ADDRESSING THE INTERSECTION OF RACIAL JUSTICE AND IMMIGRANT RIGHTS

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INTRODUCTION

They say a picture is worth a thousand words. This Article is about the intersection of racial justice and immigrant rights. The images of Border Patrol officers on horseback in September 2021 using long "reins" or whips to stop Haitian migrants from entering an encampment on the banks of the Rio Grande River and "grabbing" some migrants by the shirt say it all.[1] The White House press secretary called the images "horrific."[2] Representative Alexandria Ocasio-Cortez denounced the actions as part of a system "designed for cruelty towards and dehumanization of immigrants."[3] To Representative Ilhan Omar, the incidents constituted "human rights abuses . . . . Cruel, inhumane, and a violation of domestic and international law."[4] To others, this "corralling" of Haitian asylum seekers is racist.[5]

In the summer of 2020, the deaths of George Floyd, Ahmaud Arbery, Breonna Taylor, and too many others ignited a racial justice movement with defending Black life at the center.[6] The slaying of Black community members by the police, targeting of Black people and communities of color, and racist rhetoric spewed by hate groups are continual reminders that anti-Blackness and racism pervade our society and imperil efforts to promote diversity and uphold the rights of all people. As a result, countless individuals and organizations across the country committed to supporting anti-racism, diversity, equity, and inclusion, declaring that "Black Lives Matter."[7]

Not surprisingly, immigrant rights organizations are among the groups committed to racial justice for Black Americans. For some

1. *See* Annika Kim Constantino, *U.S. Border Patrol will no longer use horses in Del Rio, Texas, after outrage over treatment of Haitian migrants*, CNBC (Sept. 23, 2021, 7:04 PM), https://www.cnbc.com/2021/09/23/border-patrol-wont-use-horses-in-del-rio-after-outrage-over-treatment-of-haitians.html [https://perma.cc/VW2Y-79NM].

2. *Id.*

3. *Id.*

4. *Id.*

5. *See* Aaron Morrison, et al., *Haitians see history of racist policies in migrant treatment,* PBS NEWS HOUR (Sept. 24, 2021, 11:50 AM), https://www.pbs.org/newshour/nation/haitians-see-history-of-racist-policies-in-migrant-treatment [https://perma.cc/BA4T-GVFR]; *see also,* Cindy Carcamo et al., *Biden calls Haitian migrant crisis 'an embarrassment.' Advocates say racism at root*, L.A. TIMES (Sept. 24, 2021, 3:55 PM), https://www.latimes.com/politics/story/2021-09-24/biden-haitian-migrants-border-critics-claim-racism [https://perma.cc/G4PS-622G].

6. BILL ONG HING ET AL., IMMIGRATION LAW AND SOCIAL JUSTICE 147 (2d ed. 2022) [hereinafter Immigration Law].

7. *See, e.g.*, Tatum Hunter, *23 Companies That Support Black Lives Matter (BLM) in 2021*, BUILTIN (Dec. 17, 2021), https://builtin.com/diversity-inclusion/companies-that-support-black-lives-matter-social-justice [https://perma.cc/FMK2-5J49].

immigrant rights organizations, the commitment to supporting justice for Black Americans is consistent with the commitment expressed by others: it is simply the right thing to do in the face of discrimination and police brutality toward Black Americans. For others in the immigrant rights movement, fighting for Black rights is a natural part of the battle for immigrant rights because, as this Article will establish, the immigration system is itself racist.[8] Many victims of the harsh immigration enforcement regime are Black migrants.[9]

In this Article, I have two main objectives. The first is to explore the intersection between racial justice and immigrant rights. The recent treatment of Haitian migrants is emblematic of that intersection. That intersection demonstrates how immigration laws and enforcement policies are prima facie evidence and a concrete manifestation of systemic and institutionalized racism. In short, this critical race theory critique explains why the battle for immigrant and refugee rights should be viewed as an important part of the battle for racial justice. My second goal is to begin a discussion on how immigrant rights attorneys and advocates can begin to incorporate this racial justice lens of United States immigration laws in their practice. In that spirit, one notion I explore borrows strategies for combating racial injustice in the criminal justice system and considers how analogous approaches might be utilized in the immigration field.

I. THE INTERSECTION OF RACIAL JUSTICE AND IMMIGRANT RIGHTS

A. Anti-Blackness as Manifested in Immigration Laws and Enforcement

"The deaths of George Floyd, Ahmaud Arbery, Breonna Taylor, and so many others sparked a racial justice revolution in defense of Black life in summer 2020."[10] Simultaneously, Black immigrants were targeted in immigration proceedings by the Trump administration while the coronavirus pandemic raged on across the nation and the world.[11]

This target on Black immigrants then continued into 2021 as the Biden administration failed to end the "deportation flights" of African

8. *See infra* Sec. II(B); *see also* Julissa Arce, *The structural racism of our immigration system*, UNIDOSUS BLOG (July 1, 2021), https://www.unidosus.org/blog/2021/07/01/the-structural-racism-of-our-immigration-system/ [https://perma.cc/8PNN-W89F].

