV. 393 (2017).



proceedings are pending,<sup>70</sup> purported to eliminate judicial review of removal decisions,<sup>71</sup> authorized state and local law enforcement officers to be deputized as immigration agents,<sup>72</sup> and blocked immigrants from receiving welfare benefits.<sup>73</sup> Ultimately, we were fighting a three-headed monster, with three major legislative packages – IIRIRA, AEDPA, and PRWORA – all moving through Congress at the same time. While we were able to fend off a number of anti-immigration provisions that would have resulted in significant harms, many others were adopted and enacted into law.

Immigrant communities continue to endure the consequences of that legislation. The framework established by the 1996 immigration legislation became the foundation upon which the vast, “formidable machinery” of immigration enforcement that exists today was built.<sup>74</sup> The development of that regime occurred not in one fell swoop in 1996, but over an extended period of time, with ongoing, bipartisan collusion to devote ever-increasing resources to implement the provisions enacted into law in 1996. This growth of immigration enforcement was accelerated by the Bush administration’s response to the 2001 terrorist attacks. Among the many actions the Bush administration took to target immigrants in the aftermath of the attacks – including the interrogation, detention, and deportation of Muslim, Arab, and South Asian immigrants and the “special registration” program – one of its most far-reaching initiatives grew directly out of the 1996 legislation.<sup>75</sup> Using § 287(g) of the Immigration and Nationality Act – which was enacted into law as part of IIRIRA in 1996, but had not previously been utilized to any meaningful extent prior to the 2001 terrorist attacks – the Bush administration began aggressively enlisting state and local police in federal immigration enforcement activities.<sup>76</sup> Several years later, the Bush administration sought to

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70. See Margaret H. Taylor, *Demore v. Kim: Judicial Deference to Congressional Folly*, in IMMIGRATION STORIES 343, 345–54 (David A. Martin & Peter H. Schuck eds., 2005).

71. See Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 963–69 (1998).

72. Jennifer M. Chacón, *A Diversion of Attention: Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1582–86 (2010).

73. See Wishnie, *supra* note 35, at 511–18.

74. DORIS MEISSNER ET AL., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY (2013).

75. See generally MUZAFFAR A. CHISHTI ET AL., AMERICA’S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES AND NATIONAL UNITY AFTER SEPTEMBER 11 (2003) (discussing the broad measures undertaken in the aftermath of the 2001 terrorist attacks).

76. Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1094 (2004).

deepen state and local police involvement with immigration enforcement with the creation of its Secure Communities program, which was dramatically expanded under the Obama administration to become an immigration policing dragnet until it was suspended in November 2014.<sup>77</sup> As a result of these developments since 1996, as the Migration Policy Institute has documented, immigration enforcement has now become an \$18 billion regime, utilizing more resources than all other federal law enforcement programs combined and resulting in the deportation of hundreds of thousands of individuals per year.<sup>78</sup>

### III. TOWARD A NEW PARADIGM ON IMMIGRATION REFORM

As the political process now appears to stand at the edge of another anti-immigrant backlash, how should we think about the future of immigration policy and immigration reform in light of the fights over AEDPA and IIRIRA during the mid-1990s? Notably, in the years immediately after the enactment of the 1996 legislation, immigration advocates were able to regain some momentum and achieve some legislative successes—enabling significant numbers of Central Americans, Haitians, and other groups in limbo to apply for permanent residence<sup>79</sup> In addition, by 2001, as noted above, members of Congress from both parties—particularly as the harsh consequences of the 1996 immigration laws became more visible—seemed ready to agree upon at least some limited reforms to scale back some of the most excesses in those laws.<sup>80</sup> However, the 2001 terrorist attacks put a sudden halt to those efforts. For the past fifteen years or so, the primary legislative goal for most immigration advocates has been to seek comprehensive immigration reform in the form of a legislative

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77. Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105, 1108, 1126–31 (2013).

78. See MEISSNER ET AL., *supra* note 75, at 20–21.

79. See Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2160 (1997); Haitian Refugee Immigration Fairness Act, Pub. L. No. 105-277, Div. A., Tit. IX, 112 Stat. 2681, 2681-538 to 2681-542 (1998); Legal Immigration Family Equity Act, Pub. L. No. 106-553, §§ 1101-04, 114 Stat. 2762, 2762A-143 to 2762A-149 (2000); Legal Immigration and Family Equity (“LIFE”) Act Amendments of 2000, Pub. L. No. 106-554, Appx. D, Div. B, §§ 1501-06, 114 Stat. 2763, 2763A-324 to 2763A-328 (2000); see also SCHRAG, *supra* note 18, at 225 (noting that the enactment of AEDPA, PRWORA, and IIRIRA “might have been possible only in the brief two-year life span of the 104th Congress,” since the “spike in public distress about immigration” was “temporary” and happened to coincide with the ascendance of anti-immigration politicians in Congress).

