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Mariela Olivares

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# Narrative Reform Dilemmas

*Mariela Olivares*\*

## I. INTRODUCTION

The way in which we tell our stories and describe our characters sets the foundation for how our audience perceives the story. Depending on the narrator's choices, our protagonist may be a hero against the wrongs of an unjust authoritarian system – or a terrorist working against a legitimate government. Nelson Mandela, even as a former President of South Africa, was on a U.S. government terror watch list until as late as 2008 and could not enter the country without a dispensation of U.S. immigration policies.<sup>1</sup> The U.S. government prohibited his entry as a communist sympathizer who fought against the once-recognized South African leadership.<sup>2</sup> Only with the wisdom of time and political awakening did the world fully recognize that Mandela fought for freedom against the apartheid regime and that his resistance against the government was just. Prior to this realization, however, Mandela was characterized in many popular media outlets of the time as a communist and terrorist leader of the revolutionary African National Congress (“ANC”) South African party.<sup>3</sup>

Though the passage of time may influence narrative choices, changes in rhetoric can have concomitant influence on political movements. For example,

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\*Associate Professor of Law, Howard University School of Law; LL.M., Georgetown University Law Center; J.D., University of Michigan Law School; B.A., University of Texas at Austin. I am very grateful for the thoughtful and insightful comments of Stewart Chang, Kevin R. Johnson, Elizabeth Keyes, Karla McKanders and participants at presentations at the Howard University School of Law and the 2016 Law & Society Conference. I dedicate this Article to my parents, José and Tomacita, and to my daughters, Amalia and Alena.

1. See Caitlin Dewey, *Why Nelson Mandela Was on a Terrorism Watch List in 2008*, WASH. POST (Dec. 7, 2013), <https://www.washingtonpost.com/news/the-fix/wp/2013/12/07/why-nelson-mandela-was-on-a-terrorism-watch-list-in-2008/> (“The Reagan administration also followed South Africa’s lead on characterizing the ANC, naming it a terrorist group in the 1970s and forcing Mandela to get special State Department clearance to enter the U.S. in 2008. (‘It’s frankly a rather embarrassing matter,’ Secretary of State Condoleezza Rice said at the time.)”).

2. See *id.*

3. See *id.*; Robert Windrem, *US Government Considered Nelson Mandela a Terrorist Until 2008*, NBC NEWS (Dec. 7, 2013, 4:55 AM), <http://www.nbcnews.com/news/other/us-government-considered-nelson-mandela-terrorist-until-2008-f2D11708787>. Indeed, some news outlets continued to paint Mandela in this light after his death. See, e.g., Andrew C. McCarthy, *Remembering Mandela, Without Rose-Colored Glasses*, NAT’L REV. (Dec. 14, 2013, 4:00 AM), <http://www.nationalreview.com/article/366317/remembering-mandela-without-rose-colored-glasses-andrew-c-mccarthy> (“Still, while high-wattage fawning was to be expected in the mainstream media [upon Mandela’s death], the conservative press, too, tripped over itself to praise Mandela. That was disheartening.”).

as this Article explores, the popular vilification of immigrants in the United States has negatively influenced the societal and political environment against immigrants. I discuss the power of narrative and outline ways in which advocates use this power to influence social and political opinion to effectuate legal reform. Importantly, however, I caution that advocates must be wary about reifying one community of people to the demonization of another.

To juxtapose this approach using another contemporary example, I discuss the advocacy that eventually secured marriage equality rights for gay people in the United States as a case study for the power of narrative to achieve civil rights gains. When the U.S. Supreme Court decided the landmark case of *Obergefell v. Hodges*<sup>4</sup> in June 2015, a broad coalition of gay rights advocates and supporters celebrated the decision that provided same-sex couples with the same rights to marry as heterosexual people.<sup>5</sup> Yet, upon reflection on the language and tenor of the opinion, I wondered to what extent the opinion's exultation of the marriage institution would eventually harm the rights of other communities and families who did not seek marriage. This case study explores how the narrative of the *Obergefell* opinion builds upon and solidifies the primacy of the American marriage to the ongoing detriment of a non-traditional family structure and of an individual's choice to eschew the government-sponsored marriage institution. Although this fealty to marriage is not surprising in the context of civil rights advancement of marriage equality, the marriage narrative also demeans those who do not fit within its traditional purview.

Consequently, I challenge the advocacy strategy that builds support for equality movements by using a traditional normative context – like the heteronormative narrative that sought to normalize gay marriage by drawing comparisons to traditional family structures but which ultimately results in the denigration of those residing outside these contextual boundaries. Analogously, then, advocates cannot simply replace one narrative with another in the fight for immigrant rights and equality. Instead, reforming the narrative must be strategic and informed.

This Article proceeds in the following way. Part II lays an important foundation in understanding the historical context of public and political perceptions in immigration law and policy. Although there have been periods of relative acceptance of immigrants – including through legislative reforms in the 1980s that provided legalization to millions of undocumented agricultural workers – more contemporary rhetoric has returned to an environment overwhelmed by vitriol and scapegoating against immigrant communities.<sup>6</sup> More-

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4. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

5. See Brian McBride, *Four Cases That Paved the Way for Marriage Equality and a Reminder of the Work Ahead*, HUM. RTS. CAMPAIGN (June 26, 2017), <http://www.hrc.org/blog/four-cases-that-paved-the-way-for-marriage-equality-and-a-reminder-of-the-w>.

6. See Peter J. Duignan, *Making and Remaking America: Immigration into the United States*, HOOVER INSTITUTION (Sept. 15, 2003), <http://www.hoover.org/research/making-and-remaking-america-immigration-united-states>.

over, animosity against immigrants has historically and contemporarily included discriminatory and racist policies and laws that consistently target or implicitly affect immigrants of color. Thus, Part II frames the historical discussion as one of racial and ethnic subordination, particularly against Black and Latino/a immigrants, and comments on how the negative narrative against such communities has emerged.

To consider how to turn this tide of harmful rhetoric, Part III provides an analogous illustration. As an example of how civil rights equality movements have successfully reframed a contentious debate, I discuss the marriage equality movement. The same-sex marriage debate and the fight for equality for gay people represent a useful example of how advocates created a tidal shift in the ways in which the larger society perceived gay people and their demands for equality. Through this brief historical discussion, Part III describes the gay-rights movement, from a time in which the U.S. Supreme Court upheld criminalization of same-sex sodomy in 1986<sup>7</sup> to the 2015 *Obergefell* decision in which the U.S. Supreme Court lauded the gay community and upheld same-sex marriage as a fundamental right.<sup>8</sup> Within this success, however, Part III introduces the concomitant effects that the advocacy strategy that sought to normalize gay people and their quest for marriage equality could have upon others who do not fit this normative rhetorical ideal. This is an important foundational discussion for Parts IV and V.

Part IV comments on this advocacy strategy of normalizing narrative in the immigrants' rights movement. Using legislative and political movements that have garnered relative widespread support (even if not ultimately or yet successful), one can glean lessons from the DREAM Act,<sup>9</sup> the Deferred Action for Childhood Arrivals ("DACA") program,<sup>10</sup> and the advocacy efforts on be-

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7. *Bowers v. Hardwick*, 478 U.S. 186, 193–96 (1986) (upholding Georgia's anti-sodomy law by reasoning that there was no fundamental right to homosexual sodomy), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

8. *See Obergefell*, 135 S. Ct. at 2604.

9. The Dream Act of 2017, introduced to Congress on July 20, 2017, failed to pass. *See* Dream Act of 2017, S. 1615, 115th Cong. (2017); Dream Act of 2017, H.R. 3440, 115th Cong. (2017). DREAM stands for Development, Relief, and Education for Alien Minors.

10. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> (last visited Dec. 29, 2017). At the time of publication, there is profound volatility in the political climate surrounding DACA reform, including a 2018 shutdown of the federal government due, in large part, to certain Democrats withholding their support for a spending bill without renewed protections for DACA recipients after the Trump Administration decided to end DACA. Sean Sullivan, Ed O'Keefe and Elise Viebeck, *Shutdown Ends After Democrats Agree to Trust that McConnell Will Allow "Dreamer" Vote*, WASH. POST (Jan. 22, 2018), [https://www.washingtonpost.com/powerpost/congress-votes-to-end-shutdown-after-democrats-agree-to-trust-mcconnell-on-dreamer-promise/2018/01/22/79783cc2-ff85-11e7-bb03-722769454f82\\_story.html?utm\\_term=.092a5b0c8b30](https://www.washingtonpost.com/powerpost/congress-votes-to-end-shutdown-after-democrats-agree-to-trust-mcconnell-on-dreamer-promise/2018/01/22/79783cc2-ff85-11e7-bb03-722769454f82_story.html?utm_term=.092a5b0c8b30).

half of unaccompanied immigrant minors. Using a framework of the vulnerable or helpless “good” immigrant has been a common and somewhat successful tool in reframing the debate in immigration reform. For example, although there was and is still considerable vehement opposition against undocumented immigrant children and families remaining and gaining lawful status in the United States,<sup>11</sup> there was a marked shift in rhetoric when high numbers of Central American unaccompanied children and mothers with their children arrived in the United States fleeing violence in their home countries in 2014.<sup>12</sup> It seemed as if the arrival of perhaps the most vulnerable of immigrants sparked a measure of compassion and humanitarianism that had not previously been the norm. Part IV discusses the power of narrative in immigration equality strategies but notes that past efforts have resulted in incomplete successes.

Part V warns that strategies relying upon the normalization of immigrants will result in the same effects as in the same-sex marriage debate. Just as prioritizing the marriage institution has effects on those who eschew the traditional marriage norm, touting the worthiness of seemingly vulnerable immigrants will have effects on other immigrants who do not fit the archetype. In this sense, the role of the advocate for immigrant equality must be cognizant of the resulting dilemma in achieving results for one group, only to increase the burden on another. Indeed, the immigration law and policy consequences of demonizing one community to uplift another will lead to serious and irreversible consequences for the ostracized group. Finally, critical legal scholars teach that meaningful gains towards civil rights equality must pay heed to the dominant political majority, who condones reform only when it is in its own interests. This Article concludes by acknowledging these conflicts and realities, while encouraging advocates to create a politically viable narrative that capitalizes on the invigorated public consciousness about immigrant inequality. Although I am unsure of the ultimate successful narrative strategies, the aim of this Article is to engage advocates and political communities in strategic and productive conversations that will advance the immigrant justice movement.

## II. SETTING THE STAGE FOR THE IMMIGRATION RHETORIC

The societal and political perception of immigrants’ presence in the United States has gone through permutations spanning the spectrum of early inclusiveness to vehement opposition. Indeed, in our country’s earliest history,

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11. See Mariela Olivares, *Intersectionality at the Intersection of Profiteering & Immigration Detention*, 94 NEB. L. REV. 963, 997 (2016) [hereinafter Olivares, *Intersectionality at the Intersection*] (focusing on the rhetoric labeling “immigrants as criminal lawbreakers who will steal free education, public benefits and healthcare, and infest schools . . . with disease” (footnotes omitted)).

12. *Id.* at 997–98 (highlighting some of the grounds for asylum that the immigrant women sought, including fleeing persecution from domestic and gang violence and sexual abuse). Yet, as also noted, there were protests and angry rhetoric aimed at the mothers and children. *Id.*

there was no formalized immigration law but instead a largely unregulated regime of open borders.<sup>13</sup> In the late eighteenth century, states began to legislate about topics surrounding migration, which prompted the nascent federal government to recognize the problematic system of allowing each state to make its own rules regarding the migration of people.<sup>14</sup> What resulted were the federal government's efforts to regularize immigration law and policy through common law decisions and eventual legislation. These earliest years of federal immigration power represent the seeds of congressional plenary power, the broad, all-encompassing power of the federal government to regulate immigration law.<sup>15</sup>

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13. *Overview of INS History: Early American Immigration Policies*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/history-and-genealogy/our-history/agency-history/early-american-immigration-policies> (last updated Sept. 4, 2015) (“Americans encouraged relatively free and open immigration during the 18th and early 19th centuries, and rarely questioned that policy until the late 1800s.”); see also Paul Finkelman, *Coping with a New “Yellow Peril”: Japanese Immigration, the Gentlemen’s Agreement, and the Coming of World War II*, 117 W. VA. L. REV. 1409, 1414 (2015) (noting that, in the 1600–1800s and through the time of the American Revolution, the voluntary and heavily-encouraged immigration of mostly Protestants “from Great Britain (England, Wales, Scotland, and Ireland), and . . . many people of Dutch ancestry in what became New York. The largest non-British immigration was from Germany”). These numbers do not note the forced migration in the American slave trade. See *id.* at 1414 n.26 (discussing the data from the Trans-Atlantic slave trade). Indeed, as Finkelman further writes, even the earliest settlers and colonizers in the United States complained about the effects of immigrants, noting that “as early as 1642, authorities in the Plymouth colony blamed social problems on unwanted immigrants: in [one documented] case, a fellow Englishman whose religious convictions and personal behavior were not exactly in tune with the founders of the colony.” *Id.* at 1413.

14. See *Henderson v. Mayor of N.Y.*, 92 U.S. 259, 274 (1875) (holding that a state tax on emigrant steamship passengers was inappropriate because such matters fall under the powers of Congress); *The Head-Money Cases*, 18 F. 135, 138–39 (C.C.E.D.N.Y. 1883) (upholding taxes on incoming noncitizen passengers as exercise of Congress’ interstate commerce power), *aff’d*, 112 U.S. 580 (1884); see also Finkelman, *supra* note 13, at 1415–17 & n.45 (discussing how states openly regulated migration until about 1849 when the U.S. Supreme Court struck down Massachusetts and New York immigration-related statutes as a violation of Congress’s dormant powers in *Smith v. Turner*, 48 U.S. 283 (1849)). As noted, this discussion regarding interstate commerce and the parallel restrictions regarding taxing incoming international passengers did not encompass the slave trade. Indeed, at the time of the slave trade, the discussion in the courts often centered on whether the Constitution could interfere with states’ rights with regards to slavery. Justice Daniel Webster, for example, famously declared that “the Constitution recognized slaves as property, and as such they fell under the commerce clause,” thereby equating slaves as any other property. See Kirk Scott, *The Two-Edged Sword: Slavery and the Commerce Clause, 1837–1852*, 2 FAIRMOUNT FOLIO 41, 44 (1998).

15. Olivares, *Intersectionality at the Intersection*, *supra* note 11, at 967–69; see also Rose Cuison Villazor, *Chae Chan Ping v. United States: Immigration as Property*, 68 OKLA. L. REV. 137, 156 (2015) (speculating that had Chae Chan Ping’s property rights argument swayed the Court, the plenary power doctrine would not have the same

Within the establishment of these broad powers, the law was explicitly and pointedly discriminatory against immigrants of color, reflecting the general racist political and societal climate of the time.<sup>16</sup> As one of the most notorious examples, the U.S. Supreme Court, in *Chae Chan Ping v. United States*, upheld the Chinese Exclusion Act of 1882, which restricted the immigration of Chinese immigrants to the United States.<sup>17</sup> In the early 1800s, there was relatively minimal immigration from China, but the number of Chinese immigrants surged towards the end of the 1800s as labor shortages hindered the growing American industrial economy, prompting efforts to bring Chinese laborers.<sup>18</sup> As the numbers of Chinese immigrants increased in the United States, and as they began to compete with U.S. citizens for jobs and assert themselves more permanently in U.S. cities and communities, as the U.S. Supreme Court noted in *Chae Chan Ping*, “the consequent irritation, proportionately deep and bitter, was followed, in many cases, by open conflicts, to the great disturbance of the public peace.”<sup>19</sup> Thus, the Court upheld the federal Chinese Exclusion Act, in part because the “presence of Chinese laborers had a baneful effect upon the material interests of the state, and upon public morals; . . . their immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization.”<sup>20</sup>

Building upon the rhetoric of the Chinese Exclusion Act, immigration law and policy continued to target immigrants of color, including Asian, Latino/a, and African immigrants and other members of the “Black race” throughout the

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scope that it does today); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1628 (1992) (asserting that procedural due process has substituted for judicial review in the development of immigration law and the plenary power doctrine).

16. I have written about the discriminatory history of immigration law along racial and ethnic lines. See Olivares, *Intersectionality at the Intersection*, *supra* note 11, at 964–70. This section uses information from and builds upon that previous work.

17. *Chae Chan Ping v. United States*, 130 U.S. 581, 600 (1889). For a more thorough discussion of this history, see Olivares, *Intersectionality at the Intersection*, *supra* note 11, at 1006–07.

18. See Olivares, *Intersectionality at the Intersection*, *supra* note 11, at 1006–07; see also Finkelman, *supra* note 13, at 1423 (“While entrepreneurs and railroad executives in California welcomed this source of cheap [Chinese] labor, the vast majority of Californians and Oregonians came to resent the presence of these apparently strange people whose culture, language, religion, dress, hair style, food – and most of all physical appearance – were so alien to most Americans.”); Lakshmi Gandhi, *A History of Indentured Labor Gives ‘Coolie’ Its Sting*, NPR (Nov. 25, 2013, 5:03 PM), <http://www.npr.org/sections/codeswitch/2013/11/25/247166284/a-history-of-indentured-labor-gives-coolie-its-sting> (explaining the origin of the pejorative term “coolie” to denote Chinese immigrants employed in the American railroad industry); *Immigration, Railroads, and the West*, HARV. U. LIBR. OPEN COLLECTIONS PROGRAM, <http://ocp.hul.harvard.edu/immigration/railroads.html> (last visited Dec. 29, 2017) (describing immigrants’ work on American railroads between 1789 and 1930).