9. RAICES, *Black Immigrant Lives Are Under Attack* (2020), https://www.raicestexas.org/2020/07/22/black-immigrant-lives-are-under-attack/ [https://perma.cc/B29D-XMLV].

10. Immigration Law, *supra* note 6, at 147.

11. *See* Julian Borger, *US to Send Asylum Seekers Home to Cameroon Despite 'Death Plane' Warnings*, THE GUARDIAN (Nov. 9, 2020, 7:18 PM), https://www.theguardian.com/us-news/2020/nov/09/us-to-send-asylum-seekers-home-to-cameroon-despite-death-plane-warnings?CMP=Share_iOSApp_Other [https://perma.cc/593K-KU2X].

immigrants that began during the prior administration.[12] Despite Biden's attempted moratorium on deportations for the first 100 days of his presidency, a federal judge temporarily blocked the deportation pause and United States Immigration and Customs Enforcement ("ICE") continued to deport Black immigrants, including children, under Title 42.[13] "Advocates cried out while these deportations sent many people, including children, into hostile and dangerous countries such as Haiti or Mauritania at the outset of 2021."[14]

The Black Alliance for Just Immigration ("BAJI") charged in the summer 2020: "there is an 'Anti-Blackness' in America that permeates throughout all levels of systemic governance."[15] "Anti-Blackness" differs from the ever-growing practice of "anti-racism." An "Anti-Racist" is "someone who is supporting an antiracist policy through their actions or expressing antiracist ideas."[16] On the other hand, "Anti-Blackness" represents a different way of thinking. Some Black scholars describe "Anti-Blackness" as "what it means to be Black in an Anti-Black world . . . it's a theoretical framework that illuminates society's inability to recognize [Black people's] humanity—the disdain, disregard, and disgust for [their] existence."[17] "'Anti-Blackness' describes the 'inability to recognize Black humanity,'[18] and this notion is saturated across numerous institutions in the United States, particularly within its immigration system."[19]

In immigration matters, race pervades a host of law enforcement, legislative, legal, and border realities. This section helps illuminate the ways in which racism, especially Anti-Blackness, affects United States immigration law and enforcement, and gives insight into the intersectionality of anti-racism and the immigrant rights movement.

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12. Ed Pilkington, *Outcry as More than 20 Babies and Children Deported by U.S. to Haiti*, THE GUARDIAN (Feb. 8, 2021, 6:21 PM), https://www.theguardian.com/us-news/2021/feb/08/us-ice-immigration-customs-enforcement-haiti-deportations [https://perma.cc/6P5U-EUUF]; Jacqueline Charles, *He Wasn't Born in Haiti. But That Didn't Stop ICE From Deporting Him There, Lawyer Says*, HERALD MAIL-MEDIA (Feb. 3, 2021, 11:05 AM), https://www.heraldmailmedia.com/story/news/2021/02/03/he-wasnt-born-in-haiti-but-that-didnt-stop-ice-from-deporting-him-there-lawyer-says/115758308/ [https://perma.cc/6T5F-BGVU]; Maria Sacchetti & Arelis R. Hernández, *Black Lawmakers Urge Biden to Stop the Deportation of Black Immigrants*, WASH. POST (Feb. 12, 2021, 8:09 PM), https://www.washingtonpost.com/immigration/black-immigrants-deportations-biden/2021/02/12/5f395932-6d54-11eb-ba56-d7e2c8defa31_story.html. [https://perma.cc/23AG-BZQW].

13. Pilkington, *supra* note 12, at 2; Sacchetti & Hernández, *supra* note 12.

14. Immigration Law, *supra* note 6, at 147; *see also* Pilkington, *supra* note 12, at 3.

15. Immigration Law, *supra* note 6, at 148.

16. *Id.*; *Racial Equity Tools Glossary*, RACIAL EQUITY TOOLS (2020), https://www.racialequitytools.org/glossary#anti-racist [https://perma.cc/JH9S-UTA8].

17. Immigration Law, *supra* note 6, at 148; Kihana Miraya Ross, *Call It What It Is: Anti Blackness,* N.Y. TIMES (June 4, 2020), https://www.nytimes.com/2020/06/04/opinion/george-floyd-anti-blackness.html [https://perma.cc/TNL8-6EVE].

18. Immigration Law, *supra* note 6, at 148; Ross, *supra* note 17.

19. Immigration Law, *supra* note 6, at 148.

Practicing immigration law from a social justice perspective requires us to have anti-racism in the forefront of our minds.