80. See *supra* notes 4–7 and accompanying text.

package that combines legalization of undocumented workers, increases in the future flow of legal immigration, and targeted enforcement measures.<sup>81</sup>

Although the Senate over the past decade has twice managed to adopt major comprehensive immigration reform bills, in 2006 and 2013, Congress has nevertheless ultimately deadlocked and been unable to enact this reform legislation into law.<sup>82</sup> Indeed, congressional Republicans have strongly opposed not only comprehensive immigration reform, but *any* effort to achieve reform that might legalize or grant relief to undocumented immigrants—including the DREAM Act, which would provide legal status to undocumented immigrants who came to the United States as youth, and President Obama’s administrative initiatives to provide deferred action to individuals deemed to be low priorities for removal.<sup>83</sup> For their part, Democrats have not always had their hearts in support of immigration reform either. As a result, Congress has been unable to pass major immigration reform legislation in the years since 1996.

Many people have asked me why the Obama administration was deporting as many as 400,000 individuals per year—and detaining an average of more than 30,000 individuals per day—even as it professed to support comprehensive immigration reform, and even as the immigrants’ rights and immigration reform movement was getting stronger and stronger in opposition to the aggressive, draconian enforcement practices that the 1996 legislation enabled.<sup>84</sup> A key reason is that the Obama administration largely operated from the premises of an outdated paradigm, which stood for the proposition that if Democrats took a hard stance on enforcement, they might successfully win over Republican support for comprehensive immigration reform. Only by exhibiting toughness on immigration enforcement, Obama administration officials believed, could they effectively persuade Republicans to support reforms that would provide legal sta-

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81. See, e.g., Sheila Jackson Lee, *Why Immigration Reform Requires a Comprehensive Approach That Includes Both Legalization Programs and Provisions to Secure the Border*, 43 HARV. J. ON LEGIS. 267 (2006).

82. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (as passed by Senate, June 27, 2013); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (as passed by Senate, May 25, 2006).

83. Elisha Barron, Recent Development, *The Development, Relief, and Education for Alien Minors (DREAM) Act Recent Development*, 48 HARV. J. ON LEGIS. 623, 634–38 (2011).

84. MEISSNER ET AL., *supra* note 75, at 118–40.

tus and a path to citizenship for undocumented immigrants and facilitate regularized future flows of legal immigrants at levels more in line with economic and social realities.<sup>85</sup>

That was the presumption. And it was one that I used to share. However, as the deadlock over immigration reform in Washington has persisted, grassroots immigrants' rights activists and local immigration policy advocates working on the front lines have stood up to say that we have to shift that paradigm—that we can no longer just stand by waiting for comprehensive immigration reform in Washington while enforcement gets ramped up, hundreds of thousands of individuals get detained and deported, due process gets eviscerated, avenues for legalization and relief from removal get closed, and aggressive ICE raids turn people over to the deportation machine. Rather, these advocates have insisted that we find ways to more directly challenge irrational enforcement priorities and heavy-handed enforcement tactics because too many people are getting caught up in the enforcement dragnet.

The fact is that these grassroots advocates were right—and eventually, the whole immigrants' rights and immigration reform movement came around. And the movement itself has evolved dramatically, becoming stronger, more diverse, and much more capable and effective at directly making its voices heard in Washington. The picture is far different from the way things were twenty years ago in the mid-1990s when there was more of a sharp divide between immigration advocates in Washington and activists working at the grassroots. The growing strength of this grassroots movement has led to tangible results. The movement effectively prompted the Obama administration to shift course by refining and adjusting its enforcement priorities and practices, by initiating the Deferred Action for Childhood Arrivals (“DACA”) program, and later by expanding DACA and initiating a second deferred action initiative, the Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”) program.<sup>86</sup> While DAPA and the expansion of DACA were blocked by a federal judge in Texas, the Obama administration's shift in enforcement priorities—which were not affected by that preliminary injunction—played an important role in changing the executive branch's practices, leading to a significant reduction in the number of

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85. See, e.g., Rebecca Kaplan, *Hillary Clinton Faults Obama for Aggressive Immigration Enforcement*, CBS NEWS (Oct. 6, 2015) <http://www.cbsnews.com/news/clinton-faults-obama-for-aggressive-immigration-enforcement/>; see also David A. Martin, *A Lawful Step for the Immigration System*, WASH. POST, June 25, 2012, at A17.