19. *Chae Chan Ping*, 130 U.S. at 595.

20. *Id.*

nineteenth and into the twentieth centuries, while protecting immigration of white people from western and northern Europe.<sup>21</sup> The explicit preference for northern European and other white immigrants continued through much of the twentieth century.<sup>22</sup> With the belief that white immigrants would more easily assimilate into a dominant “American” culture,<sup>23</sup> policies regarding immigration and naturalization were centered on prioritizing white people and ostracizing immigrants of color.<sup>24</sup> These pervasive efforts to keep out immigrants of color manifested in various ways, including the targeting of Latino/a immigrants, especially Mexicans.<sup>25</sup>

As a historical example of an exclusionary program, the Bracero program, a result of the agricultural labor shortages created by World War II, began when the U.S. government entered into an agreement with the Mexican government to send Mexicans to the United States to work on a temporary basis. The Mexicans were largely from impoverished rural towns and sent to the fields, farms and cities of the United States to pick fruits and vegetables and to build railroads.<sup>26</sup> But after encountering increased racial and ethnic animus and having

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21. See IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 27 (2006) (noting the passage of the Chinese Exclusion Act in 1882, the creation of the “Asiatic barred zone” in 1917, a Senate bill excluding “all members of the African or black race,” and a quota system designed to limit immigration to western and northern Europeans); Hiroshi Motomura, *Who Belongs?: Immigration Outside the Law and the Idea of Americans in Waiting*, 2 U.C. IRVINE L. REV. 359, 368 [hereinafter Motomura, *Who Belongs*] (similarly discussing the racialized history of the laws); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 IND. L.J. 1111, 1120, 1127–30 (1998) [hereinafter Johnson, *Race, the Immigration Laws, and Domestic Race Relations*].

22. See Motomura, *Who Belongs*, *supra* note 21, at 369–71; Johnson, *Race, the Immigration Laws, and Domestic Race Relations*, *supra* note 21, at 1129–30 (recognizing that the national origins quota system was designed to preserve the traditional cultural and sociological balance of the United States); LÓPEZ, *supra* note 21, at 27–28 (stating that the restriction on immigration to the United States on the basis of race lasted from the 1880s until 1965).

23. See Motomura, *Who Belongs*, *supra* note 21, at 369 (discussing the connection between racial restrictions and naturalization and the ways in which these restrictions evinced a political understanding that white immigrants would easily assimilate, integrate and ultimately choose to be U.S. citizens).

24. See *id.*; Johnson, *Race, the Immigration Laws, and Domestic Race Relations*, *supra* note 21, at 1121; LÓPEZ, *supra* note 21, at 27.

25. Immigrants from Mexico have long constituted the largest group of Latino/a immigrants in the United States, comprising 26.9% of all immigrants in 2015 – far above El Salvador, the nation with the second largest total group of Latino/a immigrants in the United States at 3.1%. See *Largest U.S. Immigrant Groups over Time, 1960–Present*, MIGRATION POL’Y INST., <http://www.migrationpolicy.org/programs/data-hub/charts/largest-immigrant-groups-over-time> (last visited Dec. 29, 2017) (presenting the United States’ immigrant population as a moving pie chart relevant to the country of origin up to 2015).

26. See Ediberto Román, *The Alien Invasion?*, 45 HOUS. L. REV. 841, 878–79 (2008).



received temporary lawful status for the sole purpose of providing cheap labor, millions of Mexican immigrants and others of Mexican ancestry were forcibly removed during the program's operation and at the program's end in 1965.<sup>27</sup> Many of those deported were actually U.S. citizens.<sup>28</sup>

Inherent in the phenomenon of mass removal and deportation, like in the Bracero program, was the targeting immigrants of color and other minorities: Because the immigrant is Asian, Latino/a or (more commonly now) Muslim, societal and political rhetoric ostracizes the community. Bill Hing labels this process "de-Americanization," which excludes the minority-other due to xenophobia, masquerading as patriotism:

Certainly, de-Americanization is a process that involves racism, but . . . de-Americanizers base their assault on loyalty and foreignness. In the minds of the private actors, who are nothing more than lawless vigilantes, self-appointed enforcers of true Americanism, their victims are immigrants or foreigners even though they may in fact be citizens by birth or through naturalization. Irrespective of the victim community's possible longstanding status in the country, its members are regarded as

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27. LÓPEZ, *supra* note 21, at 27–28 (citing U.S. COMM'N ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION 10 (1990)) (suggesting that the mass deportation of approximately 500,000 Mexican immigrants was spurred by the economic distress of the Great Depression); *see also* Kevin R. Johnson, *The Forgotten "Repatriation" of Persons of Mexican Ancestry and Lessons for the "War on Terror"*, 26 PACE L. REV. 1, 1–2 (2005) (noting that up to one million people were removed); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76 OHIO ST. L.J. 599, 621–22 (2015) (discussing the repatriation of Mexican immigrants and their forcible removal during "Operation Wetback," which began in 1954). Vázquez also writes about the racialized and oppressive mechanisms at work in the temporary immigration labor provisions that targeted Mexican immigrants during this time:

Temporary worker programs ensured that Latinos remained temporary and marginalized . . . . Latinos were tied to their employer, they were tied to a specific occupation, wages were low, and they could not remain permanently in the United States. Furthermore, they could not bring their spouse or children as such actions might cause them to try to reside permanently in the country.

*Id.* at 620 (footnotes omitted); *see* Motomura, *Who Belongs*, *supra* note 21, at 370; S. POVERTY LAW CTR., CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES 3 (2013), [https://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf](https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf) (explaining that World War I brought migration from Europe largely to a halt and created a greater demand for Mexican labor. In the Great Depression, Mexican workers were seen as a threat to American jobs, leading to their forcible deportation).

28. *See* LÓPEZ, *supra* note 21, at 27; Johnson, *Race, the Immigration Laws, and Domestic Race Relations*, *supra* note 21, at 1117.

perpetual foreigners. The victim community is forever regarded as immigrant America, as opposed to simply part of America and its diversity.<sup>29</sup>

Thus, as a case study of this de-Americanization process, the deportations of Mexicans (and Mexican-Americans) as part of the Bracero program were not just due to the labor and economic environment of the time. Rather, these mass deportations occurred because Americans did not perceive the Mexican laborer as an acceptable member of the American citizenship. Moreover, Mexicans and Mexican-Americans were not considered to be worthy of future American citizenship. Hiroshi Motomura, for example, describes this aspirational citizen as an “American in waiting.”<sup>30</sup> In that description, the immigrant arrives to the United States to make his or her life and pursue the quintessential American dream – achieving along the way the markers of American assimilation, like language, employment, education and familial stability.<sup>31</sup> Those immigrants occupy a type of regularized middle ground, which comes with some measure of belonging and inclusion by the larger American society. These almost-Americans embody the narrative of the industrious and/or educated, skilled or exceptionally talented immigrant that U.S. society seeks and even sometimes embraces.<sup>32</sup>

In contrast, immigrants who came to perform lower-skilled laborer jobs – like the Chinese railroad laborers and the Mexican Bracero workers – were perceived as un-American and perpetual outsiders to American society, who were simply here to do the hard jobs that Americans did not want. Thus, the path to the temporary Bracero program was smoothed not just because of the dire labor shortages at the time but because the Mexican immigrant was perceived as a servile peon and/or as a less-than-human savage, who could perform hard labor while not challenging the authority of his or her American boss.<sup>33</sup> As Deborah Weissman writes, the vitriolic and negative stereotyping

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29. Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441, 443–44 (2002) (footnotes omitted).

30. Motomura, *Who Belongs*, *supra* note 21, at 363.

31. *Id.* at 360–61 (introducing the term “Americans in waiting” to refer to immigrants in the United States who hope to become legal citizens of the country).

32. In addition to the goals of family unification or reunification, immigration law prioritizes attracting highly-skilled immigrants or those who will perform certain jobs and tasks that not enough Americans will perform. Mariela Olivares, *Renewing the Dream: DREAM Act Redux and Immigration Reform*, 16 HARV. LATINO L. REV. 79, 83 (2013) [hereinafter Olivares, *Renewing the Dream*] (asserting the desirability and prioritization of certain immigrants over others, mainly those who have attained higher education or specialized skills).

33. See, e.g., Leticia M. Saucedo, *Anglo Views of Mexican Labor: Shaping the Law of Temporary Work Through Masculinities Narratives*, 13 NEV. L. J. 547, 551–52 (2013) (discussing the legislative debates at the time to create and enforce the Bracero program, with legislators stating, for example, “In a dialogue during a congressional hearing on importing seasonal workers from Mexico, Congressman Adolph Sabath observed that Mexicans could ‘bend better’ than other workers. Congressman Adam

of the Mexican immigrant has deep roots in U.S. history, beginning at least in the nineteenth century, when Americans described Mexican immigrants as “earless and heartless creatures, semi-barbarians, . . . uneducated and grossly ignorant . . . . They [were] lynched for being too Mexican, and harassed for speaking their native language or otherwise expressing their culture.”<sup>34</sup>

Importantly, the broad societal perceptions of the immigrant-other carry over into the enactment of immigration law, which has an undeniable and clear history of racial, ethnic and class discrimination. Or, as Kevin Johnson expertly summarizes: “At bottom, U.S. immigration law historically has operated – and continues to operate – to prevent many poor and working noncitizens of color from migrating to, and harshly treating those living in, the United States.”<sup>35</sup> In this instance, the mass deportations and removals at the end of the Bracero program coincided with and were fueled by Americans’ perceptions that the Mexican population in the United States was getting too large, and thus Mexicans needed to be removed and prohibited from continuing to immigrate.<sup>36</sup> By 1959, for example, over 450,000 Mexicans were part of the Bracero program and, in total, more than 5 million Mexicans came to the United States to work, a migration that had demographic and cultural effects on the states in which they settled.<sup>37</sup> Moreover, this Cold War period marked a time of heightened fear of foreigners generally, who were equated with possible spies or enemies of the State.<sup>38</sup>

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Smith responded, “Not only can they do it better than anybody else, but there is scarcely any other work they can do as successfully.” (footnotes omitted).

34. Deborah Weissman, *The Politics of Narrative: Law and the Representation of Mexican Criminality*, 38 *FORDHAM INT’L L.J.* 141, 145 (2015) (internal quotation marks omitted); see also Laura E. Gómez, *Off-White in an Age of White Supremacy: Mexican Elites and the Rights of Indians and Blacks in Nineteenth-Century New Mexico*, in “COLORED MEN” AND “HOMBRES AQUÍ”: *HERNANDEZ V. TEXAS* AND THE EMERGENCE OF MEXICAN-AMERICAN LAWYERING 1, 23 (Michael A. Olivás ed., 2006) (describing the white American strategy in the late nineteenth century to afford elite Mexican-Americans (or Mexicans in later U.S. territories) superior status to native Indians even though, in reality, “American writers, newspapermen, and politicians had denounced Mexicans as racially inferior and unfit to govern themselves or join the Union”).

35. Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 *L. & CONTEMP. PROBS.* 1, 2 (2009) [hereinafter Johnson, *Race and Class*].

36. Román, *supra* note 26, at 878–79.

37. See *id.*; see generally Daniel Martínez, *The Impact of the Bracero Programs on a Southern California Mexican-American Community* (May 17, 1958) (unpublished M.A. thesis, Claremont Graduate School) (on file with Bracero History Archive, Item No. 3184) (providing the background of the Bracero program while focusing on a small town in California that was impacted by the program) (available at [http://braceroarchive.org/archive/files/danielmartinezthesis\\_d24a05a438.pdf](http://braceroarchive.org/archive/files/danielmartinezthesis_d24a05a438.pdf)). Martínez discusses the tensions between the Anglo Californians in the town of Northtown and the Mexican Braceros who lived in Cucamonga, a worksite town. See *id.*

38. See Román, *supra* note 26, at 880.

Thus, the rhetoric regarding the immigration and eventual settlement of Mexicans in the United States provides one example of the way in which immigration law concentrated on othering immigrants of color so as to dehumanize and exploit them. As Leticia Saucedo notes about this historical period, “[T]he narratives of the Mexican problem and the racialized, inferior Mexican followed Mexican migrants into the U.S.” and continued throughout the twentieth century.<sup>39</sup> The narrative surrounding the immigrant-other goes hand in hand with important legislative effects, like the mass deportations of Braceros and, contemporarily, the ongoing anti-immigrant animus driving legislative changes.

In short, societal perception and concomitant legislative processes jointly operate to systemically paint the immigrant of color as an outsider. Each informing and fueling the other, it becomes easier to legislate against immigrant inclusion when the immigrant is seen as un-American.<sup>40</sup> Indeed, the deep interconnectedness between law and societal trends is a hallmark of immigration law. As the Second Circuit Court of Appeals famously remarked, immigration law and the laws therein regarding the exclusion or expulsion of noncitizens are like a “magic mirror, reflecting the fears and concerns of past Congresses.”<sup>41</sup> In this sense, then, when public sentiment turns to animus against immigrants, the consequences are not limited to social divisiveness but also lead to actual legislative enactments limiting the immigration of certain groups of people, including people of color and other marginalized populations.

Indeed, Mexican immigrants suffered the same indignities as many immigrants of color through these explicit and implicit racist and discriminatory laws and policies. Although the Immigration Act of 1965 repealed the national origin quota system (which had effectively prohibited the immigration of people of color) and incorporated race-neutral language for the first time,<sup>42</sup> by that time, immigration law and policy had condemned immigrants of color in such

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39. Leticia M. Saucedo, *Mexicans, Immigrants, Cultural Narratives, and National Origin*, 44 ARIZ. ST. L.J. 305, 315 (2012) [hereinafter Saucedo, *Mexicans, Immigrants*].

40. See, e.g., Hing, *supra* note 29, at 444 (describing the de-Americanization process as two-fold: “(1) the actions of private individuals and (2) official government-sanctioned actions. On the private side, the process involves identifying the victims as foreigners, sometimes mistakenly, other times simply treating the person as a foreigner knowing otherwise . . . . The official side of the process involves laws or enforcement strategies that broadly focus on the entire group either without adequate basis or at least in an overly-broad manner”).

41. *Lennon v. Immigration & Naturalization Serv.*, 527 F.2d 187, 189 (2d Cir. 1975); see also Johnson, *Race, the Immigration Laws, and Domestic Race Relations*, *supra* note 21, at 1119–47 (discussing the history of discriminatory practices and laws in immigration law and policy).

42. Immigration & Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended in scattered sections of 8 U.S.C. (2012)); see also Johnson, *Race and Class*, *supra* note 35, at 2–3 (adding that the 1960s Civil Rights Movement led to the elimination of the quota system in the 1965 Immigration Act amendments); Johnson, *Race, the Immigration Laws, and Domestic Race Relations*, *supra* note 21, at 1131–32 (same).

oppressive ways that the discriminatory effects continued.<sup>43</sup> Moreover, the end of the national origin quota changed the demographic makeup of the country and of the immigrant population, most notably by increasing the numbers of Asian and Latino/a immigrants.<sup>44</sup> At that point, then – confronted with marked demographic and cultural shifts – the discriminatory foundations of immigration law and policy became more implicit and facially neutral. Yolanda Vázquez asserts, for example, that Congress continues to exercise its plenary power to uphold racially discriminatory immigration laws “on the basis of national security and absolute sovereign power.”<sup>45</sup> Similarly, as proxies to racially motivated discrimination, other laws and policy provisions credit the protection of American jobs from immigrant competition and of American cities and towns from supposed alien criminal threats.

Examples of these laws and policies abound both in the historical record and in contemporary times. For example, the Immigration and Nationality Act of 1965 restricted the number of people who could migrate from the Western Hemisphere to only 120,000 individuals per year.<sup>46</sup> The emphasis of this particular limitation was purposeful as “part of a compromise to those who feared a drastic upswing in Latin American immigration. Consequently, Congress coupled more generous treatment of those outside the Western Hemisphere

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43. This portion of the Article draws heavily from my previous work regarding race and ethnicity intersectionality subordination. See Olivares, *Intersectionality at the Intersection*, *supra* note 11, at 1006–15; see also Johnson, *Race and Class*, *supra* note 35, at 2 (exploring the historical connections between race and poverty in anti-immigrant legislation, which continued to oppress immigrants after the repeal of the quota system).

44. See Motomura, *Who Belongs*, *supra* note 21, at 369–70; Kevin R. Johnson, “Aliens” and the U.S. Immigration Laws: *The Social and Legal Construction of Non-persons*, 28 U. MIAMI INTER-AM. L. REV. 263, 282 (1997).