1. Racial Justice and Immigration Law Enforcement

"Criminal law and law enforcement are directly connected to and entangled with immigration law and enforcement."[20] The two systems in many ways have become so intertwined that the "Defund the Police" movement in the United States is nearly identical to the "Abolish ICE" movement.[21] Although each movement raises respective concerns with different branches of law enforcement, each movement calls for reallocating resources that would directly impact the other due to the closely related nature of the law enforcement world.

a. Criminal Convictions

When the "vulnerabilities of race and immigration status intersect, they form a 'prison to deportation pipeline,' a term used to describe a system that works to funnel Black and Latinx immigrants from the criminal court system into ICE custody."[22] According to the Immigrant Legal Resource Center ("ILRC"), immigrants are actually less likely to commit a crime than those born in the United States, yet immigrants of color are more likely to have experience in the United States criminal justice system.[23] In fact, Black and Latinx people are stopped more frequently by police than white residents, and when stopped, "police are twice as likely to threaten or use force against them."[24] The stakes tend to be even higher for Black immigrants, because "Black immigrants make up one in five non-citizens facing deportation on criminal grounds, which is close to three times their share of the non-citizen population."[25] What many people do not know, however, is that if an immigrant's record reflects any criminal charge or conviction, their chances at immigration relief are significantly reduced and their likelihood of deportation is significantly increased.[26]

b. Detention

It is no surprise then that Black immigrants are more likely to be detained and deported for criminal convictions than the rest of the

20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 148–49; *see also* Ross, *supra* note 17.
24. Immigration Law, *supra* note 6, at 149 (quoting Ross, *supra* note 17).
25. *Id.*
26. *Id.*

immigration population.[27] In fact, Black immigrants represented seven percent of the total immigration population (about 3.4 million people) between 2003 and 2015, but comprised 10.6% of all immigrants in removal proceedings during that time period.[28]

In 2020, the number of Haitian families detained by ICE grew significantly at the Karnes County Residential Center in Texas.[29] As the COVID pandemic progressed and ICE released some families, the Haitian population in Karnes County disturbingly grew from twenty-nine percent to forty-four percent from January to March of 2020.[30] During the same period, seventeen percent of the families in that detention center were Mexican, six percent were Honduran, and 5.2% were Cuban.[31] According to further data gathered by the Refugee and Immigrant Center for Education and Legal Services ("RAICES") in Texas, there is also a massive disparity in the costs of Haitian immigrant bonds compared with the bonds for other nationalities.[32] From June 2018 to June 2020, "the average bond paid by RAICES was a whopping $10,500. But bonds paid for Haitian immigrants by RAICES averaged $16,700, 54% higher than for other immigrants. The result: Black immigrants stay in ICE jails longer because of the massive disparity in their bonds."[33]

In July 2021, Black migrants who had been detained by ICE submitted a complaint to the Department of Homeland Security ("DHS") over conditions at two Louisiana detention facilities: one run by Geo Group, a private prison company, and another by the Allen Parish Sheriff's Office.[34] According to the complaint:

> [O]fficials denied Black immigrants basic human necessities, including potable water and necessary medical treatment; physically abused detained persons, including physical abuse of a person in detention while he experienced a mental health crisis; threatened lethal force against Black immigrants in ICE custody; threatened Black immigrants with punitive solitary confinement in retaliation for peacefully expressing their rights and for their support of the Black Lives Matter movement; and ignored written

27. ALEJANDRO SANCHEZ-LOPEZ ET AL., THE STATE OF BLACK IMMIGRANTS IN CALIFORNIA 24, (Opal Tometi ed., 2018).

28. *Id.*

29. RAICES, *supra* note 9.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. S. POVERTY L. CTR., *Immigrant Advocates Call to End Contracts and Shut Down Two Louisiana ICE Facilities over Racial Discrimination & Abuse* (July 28, 2021), https://www.splcenter.org/presscenter/immigration-advocates-call-end-contracts-and-shut-down-two-louisiana-ice-facilities-over [https://perma.cc/G2KS-JL72].