86. See generally Kalhan, *supra* note 5, at 60–62 (examining a series of issues in litigation surrounding DACA and DAPA, specifically *Texas v. United States*).

people being deported by the end of President Obama's second term in office.<sup>87</sup>

To be sure, those administrative initiatives were never sufficient to fully reverse the injustices wrought by the 1996 laws. Even under the Obama administration's changes to its enforcement priorities, if ICE agents could find someone, for example, with a driving while intoxicated offense from twenty years ago, they still might have pursued enforcement action against them—even if the balance of equities weighed against doing so. The Trump administration has reversed even these limited efforts to temper the effects of the 1996 laws through executive action. Indeed, as immigration attorney David Leopold describes, the Trump administration's approach to immigration enforcement can fairly be described as “throwing any notion of ‘deportation priorities’ out the window” altogether, sweeping broadly to deem virtually every undocumented immigrant, and many noncitizens with legal status, to be a priority for deportation while simultaneously seeking to limit due process protections even further.<sup>88</sup>

Nevertheless, even as politicians in Washington cling to the old paradigm—and some of them double down on anti-immigrant approaches reminiscent of the mid-1990s—there also has been a shift taking place at the state and local levels.<sup>89</sup> Increasingly, states and localities across the country are adopting and implementing policies that seek to integrate and include immigrants—for example, by limiting the involvement of state and local officials with federal immigration enforcement activities; expanding immigrants' access to health care, social services, and higher education; providing access to driver's licenses and other forms of identification; ensuring immigrants' eligibility for professional licenses; extending workplace and employment protections to immigrant workers; and enacting crimi-

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87. See *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (entering preliminary injunction blocking DAPA and expansion of DACA), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam); Kalhan, *supra* note 5, at 85–90; Roque Planas & Elise Foley, *Obama Closes Presidency With Far Fewer Deportations Than When He Started*, HUFFINGTON POST (Dec. 30, 2016), [http://www.huffingtonpost.com/entry/barack-obama-deportations-2016\\_us\\_58668157e4b0eb5864890a03](http://www.huffingtonpost.com/entry/barack-obama-deportations-2016_us_58668157e4b0eb5864890a03).

88. See David Leopold, *Trump's Immigration Executive Order Is a Blueprint for Mass Deportation*, MEDIUM, Jan. 26, 2017, <https://medium.com/@DavidLeopold/trumps-immigration-plan-is-a-blueprint-for-mass-deportation-fd0644c3a612>.

89. See, e.g., Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703 (2013).

nal justice reforms that are often intended in part to benefit immigrants and immigrant communities.<sup>90</sup> It is not happening everywhere—for example, Arizona and other states have continued to make life more difficult for immigrants in many ways. But particularly in the wake of the Supreme Court's decision in *Arizona v. United States*—which invalidated a number of the most severe anti-immigrant measures taken by states such as Arizona in the late 2000s—a growing number of states are making significant strides in the direction of integration and inclusion of immigrants and immigrant communities.<sup>91</sup>

So what does this mean going forward? Right now, immigrants and immigrant communities are facing a critical moment given the growth and consolidation of the federal immigration enforcement machinery and the rise of Donald Trump. His aggressive policies have plunged millions of immigrants into crisis, with families that include undocumented immigrants fearful of increased raids and deportations. His immigration executive orders create a blueprint for the mass deportation of millions of rooted families, aim to block Syrian and other refugees from being resettled in the United States, and threaten to bar tens of millions of Muslims from being admitted into the United States.<sup>92</sup> And as a movement, we will have to show that we can generate the power and the support to resist the onslaught of ramped up enforcement. His administration may even promote legislation aimed at severely cutting legal immigration levels by cutting family immigration, a throwback to the mid-1990s debate.<sup>93</sup>

However, I am optimistic we will effectively limit the damage the Trump administration does, and I remain optimistic that the debate will move in a more progressive direction on the other side of the Trump administration. Let me be bold. From my point of view, the rise of Trump reveals that the populist, anti-immigrant right may not go down easily—but they are going to go down. Trump's presidency

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90. NAT'L IMMIGR. LAW CENTER, STATES REJECT IMMIGRATION ENFORCEMENT MEASURES AND ADVANCE INCLUSIVE POLICIES IN 2016 (2016); VILLAREAL, *supra* note 25; Recent Legislation, *Immigration Law—Criminal Justice And Immigration Enforcement—California Limits Local Entities' Compliance With Immigration And Customs Enforcement Detainer Requests*, 127 HARV. L. REV. 2593 (2014) (discussing California's Transparency and Responsibility Using State Tools (Trust) Act).