45. Vázquez, *supra* note 27, at 626.

46. Immigration & Nationality Act of 1965, Pub. L. No. 89-236, § 21(e), 79 Stat. 911, 921 (1965) (repealed 1976); see also Johnson, *Race, the Immigration Laws, and Domestic Race Relations*, *supra* note 21, at 1131–32 (noting the immigration limits on peoples from the Western Hemisphere after Congress dissolved immigration barriers based on race). Interestingly, as the focus moved away from racial quotas, the 1965 Immigration Act put new importance on family ties, including an emphasis on families through marriage. See, e.g., Kerry Abrams & R. Kent Piacenti, *Immigration’s Family Values*, 100 VA. L. REV. 629, 661–62 (2014) (noting that “[t]he passage of the Immigration and Nationality Act of 1965 marked a dramatic shift in U.S. immigration policy. The Act . . . focused immigration policy on skills-based immigration and, as relevant here, family reunification. Suddenly, family relationships became the centerpiece not only of jus sanguinis citizenship transmission, but also of legal immigration – a change that affected vast numbers of people” (footnotes omitted)).

with less generous treatment of Latin Americans.”<sup>47</sup> Moreover, the Immigration Act of 1965 and its 1976 Amendments imposed an annual immigration limit of 20,000 people from each foreign country,<sup>48</sup> which detrimentally and disparately affected immigrants of color from certain developing countries, like Mexico, the Philippines and India.<sup>49</sup> As the ceiling pertained to Mexicans, for example, the 20,000-person limit worked to drastically reduce Mexican immigration.<sup>50</sup> Further, the fervor against Latino/a immigration in the 1960s and into the 1970s (and particularly directed still at Mexicans at this point) was strengthened by court decisions, which constitutionally upheld immigration checkpoint stops that targeted people based on their “apparent Mexican ancestry,”<sup>51</sup> and a state law provision targeting the employment of undocumented Mexicans.<sup>52</sup>

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47. Johnson, *Race, the Immigration Laws, and Domestic Race Relations*, *supra* note 21, at 1132 (footnote omitted); accord Vázquez, *supra* note 27, at 630–31 (describing how the Immigration Act of 1965 “curtailed legal immigration” from Latin American countries).

48. See Immigration and Nationality Act of 1965, Pub. L. No. 89-236, § 2, 79 Stat. 911, 911–12 (1965) (codified as amended at 8 U.S.C. § 1152(a) (2012)); see also Johnson, *Race, the Immigration Laws, and Domestic Race Relations*, *supra* note 21, at 1133 (noting the various caps Congress has placed on immigration from the developing world). The 1990 Immigration Act altered this quota and instituted a world-wide ceiling of 675,000 immigrants, while also changing the per-country limitations. See Michael J. Greenwood & Fred A. Ziel, *The Impact of the Immigration Act of 1990 on U.S. Immigration*, U.C. DAVIS, <http://migration.ucdavis.edu/mn/cir/greenwood/combined.htm> (last visited Dec. 29, 2017). Moreover, the 1976 Amendments to the Immigration Act repealed the Western Hemisphere restrictions. Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, § 2, 90 Stat. 2703, 2703 (1976) (codified as amended at 8 U.S.C. § 1151(a) (2012)).

49. See Johnson, *Race, the Immigration Laws, and Domestic Race Relations*, *supra* note 21, at 1133.

50. See Vázquez, *supra* note 27, at 631 & nn.195–96 (citing MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 261 (2004)) (explaining the shift in immigration rates after the 1976 Amendments to the Immigration Act: “[I]n the early 1960s, 200,000 Mexicans were admitted under the Bracero Program and 35,000 entered as permanent residents each year”).

51. *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976). In his dissent, Justice Brennan argued the illogic of the majority opinion. *Id.* at 572 (Brennan, J., dissenting) (“The process will then inescapably discriminate against citizens of Mexican ancestry and Mexican aliens lawfully in this country for no other reason than that they unavoidably possess the same ‘suspicious’ physical and grooming characteristics of illegal Mexican aliens.”).

52. See *DeCanas v. Bica*, 424 U.S. 351, 357 (1976), *superseded by statute*, Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a(h)(2) (2012) (noting the deleterious effects of illegal immigration on working conditions and competitive markets for Americans and the special problem of California, which enacted the employment provision: “These local problems are particularly acute in California in light of the significant influx into that State of illegal aliens from neighboring Mexico”).

Interestingly, at this time, there were important and vocal supporters of Mexican immigration. Speaking about the 1976 Amendments to the Immigration Act that set the new migration ceiling, President Gerald Ford predicted ill-effects on Mexican migration, noting:

I am concerned . . . about one aspect of the legislation which has the effect of reducing the legal immigration into this country from Mexico. Currently about 40,000 natives of Mexico legally immigrate to the United States each year. This legislation would cut that number in half.<sup>53</sup>

Ford went on to state that he would push for a legislative reform to increase the immigration ceiling for Mexicans wishing to immigrate.<sup>54</sup> He was not successful, though, in getting any legislation through Congress. Soon after, in August 1977, President Jimmy Carter followed through with Ford's idea and proposed legislation to raise the ceiling of numbers of Mexican immigrants who could migrate and to establish a legalization program for undocumented immigrants already in the United States.<sup>55</sup> Congress did not legislate on the proposal, but Congress and the Administration created the "Select Commission on Immigration and Refugee Policy" to "study and evaluate the existing laws, policies and procedures governing the admission of immigrants and refugees."<sup>56</sup> The Commission eventually gave its report and recommendations to the newly-elected President, Ronald Reagan.<sup>57</sup>

The Commission reported on the estimated three to five million undocumented immigrants living and working in the United States, which apparently struck a chord with the free-market champion, Reagan, who saw the "problem" of undocumented migration as one of the corrective power of labor demand.<sup>58</sup> In a 1977 radio address, Reagan drew an analogy for the American people to illustrate the importance of regularizing the immigration status of these millions of migrant workers, stating:

It makes one wonder about the illegal alien fuss. Are great numbers of our unemployed really victims of the illegal alien invasion or are those illegal tourists actually doing work our own people won't do? One thing is certain in this hungry world: No regulation or law should

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53. *Statement on Signing the Immigration and Nationality Act Amendments of 1976*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=6495> (last visited Dec. 30, 2017) [hereinafter *Statement on Signing*].

54. *Id.*

55. Evan Wyloge, *The Immigration Reform and Control Act: What It Is, Why It Matters*, ARIZ. ST. U. NEWS 21 (Nov. 6, 1986), [http://asu.news21.com/archive/2009/the\\_first\\_immigration\\_amnesty/index.html](http://asu.news21.com/archive/2009/the_first_immigration_amnesty/index.html).

56. *See id.* (internal quotation marks omitted).

57. *See id.*

58. *See id.*

be allowed if it results in crops rotting in the fields for lack of harvesters.<sup>59</sup>

With this idea of opening up the labor market for overall American prosperity, and as Mexican migration continued, Congress responded with the Immigration Control and Reform Act of 1986 (“IRCA”), which, among other provisions, included sanctions against employers for hiring undocumented workers.<sup>60</sup> Senator Alan K. Simpson and Representative Romano L. Mazzoli co-authored the IRCA bill, the first iteration of which was introduced in 1982 and finally passed in 1986 with heavy bipartisan support in both the House and Senate.<sup>61</sup> Reagan applauded the new legislation and, at its signing, remarked: “Future generations of Americans will be thankful for our efforts.”<sup>62</sup>

IRCA would continue the immigration law legacy of disproportionately negatively affecting immigrants of color and, in this particular case, Mexican immigrants.<sup>63</sup> Other more recent immigration regulations implicitly targeting people of color include federal enforcement efforts like Secure Communities,<sup>64</sup> the purpose of which was to join local law enforcement agencies with Immigration and Customs Enforcement (“ICE”) so as to catch and deport criminal aliens.<sup>65</sup> These federal and state efforts use the premise of securing the borders

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59. *Id.*

60. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101(a)(1), 100 Stat. 3359, 3360–74 (1986) (codified as amended at 8 U.S.C. § 1324a (2012)); see also Saucedo, *Mexicans, Immigrants*, *supra* note 39, at 330 (outlining the discriminatory immigration-targeted provisions of this time period and how the implementation of such laws, including IRCA, bolstered the “illegal alien” narrative: “With more than a million workers of Mexican national origin working [in] the United States, the status of ‘illegal’ was inevitable”).

61. See § 101(a)(1).

62. *Statement on Signing*, *supra* note 53.

63. See Saucedo, *Mexicans, Immigrants*, *supra* note 39, at 330.

64. See Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2050 (2007) (appropriating \$200 million to the Department of Homeland Security to enhance efforts to remove aliens from the United States after they are deemed deportable for being convicted of a crime or sentenced to imprisonment).

65. See *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/secure-communities#a1> (last updated Nov. 13, 2017) (asserting that Secure Communities applies to all jurisdictions within the fifty states, the District of Columbia and five U.S. territories and that Secured Communities provides “clear and common-sense” priorities for immigration enforcement); see also Press Release, U.S. Dep’t of Homeland Sec., ICE Unveils Sweeping New Plan to Target Criminal Aliens in Jails Nationwide (March 28, 2008) (on file with author) (adding that one of the most important features of the plan is the distribution of integration technology that will link local law enforcement agencies to DHS and Federal Bureau of Investigations (“FBI”) biometric databases).



against terrorist threats to disproportionately target immigrants of color for arrest, detention, and deportation.<sup>66</sup> Indeed, many decried these efforts, asserting that the measures unconstitutionally deputize local law enforcement regimes with federal immigration authority and serve as a proxy for racial profiling practices.<sup>67</sup> Advocates filed lawsuits and utilized other forms of advocacy to eventually discontinue and revamp Secure Communities and to dismantle much of S.B. 1070.<sup>68</sup>

But in 2015 to 2016, and particularly in the period leading up to the 2016 presidential election, the issue of immigration took on an incredibly explicit racial and xenophobic tone. Famously, then-Republican presidential candidate (now President) Donald Trump decried Mexican immigrants as “people that

66. See Vázquez, *supra* note 27, at 650 (discussing how Secure Communities targeted a disproportionate number of Latino men); Katarina Ramos, *Criminalizing Race in the Name of Secure Communities*, 48 CAL. W. L. REV. 317, 341 (2012) (concluding that law enforcement and government authorities intimidate residents through the Secure Communities program by subjecting people typically unnoticed by ICE in removal proceedings, which creates a fearful group of second-class citizens). Indeed, this time period is marked by a conflation of national security concerns with immigration, leading to the success of measures like Secure Communities under the guise of protecting communities from criminal threats, including security concerns. See, e.g., Vázquez, *supra* note 27, at 648–49.

67. See, e.g., Kristina M. Campbell, *The Road to S.B. 1070: How Arizona Became Ground Zero for the Immigrants’ Rights Movement and the Continuing Struggle for Latino Civil Rights in America*, 14 HARV. LATINO L. REV. 1, 2 (2011) (asserting that S.B. 1070 was the legislature’s attempt to rid the state of people who are or appear to be Latino); Ramos, *supra* note 66, at 329 (proffering that the goal of Secure Communities is to propagate racial bias through a flawed correlation of people of Mexican descent with undocumented immigrants); Daniel Denvir, *The ICE Man: Obama’s Backdoor Arizona-Style Program*, SALON (July 16, 2010, 6:01 AM), [http://www.salon.com/2010/07/16/immigration\\_safe\\_communities\\_obama](http://www.salon.com/2010/07/16/immigration_safe_communities_obama) (pointing out the contradiction between the Obama administration’s condemnation of Arizona’s S.B. 1070 with its support for the federal Secure Communities program, which in some cases had the same effect of racializing and criminalizing immigrants as did the Arizona bill).

68. DHS terminated the Secure Communities program in November 2014 and replaced it with the Priority Enforcement Program (“PEP”). See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, PRIORITY ENFORCEMENT PROGRAM (PEP) (2015), [https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2015/pep\\_brochure.pdf](https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2015/pep_brochure.pdf). As PEP was unveiled, however, some noted that the differences between it and Secure Communities were small. See, e.g., Jon Greenberg, *Fox News Host: Obama Ended Program for Tracking Undocumented Immigrants*, PUNDITFACT (July 8, 2015, 10:05 AM), <http://www.politifact.com/punditfact/statements/2015/jul/08/harris-faulkner/fox-news-host-obama-ended-program-tracking-undocum> (noting that the main difference between PEP and Secure Communities is that PEP is more about conviction than arrest); see also *Arizona v. United States*, 567 U.S. 387, 416 (2012) (enjoining as federally preempted all provisions of Arizona’s S.B. 1070 except the provision that allowed for officers to check the immigration status of arrestees). An Executive Order by Trump proposes to renew the 287(g) Secure Communities program. See Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017).

have lots of problems . . . . They're bringing drugs. They're bringing crime. They're rapists."<sup>69</sup> Perhaps the culturally-specific targeting of certain immigrants was at its zenith when Trump declared that "Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."<sup>70</sup> Although some challenged his statements,<sup>71</sup> his popularity and racist, xenophobic rhetoric catapulted him to the White House. His candidacy and success highlight that the practical effect of societal perceptions and stereotypes continue to support this ongoing racial, cultural, religious and ethnocentric oppression in society, law and policy.

Importantly, this connection between societal perception and eventual legislative outcomes is robust and operates against immigrants of color. Emily Ryo's empirical research shows that American law influences the public perception and resulting narrative in negative, but not positive, ways.<sup>72</sup> In other words, those exposed to law that was perceived as anti-immigrant or that stereotyped immigrants negatively were more apt to have negative connotations of immigrants, specifically Latino/as. Ryo discusses how participants in her study who were exposed to negative rhetoric were more likely to view Latino/a immigrants as unintelligent and law-breaking.<sup>73</sup> Ryo did not find that this law-perception connection was present when study participants were exposed to

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69. *Full Text: Donald Trump Announces a Presidential Bid*, WASH. POST (June 16, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/>. As discussed in Part IV, *infra*, the data regarding immigrant criminality proves that immigrants do not commit crimes at higher rates than U.S. citizens.

70. Press Release, DONALD J. TRUMP FOR PRESIDENT, INC., Donald J. Trump Statement on Preventing Muslim Immigration (Dec. 7, 2015), <https://web.archive.org/web/20151207230751/https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration>.

71. *See, e.g.*, Jonathan Martin, *Donald Trump's Anything-Goes Campaign Sets an Alarming Political Precedent*, N.Y. TIMES (Sept. 17, 2016), <https://www.nytimes.com/2016/09/18/us/politics/donald-trump-presidential-race.html> (providing multiple examples of both Democrats and Republicans responding to the way Trump ran his campaign and predicting the likely negative outcomes if he were to win the presidency); Stephen Collinson, *Donald Trump's Strange Campaign Gets Stranger*, CNN (Aug. 3, 2016, 4:04 PM), <http://www.cnn.com/2016/08/03/politics/donald-trump-paul-ryan-john-mccain-election-2016/> (providing examples of well-known Republicans who made clear they were voting for Hillary Clinton because of Trump's lack of fitness to be president).

72. Emily Ryo, *On Normative Effects of Immigration Law*, 13 STAN. J. C.R. & C.L. 95, 97 (2017).

73. *Id.* at 119–20 (noting one result of her study: “compared to the participants in the baseline condition, the participants exposed to the anti-immigration law were significantly more likely to report that Latinos were less intelligent . . . and less law-abiding”).

seemingly pro-immigrant laws.<sup>74</sup> Thus, pro-immigrant laws did not result in societal viewpoints of immigrants as intelligent or law-abiding.<sup>75</sup>

This conclusion is manifested in the current examples of mothers and children immigrants fleeing violence in Central America and arriving in the United States, only to be detained in detention centers.<sup>76</sup> The ongoing and strong perception of these mothers and children as law-breakers who deserve to be detained in jail-like conditions highlights the extreme antipathy towards immigrants in the United States.<sup>77</sup> Consequently, it seems that moving a successful immigrant equality movement forward requires a shift in strategy that aims to recast the immigrant in a traditional white American normative framework and focuses less on ethnic and cultural difference or diversity. As Part III discusses, same-sex marriage equality advocates employed this strategy to successfully argue and ultimately achieve marriage equality for gay people. This reframing of narrative from outsider identity to “everyday American” was purposeful so as to convince the larger society to embrace marriage equality. But, as discussed in Parts IV and V, this strategy only works when the “non-conforming” community is ostracized – a problematic collateral consequence when applied especially to immigrant equality efforts.

### III. THE CASE STUDY OF THE MARRIAGE MOVEMENT

To set the stage for the discussion in Parts IV and V on the strategic complexities involved in constructing a newly-honed immigrant equality movement, I aim in this Part to provide a corollary (albeit brief) history of the contemporary example of the same-sex marriage equality movement, which successfully capitalized on the viability of the social and political environment. To be sure, the scholarship on the gay rights and marriage equality movement is robust, documenting the arduous journey towards civil rights equality that culminated in the historic 2015 U.S. Supreme Court decision, *Obergefell v. Hodges*, which upheld the rights of same-sex couples to marry.<sup>78</sup> In *Obergefell*, a majority of the Court provided definitive approval of the civil right of

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74. *Id.* at 122–23.

75. *Id.*

76. See, e.g., Emily Gogolak, *Meet the Central American Women the United States is Detaining and Deporting*, NATION (Dec. 26, 2016), <https://www.thenation.com/article/meet-the-central-american-women-the-united-states-is-detaining-and-deporting/> (describing the conditions of the family detention centers, housing mothers and children: “Inside [Karnes County Residential Center] that day were 604 women . . . virtually all of whom were asylum seekers from Honduras, El Salvador, and Guatemala, the violence-plagued region of Central America known as the Northern Triangle”).