> grievances related to racial tensions between detention officials and immigrants in detention.[35]

According to the Southern Poverty Law Center, the former detainees were victims of racial discrimination.[36]

2. Police Brutality Against Black Immigrants

Due to race, poverty, and class assumptions, Black immigrants' lived experiences tend to become criminalized, inserted into charity narratives (such as with Haiti), or equated to Black American experiences.[37] Such stereotyped categories reflect an attempt to push Black immigrants to the outskirts of society and, consequently, Black immigrants often get caught in the good-bad binary of immigrants (more often the latter).[38]

Gruesome outcomes can occur due to this assumption, especially in the already structurally racist system of policing and law enforcement. Police brutality toward Black immigrants is a manifestation of this assumption. Consider these three examples: Charly "Africa" Leundeu Keunang, Amadou Diallo, and Alfred Olango.[39] Keunang was a forty-three-year-old homeless Cameroonian beaten and killed by the Los Angeles Police Department in 2015.[40] Diallo was a twenty-two-year-old Guinean immigrant shot and killed by New York City police outside of the Union Rescue Mission in the Bronx in 1999.[41] Diallo was shot with forty-one bullets when he reached to grab his wallet (the police thought he was grabbing a gun).[42] Lastly, Olango was a thirty-eight-year-old mentally ill Ugandan refugee who was shot and killed by police officers near San Diego in the historically white and conservative city of El Cajon, California.[43] His sister had called the police because he was "acting strangely," and rather than providing information about mental health services or seeking any other form of mitigation, the police resorted to violence.[44]

These three examples demonstrate how Black immigrants suffer at the structurally racist hands of law enforcement just as Black United States-born citizens do. As mentioned earlier, Black immigrants are doubly vulnerable to police brutality because they may not know English and/or demonstrate behavior unfamiliar to American customs.[45] These

35. *Id.*
36. *Id.*
37. SANCHEZ-LOPEZ ET AL., *supra* note 27, at 22.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 24.
44. *Id.*
45. *Id.*

"differences"—paired with being Black in the United States—paint targets on many Black immigrants' backs.

As Nunu Kidane, founder and Director of Priority Africa Network ("PAN"),[46] states:

> For new Africans in the United States, the challenges of navigating life are no different than what millions of migrants face daily: managing employment, school, housing, health care, etc. What is special is the "double jeopardy" they face in being Black and immigrant, where few institutions understand the combined challenges let alone provide support and services when they are racially profiled by law enforcement and ICE.[47]

As Ms. Kidane aptly referenced, racial profiling occurs among traditional law enforcement *and* ICE. In addition to the violence that may happen during the arrest phase, Black immigrants may also be targeted for abuse while in ICE detention, as seen in the recent expedited deportations of Cameroonians.[48] *The Guardian* details how "lawyers, human rights groups, and Democratic Senator Chris Van Hollen . . . expressed concern that the deportations [in fall 2020] were being rushed to clear African asylum-seekers out of the country by the end of the Trump presidency, as part of a scorched earth policy in the administration's final weeks."[49] This troubling deportation agenda was then coupled with alleged abuse in detention facilities against Cameroonian detainees scheduled for a deportation flight on November 9, 2020.[50] Black migrants clearly face double-barreled manifestations of racism.

3. Relevant Cases

Despite four years of immigration enforcement turmoil during the Trump administration, there was movement against race-based discrimination in immigration, including discouraging Anti-Blackness. Such progress occurred despite the dehumanizing rhetoric around Black Immigrants—like that in 2018, for example, when President Trump referred to Haiti and African countries as "sh**hole countries" in a discussion about

46. *Nunu Kidane - Champions of Change: Winning the Future Across America*, THE WHITE HOUSE, PRESIDENT BARACK OBAMA, https://obamawhitehouse.archives.gov/champions/american-diaspora-communities/nunu-kidane [https://perma.cc/RKH5-M5PT] (last visited Dec. 10, 2021).

47. SANCHEZ-LOPEZ ET AL., *supra* note 27, at 23.

48. Borger, *supra* note 11, at 2.

49. *Id.*

50. *Id.*

immigration[51]—and despite attempts to implement discriminatory policies increasingly targeting Black immigrant populations, like Trump's various Muslim travel ban iterations.[52]

With regard to Haitian immigrants, the National Association for the Advancement of Colored People ("NAACP") filed a lawsuit against the Trump administration after the attempt to cancel Temporary Protected Status ("TPS") for Haiti.[53] The federal district court granted a motion to stay on March 23, 2020 due to the interconnectedness of this case with its parallel case, *Ramos, et al. v. Nielson*.[54]

Ramos also challenged the President's motives in terminating TPS for Haiti.[55] In October 2018, the U.S. District Court for the Northern District of California enjoined DHS from implementing and enforcing the decision to terminate TPS for Sudan, Nicaragua, Haiti, and El Salvador.[56] The court determined that the plaintiffs had plausibly alleged that the Trump administration was guided by racism—not a sober consideration of the facts on the ground—when it cancelled TPS designations for El Salvadoran, Haitian, Sudanese, and Nicaraguan escapees from political and natural disasters.[57] Although the Ninth Circuit vacated the district court's injunction on September 14, 2020,[58] a year later, the Biden administration announced the continuation of TPS designation for El Salvador, Haiti, Nicaragua, and Sudan.[59]

Among the African nations targeted by the Trump Administration, Somalians stood out.[60] A class action lawsuit was filed by ninety-two Somali men and women who were being deported.[61] "The *Miami New Times* euphemistically called their deportation flight 'Deported by ICE on a Slave Ship.'"[62] Importantly, the federal district court in south Florida

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51. *See* Ali Vitali et al., *Trump Referred to Haiti and African Nations as 'Shithole' Countries*, NBC NEWS (Jan. 11, 2018, 4:19 PM), https://www.nbcnews.com/politics/white-house/trump-referred-haiti-african-countries-shithole-nations-n836946 [https://perma.cc/6HQJ-Z97W].