91. See *Arizona v. United States*, 132 S. Ct. 2492 (2012).

92. Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017) (revised ban on entry and refugee admissions); Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (ban on entry and refugee admissions) (rescinded Mar. 6, 2017 by Exec. Order 13,780); Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (directives on interior immigration enforcement); Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017) (directives on border enforcement).

93. Ashley Killough, *GOP Senators Aim to Cut Legal Immigration by Half*, CNN POLITICS (Feb. 7, 2017), <http://www.cnn.com/2017/02/07/politics/cotton-perdue-immigration-bill/>.

presents a grave and perilous threat to immigrant communities. But just as California has shifted from being a laboratory of anti-immigrant legislation to one of the most pro-immigrant states in the country, my hope and belief is that the culture of nativism, racism, xenophobia, misogyny, and “othering” that propelled Trump and his Republican enablers may, in fact, represent the death throes of the anti-immigrant movement in this country—not its permanent ascendance.<sup>94</sup>

Democrats are now largely united in favor of comprehensive immigration reform and other initiatives to integrate, include, and support immigrants. Indeed, during the 2016 primary election campaign for president, former Secretary of State Hillary Clinton and Senator Bernie Sanders—neither of whom had a particularly distinguished record of leadership on immigration before entering the race—were falling all over themselves to show who was more strongly in favor of immigration and immigrants’ rights.<sup>95</sup>

The shift in public opinion on the issue of immigration has also been astounding. In 1994, when the Pew Research Center first began asking whether immigrants were a “burden on our country because they take our jobs, housing and health care” or “strengthen the country because of their hard work and talents,” individuals responded by a margin of two-to-one that immigrants were a burden.<sup>96</sup> That was the public opinion climate that shaped the debates over AEDPA, PRWORA, and IIRIRA. Now, when Pew asks the same questions, the margin is precisely the opposite: almost a two-to-one margin in favor of the view that immigrants are good for America.<sup>97</sup> That view is held even more strongly by younger Americans, with 76 percent of “millennials” and 60 percent of those in “Generation X” viewing immigrants favorably.<sup>98</sup> As immigrants have moved throughout the country and are better understood, public opinion in support of immigrants and immigration has increased. To a considerable extent, the

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94. See, e.g., Hemmer, *supra* note 25.

95. Julia Preston, *Hilary Clinton and Bernie Sanders Draw Distinctions on Immigration Policy*, N.Y. TIMES (Mar. 10, 2016), <https://www.nytimes.com/2016/03/11/us/politics/hillary-clinton-and-bernie-sanders-draw-distinctions-on-immigration-policy.html>.

96. Bradley Jones, *Americans’ Views of Immigrants Marked by Widening Partisan, Generational Divides*, PEW RESEARCH CENTER (Apr. 15, 2016), <http://www.pewresearch.org/fact-tank/2016/04/15/americans-views-of-immigrants-marked-by-widening-partisan-generational-divides/>.

97. *Id.*

98. *Id.*

people who are most hostile to immigrants appear to be those who do not know them or live in communities with them.<sup>99</sup>

Even in the wake of Donald Trump's ascendance to the White House — bringing with it the daily vilification of immigrants in public discourse, often on the basis of entirely false information — it seems clear that the public has not been won over to support the Republican administration's anti-immigrant policy positions. Americans in both political parties continue to support legalization for undocumented immigrants by significant margins.<sup>100</sup> Majorities of Americans also oppose the suspension of the program to admit Syrian refugees, the suspension of entry of individuals from predominantly Muslim countries, and the construction of a wall along the U.S.-Mexico border.<sup>101</sup>

If these trends hold, then we have already won these arguments — and the only real question concerns how long it will take the political system to catch up with the public. In the coming years, I believe that there will be a moment of truth as to whether meaningful immigration reform will be permitted back onto the political agenda at the federal level in Washington. To the extent that moment of truth is a contentious one, it will likely tell us much more about the future of the Republican Party than about the future of the country — because the majority of the country already appears to have decided that immigrants are good for America, that we should continue to play a leadership role in accepting refugees, that we should not treat religious minorities as the “other,” and that we should make sure that we are a country where our differences are seen as a source of strength, rather than a source of threat.