77. See Olivares, *Intersectionality at the Intersection*, *supra* note 11, at 992, 997–98 (describing the ways in which popular rhetoric criminalizes immigrants, including the mothers and children seeking asylum: “[These] statements contribute to the popular perception that typecasts immigrants as rule-breakers, who are thus rightly subject to prison detention”).

78. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

marriage for same-sex couples. This created an immense impact on the gay community, who are now finally afforded a fundamental right that they had been unjustifiably and unconstitutionally denied.<sup>79</sup> The decision provided a clear and profound moment of joy for many, magnified by the overwhelmingly positive social and political reaction to the decision.<sup>80</sup>

But the road towards marriage equality and gay rights, which began in earnest in the late 1960s, was anything but smooth. Many scholars and advocates have characterized the 1969 Stonewall Riots as a turning point for the gay-rights movement and, thus in some respects, for the same-sex marriage equality movement.<sup>81</sup> This time period was the nadir for the civil rights struggle for racial and ethnic minorities and similarly symbolized a time in which gays and lesbians began to vocalize their own calls for equal treatment under legal and societal norms. Section III.A briefly discusses the important litigation stepping stones from Stonewall to the 2003 landmark decision of *Lawrence v. Texas* and the ways in which advocates strategized a narrative shift, highlighting gay people as equal to straight people due to commonalities among the communities. Section III.B then comments on how this successful narrative shift in the gay rights movement is critiqued precisely because it adheres to a heteronormative rhetoric, thereby degrading the uniqueness of the community while also ostracizing those in the gay community who are most “outside” this traditional context. This debate is particularly poignant for immigrant-equality advocates searching for an effective and inclusive narrative of their own, as explored in Parts IV and V.

### A. The Road Towards Equality

The 1969 Stonewall Riots (“Stonewall”) are viewed as a transformative event in the gay rights equality movement as they represent an early large-scale

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79. *Id.*

80. See, e.g., Letters to the Editor, ‘Love Has Won:’ Reaction to the Supreme Court Ruling on Gay Marriage, N.Y. TIMES (June 26, 2015), [https://www.nytimes.com/2015/06/27/opinion/love-has-won-reaction-to-the-supreme-court-ruling-on-gay-marriage.html?\\_r=0](https://www.nytimes.com/2015/06/27/opinion/love-has-won-reaction-to-the-supreme-court-ruling-on-gay-marriage.html?_r=0) (expressing positive viewpoints toward *Obergefell* decision); Michele Gorman, *President Obama: Gay Marriage Ruling ‘Victory for America’*, NEWSWEEK (June 26, 2015, 11:28 AM), [http://www.newsweek.com/president-obama-347265?utm\\_source=internal&utm\\_campaign=incontent&utm\\_medium=related1](http://www.newsweek.com/president-obama-347265?utm_source=internal&utm_campaign=incontent&utm_medium=related1).

81. See, e.g., William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1423–24 (1993) [hereinafter Eskridge, *A History*] (discussing the riots in which gays and lesbians fought back against what was a typical police raid at the Stonewall Bar gay club and noting how the event highlights a sea-change in the same-sex marriage equality movement: “Before 1969, the notion of a same-sex couple entering into state-sanctioned marriage seemed culturally and legally implausible in this country . . . . The Stonewall riots changed all that, however, as gay men, lesbians, and bisexuals came out of the closet in substantial numbers. Many of these newly-liberated couples formed openly committed relationships functionally similar to different-sex marriages”).

effort to normalize gay people in what had been a historically discriminatory landscape.<sup>82</sup> Andrew M. Jacobs notes that, as a consequence of Stonewall, gay people began to strategically and purposefully shift the narrative and rhetoric away from the “outsider homosexual” to the normalized “gay” person, the word that gay people often used in their own community.<sup>83</sup> This strategic employment of “visibility rhetoric” was a necessary first step to “societal cognizance of lesbians and gays as a social group [which would precede] any remedy formulated in group terms for injuries suffered by” gays and lesbians.<sup>84</sup> “Visibility rhetoric,” Jacobs asserts, “says, ‘I am.’”<sup>85</sup> Importantly, this movement also demanded that the community embrace its unique identity while simultaneously framing its demands for equality as an exercise in normative idealism. In this sense, then, Stonewall and the movement that followed to bring gay people more into the heteronormative mainstream signaled the beginning of a societal shift away from merely highlighting differences and towards a focus on similarities with the straight majority and, in particular, the majority that seeks monogamous commitment.

It was also at this time that advocates began to more fervently assert demands for legal equality. William Eskridge, Jr. notes that Stonewall and the resulting community activism in the legal and political realm sparked new calls for what would be the precursor to marriage equality:

As part of this demand for acknowledgment or acceptance, many activists sought legal recognition of same-sex marriages on the same terms as different-sex marriages, as part of a general movement to end all forms of state discrimination against lesbians, gay men, and bisexuals.<sup>86</sup>

Again, this movement required advocates to shift the ways in which the larger heteronormative-minded society would characterize the gay community, moving from an outsider to an acceptable member of society. Jacobs discusses the societal reconstitution of gay identity beginning in the early 1970s, noting:

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82. See, e.g., Andrew M. Jacobs, *The Rhetorical Construction of Rights: The Case of the Gay Rights Movement, 1969–1991*, 72 NEB. L. REV. 723, 725–26 (1993) (asserting that the Stonewall riots marked the beginning of the gay liberation movement because “it was active, collective, public action by gays as and for gays. Second, Stonewall energized lesbians and gays across the country to spontaneously form political associations and to publicly demonstrate in affirmation of gayness. Thus, Stonewall was a milestone as a public declaration and as a catalyst for gay political activity and consciousness” (footnote omitted)).

83. *Id.* at 726.

84. *Id.* at 725.

85. *Id.*

86. Eskridge, *A History*, *supra* note 81, at 1424. Eskridge discusses how “pragmatic” activists sought these changes through incremental steps that would begin with decriminalization of behaviors and eventually lead to marriage equality. See *id.* at 1430–32, 1502–04.

[S]ociety viewed “homosexuals” much as it did murderers and child molesters: . . . a silent, isolated, deviant set of outlaws, not as a visible, aggregative, tolerable set of like persons with a positive agenda for themselves. To create new social knowledge, gays needed to . . . create new meanings for their group that would destroy and replace the old meanings.<sup>87</sup>

Yet, as he notes, at that time more than seventy percent of polled Americans viewed homosexuality negatively,<sup>88</sup> a stark contrast to 2016 polling, in which sixty-three percent of Americans had a positive view of gay people.<sup>89</sup> The current polling demonstrates, then, that this rhetorical shifting was a highly successful strategy that embraced incremental steps, eventually leading to marriage equality.

But the shift from explicit discrimination – the prohibition, for example, against same-sex sexual activity – to inclusion and the arrival of marriage equality was the product of a long-term, evolving strategy. Jacobs discusses how advocates for gay equality, while using visibility tactics, had to fight against a “scourge rhetoric” in which anti-gay advocates demonized gay people according to the same stereotypes of sexual deviants and child predators.<sup>90</sup> To battle against such a formidable narrative, gay equality advocates moved away from visibility tactics, concentrating instead on publicly humanizing gay people by putting forth exemplars of the gay community and emphasizing the harm afflicted against such people from the larger society.<sup>91</sup> Thus, in what Jacobs

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87. Jacobs, *supra* note 82, at 729.

88. *Id.*

89. See Hannah Fingerhut, *Support Steady for Same-Sex Marriage and Acceptance of Homosexuality*, PEW RES. CTR (May 12, 2016), <http://www.pewresearch.org/fact-tank/2016/05/12/support-steady-for-same-sex-marriage-and-acceptance-of-homosexuality/> (reporting polling data from 2016). Moreover, the study shows that, of Americans who report themselves as unaffiliated with a particular religion, eighty percent have a positive view of gay people. *See id.*

90. *See* Jacobs, *supra* note 82, at 729–34. Jacobs describes the scourge rhetoric example of the repeal of a 1977 Dade County, Florida anti-discriminatory provision aimed at protecting gay people from housing and employment discrimination. *Id.* Voters repealed the measure after a concerted campaign that focused on painting gay people as sexual deviants who would molest children if allowed to be teachers. *See id.* at 732. Jacobs notes that pro-gay advocates who tried to combat the repeal campaign failed because they focused on “espousing the ‘good’ claim [i.e., that gay is good] instead of steering the discourse toward the question of discrimination or other narrow political question at issue in the referendum.” *Id.* That strategy could not defeat the powerful “gay as scourge” rhetoric. *See id.*

91. Authors in the popular media, for example, described the pursuit of marriage equality as akin to seeking fulfilment of gay equality rights. *See, e.g.*, Molly Ball, *How Gay Marriage Became a Constitutional Right*, ATLANTIC (July 1, 2015), <https://www.theatlantic.com/politics/archive/2015/07/gay-marriage-supreme-court-politics-activism/397052/>. Ball quotes advocate (and one of the chief strategists in the marriage equality movement) Evan Wolfson:

calls the “victimage rhetoric,” gay people were painted as the target of unfair, unjust and immoral violence and discrimination.<sup>92</sup> As he notes, this strategy “h[e]ld inherently greater promise for pro-gay rhetors. Gay rights advocates have had trouble establishing the concept of gay as good in the public consciousness; however, establishing the notion that gays are victims in the public psyche [was] an attainable goal.”<sup>93</sup> In this way, then, the political and societal shift away from emphasizing perceived differences of gay people (which, up to that time had equated to morally corrupt) to, instead, viewing them as a sympathetic victim figure helped to humanize the community in the eyes of the American public.

Gay rights advocates also utilized this humanizing approach to fight for legal equality, asserting that same-sex marriage prohibitions amounted to illogical discrimination, akin to the anti-miscegenation laws deemed unconstitutional in *Loving v. Virginia*.<sup>94</sup> Just like in *Loving* and subsequent precedent, advocates argued that same-sex marriage bans were also violations of the Due Process Clause because they unconstitutionally infringed upon the fundamental right to marry.<sup>95</sup> They thus argued that gay people wishing to marry were no different than any other person wishing to marry and, thus, the Constitution necessarily extends to their claims. Moreover, under an Equal Protection analysis, lawyers for marriage equality historically argued that same-sex marriage bans discriminated against gay people because of their gender (e.g., a woman could not marry another woman only because they are both women).<sup>96</sup>

Indeed, the approach of framing gay rights as the unconstitutional deprivation of rights based on an immutable characteristic of the person – and away from the moral justness of equality for gay people or for homosexual conduct

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What is the center, the heart, of the discrimination gay people face? It's the denial of our love. And what is the central institution of love? It's marriage. Therefore, we needed to claim the freedom to marry, because it would be an engine of transformation for the way society viewed gay people.

*Id.* Ball also discusses the shift in strategy employed by marriage equality advocates: “[T]he new ads featured straight people talking about their gay relatives: the mother or sister or grandfather of a gay person, talking about their loved one’s commitment to a partner.” *Id.* As discussed *infra* in Part V, this strategy of normalization and humanization played (and continues to play) a significant role in the civil rights movement for racial equality.

92. Jacobs, *supra* note 82, at 733–37.

93. *Id.* at 736.

94. *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

95. See Eskridge, *A History*, *supra* note 81, at 1424–25 & n.9 (discussing *Loving*; *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978); and *Boddie v. Connecticut*, 401 U.S. 371 (1971) in the context of the same-sex marriage equality Due Process Clause precedent).

96. See, e.g., *id.* at 1425.

itself – solidified after the 1986 *Bowers v. Hardwick* U.S. Supreme Court decision that upheld Georgia’s law criminalizing sodomy.<sup>97</sup> In *Bowers*, a majority of the Court interpreted the claim seeking to strike down the anti-sodomy law as one asserting a positive right to the actual homosexual sodomy act. Using that lens, the Court thus held that there is no “fundamental right to engage in homosexual sodomy.”<sup>98</sup> Moreover, Justice Burger’s concurrence emphasized the apparent critical moralistic issues, citing millennia of historical tradition purportedly upholding criminalization of sodomy, stating:

The common law of England, including its prohibition of sodomy, became the received law of Georgia and the other Colonies. In 1816 the Georgia Legislature passed the statute at issue here, and that statute has been continuously in force in one form or another since that time. To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.<sup>99</sup>

In short, the majority and concurrence in *Bowers* epitomized the anti-gay narrative of demonizing gay people based on supposed moral and traditional notions of actual (perceived) gay conduct.

In contrast, the *Bowers* dissenters framed the issue as one of rights against governmental intervention in private matters, which as Justice Blackmun asserted, amounts to “the right to be let alone.”<sup>100</sup> Moreover, Justice Blackmun and the other dissenters emphasized the rights of gay people as a community to live as they choose as long as there is no harm to the public<sup>101</sup> and that ap-

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97. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003); *see also* Jacobs, *supra* note 82, at 737–42 (discussing the rhetorical formulations used in the various opinions in *Bowers*).

98. *Bowers*, 478 U.S. at 191.

99. *Id.* at 197 (Burger, C.J., concurring).

100. *Id.* at 199 (Blackmun, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

101. *See id.* at 204–06 (citing precedent upholding fealty to diversity of opinion and lifestyle when not in contradiction to important public safety or governmental functions, including *Wisconsin v. Yoder*, 406 U.S. 205, 223–24 (1972) (“There can be no assumption that today’s majority is ‘right’ and the Amish and others like them are ‘wrong.’ A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.”)); *id.* at 218–19 (Stevens, J., dissenting) (Justice Stevens, in dissent and joined by others, emphasized that the State has offered no legitimate interest in prohibiting the conduct if applied solely to homosexual behavior: “Although the meaning of the principle that ‘all men are created equal’ is not always clear, it surely must mean that every free citizen has the same interest in ‘liberty’ that the members of the majority share. From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions. State intrusion into the private conduct of either is equally burdensome.”).



parent historical tradition cannot be the basis to protect inherently discriminatory legislation.<sup>102</sup> As Justice Blackmun concluded: “[T]he mere knowledge that other individuals do not adhere to one’s value system cannot be a legally cognizable interest let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently.”<sup>103</sup> Thus, as opposed to the majority and concurrences, the dissenters framed the narrative regarding gay people not pursuant to particular conduct or the pursuit of new positive rights but rather as merely the assertion of rights that apply to all, regardless of sexual orientation identity. As Jacobs documents in his discussion of a 1991 California ballot initiative aimed at prohibiting sexual orientation discrimination in employment and housing, the strategic shift after *Bowers*

moved from the moral to the political, and . . . used empirical claims of harm to narrowly focus the rights-claim. This enabled the polity to alleviate victimization and prevent discrimination with narrowly-tailored remedies which did not endorse homosexuality. The shifted discourse was political, not moral, and it used victimage images to convey the need for negative rights, or freedoms from particular harms.<sup>104</sup>

As Jacobs (writing in 1993) concludes, then, gay-rights advocates would be wise to embrace this narrative of victimage, rather than try to convince the general public that gays are moral or “just as normal” as their heterosexual neighbors.<sup>105</sup>

Indeed, the narrative that gay people are worthy of protection from certain harms – just like everyone else – underscored the U.S. Supreme Court’s next big pronouncement in the gay rights movement in the 1996 case, *Romer v. Evans*.<sup>106</sup> In *Romer*, the Court, although not explicitly overruling *Bowers*, declared unconstitutional on Equal Protection grounds a Colorado ballot initiative, known as “Amendment 2,” that would have amended the Colorado Constitution to prohibit the enactment of legislation protecting gay people from certain kinds of discrimination.<sup>107</sup> In the decision, the Court espoused a pro-gay view that upholds protectionism of gay people and decries discrimination

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102. *Id.* at 210 (Blackmun, J., dissenting) (Justice Blackmun cites, among other precedent, *Roe v. Wade*, 410 U.S. 113 (1973), for the proposition that “I cannot agree that either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court’s scrutiny.”).

103. *Id.* at 213 (citation omitted).

104. Jacobs, *supra* note 82, at 747. Jacobs documents the path of the California bill, which was ultimately vetoed by Governor Pete Wilson, who asserted pro-business, anti-litigation reasons for the veto while acknowledging the prevalence of gay-bashing and discriminatory practices. *See id.* at 748–52.

105. *See id.* at 755–56.

106. *Romer v. Evans*, 517 U.S. 620, 635–36 (1996).

107. *Id.* (discussing the Colorado ballot initiative to amend the Colorado Constitution, known as “Amendment 2”).

against gays based solely on their orientation.<sup>108</sup> Importantly, and as Jacobs, expounding on his earlier piece, notes, the Court does not “valoriz[e] or vilif[y]” gays, but rather adopts a victimage rhetoric, comparing Colorado’s Amendment 2 to the country’s racist past.<sup>109</sup> Eskridge notes the important rhetorical shift employed by the Court in *Romer*, which referred to the “respondents respectfully as gay men, lesbians, and bisexuals” and described the “protections served by antidiscrimination laws as ‘normal’ protections everyone else either takes for granted or enjoys – and not as the ‘special rights’ claimed by the state and the dissenting opinion.”<sup>110</sup> Further commenting on the victimage strategic success of *Romer*, Eskridge notes, “Justice Kennedy also openly recognized that much of the support of the amendment was inspired by antigay ‘animus’ . . . .”<sup>111</sup> This strategic advocacy shift away from highlighting the uniqueness of gays (e.g., the early post-Stonewall movement) towards focusing on the similarities between gay people and straight people and the indignity put on gay people by discriminatory measures (i.e., a victimage rhetoric) led to victory in *Romer*<sup>112</sup> and set the stage for future litigation success.