52. *See* Zolan Kanno-Youngs, *Trump Administration Adds Six More Countries to Travel Ban*, N.Y. TIMES (Jan. 31, 2020), https://www.nytimes.com/2020/01/31/us/politics/trump-travel-ban.html [https://perma.cc/2FTT-RKAM].

53. *See* NAACP v. U.S. Dep't of Homeland Sec., 364 F. Supp. 3d 568 (D. Md. 2018).

54. *Id.*

55. *See* Ramos v. Nielson, 321 F. Supp. 3d 1083 (N.D. Cal. 2018).

56. *Id.* at 1092.

57. *Id.* at 1132–33.

58. Ramos v. Wolf , 975 F.3d 872 (9th Cir. 2020).

59. *See Update on Ramos v. Nielsen*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Sept, 9, 2021), https://www.uscis.gov/humanitarian/update-on-ramos-v-nielsen [https://perma.cc/2NXV-UN3W].

60. *See* Karla McKanders, *Immigration and Blackness: What's Race Got to Do With It?,* AM. BAR ASSOC. (May 16, 2019), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future/immigration-and-blackness/ [https://perma.cc/S683-BJUK].

61. Ibrahim v. Acosta, 326 F.R.D. 696 (S.D. Fla. 2018).

62. McKanders, *supra* note 60.

granted a preliminary injunction to stay the removal of the Somalians until they could reopen their deportation orders and apply for relief under the Refugee Convention.[63]

Outside of Anti-Blackness litigation, there have also been numerous lawsuits based on discriminatory practices (especially in Arizona) against Central Americans and Mexicans.[64] One such case is *Arizona v. United States*, where the Supreme Court reviewed anti-immigrant legislation passed by the Arizona State Legislature. [65] The Court found three of four challenged provisions were preempted by federal law.[66] Under the one provision left for another day, officers could potentially make arrests based solely on racial profiling.[67]

Another case worth mentioning is *Department of Homeland Security v. Regents of the University of California.*[68] In that case, the Supreme Court ruled that the Trump administration's attempt to terminate the Deferred Action for Childhood Arrivals ("DACA") program was not proper in large part because the Administrative Procedures Act was not followed. Noteworthy for purposes of our racial analysis, in her concurring opinion, Justice Sotomayor also cited strong evidence of impermissible racial animus on the part of Trump in the attempt to terminate DACA.[69]

4. Legislation

Legislation in the field of anti-racism and preventing race discrimination is not new to the United States; however, BAJI argues that because of accessibility issues, "many (if not most) Black immigrants do not seek out services or organizing spaces over fear of future repercussions of their status."[70] The lack of Black voices in the legislative and advocacy spheres further the absence of inclusion of Black immigrants during immigration law reforms.

During the "last big fight for immigration reform," BAJI's report detailed that numerous Black immigrants not only felt left out of the conversation, but key issues relevant to the Black immigrant community were "traded away during negotiations" (including policy decisions in family preferences, the diversity visa lottery, and TPS).[71] Some reform proposals also unduly affect Black immigrants because of their criminal carve outs. Black immigrants are disproportionately excluded from forms of

63. *See Ibrahim*, 326 F.R.D. at 701–03.

64. *See* Doris Marie Provine, *Institutional Racism in Enforcing Immigration Law*, NORTE AMÉRICA, Year 8, Special Issue (2013) at 38.

65. *See* Arizona v. United States, 567 U.S. 387 (2012).

66. *Id.*

67. *Id*. at 451–52.

68. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

69. *Id.* at 1916.

70. SANCHEZ-LOPEZ ET AL., *supra* note 27, at 21.

71. *Id.*

immigration relief because they are excessively criminalized in the United States—as a tragic consequence of criminal convictions, Black immigrants are then ineligible for programs such as TPS and the diversity lottery.[72]

In an effort to be included in legislative dialogue, organizations such as The Undocublack Network clearly and publicly announce the policies it supports.[73] For instance, Undocublack advocates for reforming the Dream and Promise Acts, TPS, Diversity Visa, and Public Charge by giving a synopsis of the issue and stating their "Ask" on its website.[74] The organization also conducts petitions and campaigns such as the #WeAreHome campaign, which called on the Biden Administration to help protect millions of immigrants from the cruelty of internal detention and the deportation system.[75]