Diversity does not threaten American ideals — it is the very premise of American ideals. I am confident that we are winning these big arguments and that ultimately we will win the big legal and policy arguments as well. The immigration policy aspirations held by a solid majority of Americans have been frustrated by a deadlocked Supreme Court, a federal district court judge in Texas, a Republican Congress, and now a virulently anti-immigrant Republican President. History may well regard all of these actors to have been effective in blocking immigration reform and undermining immigrants' rights

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99. See *Nearly 20% of All Illegal Immigrants Live Near NYC and LA*, N.Y. DAILY NEWS (Feb. 10, 2017), <http://www.nydailynews.com/news/national/20-illegal-immigrants-live-nyc-la-article-1.2969412> (noting that cities with high concentrations of illegal immigrants oppose expanded deportation plans).

100. *Polling Roundup: Trump's Immigration and Refugee Policies Are as Unpopular as He Is*, AMERICA'S VOICE (Feb. 6, 2017), [http://americasvoice.org/press\\_releases/polling-roundup-trumps-immigration-refugee-policies-unpopular/](http://americasvoice.org/press_releases/polling-roundup-trumps-immigration-refugee-policies-unpopular/).

101. *Id.*



for some period of years – but ultimately, they will be seen as having failed their nation, because the American people want policies that are pragmatic, humane, and are as good as our ideals and values.

Regardless of whether Republicans continue to stymie immigration reform at the federal level, there likely will continue to be more advances every day at the state and local levels, where advocates have continued to push strongly for policies that seek to welcome, integrate, and normalize the equitable treatment of immigrants regardless of whether they have documentation and legal status. I can imagine and foresee state-level immigration initiatives – akin to the state-level efforts in recent years to legalize marijuana even as its cultivation, possession, sale, and distribution remain unlawful as a matter of federal law – that push the envelope on the preemptive effective of federal immigration enforcement initiatives.<sup>102</sup> Perhaps some immigrant-friendly states will provide, for example, that if a resident has a valid state driver's license or other identification document establishing state residence, they will be deemed eligible to work within the state regardless of their immigration status as a matter of federal law.<sup>103</sup> There is too much power behind the immigrants' rights movement, too much conviction in support of welcoming and integrating immigrants as part of our society, and too much demand to fix the wrongs of the past generation's comprehensive severity on immigration, to echo the theme of this Symposium, and make things right for future generations of Americans.

### CONCLUSION

Twenty years after the enactment of AEDPA and IIRIRA in 1996, it is manifestly clear that these laws have wrought enormous damage by subjecting large numbers of people to sweeping, disproportionately harsh deportation grounds without sufficient procedural protections or opportunities for relief based on the equities of individualized circumstances. Given the many injustices arising from the massive deportation regime ushered in by the 1996 legislation, the need for reform has only become more urgent.

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102. See Erwin Chemerinsky, Jolene Forman, Allen Hopper, & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74 (2015); Sam Kamin, *Marijuana at the Crossroads: Keynote Address*, 89 DENV. U.L. REV. 977 (2012).

103. Major immigration initiatives that have been introduced in state legislatures this year include the California Values Act, S.B. 54, 2017–18 Sen., Reg. Sess. (Cal. 2017), and the New York is Home Act, S. 1215, 2017–18 Sen., Reg. Sess. (N.Y. 2017); see also Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 STAN. L. REV. 869, 872 (2015).

Many of us used to believe that when it came to immigration policy, there were only two options: comprehensive reform at the federal level or nothing. However, particularly in the wake of the 2016 election, we need to identify new ways to measure our success when it comes to immigration reform. Although many of us hoped that Congress would establish a new framework by enacting comprehensive immigration reform into law—and we could then spend the years that follow detailing and refining its implementation, in order to make reform work—it may instead be that we need to pursue the model successfully pursued by LGBT advocates, where we push for change at the state and local level, create new facts on the grounds, and realize the big victory at the federal level only later.<sup>104</sup> Despite the challenges we face as advocates for immigrants' rights and immigration reform, I am confident that the power, drive, and resilience of our movement and the strong support from the majority of Americans will, sooner than most believe, result in policies that ensure dignity and fair treatment for immigrants and that are true to our values as a nation.

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104. See Suzanne B. Goldberg, *Obergefell at the Intersection of Civil Rights and Social Movements*, 6 CAL. L. REV. CIR. 157 (2015); MARC SOLOMON, *WINNING MARRIAGE: THE INSIDE STORY OF HOW SAME-SEX COUPLES TOOK ON THE POLITICIANS AND PUNDITS AND WON* (2014).