Advocates scored a next important victory in the 2003 U.S. Supreme Court decision of *Lawrence v. Texas*,<sup>113</sup> in which the Court overruled *Bowers* and deemed state anti-sodomy laws unconstitutional.<sup>114</sup> As Eskridge surmises, “Read together, *Romer* and *Lawrence* represent a regime shift for gay people analogous to the regime shift that *Brown* and *Loving* represented for people of color and that *Roe* and *Craig* represented for women.”<sup>115</sup> Indeed, as Nancy Levit discusses, the Court’s decisions from *Bowers* to *Lawrence* represent a

108. *Id.* at 633.

109. See Andrew M. Jacobs, *Romer Wasn’t Built in a Day: The Subtle Transformation in Judicial Argument over Gay Rights*, 1996 WIS. L. REV. 893, 952–53 (1996) [hereinafter Jacobs, *Romer Wasn’t Built in a Day*].

110. William N. Eskridge, Jr., *Lawrence’s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1038 (2004) [hereinafter Eskridge, *Lawrence’s Jurisprudence*].

111. *Id.*

112. See, e.g., Alexander Nourafshan & Angela Onwuachi-Willig, *From Outsider to Insider and Outsider Again: Interest Convergence and the Normalization of LGBT Identity*, 42 FLA. ST. U. L. REV. 521, 525–26 (2015) (describing this shift from calls of “We’re here! We’re queer! Get used to it!” to “We’re just like you,” concluding that “rather than seek to disrupt the paradigm of heteronormativity, assimilation-oriented homosexuals sought to fit gay rights into the existing legal and social structure, without threatening to upend the social order”).

113. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

114. See *id.*; see also Eskridge, *Lawrence’s Jurisprudence*, *supra* note 110, at 1040 (commenting on the majority opinion in *Lawrence*, which explicitly and forcefully repudiated the Court’s decision in *Bowers*: “The Court concluded that ‘Hardwick was not correct when it was decided, and it is not correct today.’ Never in its history has the Supreme Court so pointedly repudiated a precedent. With this rebuke, an era in constitutional history ended” (footnote omitted) (quoting *Lawrence*, 539 U.S. at 578)).

115. Eskridge, *Lawrence’s Jurisprudence*, *supra* note 110, at 1040 (footnotes omitted).

“tectonic shift” in the perception and narrative espoused regarding gay people.<sup>116</sup> Once decried as morally bankrupt and unworthy of basic civil rights protections because of their participation or perceived participation in “particular sexual acts,” in *Lawrence*, gay people and their relationships were finally treated with importance and dignity.<sup>117</sup>

In this sense, then, pro-gay rights advocates achieved an incredible victory in recharacterizing the struggle for equality from one of highlighting uniqueness (or difference) to emphasizing commonalities with straight communities by, first, highlighting victimization tactics so as to draw on empathic and sympathetic norms.<sup>118</sup> Far from “we’re here; we’re queer” or “gay is good,” the narrative morphed into a call for equal protections for people and relationships that were effectively no different from the straight “ideal.” Similarly, advocates’ strategic restructuring of the pro-gay rights narrative in the fight for same-sex marriage equality utilized this call for freedom from discrimination while also touting a claim for sameness in a heteronormative context. As the next Section explores, this rhetorical framework, while ultimately successful, has its critiques. This discussion is particularly relevant in foreshadowing an effective strategy for immigrant rights, as Part IV asserts.

### *B. Identity Politics Strategy and Backlash – the Othering Effects of Embracing Sameness*

Most proponents of gay rights would likely agree that the *Obergefell* decision represents a monumental step forward. The declaration that people finally have the constitutional right to marry whom they choose solidified a key victory in the long, arduous journey for equal treatment of gay people. But in exploring the rhetoric employed by the *Obergefell* majority, I and other critics uncover troubling effects of the dominant narrative used post-*Bowers* and ultimately to great success in *Lawrence*. As one example, as Levit writing in a pre-*Obergefell* piece summarizes, advocates relying upon the dominant narrative to achieve gay-rights equality risk the subordination of those outside the

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116. Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER & L. 21, 29–30 (2010) [hereinafter Levit, *Theorizing and Litigating*].

117. *Id.* at 30.

118. To be sure, the equality battle has not been won. Other recent victories of the gay rights movement, specifically in the employment discrimination context, have not been widespread. In *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339, 345 (7th Cir. 2017), the Seventh Circuit became one of the few federal courts to hold that Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating on the basis of sexual orientation.

dominate narrative<sup>119</sup> and instead should utilize a narrative of equality theory based on “respect for the common humanity of all people.”<sup>120</sup>

This Section begins with an exploration of the *Obergefell* narrative and then discusses the fealty to the heteronormative ideal of marriage, illustrating how the narrative subordinates those living outside the norm. This discussion is especially illustrative in crafting the civil rights narrative of immigrant equality, as explored more below.

In *Obergefell*, Justice Kennedy ends the majority opinion with the following statement:

From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.<sup>121</sup>

The language seems apt for a marriage sermon and uncharacteristically effusive for constitutional precedent.<sup>122</sup> Placing collective hopes and aspirations in the governmental institution of marriage (which is what, after all, same-sex couples were seeking – the right to have the State and state recognize their union under the domestic marriage laws) affords a great deal of faith and deference to the institution. The majority further notes: “Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.”<sup>123</sup> Here, too, marriage is ascribed incredible power – not only does it hold Americans’ collective

119. Levit, *Theorizing and Litigating*, *supra* note 116, at 30.

120. Nancy Levit, *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory*, 61 OHIO ST. L.J. 867, 870 (2000) [hereinafter Levit, *A Different Kind of Sameness*].

121. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593–94 (2015).

122. Other writers remarked on the majority’s choice of language and rhetoric. See, e.g., Paul Horwitz, *Pomp and Circumstances*, COMMONWEAL (July 10, 2015), <https://www.commonwealmagazine.org/pomp-circumstances> (“Kennedy should have devoted more effort to clarity and guidance, and less to pomp and sentimentality.”); Garrett Epps, *The U.S. Supreme Court Fulfills Its Promises on Same-Sex Marriage*, ATLANTIC (June 26, 2015), <https://www.theatlantic.com/politics/archive/2015/06/same-sex-marriage-supreme-court-obergefell/396995/> (quoting Scalia’s dissent in *Obergefell*, which characterized Kennedy’s opinion as “filled with ‘mummeries and straining-to-be-memorable passages’ written ‘in a style as pretentious as its content is egotistic’”).

123. *Obergefell*, 135 S. Ct. at 2600.

hopes and aspirations but also provides the answer to an apparent universal fear of loneliness.

Indeed, the language of *Obergefell* adopts a dominant heteronormative-focused narrative seeking society's longstanding approval of marriage relationships to achieve the goal of same-sex equality.<sup>124</sup> But advocates should ask what effect embracing the norm may have for others – like that of the gay person seeking recognition of his or her equal status in society while not wishing to marry. Does *Obergefell* uplift gay rights, generally?<sup>125</sup> Beyond gay-rights consciousness, the language of *Obergefell* may have a similar othering effect on, for example, heterosexual couples who do not seek the state-sponsored imprimatur of their relationship through marriage but seek respect for their relationships and families. Yet, the *Obergefell* rhetoric suggests that people of any sexual orientation who remain unmarried are resigned to an unfulfilled life devoid of companionship and understanding.

To be sure, the *Obergefell* opinion builds upon and solidifies the reification of the American marriage to the ongoing detriment of a non-traditional family structure and of an individual's choice to eschew the government-sponsored marriage institution. Although this fealty to marriage is not surprising in the context of civil rights advancement of marriage equality, the marriage narrative concomitantly demeans those who do not fit within its traditional purview. This advocacy strategy to build support for equality movements by using a heteronormative context – normalizing gay marriage by drawing comparisons to traditional heterosexual family structures – ultimately results in the denigration of those residing outside these contextual boundaries.<sup>126</sup>

To be sure, the preference for the marriage institution is well established in our family law canon, as noted by both the majority and dissenters in *Obergefell*.<sup>127</sup> The litigants and lawyers in *Obergefell* strategically relied upon this

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124. See, e.g., Stewart Chang, *Is Gay the New Asian?: Marriage Equality and the Dawn of a New Model Minority*, 23 ASIAN AM. L.J. 5, 23 (2016) (writing about the marriage equality narrative in the context of similar narrative devices for Asian Americans and cautioning against an ascription to a normative ideal: “[T]he goal of marriage equality venerates marriage as an ideal to be emulated and achieved by gay couples, which in turn promotes further homogeneity with normative family structures in America” (footnote omitted)).

125. See, e.g., Levit, *A Different Kind of Sameness*, *supra* note 120, at 869 (asking in another context: “If respect for gay and lesbian relationships comes only from their resemblance to categories of straight relationships, how can laws transform consciousness?”).

126. See, e.g., Chang, *supra* note 124, at 27 (noting these effects of the *Obergefell* rhetoric, “When formal equality is tied to marriage, only those who subscribe to and have access to the institution of marriage are able to attain equality. In this respect, *Obergefell* stifles heterogeneous sexualities. Through *Obergefell*, what is gained is not so much a right to marry, but access to the rights that come with marriage” (footnotes omitted)).

127. *Obergefell*, 135 S. Ct. at 2601; *id.* at 2613 (Roberts, C.J., dissenting).

historical fealty to marriage to craft their winning arguments.<sup>128</sup> The 1888 case of *Maynard v. Hill* set the stage for the legal preference for marriage. In that case, the U.S. Supreme Court considered whether an order of the Oregon territory legislative body legally dissolved the marriage of David and Lydia Maynard, even though Lydia knew nothing about the action.<sup>129</sup> Ultimately affirming the decision of the lower court upholding the legislative divorce, the Court cited another court's description of the contractual and societal character of marriage as:

a social relation like that of parent and child, the obligations of which arise not from the consent of concurring minds, but are the creation of the law itself, a relation the most important, as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress.<sup>130</sup>

In 1967, in declaring Virginia's anti-miscegenation law unconstitutional, thereby ending the State's power to prohibit interracial marriage, the U.S. Supreme Court in *Loving v. Virginia* declared that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."<sup>131</sup> The Court's pronouncement of the importance of marriage continued in *Zablocki v. Redhail*, when the fundamental right of marriage was explicitly solidified<sup>132</sup> and in *Turner v. Safley*, when the right to marry was extended to prisoners not serving a life sentence.<sup>133</sup>

In fact, the *Obergefell* majority cites to each of these precedents to reaffirm that extending the right to marry a person of the same sex is within the fundamental constitutionally-protected right to marry.<sup>134</sup> By placing same-sex marriage within the context of past challenges to marry, *Obergefell* asserts that people wishing to marry someone of the same sex want nothing more than what

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128. This strategy is clearly outlined in the briefs filed in the *Obergefell* litigation. See Brief for Petitioners at 37, *Obergefell*, 135 S. Ct. 2584 (No. 14-556) (discussing the benefits that marriage has historically conferred on couples, such as privacy rights, property rights and control over important family decisions, to justify the fight for marriage equality).

129. *Maynard v. Hill*, 125 U.S. 190, 192–93 (1888).

130. *Id.* at 211–12 (quoting *Adams v. Palmer*, 51 Me. 480, 483 (1863)).

131. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

132. *Zablocki v. Redhail*, 434 U.S. 374, 383–86 (1978) (reviewing precedent and reaffirming the fundamental nature of marriage as akin to the right to privacy protections).

133. *Turner v. Safley*, 482 U.S. 78, 97 (1987).

134. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602, 2604 (2015) (asserting that "[t]he right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws" and that "same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right").

everyone else is entitled to: “Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect – and need – for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.”<sup>135</sup> Thus, from *Maynard* to *Obergefell*, the lesson is that marriage is a fundamental legal and social institution within which individuals achieve the respectful state of formalized commitment. This description of the normalcy of what gay people seek hearkens back to the victory in *Romer* and *Lawrence* and shows the sharp contrast that had been achieved since the archaic language of *Bowers*. By this point, then, the victimage rhetoric had proven useful in successfully painting the deprivation of equal rights to gay people as akin to the deprivation of the same rights for the straight norm.

As another crucial strategic point, advocates carefully chose the plaintiffs in *Obergefell* to paint an empathetic portrait of this aggrieved community. James Obergefell and John Arthur lived as committed partners for decades before traveling from their home state of Ohio to Maryland to marry.<sup>136</sup> Mr. Arthur, suffering from the debilitating effects of amyotrophic lateral sclerosis (“ALS”) disease had to be transported in a private medical transport plane, and the two men married on the tarmac upon landing at Baltimore.<sup>137</sup> A few months later when Mr. Arthur succumbed to the disease, Mr. Obergefell was not allowed to be listed as his spouse on the death certificate and thus sued to have Ohio recognize his Maryland marriage.<sup>138</sup> The *Obergefell* opinion also profiles Army Reserve First Class Ijpe DeKoe and his husband Thomas Kostura who married in New York but live in Tennessee where Mr. DeKoe works for the Army Reserve.<sup>139</sup> A veteran of the war in Afghanistan, Mr. DeKoe “served this Nation to preserve the freedom the Constitution protects” while his marriage was outlawed in his home state of Tennessee.<sup>140</sup> Mr. DeKoe and Mr. Kostura thus sued for recognition of their marriage. With each story, the face of same-sex marriage shines a harsh light back at the critic of the practice – who among us, after all, wants to deny the dignity of formalized recognition of this union to the widower or the Army veteran? The incredibly compelling histories of the profiled plaintiffs shore up the narrative that the Court uses in discussing just how important marriage is to all couples (including those couples who happen to be of the same sex) seeking to marry.

Moreover, *Obergefell* – just as U.S. Supreme Court precedent before it – touts marriage as essential to the unassailable and foundational right of procreation and for raising children.<sup>141</sup> Plaintiffs April DeBoer and Jayne Rowse,

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135. *Id.* at 2594.

136. *Id.*

137. *Id.*

138. *Id.* at 2594–95.

139. *Id.* at 2595.

140. *Id.*

141. *Id.* at 2600; *see also* *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (citing approvingly past precedent in which “the Court recognized that the right ‘to marry, establish a home and bring up children’ is a central part of the liberty protected by the

who sought to marry in their home state of Michigan, adopted three children, but because Michigan would not let both of them serve as each child's adoptive parents, each of their children could only have one of the women as his/her adoptive mother.<sup>142</sup> Therefore, the Court noted that "[i]f an emergency were to arise, schools and hospitals may treat the three children as if they had only one parent. And, were tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the children she had not been permitted to adopt."<sup>143</sup> Thus, for critically important reasons, the parents sought that Michigan recognize their union as a marriage, thereby allowing both parents to adopt each child.<sup>144</sup>

Like many other same-sex American parents seeking the validity of marriage in their states, Plaintiffs DeBoer and Rowse represent the injustice of not being able to formalize their union for not only their sake but for their children. But beyond the very real problems of what would happen to their children in an emergency or should one of the mothers die, the Court in *Obergefell* again relied on the dignity that marriage ostensibly brings to families with children. In dramatic fashion, the Court proclaimed:

Without the recognition, stability, and predictability *marriage* offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.<sup>145</sup>

Citing the 2013 precedent of *U.S. v. Windsor*, in which the U.S. Supreme Court struck down the section of the Defense of Marriage Act that defined marriage as only between one man and one woman for federal law purposes,<sup>146</sup> the Court opined that raising children is ideally accomplished by married parents.<sup>147</sup> Without the benefits of such a formally-recognized family, children of di-

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Due Process Clause [and] . . . marriage was described as 'fundamental to the very existence and survival of the race'" (first quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and then quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942))).

142. *Obergefell*, 135 S. Ct. at 2595.

143. *Id.*

144. DeBoer and Rowse, who have since the lawsuit adopted another child, recently married in Michigan and are moving to each become adoptive parents of the children and change their names to DeBoer-Rowse. See Oralandar Brand-Williams, *DeBoer and Rowse Exchange Vows in 'Historic' Wedding*, DETROIT NEWS (Aug. 23, 2015, 4:20 AM), <http://www.detroitnews.com/story/news/local/oakland-county/2015/08/22/deboer-rowse-exchange-vows-historic-wedding/32212729/>.

145. *Obergefell*, 135 S. Ct. at 2600 (emphasis added) (citing *United States v. Windsor*, 133 S. Ct. 2675, 2694–95 (2013)).

146. *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013).

147. *Obergefell*, 135 S. Ct. at 2590.



vorced parents, of single parents, or of no biological parents (for example, children raised by other family members) are apparently destined to live lives devoid of dignity and full of harm and humiliation.<sup>148</sup> In this sense, too, *Obergefell* places the institution of marriage on a pedestal to be sought after and hopefully achieved not only for the individual adult but also for the good parent. Deprivation of this right would thus result in unjust and severe harm to both the adults seeking to marry and their children.