Clearly, advocates for federal immigration reform need to create a way for Black immigrants to be consistently and continuously represented in legislative and executive decision-making. One example of inclusion is the Ignatian Solidarity Network. The Network, along with other advocates, called on the Biden Administration to create a Black Immigrant task force "that will work to address reasons why Black immigrants are often overlooked, undercounted, and sometimes altogether erased in the United States. Debate surrounding immigration, and yet are often disproportionately impacted by anti-immigrant policies."[76]

As legislation develops, strategies for lobbying and legislating need to focus on the Black immigrant community in the conversation as much as other groups. To accomplish such inclusion, it will likely take increased outreach to and trust-building with the Black immigrant community.

5. Moving Forward

As the Immigrant Learning Center ("ILCTR") aptly states, we must try and "make meaning" out of the battles waged against Anti-Blackness

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72. *See* Kica Matos & Nana Gyamfi, *Centering Black Voices in the Struggle for Immigrant Rights*, VERA INST. OF JUST. (Sept. 9, 2020), https://www.vera.org/blog/centering-black-voices-in-the-struggle-for-immigrant-rights [https://perma.cc/5TSX-G7U5]; *see also* Andrew Glass, *U.S. Enacts First Immigration Law, March 26, 1790*, POLITICO (Mar. 26, 2012, 4:51 AM), https://www.politico.com/story/2012/03/the-united-states-enacts-first-immigration-law-074438 [https://perma.cc/44GK-UAPC]; *NAACP*, 364 F.Supp.3d 568.

73. *See, e.g.*, *H.R. 6: The American Dream and Promise Act of 2019*, THE UNDOCUBLACK NETWORK (2021), https://undocublack.org/dream-and-promise-act-of-2019 [https://perma.cc/462C-YX2A].

74. *Id.*

75. *See* THE UNDOCUBLACK NETWORK, *Campaigns* tab (2021), https://undocublack.org/new-page [https://perma.cc/DT7P-Q5WW].

76. José Arnulfo Cabrera, *Black Immigrant Advocacy Week of Action*, IGNATIAN SOLIDARITY NETWORK (Feb. 12, 2021), https://ignatiansolidarity.net/blog/2021/02/12/black-immigrant-advocacy-week-of-action/ [https://perma.cc/UJ53-T87P].

and in support of Black life (immigrant and non-immigrant alike).[77] This can be accomplished by acknowledging that each Black immigrant is strong and capable, and can define what it means to be Black and an immigrant for themselves.[78] The rest of the population must serve as allies, use their privilege to raise Black immigrant voices in addition to other immigrant communities, and think of policies that holistically benefit the entire immigrant community. We must combat structural racism in law enforcement (by supporting movements such as "Defund the Police" and "Abolish ICE") and other entities, and discover ways to provide Black immigrant communities with the resources that have often been denied to them.

Besides the primary onus to remember that each Black person is a human being, we would do well to remember that Black immigrants and Black people have achieved incredible accomplishments and contributed much to American society and culture. This fact is summarized effectively by the ILCTR: "Black history is full of stories of great achievement, including luminaries like George McKay, Kwame Ture and Chimamanda Ngozie Adichie. As of 2021, Black immigrants contribute $36 billion in tax revenue every year, and they are more likely to start businesses than U.S.-born Americans, creating more jobs for everyone."[79] Black immigrants and immigrant communities create their own success, and the Vera Institute of Justice that is committed to ending overcriminalization and mass incarceration of people of color and immigrants provides the following agenda for how those of us can support them in their efforts:

- **Ensure Black voices are centered** in the immigration conversation and public narrative.
- **Ensure that Black leadership is part of key decision making** and agenda setting in immigration reform organizations.
- **Challenge anti-Blackness** in our movements, coalitions, and communities wherever we see it.
- **Support local efforts to divest from policing and invest in Black communities**. Local immigration campaigns can ensure connection on the ground with Black Lives Matter and other grassroots campaigns for racial justice.
- **Support and advance efforts like universal representation** for all immigrants facing deportation proceedings to dismantle the pipeline between the criminal legal and immigration systems. [80]

77. The Immigrant Learning Ctr., *What Does it Mean to Be a Black Immigrant in the United States?*, (June 19, 2020), https://www.ilctr.org/what-does-it-mean-to-be-black-immigrant-united-states/ [https://perma.cc/4CFC-NULH].

78. *Id.*

79. *Id.*

80. Matos & Gyamfi, *supra* note 72.

The intersectionality of race and immigration law and enforcement is undeniable. Whether through racial profiling of all immigrant communities, policy carveouts that fail to account for Black immigrant realities, administrations that perpetuate discrimination, forced migration and/or deportation, or systemic racism, the United States has a long history of racially discriminating and furthering Anti-Blackness in its immigration laws and policies.