Indeed, the same-sex marriage equality movement achieved successes and setbacks throughout the journey towards ultimately achieving constitutional equality under *Obergefell*. As “Freedom to Marry,” a leading marriage equality non-profit organization, details in its history of the movement, advocates had a two-pronged approach. On the legal front, the strategy was to change the laws at the state level and achieve enough success in enough states to move the national momentum towards legalizing same-sex marriage everywhere.<sup>149</sup> To achieve this legal reform, however, advocates needed a second strategic focus that concentrated on changing societal views about gay people and gay marriage. Thus, as described in the discussion of the Massachusetts efforts to legalize same-sex marriage, as the lawyers argued the case in the courts, the “Massachusetts Freedom to Marry Coalition engaged with LGBT community and potential non-gay allies in the legislature, in houses of worship and elsewhere, explaining why marriage matters to all loving couples.”<sup>150</sup>

It is unsurprising that the advocates in *Obergefell* focused on the preference for marriage to make the case for same-sex marriage equality. By contextualizing gay marriage as just like straight marriage, in which gay couples seek nothing more than what straight couples are entitled to, and by presenting the face of same-sex marriage as empathetic and deserving, *Obergefell* speaks to the opponents of same-sex marriage or at least to those on the fence about it. In this sense, the advocates’ narrative strategy formed post-Stonewall and *Bowers* comes full circle. By placing gay marriage in a heteronormative context, it becomes less about sexual preferences and orientation but instead about same-sex couples “aspir[ing] to the transcendent purposes of marriage and seek[ing] fulfillment in its highest meaning.”<sup>151</sup> Thus, the gay couple seeking to marry fits well into the socially-prescribed box of normalcy and familiarity.

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148. See Levit, *Theorizing and Litigating*, *supra* note 116, at 53–54 (discussing amicus efforts in the same-sex marriage equality case litigated in California to argue that “children are harmed financially, emotionally, and psychologically if their parents are not allowed to marry – that ‘they recognize they and their parents are treated as second-class citizens.’ . . . These themes resonated with the California Supreme Court, which recognized that state sanctioning of same-sex marriage provides children with a secure legal basis for their parents’ union”).

149. See *Winning the Freedom to Marry Nationwide: The Inside Story of a Transformative Campaign*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/how-it-happened> (last visited Jan. 1, 2018).

150. *Id.*

151. *Obergefell*, 135 S. Ct. at 2602.

In her 2000 article (pre-*Obergefell*), Levit defines this strategy as one based on “equality theory,” in which advocates may remain agnostic about the actual idealization of the hetero norm but recognize that ascribing gays to the norm is the most practical way to achieve equality. She asserts:

Equality theorists accept . . . the given identity categories of homosexuals and heterosexuals, but try to show that sexual differences should not make a difference, socially or legally. . . . Equality-seeking political activists must be prepared to argue that to the extent an ideal model of family life exists, gays and lesbians conform to that snapshot.<sup>152</sup>

This theory contrasts with what she deems the “outsider theory” in which proponents criticize the equality theoretical model as erasing a critical component of sexual minorities’ unique identity by aligning too closely with the hetero norm.<sup>153</sup> In an outsider theoretical model, proponents argue for equality for gays while emphasizing and even celebrating their differences from straights.<sup>154</sup> Moreover, this outsider theory recognizes that by ascribing too closely to a heteronormative ideal, those gays and sexual minorities who look and/or are less like the ideal will still be left out of the equality movement. Ascribing to this ideal may even create backlash within the gay community itself. Levit notes: “Poor, nonwhite committed monogamous gay couples will not be treated like upper middle class white committed monogamous gay couples. Since mainstreaming will work selectively . . . to the extent that an equality strategy relies on a heterosexual ideal, it risks polarizing and destroying a

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152. Levit, *A Different Kind of Sameness*, *supra* note 120, at 880.

153. *Id.* at 886–87 (discussing other scholars’ works and noting that for outsider theorists, “One primary concern [regarding the equality theory] centers on the idea that if sexual others try to show the same entitlement to rights as straights, they will be forced to hide their unique or distinctive traits”).

154. *Id.*; see also Mary Bernstein, *Celebration and Suppression: The Strategic Uses of Identity by the Lesbian and Gay Movement*, 3 *AM. J. SOC.* 531, 532 (1997) (discussing the gay rights movement’s strategic shift in advocating for equality: “Over time, ‘identity’ movements shift their emphasis between celebrating and suppressing differences from the majority . . . the lesbian and gay movement has been altered from a movement for cultural transformation through sexual liberation to one that seeks achievement of political rights through a narrow, ethnic-like . . . interest-group politics” (citation omitted)).

sense of community among sexual minorities.”<sup>155</sup> Thus, ascription to a heteronormative ideal risks damage to the sense of community itself.<sup>156</sup>

Further, a focus on highlighting the idealized norm not only serves to sever inter-community ties, it subjugates those who do not fit the archetype. As Alexander Nourafshan and Angela Onwuachi-Willig argue, the “dominant image” propagated in the same-sex marriage equality movement as a “white, upper middle class, educated, and Northern-city-based gay community . . . worked to persuade those in the decision-making elite that the gay community’s interests converge with their own because it implicitly reinforces racial, class, and regional hierarchies within the gay community and in society more generally.”<sup>157</sup> In this sense, then, the successes of an equality theoretical model were built in part on the already established discriminatory models that permeate general society. By aligning with the most traditional “American” ideal – the middle to upper-class, formally educated, white heterosexual couple – advocates for marriage equality sought to paint gays as being “just like everyone else,” a strategy that necessarily subordinates those historically outside the traditional ideal.

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155. Levit, *A Different Kind of Sameness*, *supra* note 120, at 887; *accord* Nourafshan & Onwuachi-Willig, *supra* note 112, at 536 (commenting on the subordinating discriminatory effect of the dominant upper-class white narrative used in the gay-rights movement: “This strategy for establishing legal protection and social equality for gays and lesbians, through the use of whiteness, marginalize[d] gays and lesbians of color and normalize[d] white gay identity without accounting for the substantial portion of the gay community that is non-white”).

156. *See* Levit, *A Different Kind of Sameness*, *supra* note 120, at 887; Nourafshan & Onwuachi-Willig, *supra* note 112, at 536; Chang, *supra* note 124, at 27–28. As the Freedom to Marry organization notes in its article describing the history of the marriage equality movement:

Some activists presented ideological resistance to marriage entirely, asserting that working to win marriage was in itself a flawed goal – arguing that marriage is a patriarchal institution that should be avoided and that LGBT people should chart their own path for sexual liberation and relationships rather than embrace marriage. Others had strategic concerns, declaring that the nation would never be ready to allow same-sex couples to wed and that the pursuit would harm the community’s ability to prevail on other, seemingly more likely, gains.

*Winning the Freedom to Marry Nationwide*, *supra* note 149.

157. Nourafshan & Onwuachi-Willig, *supra* note 112, at 522; *accord* Chang, *supra* note 124, at 30 (noting the racialized effects of the marriage equality movement’s fealty to the normative structure: “The incrementalist strategy towards gay rights dissociated from this type of reckless behavior and developed an image of the good gay that represented a desire for inclusion in normative family life. However, with this shift the face of gay rights also became increasingly whitewashed and underplayed intersectional identities. The marriage equality movement emphasized stability traditionally associated with normative white families” (footnotes omitted)).

This advocacy strategy in the marriage equality movement to normalize the narrative was not new. Mildred Jeter, “a Negro woman,” and Richard Loving, “a white man,” simply wanted to live as husband and wife in their home state of Virginia but instead were convicted under the Virginia anti-miscegenation statute and sentenced to a year in jail for the crime of getting married.<sup>158</sup> Such an outcome represents inequality at its clearest. Edith Windsor married Thea Spyer in Canada after decades of living as life partners.<sup>159</sup> Upon Spyer’s death, Windsor inherited Spyer’s estate and was slapped with a \$363,053 tax bill because, as a woman married to another woman, she was not considered a lawful spouse for federal government purposes and thus did not qualify for the spousal estate tax exemption.<sup>160</sup> Windsor’s reality represents an injustice perpetrated by the federal government against a grieving widow.<sup>161</sup> In these examples, the heteronormative narrative framing was an important and extremely useful strategy to achieve civil rights successes in the U.S. Supreme Court cases of *Loving v. Virginia* and *United States v. Windsor*.

But the framing necessarily excludes those who are not part of a two-parent family or a married couple. Indeed, in his dissent in *Obergefell*, Justice Thomas noted:

The majority also suggests that marriage confers “nobility” on individuals. I am unsure what that means. People may choose to marry or not to marry. The decision to do so does not make one person more “noble” than another. And the suggestion that Americans who choose not to marry are inferior to those who decide to enter such relationships is specious.<sup>162</sup>

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158. *Loving v. Virginia*, 388 U.S. 1, 2–3 (1967)

159. *United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013).

160. *Id.*

161. The selection of Windsor as a plaintiff to challenge the Defense of Marriage Act also indicates a strategic alliance with an ideal – here, a white person with significant income – that would personally speak to the community of decisionmakers who could likely relate to the estate tax issue. See Nourafshan & Onwuachi-Willig, *supra* note 112, at 522–23 (“Under the theory of interest convergence, Edith Windsor, a wealthy, white woman in a long-term committed relationship in New York City, was, in many ways, the perfect plaintiff to challenge DOMA because she could be sold as part of a respectable, assimilation-based gay image to the general public and, more importantly, to those in power.”). Indeed, in other contexts too, narrative plays an important function in advocacy and legislative strategy and outcomes. I have written about this previously in the immigration law and policy realm in Mariela Olivares, *The Impact of Recessionary Politics on Latino-American and Immigrant Families: SCHIP Success and DREAM Act Failure*, 55 HOW. L.J. 359 (2012); Olivares, *Renewing the Dream*, *supra* note 32; Mariela Olivares, *Battered by Law: The Political Subordination of Immigrant Women*, 64 AM. U. L. REV. 231 (2014) [hereinafter Olivares, *Battered by Law*]; and Olivares, *Intersectionality at the Intersection*, *supra* note 11.

162. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2639 n.8 (Thomas, J., dissenting) (citation omitted).

Although the majority in *Obergefell* likely does not intend to assert that unmarried people are inferior to married couples or that children living in families with unmarried parents are always worse off than those children with married parents, by employing a narrative that elevates the marriage institution to a “noble,” “transcendent,” “profound” and “digni[fied]” state of being, the implication of inferiority is strong.<sup>163</sup> Moreover, the narrative choice diminishes to some degree the equality effect *Obergefell* has or could have for gay individuals generally. By using language that places the demand for constitutional equality in the realm of couple-hood, it obfuscates the right of the gay individual to be treated equally despite his/her preference to marry.

Further, the construct promoting marriage demotes *all* unmarried, divorced or single people – gay or straight – to an apparent realm of loneliness. One commentator noted of the opinion’s focus on marriage: “Now all of us single people are pathetic, not just the straight ones.”<sup>164</sup> Indeed, in 2014, the Bureau of Labor Statistics reported that for the first time since it began tracking such numbers, a majority of adult Americans – 50.2% or 124.6 million people – consider themselves “single.”<sup>165</sup> The Pew Research Center similarly reported that “[i]n 2012, one-in-five adults ages 25 and older (about 42 million people) had never been married,” a historically high percentage of unmarried Americans.<sup>166</sup> In this regard, the *Obergefell* marriage rhetoric therefore speaks disparagingly to millions of Americans.<sup>167</sup>

Similarly, the language regarding the harm and humiliation that befalls children of unmarried parents may be surprising to the millions of families raising children outside of the traditional two-married parent construct. One recent study indicates that in 2013, only 46% of children in the United States were living in a home with two married heterosexual parents in their first marriage.<sup>168</sup> Breaking down this data in various ways, the Pew Research Center

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163. *Id.* at 2599–2602 (majority opinion).

164. Michael Cobb, Opinion, *The Supreme Court’s Lonely Hearts Club*, N.Y. TIMES (June 30, 2015), [http://www.nytimes.com/2015/06/30/opinion/the-supreme-courts-lonely-hearts-club.html?\\_r=1](http://www.nytimes.com/2015/06/30/opinion/the-supreme-courts-lonely-hearts-club.html?_r=1).

165. Mythili Rao, *Singles Now Outnumber Married People in America – and That’s a Good Thing*, PRI (Sept. 14, 2014, 1:30 PM), <http://www.pri.org/stories/2014-09-14/singles-now-outnumber-married-people-america-and-thats-good-thing> (citing Bureau of Labor Statistics data).

166. Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married*, PEW RES. CTR. (Sept. 24, 2014), <http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married/>.

167. See Cobb, *supra* note 164 (“The words and the value [the *Obergefell* marriage rhetoric] communicate are impossible to avoid, and often difficult to resist. It’s as if the words of Justice Kennedy and my grandmother, who, on her deathbed, begged me to get married, have melded together in my head, declaring my life lacking . . .”).

168. Gretchen Livingston, *Fewer Than Half of U.S. Kids Today Live in a ‘Traditional’ Family*, PEW RES. CTR. (Dec. 22, 2014), <http://www.pewresearch.org/fact-tank/2014/12/22/less-than-half-of-u-s-kids-today-live-in-a-traditional-family/>.

study shows that roughly 34% of children were living in a home with an unmarried parent; 15% were living in a home with married parents at least one of which was not the first marriage; 4% of children were living with unmarried cohabitating parents; and 5% of children were living with neither parent.<sup>169</sup> The implication that these millions of children are living in undignified or inferior families and that perhaps they should feel humiliation (if they do not already) because they live without married parents would likely come as a surprise to many of them.

The heteronormative preference narrative has far-reaching effects beyond the legal precedent of *Obergefell* and for civil rights advocacy strategies to come. Levit discusses, for example, the ways in which ascription to the two-heterosexual-parent norm negatively affects gay parents seeking to be foster parents or involved in child custody disputes.<sup>170</sup> Courts, she reports, still find that gayness can be harmful to a child and thus penalize gay parents seeking custody.<sup>171</sup> Similarly, single gay people seeking to become foster parents are perceived as less than ideal parents because they are not in a “committed, monogamous relationship.”<sup>172</sup>

By relying on the marriage preference narrative as the ultimate heteronormative model to convince the American public that same-sex couples should be entitled to the right to marry just like opposite-sex couples, *Obergefell* excludes those outside this constructed ideal. The effects of the chosen narrative should not be ignored. Indeed, the dependence on the heteronormative marriage preference – a preference that is falling out of favor for millions of Americans – has concomitant demeaning effects on many other adults, children and families. Or, as Levit concludes, “[H]eteronormativity has real world consequences.”<sup>173</sup>

Employing a chosen narrative in the immigration equality movement has similarly stark real-world consequences. By painting the worthy immigrant in a very particular light, the effects on those outside the ideal go far beyond internalized feelings of otherness or humiliation. Because the narrative affects legislative change that is remarkably stagnant – comprehensive immigration reform happens over decades, if that – and affects people’s literal ability to remain in the country, it behooves immigration equality advocates to be cautious in their strategic maneuverings. Part IV discusses the importance of the chosen strategic narrative, the paths that advocates have historically chosen and the ways in which those strategies have failed. Part V then provides important guidance in crafting a narrative that achieves legislative and political success while diminishing the potential harmful effects on the community at large.

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169. *Id.*

170. Levit, *Theorizing and Litigating*, *supra* note 116, at 33–34.

171. *Id.*

172. *Id.* at 34.

173. *Id.*

## IV. THE IMMIGRANT NARRATIVE

President Obama's Administration deported more immigrants than any prior president in U.S. history.<sup>174</sup> Despite statements of inclusion for immigrants, the reality is one of broad exclusion. Where, then, do the rhetoric and reality diverge? The answer lies in the criminal narrative ascribed to the immigrant identity.

As I have previously asserted, the criminality narrative as applied to immigrants is a politically volatile strategy that has been effectively employed by both major political parties.<sup>175</sup> Immigration and criminality have become inextricably linked in public and political media and discourse. Legislators from both dominant political parties rely on the narrative of the criminal alien to distance themselves from reform and advocacy that may seem too soft on those who violate the immigration laws. Senator and 2016 Republican presidential candidate Ted Cruz called for the immediate deportation of all undocumented immigrants, with seemingly no regard for due process or other constitutional and statutory protections, stating in one interview, "[Y]es, we should deport them [all undocumented immigrants]. We should build a wall, we should triple the Border Patrol. Federal law requires that anyone here illegally that's apprehended should be deported."<sup>176</sup> In a similar vein, to support his executive actions to provide deferred action to certain groups of undocumented immigrants, Obama noted that his immigration policies are about targeting "[f]elons, not families. Criminals, not children. Gang members, not a mom who's working hard to provide for her kids."<sup>177</sup>

Both statements support a view of immigrants as criminal lawbreakers. While Obama's emphasis on immigrants' criminality or latent criminality is powerful enough, others cast a criminal character on simply the act of being an

174. See, e.g., Serena Marshall, *Obama Has Deported More People Than Any Other President*, ABC NEWS (Aug. 29, 2016, 2:05 PM), <http://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661> ("According to governmental data, the Obama administration has deported more people than any other president's administration in history. In fact, they have deported more than the sum of all the presidents of the 20th century.").