Moving forward, we have a long way to go before equality, equity, justice, and accountability can be found at each level of systemic governance as well as within the public at large. By being mindful of the issues raised in this section, social justice advocates and organizations can further the progress that has been made by organizations like BAJI, ILRC, The Vera Institute, ILCTR, and numerous others. We should accept the challenge to advocate against racism in immigration law and enforcement through policy advocacy and litigation.

Education is the key ingredient to sustaining these movements and should be at the forefront of any activist and advocate's priorities. Educating oneself and then empowering others with that knowledge is how true systemic change occurs.

B. Systemic, Institutionalized Racism in United States' Immigration Laws and Enforcement

As the previous section demonstrates, even a cursory view of recent immigration enforcement efforts demonstrates the clear intersectionality between racial justice and immigrant rights. However, a deeper dive into this historical framework of immigration laws and enforcement reveals a system that has institutionalized racism. This analysis makes it even more apparent that the battle for immigrant and refugee rights is an important part of the battle for racial justice.

In the United States, institutional racism resulted from the social caste system of slavery and racial segregation.[81] Much of its basic structure still stands to this day.[82] By understanding the fundamental principles of institutionalized racism, we begin to see the application of the concept beyond the conventional black-white paradigm. Institutional racism embodies discriminating against certain groups of people using biased laws or practices.[83] Structures and social arrangements become accepted, operated, or manipulated to support or acquiesce in acts of racism.[84]

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81. *See* Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L.REV. 307 (2009) [hereinafter *Institutional Racism*].

82. *See id.* at 352.

83. *Id.* at 309.

84. *Id.*

"Institutional racism can be subtle and less visible, but it is no less destructive than individual acts of racism."[85]

The forces of racism have become embodied in United States immigration laws.[86] The enforcement of these immigration laws are accepted as common practice despite their racial effects. We may not like particular laws or enforcement policies because they display harshness toward human dignity or civil rights, but many of us do not sense the inherent racism because we are not cognizant of the dominant racial framework. Understanding the evolution of United States immigration laws and enforcement provides us with a better awareness of the institutional racism that controls those policies. This part will focus on that evolution, beginning with slavery. Forced African labor migration set the stage for prejudicial immigration reform toward Mexicans and Chinese.[87] This Part reviews the history of Mexican migration, the enforcement of the southwest border, and the sea change to enforcement through employer sanctions enacted in 1986.[88]

1. Slavery as Forced Immigration Policy

Professor Rhonda Magee writes convincingly that the notion of immigration must include the forced immigration system of chattel slavery, and that the law and policy of chattel slavery is a relevant historical antecedent to today's immigration law.[89] She points out:

> [S]lavery was, in significant part (though hardly exclusively), an immigration system of a particularly reprehensible sort: a system of state-sponsored forced migration human trafficking, endorsed by Congress, important to the public fisc as a source of tax revenue, and aimed at fulfilling the need for a controllable labor population in the colonies, and then in the states, at an artificially low economic cost.
>
> Viewing immigration as a function of slavery helps us articulate an important irony: that with respect to immigration, slavery—our racially based forced migration system—laid a foundation for both a racially segmented labor-based immigration system, and a racially diverse (even if racially hierarchical) "nation of immigrants." These legacies which the founders may not have set out to

85. *Id.* at 323.
86. *Id.* at 329.
87. *Id.* at 324.
88. *Id.*
89. *Id.*

> leave, but which are among the United States' most pernicious and most precious gifts to civilization. [90]

Scholars generally trace the beginning of racially restrictive United States immigration policies to laws directed at various immigrant groups.[91] Prior to 1870, the law prohibited those of African descent from becoming United States citizens through naturalization, furthering the subordination of African Americans.[92] The Nationality Act of 1790 limited naturalization to "free white persons," specifically excluding African and Native Americans.[93] Ninety years later, Congress extended naturalization rights to anyone of African descent.[94]

Africans have been underrepresented as a voluntary immigrant group in the entire immigration history of the United States. Prior to 1965, African immigrants accounted for less than one percent of the total immigrant population.[95] By 1990, African immigration grew to a mere 2.3% of all immigrants entering the United States.[96] African immigrant numbers neared 10% of the total immigrant population by 2008.[97] From 2000 to 2009, the numbers appear to be relatively better for Africans obtaining lawful permanent resident status. Of a total of 10.3 million immigrants during that period, 759,734 (7.3%) were African, compared to 1.3 million Europeans, 3.5 million Asians, and 1.7 million Mexicans.[98] However, of the 759,734 Africans who became lawful permanent residents, many were admitted as refugees under the 1980 Refugee Act or the 1990 diversity visa program, rather than through standard immigrant visa provisions.[99]

2. Mexican Immigration

When policymakers and the public noticed Central Americans fleeing to the United States, they turned their focus on the so-called "illegal immigration problem" to the lack of control at the United States southern border.[100] As a result, this "problem" became synonymous with Mexican migration, and anti-immigrant activists began to refer to Mexican

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90. Rhonda v. Magee, *Slavery as Immigration?*, 44 U.S.F. L. REV. 273, 276–77 (2009).