175. See Olivares, *Intersectionality at the Intersection*, *supra* note 11, at 992–93.

176. Victor Morton, *Ted Cruz Toughens Immigration Stance, Says He'd Deport All Illegals*, WASH. TIMES (Feb. 22, 2016), <http://www.washington-times.com/news/2016/feb/22/ted-cruz-says-hed-deport-all-illegal-immigrants-us/>.

177. Press Release, White House Office of the Press Sec'y, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>. Obama has otherwise spoken in terms of "good" versus "bad" immigrants. See Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Records Show*, N.Y. TIMES (Apr. 6, 2014), [http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html?\\_r=0](http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html?_r=0) (discussing the high number of deportations in the years of the Obama administration and stating that though Obama claimed to be deporting gang members and other criminals, that is not actually the case).

undocumented immigrant. Cruz incorrectly asserts that presence equates to criminality, even though a person's lawful or unlawful status can only ultimately be determined through an immigration adjudication.<sup>178</sup> This typical (though legally inaccurate) rhetoric that confuses criminality with immigrant status is bolstered by Obama's familiar yet faulty assertion that some immigrants are worthy of relief while others are not.<sup>179</sup>

Despite the popular perception that typecasts immigrants as rule-breakers, research has routinely shown that immigrants do not commit crime at a higher rate than U.S. citizens,<sup>180</sup> bucking the myth that status as an immigrant somehow correlates to a criminal nature or propensity.<sup>181</sup> The consequences of using this false corollary go far beyond the philosophical, however, and have critical effects on individuals and families every day. Legislative or political reform that increases criminal effects on immigrants or expands the deportable offenses due to criminal conduct, or even *perceived* criminality as some have

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178. See *Arizona v. United States*, 567 U.S. 387, 407 (2012) (“As a general rule, it is not a crime for a removable alien to remain present in the United States.”).

179. See, e.g., Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 221–22 (2012) (describing how the narrative of criminality and victimhood benefits certain immigrants (the perceived victims) and inordinately targets others (the perceived criminals) without suitable discretion for complexities); see also Olivares, *Renewing the Dream*, *supra* note 32, at 88–98 (showing that advocates for DREAM Act-type legislation historically fell victim to the problems inherent in the narrative dilemma of good versus bad immigrant).

180. See WALTER A. EWING, DANIEL E. MARTÍNEZ & RUBÉN G. RUMBAUT, *THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES* 4 (2015), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_criminalization\\_of\\_immigration\\_in\\_the\\_united\\_states.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_criminalization_of_immigration_in_the_united_states.pdf) (surveying the data and showing: “[E]vidence that immigrants tend *not* to be criminals is overwhelming . . . . Crime rates in the United States have trended downward for many years at the same time that the number of immigrants has grown. Second, immigrants are *less* likely to be incarcerated than the native-born. And, third, immigrants are *less* likely than the native-born to engage in the criminal behaviors that tend to land one in prison”); see also César Cuauhtémoc García Hernández, *The Perverse Logic of Immigration Detention: Unraveling the Rationality of Imprisoning Immigrants Based on Markers of Race and Class Otherness*, 1 COLUM. J. RACE & L. 353, 362 (2012) (citing Ramiro Martínez, Jr., *Coming to America: The Impact of the New Immigration on Crime*, in *IMMIGRATION AND CRIME: RACE, ETHNICITY, AND VIOLENCE* 1, 10–12 (Ramiro Martínez, Jr. & Abel Valenzuela, Jr. eds., 2006)) (noting evidence indicating that immigrants are actually less prone to criminal behavior than U.S. citizens); Kevin R. Johnson, *It's the Economy, Stupid: The Hijacking of the Debate Over Immigration Reform by Monsters, Ghosts, and Goblins (or the War on Drugs, War on Terror, Narcoterrorists, Etc.)*, 13 CHAP. L. REV. 583, 592 (2010) (citing KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* 155–58 (2007)).

181. See Olivares, *Intersectionality at the Intersection*, *supra* note 11, at 993–95 & nn.143–60.



offered, would result in many more deportations.<sup>182</sup> As history teaches, immigration reform does not happen quickly; if a new restrictive law is implemented, it will have immediate and possibly generations-long effects on millions of immigrants and their families. Such a consequence is arguably even more severe than that which was at stake in the marriage equality fight (i.e., the denial of the fundamental right to marry versus the forcible removal from one's family and community to another country). Importantly, then, immigration advocates must vehemently and urgently work towards changing the dominant narrative to stop pervasive and restrictive measures before they are enacted – rather than be forced to fight for their repeal after immigrants and their communities have borne the destructive effects.

Critically, however, the narrative reframing must employ a new strategy, as previous efforts were not successful or are no longer viable in the current anti-immigrant climate. For example, as I have previously written, one popular narrative regarding the innocence or vulnerability of certain immigrants – most commonly typified as children who had no choice in being brought to the United States – consistently failed to pass the DREAM Act despite historical bi-partisan support since its initial congressional introduction in 2001.<sup>183</sup> More

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182. Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8800 (Jan. 25, 2017) (“[T]he [DHS] . . . shall prioritize for removal those aliens . . . who . . . [h]ave been convicted of any criminal offense . . . charged with any criminal offense, where such charge has not been resolved [or] have committed acts that constitute a chargeable criminal offense . . . .”); see also Memorandum from John Kelly, Sec’y of the Dep’t of Homeland Sec., to DHS Leadership 2–3 (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) (directing ICE, CBP and USCIS to “issue further guidance to allocate appropriate resources” for these priorities). Angélica Cházaro has written poignantly about the critical effects of governmental and executive prioritization of “criminal” or “dangerous” aliens for deportation and the severe consequences these policies bring to immigrants caught in the narrative crossfire: “[P]ushing for reforms that would focus enforcement on so-called dangerous criminals instead of innocent immigrants exempts immigration enforcement practices from critique by making them isolatable to so-called real immigrant criminality. This ends up shoring up both the criminal alien category and the problems with the criminal justice system itself.” Angélica Cházaro, *Challenging the “Criminal Alien” Paradigm*, 63 UCLA L. REV. 594, 653–54 (2016).

183. See Olivares, *Renewing the Dream*, *supra* note 32, at 87–88. Importantly, though, this ascription to the innocence and vulnerability of children relies in part upon the vilification of the immigrant parents who unlawfully crossed the border, a consequence that is not lost on some immigration advocates. See, e.g., Marcela Valdes, *Is It Possible to Resist Deportation in Trump’s America?*, NY TIMES (May 23, 2017), <https://www.nytimes.com/2017/05/23/magazine/is-it-possible-to-resist-deportation-in-trumps-america.html> (interviewing immigrant advocates regarding the effects of the DREAM Act narratives: “[One interviewee] was irritated by the Dreamers’ tendency to portray themselves as innocent victims, a tactic that opened the door for conservatives to speak of Dreamers with empathy even as they cracked down on their parents as ‘criminals.’ . . . ‘A lot of us feel like we sort of shot ourselves in the foot,’ Erika Andiola, [Arizona Dream Act Coalition’s first president, said] . . . ‘Because we started

recently, the same strategy achieved a small measure of traction in calling attention to the plight of thousands of Central American mothers and children seeking asylum but who are instead jailed in detention centers upon their arrival in the United States.<sup>184</sup>

In 2016, advocates intensified their efforts to end family detention, resulting in a federal court blocking the continued licensure of two Texas family detention facilities, effectively creating a roadblock (but not a complete halt) to the family detention regime.<sup>185</sup> This move came during other Department of Homeland Security (“DHS”) efforts to review its immigrant detention practices.<sup>186</sup> In 2015 and 2016, DHS Secretary Jeh Johnson convened two separate committees of immigration experts to review (1) the ICE use of private prison businesses to build and operate immigration detention centers<sup>187</sup> and (2) the ICE practice of detaining families.<sup>188</sup> The committee ultimately divided on the continued ICE use of private prison facilities to house immigrants, drawing a strong dissent from a majority of the committee members who disputed the report’s conclusion that reliance on private prisons is inevitable.<sup>189</sup> Similarly,

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that narrative like, “I was brought here by my parents, not my fault, poor me, I was here as a child” that kind of created blamed on our parents.”).

184. *See, e.g.*, Letter from Cong. of the U.S., House of Representatives to Jeh Johnson, Sec’y, U.S. Dep’t of Homeland Sec. (May 27, 2015), [https://lofgren.house.gov/uploadedfiles/family\\_detention.pdf](https://lofgren.house.gov/uploadedfiles/family_detention.pdf) (expressing concern about the practice of detaining immigrant mothers and children in “jail-like” facilities).

185. *Grassroots Leadership, Inc. v. Texas Dep’t of Family & Protective Servs.*, No. D-1-GN-15-004336 (Travis Cty. Dist. Ct. Dec. 2, 2016); *see also Breaking: Texas Court Blocks Licensing of Family Detention Camps as Childcare Facilities*, GRASSROOTS LEADERSHIP (Dec. 3, 2016), <http://grassrootsleadership.org/releases/2016/12/breaking-texas-court-blocks-licensing-family-detention-camps-child-care-facilities> (describing the outcome of the litigation).

186. *See, e.g.*, Press Release, Dep’t of Homeland Sec., Statement by Sec’y Jeh C. Johnson on Establishing a Review of Privatized Immigration Detention (Aug. 29, 2016), <https://www.dhs.gov/news/2016/08/29/statement-secretary-jeh-c-johnson-establishing-review-privatized-immigration> (stating that the subcommittee of the Homeland Security Advisory Council should “review our current policy and practices concerning the use of private immigration detention and evaluate whether this practice should be eliminated”).

187. *Id.*

188. *See* Press Release, Dep’t of Homeland Sec., Statement by Sec’y Jeh C. Johnson on Family Residential Ctrs. (June 24, 2015), <https://www.dhs.gov/news/2015/06/24/statement-secretary-jeh-c-johnson-family-residential-centers> (stating that “I have reached the conclusion that we must make substantial changes in our detention practices with respect to families with children. In short, once a family has established eligibility for asylum or other relief under our laws, long-term detention is an inefficient use of our resources and should be discontinued”). As one part of this so-called effort to change or halt this practice, the DHS created the Federal Advisory Committee. *See id.*

189. *See* HOMELAND SEC. ADVISORY COUNCIL, REPORT OF THE SUBCOMMITTEE ON PRIVATIZED IMMIGRATION DETENTION FACILITIES (2016),

the committee that was convened to review family detention practices produced a comprehensive report but ultimately concluded: “DHS’s immigration enforcement practices should operationalize the presumption that detention is generally neither appropriate nor necessary for families – and that detention or the separation of families for purposes of immigration enforcement or management, or detention is never in the best interest of children.”<sup>190</sup>

The focus on the plight of immigrant children and families to advocate more broadly for immigrant rights and equality was, in many ways, a sound strategic decision. When politicians and other constituencies who are not typically allied with immigration rights advocates understood the realities of children and family detention, changes to the policies became possible.<sup>191</sup> The strategy of equating immigrant detention with the practice of jailing children is akin to the tactical decision of choosing certain sympathetic plaintiffs in the marriage equality fight.<sup>192</sup> Nancy Levit discusses how presenting a counter-narrative in the gay-rights movement helped to humanize gay people to the heteronormative majority: “Telling counterstories is a way to challenge dominant narratives . . . . Stories introduce the humans whose rights are being litigated, and the personal narratives tell how it feels to experience domination or discrimination.”<sup>193</sup> Similarly, when the majority politic was confronted with the reality that the U.S. government imprisons mothers and children with no criminal history, response and action ensued.<sup>194</sup> Thus, transforming the narrative in a normative context – from morally-corrupt gay outsider to grieving widower or American military veteran in the *Obergefell* case and from illegal alien criminal invader to infants and children behind barbed wire fences – helps the advocate converge the fight for equality with the reality of the majority, often to legislative and political success.<sup>195</sup>

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<https://www.dhs.gov/sites/default/files/publications/DHS%20HSAC%20PIDF%20Final%20Report.pdf>. The dissenters to the Report’s “Recommendation 1,” which described a continued reliance on private prison for immigration detention as fiscally inevitable, state that without a “meaningful determination on the best detention model in light of all relevant factors [including] . . . the most effective and humane approach to civil detention . . . . I cannot, in good conscience, agree that status quo reliance on the continuation of the private detention model is warranted or appropriate.” See *id.* at 11 n.14.

190. DEP’T OF HOMELAND SEC., REPORT OF THE DHS ADVISORY COMMITTEE ON FAMILY RESIDENTIAL CENTERS 2 (Sept. 30, 2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.

191. See Olivares, *Intersectionality at the Intersection*, *supra* note 11, at 991 & n. 139; (discussing the political and activist alliances that were created because of the children immigrant crisis in 2013–2015).

192. See *supra* notes 136–144, 158–161 and accompanying text.

193. Levit, *Theorizing and Litigating*, *supra* note 116, at 41.

194. Olivares, *Intersectionality at the Intersection*, *supra* note 11, at 991.

195. See *supra* notes 151–152 and accompanying text; Olivares, *Intersectionality at the Intersection*, *supra* note 11, at 991–99 (alluding to the narrative strategy in the family detention context as it pertains to the powerful identity politics surrounding immigrant rights). This strategy harkens strongly to the iconic work of Derrick Bell, who

To be sure, the efforts to focus on the injustices of family detention on the most vulnerable among us – mothers and children – secured some measures of success, including the Texas injunction, the DHS committee conclusions, and the eventual release of some families from family detention.<sup>196</sup> Yet, these successes should not diminish the facts that the U.S. government continues to detain families and continues to rely on the immigration detention regime to imprison women, children and men, a majority of whom have no record of serious criminality.<sup>197</sup> In the end, then, the narrative reliance on the vulnerability of women and children achieved incomplete success, and any public empathy towards this community has largely turned to apathy.<sup>198</sup>

The need to reframe the narrative framework is not limited to the immigration equality fight and is a hallmark of civil rights strategic advocacy. As Mary Bernstein writes regarding the different identity strategies utilized at different times within an equality rights movement:

Movements employ innovative direct action tactics at various points throughout their life cycle, not just when they are emerging. Such action can be internally or externally directed, depending on the type of

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cautioned about the fealty to a reliance on an interest convergence strategy in the ongoing struggle for racial equality because “[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites . . . . [but] will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.” Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980). I discuss more about this connection below.

196. Elise Foley & Roque Planas, *Hundreds of Immigrant Moms and Kids Freed from Detention After Texas Court Ruling*, HUFFPOST (Dec. 5, 2016, 5:59 PM) [http://www.huffingtonpost.com/entry/immigrant-family-detention-texas\\_us\\_5845a6d0e4b028b3233877c9](http://www.huffingtonpost.com/entry/immigrant-family-detention-texas_us_5845a6d0e4b028b3233877c9) (noting that hundreds of women and children were released from two Texas family detention centers after the Texas court enjoined the licensure of the two centers, though prison industry officials denied the correlation of the two events); *see also* Olivares, *Intersectionality at the Intersection*, *supra* note 11, at 1005 (discussing the narrative strategy employed in the fight to end family detention).

197. *See, e.g.*, Lauren Etter, *Record Numbers of Undocumented Immigrants Being Detained in U.S.*, BLOOMBERG (Nov. 10, 2016, 2:25 PM), <https://www.bloomberg.com/news/articles/2016-11-10/record-numbers-of-undocumented-immigrants-being-detained-in-u-s>. Former Secretary of the Department of Homeland Security Jeh Johnson reported that 41,000 immigrants were being held in immigration detention facilities, “up from a ‘typical’ number of between 31,000 and 34,000.” *Id.* The total number of apprehensions at the border by the U.S. Customs and Border Protection also increased twenty-three percent from the previous year to almost 409,000. *Id.*

198. A common thread among the various narrative strategies that have been employed is that they are incomplete and often result in a collateral “othering” of those outside the revered group. *See, e.g.*, Olivares, *Intersectionality at the Intersection*, *supra* note 11. In my next article, I will explore the viability of a renewed strategic framework that capitalizes upon the current socio-political resistance movement.

movement organizations, level of political access, and the extent of opposition . . . . [W]e should focus on explaining the structural relationship between identity and mobilization, when identity is a goal of collective action, and under what political conditions activists either deploy educational or critical identities or avoid identity strategies altogether.<sup>199</sup>

Though Bernstein writes here in 1997 about the gay rights movement, her words are prescient and informative for the immigrant equality rights struggle. The tactic must shift with changing times and in recognition that past efforts have resulted in incomplete successes. Part V discusses these alternatives while cautioning against the divisiveness that often accompanies narrative strategy.

## V. CHALLENGING THE NORMATIVE FRAMEWORK

In *Faces at the Bottom of the Well*, one of his groundbreaking works outlining interest convergence theory, Derrick Bell wrote:

When whites perceive that it will be profitable or at least cost-free to serve, hire, admit, or otherwise deal with blacks on a nondiscriminatory basis, they do so. When they fear – accurately or not – that there may be a loss, inconvenience, or upset to themselves or other whites, discriminatory conduct usually follows. . . .

. . . .

Racial policy is the culmination of thousands of these individual practices. Black people, then, are caught in a double bind. We are, as I have said, disadvantaged unless whites perceive that nondiscriminatory treatment for us will be a benefit for them. In addition, even when nonracist practices might bring a benefit, whites may rely on discrimination against blacks as a unifying factor and a safety valve for frustrations during economic hard times.<sup>200</sup>

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199. Bernstein, *supra* note 154, at 560–61 (asserting the strategic path of the gay rights moment as one involving numerous reframing opportunities in response to changing political climates).

200. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 7 (1992) [hereinafter BELL, *FACES AT THE BOTTOM*]. Bell also summarized the theory:

Translated from judicial activity in racial cases both before and after *Brown* [*v. Board of Education*], this principle of “interest convergence” provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial

The lesson, then, is that equality movements succeed only when the equal rights of the oppressed, vulnerable and subordinated coincide with the interests of the dominant political majority. As Bell notes, interest convergence theory has been proven ad nauseam in the context of black and other racial and ethnic minorities' struggles to achieve legal and societal equality.<sup>201</sup>

Kimberlé Crenshaw explored the theory in her 1998 article that rings incredibly poignant today. In discussing corollary critical race conceptions of antidiscrimination legislation in the context of employment laws, she notes that, in one view:

[E]ven when injustice is found, efforts to redress it must be balanced against, and limited by, competing interests of white workers – even when those interests were actually created by the subordination of Blacks. The innocence of whites weighs more heavily than do the past wrongs committed upon Blacks and the benefits that whites derived from those wrongs . . . . [This] view seeks to proscribe only certain kinds of subordinating acts, and then only when other interests are not overly burdened.<sup>202</sup>

Thus, knowing that civil rights equality is only possible when such change aligns with the interest of the political majority (namely, the heterosexual upper-income white person), the discourse has often embraced the normative rhetoric to effectuate change, as in the same-sex marriage equality movement.<sup>203</sup> But, as discussed above, difficulties emerge because the attachment to the normative framework necessarily excludes those outside of that dominant narrative, either through ostracizing tactics or by the external community's choice not to comport with the norms (e.g., gay people who choose not to marry; co-parents who raise children outside of marriage).<sup>204</sup> Herein lies the

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equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.

Bell, *supra* note 195, at 523.

201. BELL, *FACES AT THE BOTTOM*, *supra* note 200, at 10 (discussing the scapegoating by whites of blacks and the foundational component that racism has in a successful democracy, "The permanence of this 'symbiosis' ensures that civil rights gains will be temporary and setbacks inevitable. Consider: In this last decade of the twentieth century, color determines the social and economic status of African Americans, both those who have been highly successful and their poverty-bound brethren whose lives are grounded in misery and despair").

202. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1342 (1988) (footnote omitted).

203. See Nourafshan & Onwuachi-Willig, *supra* note 112, at 526–27 (discussing this phenomenon); Chang, *supra* note 124, at 22–23 (same).

204. See Nourafshan & Onwuachi-Willig, *supra* note 112, at 536–37; Chang, *supra* note 124, at 27–28; Levit, *A Different Kind of Sameness*, *supra* note 120, at 875–77 (discussing the othering effect).

critical obstacle in crafting an inclusive and not otherwise harmful political narrative that effectuates practical legal reform. Specifically, how does the immigrant rights advocate confronted with a system engrained in interest convergence effectuate change while maintaining inclusivity and not demonizing a broad sector of the immigrant community?

Analogies can be drawn once again to the marriage equality and gay rights movement, where scholars and activists have made similar calls for inclusiveness. Nourafshan and Onwuachi-Willig, for example, appeal for a renewed gay rights movement that is significantly more inclusive and diverse in various ways – race, socioeconomic status, gender, etc.<sup>205</sup> They assert that political and popular culture must be diversified so as to not rely on whiteness as a normalizing tactic, stating: “It is crucial that the gay rights movement reject colorblindness as a solution to the racialized problems that need to be addressed within the community, particularly given the unspoken role that white privilege or interest convergence is acknowledged as playing in the movement’s successes.”<sup>206</sup> To this point, too, Levit argues that a reimagined gay rights movement should focus less on ascribing to normative ideals and rather embrace an approach grounded in humanizing gay people in a broader sense while still incorporating the uniqueness of community members.<sup>207</sup> She writes: “Humanization . . . does not require homogenization. Efforts toward humanization must include changing the cultural re-presentations of sexual minorities. This necessitates increasing visibility, combating untrue media representations, and replacing the dominant cultural images with more accurate portrayals of the lived experiences of lesbians, gays, bisexuals, and transsexuals.”<sup>208</sup> The focus of both suggestions, then, is one of breadth – emphasizing our common humanity, while also including various representations of the subordinated population to highlight its diversity, would move away from relying upon a normative ideal.

Yet, the normalizing strategies in parallel civil rights movements that proved successful – like that in the marriage equality fight – seem ill-fitting for a revised immigrant equality tactic. As discussed above regarding the legal and political struggle to keep mothers and children out of immigration detention, immigrant advocates have achieved minimal successes with efforts to broadly humanize the immigrant experience. One example of a convergent narrative that plays to a normative framework is from the efforts to pass the DREAM Act.<sup>209</sup> In that strategy, immigrant rights advocates champion the “best and brightest” – those young immigrants who could provide great benefits to the United States by their educational attainment or military service. According to this advocacy theory, these positive attributes appeal to politi-

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205. See Nourafshan & Onwuachi-Willig, *supra* note 112, at 544–46.

206. *Id.* at 545.

207. Levit, *A Different Kind of Sameness*, *supra* note 120, at 931.

208. *Id.*

209. See generally Olivares, *Renewing the Dream*, *supra* note 32.

cians and to the larger society. Although this strategy would necessarily exclude a majority of the immigrant population – because most people are not the class valedictorian, a gifted scientist in training, or an eager military recruit – the effort could at least open the door to positive immigration results for some and perhaps even lead to later more inclusive immigration reform efforts.<sup>210</sup> But just as the humanizing strategy highlighting women and children immigrants housed in detention had only some measure of success, the reification of the “best and brightest” has not worked, as evidenced by the numerous unsuccessful efforts to pass the DREAM Act. The deeply-ingrained identity politics that color immigrants have thus far proven too powerful to overcome.<sup>211</sup>

Bell’s words regarding the overwhelming power of interest convergence are fitting for the plight of the immigrant in the United States. He wrote:

The fact is that, despite what we designate as progress wrought through struggle over many generations, we remain what we were in the beginning: a dark and foreign presence, always the designated “other.” Tolerated in good times, despised when things go wrong, as a people we are scapegoated and sacrificed as distraction or catalyst for compromise to facilitate resolution of political differences or relieve economic adversity.<sup>212</sup>

American history provides abundant examples of societal tolerance towards immigrants, especially immigrants of color, when cheap, expendable labor is needed. Chinese workers in the early to mid-1800s were imported during times of labor shortages, only to be ostracized and eventually forcibly removed at the time of the Chinese Exclusion Act in 1882.<sup>213</sup> Mexican Braceros were recruited from rural Mexico to perform difficult agricultural labor, only to be repatriated at the end of the Bracero program.<sup>214</sup> And in contemporary times, immigrant labor continues to fuel American demands for inexpensive products but is also vehemently targeted as the source of economic insecurity and criminality.<sup>215</sup>

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210. *See id.* at 123 (discussing the strategy that refocuses the advocacy because “a broad-scale, comprehensive immigration reform movement that grants all or most undocumented immigrant children lawful status is not currently politically feasible. Rather than continue to bemoan the lack of movement on the DREAM Act, advocates and supporters should attempt change in achievable small steps, with an eye towards expanding the benefits in a friendlier political climate”).

211. *See id.* at 114–15; Olivares, *Battered by Law*, *supra* note 161, at 262–63 (discussing the identity politics that stymied legislative reform for battered immigrants).

212. BELL, *FACES AT THE BOTTOM*, *supra* note 200, at 10.

213. *See supra* Part II.

214. *See supra* notes 29–39 and accompanying text.

215. Maryland’s crab industry, for example, relies on immigrants on H2-B visas for crab picking jobs to meet the “strong demand for Maryland crab meat” because “there are not enough [American citizens] who are trained or want to do them.” Mike Hellgren, *Immigration Crackdown Worries Maryland’s Crab Industry*, CBS BALT. (Feb. 22, 2017, 11:10 PM), <http://baltimore.cbslocal.com/2017/02/22/immigration->



A renewed strategy for achieving immigrant rights and justice must move in a different direction. At bottom, advocates must recognize the limitations inherent in past efforts. Crenshaw's assertions on the limitations of traditional civil rights reform prove instructive. She writes:

The danger of adopting equal opportunity rhetoric on its face is that the constituency incorporates legal and philosophical concepts that have an uneven history and an unpredictable trajectory. If the civil rights constituency allows its own political consciousness to be completely replaced by the ambiguous discourse of antidiscrimination law, it will be difficult for it to defend its genuine interests against those whose interests are supported by opposing visions that also lie within the same discourse. The struggle, it seems, is to maintain a contextualized, specified world view that reflects the experience of Blacks. The question remains whether engaging in legal reform precludes this possibility.<sup>216</sup>

Similarly, couching immigration activism in a traditional litigation and protest framework will not sustain justice goals when the normative view does not include immigrants as worthy. As long as immigrants remain outsiders and their interests do not adequately converge with the interests of the majority while purportedly straining common resources, traditional reform frameworks are futile. As Crenshaw concludes:

By accepting the bounds of law and ordering their lives according to its categories and relations, people think that they are confirming reality – the way things must be. Yet by accepting the view of the world implicit in the law, people are also bound by its conceptual limitations. Thus conflict and antagonism are contained: the legitimacy of the entire order is never seriously questioned.<sup>217</sup>

In short, our first step is accepting the inherent interest convergence dilemma and the limitations of the law as it applies to the immigrant whose identity cannot be adequately and completely ascribed in any quick politically viable narrative due to the illegitimacy of the present system.

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crackdown-worries-marylands-crab-industry/ (“Crab processors fear the heated climate over immigration could impact a legal visa program that brings in crab pickers from Mexico.”). Yet, the anti-immigration movement and its references to criminality continue to push for restrictive immigration laws for the “public safety and welfare of Maryland residents and visitors.” See, e.g., Fair Staff, *Stop Sanctuary Policies in Maryland!*, IMMIGRATIONREFORM.COM (Mar. 3, 2016), <http://immigrationreform.com/2016/03/03/support-immigration-enforcement-in-maryland/>.

216. Crenshaw, *supra* note 202, at 1349 (footnote omitted).

217. *Id.* at 1352.

## VI. CONCLUSION

What, then, *is* a politically viable narrative that would lead to immigrant equality? Lawyers, activists and immigrants have lobbied, petitioned, protested and litigated for decades only to find ourselves in a vicious anti-immigrant political environment. Yet, this same environment has created an encouraging counter-movement. Indeed, perhaps nothing has galvanized a larger political constituency eager to support immigrant equality than the election of Trump to the presidency. One day after his inauguration, an estimated 3.2 million people rallied in Washington, D.C. and cities around the United States to support women's rights and equality for other marginalized populations, including immigrants and refugees.<sup>218</sup> In his first month in office, President Trump issued various Executive Orders that significantly targeted immigrants and refugees, especially people from seven countries with predominately Muslim populations.<sup>219</sup> The fervent pushback against these measures was immediate and included additional rallies; outspoken and public critique; and a surge

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218. There were many more marches and rallies around the world. *Sister Marches*, WOMEN'S MARCH, <https://www.womensmarch.com/sisters> (last visited Jan. 1, 2018) (showing 673 marches registered around the world); *see also Pictures from Women's Marches on Every Continent*, N.Y. TIMES (Jan. 23, 2017), [https://www.nytimes.com/interactive/2017/01/21/world/womens-march-pictures.html?\\_r=0](https://www.nytimes.com/interactive/2017/01/21/world/womens-march-pictures.html?_r=0). The U.S.-wide estimate is based on a "relatively cautious" meta-analysis conducted by the reputable poll aggregation website, FiveThirtyEight. *See* Nate Silver, *The Long March Ahead For Democrats: What Saturday's Women's Marches Tell Us About the Party's Path Back to Power*, FIVETHIRTYEIGHT (Jan. 23, 2017, 7:59 AM), <http://fivethirtyeight.com/features/the-long-march-ahead-for-democrats/> (listing estimates and methodology by city: Washington, D.C., 485,000; Los Angeles, 450,000; New York, 400,000; Boston, 175,000; Chicago, 150,000; Seattle, 120,000; St. Paul, Minn., Denver, Colo., Madison, Wis., San Francisco, Cal., Portland, Or., Oakland, Cal., Atlanta, Ga., and Philadelphia, Pa., between 50,000 and 95,000). The focus of the rallies, marches and public gatherings was to support women's rights, immigrants and refugee protections and to show solidarity with other marginalized communities. *See Unity Principles*, WOMEN'S MARCH, <https://www.womensmarch.com/principles/> (last visited Jan. 1, 2018) (showing that two of the eight unifying causes of the organizers were women's reproductive rights and immigrant rights).

219. Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017) (ordering the creation of a "contiguous, physical wall" along the U.S.-Mexico border); Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (pledging the hire of 10,000 more immigration officers and revoking federal grant money from so-called "sanctuary cities," which refuse to deport undocumented immigrants); Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (suspending the U.S. refugee program for 120 days, indefinitely banning Syrian refugees and banning anyone arriving to the United States from seven Muslim-majority countries), *revoked by* Exec. Order 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017). On March 6, 2017, Executive Order No. 13,769 was amended by Executive Order 13,780, 82 Fed. Reg. 13,209. Among other things, the new Order banned nationals from six Muslim-majority countries from entering the United States for ninety days and banned all refugees from entering the United States for 120 days. Exec. Order

in monetary donations to organizations working against the measures.<sup>220</sup> Though public outcries against injustice towards immigrants (and others) is not novel, the magnitude and volume of the early 2017 demonstrations make it unique. Leaders in the immigrant justice movement should capitalize on this galvanizing moment, while acknowledging the interest convergence reality, to craft a narrative that captures this populist support for equality.

There is formidable opposition to any reform that supports and/or benefits immigrants. Trump won the presidency in part by blaming immigrants for perceived economic woes and security concerns, stoking fear and uncovering both unconscious and explicit bias among Americans.<sup>221</sup> As one writer cautions, “[Advocates for immigrants] can’t ignore that or underestimate it. National angst is real.”<sup>222</sup> A successful strategy, then, recognizes this angst and the divisiveness that accusatory, heated debate fuels. While a renewed narrative should neither concede the limitations of the illegitimate system nor normalize hate, a successful strategy must acknowledge the opposition and respond in a manner that will ultimately lead to successful reform – at times working with

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13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017). The Order was challenged in federal district courts around the country and eventually gained the attention of the U.S. Supreme Court. The Court ultimately granted petitions for certiorari in addition to upholding the Order as it applied to the exclusion of refugees. *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2083 (2017) (per curiam). The Court noted one exception to the refugee ban, in which “[a]n American individual or entity that has a bona fide relationship with a particular person seeking to enter the country as a refugee.” *Id.* at 2089. In October 2017, the Court dismissed an appeal of the March Executive Order, and two federal courts granted preliminary injunctions against allowing certain provisions of the September Executive Order to go into effect. *Trump v. Hawaii*, 138 S. Ct. 377 (2017); *see also Int’l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570 (D. Md. 2017); *State v. Trump*, 265 F. Supp. 3d 1140 (D. Haw.), *aff’d in part, vacated in part sub nom.*, No. 17-17168, 2017 WL 6554184 (9th Cir. Dec. 22, 2017).

220. *See* Lauren Gambino et al., *Thousands Protest Against Trump Travel Ban in Cities and Airports Nationwide*, *GUARDIAN* (Jan. 29, 2017, 7:01), <https://www.theguardian.com/us-news/2017/jan/29/protest-trump-travel-ban-muslims-airports> (detailing protests that erupted across the country at airports in New York, D.C., Dallas, Detroit, and Miami, as well as protests on the streets of New York and D.C.); Press Release, Am. Immigration Lawyers Ass’n, AILA: President’s Border and Immigration Enforcement Policies Will Undermine Rights and Weaken Pub. Safety (Jan. 25, 2017), <http://www.aila.org/advo-media/press-releases/2017/presidents-border-and-immigration-enforcement> (criticizing the executive orders targeting immigrants and refugees as “fundamentally contrary to the principles on which the American immigration system is based”); Liam Stack, *Donations to A.C.L.U. and Other Organizations Surge After Trump’s Order*, *N.Y. TIMES* (Jan. 30, 2017), <https://www.nytimes.com/2017/01/30/us/aclu-fund-raising-trump-travel-ban.html> (reporting that ACLU raised \$24 million dollars in one weekend, as compared to \$3.5 million in all of 2015).

221. Linda Valdez, Opinion, *Think Twice Before Protesting ‘Trump Regime’ on Immigration*, *AZ CENT.* (Jan. 9, 2017, 6:09 AM), <http://www.azcentral.com/story/opinion/op-ed/lindavaldez/2017/01/06/trump-immigration-protest/96215650/>.

222. *Id.*

2017]

*NARRATIVE REFORM DILEMMAS*

1139

opponents; at other times, fighting against illegal or unjust propositions. For the thousands of immigrants awaiting their fate in immigration detention or living in constant fear of deportation – or for the refugees losing hope in war-torn countries or desperate camps – political debate for the sake of mere word-play is an impractical and useless endeavor. Past immigrant equality narratives are ineffective and outdated. The challenge lies in crafting the story that will effectively and finally bring justice to all.

1140

*MISSOURI LAW REVIEW*

[Vol. 82