91. *Institutional Racism*, *supra* note 81, at 309–10.

92. *See id.* at 325.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. Bill Ong Hing, *African Migration to the United States: Assigned to the Back of the Bus in* THE IMMIGRATION AND NATIONALITY ACT OF 1965: LEGISLATING A NEW AMERICA 65 (Gabriel Chin & Rose Cuison Villazor eds., Cambridge Univ. Press 2015).

99. *Id.*

100. *See Institutional Racism, supra* note 81, at 325–26.

immigrants as the enemy.[101] Anti-immigrant activists view themselves as the voice for law and order, not as a proponent of racism.[102] The history of labor recruitment and border enforcement illustrates how the institutionalization of anti-Mexican immigration policies created a structure which allows these voices to claim racial and ethnic neutrality, and for many Americans to accept that claim.[103]

Professor Gerald López highlights the precarious historical relationship between Mexico and the United States regarding immigration.[104] Many years before the North American Free Trade Agreement ("NAFTA") and terms like "globalization" or "transnationalism" came into vogue, Mexico and America enjoyed largely interconnected economies and societies.[105] The southwest border of the United States was effectively open in 1848, when the United States and Mexico entered the Treaty of Guadalupe.[106] The United States acquired the land presently known as California, New Mexico, Nevada, Utah, and Arizona and Mexico recognized the Rio Grande as the southern boundary of Texas.[107] Effectively, Mexico lost almost fifty-five percent of its former territory.[108] All Mexicans then living in the acquired territory were given the option of becoming United States citizens or relocating within the new Mexican borders.[109] In the years immediately following the execution of the treaty, most of the people living on those lands treated the territories as part of Mexico.[110] "Mexicans and Americans paid little heed to the newly created international border, which was unmarked and wholly unreal to most."[111]

López contends the United States promoted Mexican immigration as "part of a larger pattern of labor recruitment that began to emerge in the United States in the late nineteenth century."[112] From 1910 to 1920, the United States actively recruited and admitted approximately 200,000 Mexicans to fill labor shortages caused by the curtailment of cheap European labor migration.[113] After World War I, economic necessity forced

101. *See id.* at 326.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*; *see also* Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 643 (1981).
112. *Institutional Racism*, *supra* note 81, at 326; López, *supra* note 111, at 644.
113. *Institutional Racism*, *supra* note 81, at 326–27.

the United States to recognize the value of Mexican Labor.[114] Almost 500,000 Mexicans came to the United States for work during the 1920s.[115]

In 1942, the United States and Mexico instituted the Bracero Program, which provided Mexican workers as temporary labor in United States agriculture.[116] The Bracero Program served United States economic interests in a manner similar to slavery in the 1800s.[117] The Program was renewed consecutively for over twenty years, covering five presidential administrations.[118] Braceros accounted for a quarter of the agricultural labor force in California, Arizona, New Mexico, and Texas, allowing the United States to dominate the global agriculture industry.[119]

In spite of the Bracero Program, undocumented Mexican migration remained significant while the program was in effect.[120] López asserts that United States policy makers "must have been aware that recruitment activities designed to promote the Bracero Program would encourage poor Mexicans to believe the United States was a land of opportunity, thereby encouraging those who could not be admitted legally to enter" without inspection.[121] López continues: "The relative attractiveness of illegal entry was increased by the failure to enforce the promises that had been made in connection with the adoption of the Bracero Program."[122] When the number of undocumented workers reached a politically intolerable level, the public and political response was consistent with expectations.[123] In 1954, the Immigration and Naturalization Service ("INS") launched "Operation Wetback," which resulted in the deportation of over one million undocumented Mexicans.[124]

Eventually, the United States cancelled the Bracero Program after reports of depressed wages and poor working conditions endured by the braceros combined with complaints by organized labor unions regarding unfair wage competition.[125] The "emergency wartime measure" survived twenty-two years and provided agricultural employment for almost five million Mexican workers.[126] After the Bracero Program and related H-2 workers provision ended, employers turned to rely on undocumented Mexican workers.[127] Between 1964 and 1986, United States immigration policy reflected a campaign to continue the use of undocumented Mexican

114. *Id.* at 327.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* (quoting López, *supra* note 111, at 668).
122. *Id.* (quoting López, *supra* note 111, at 668).
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*

workers in the agriculture industry while preserving immunity for the employers.[128]

Although the United States passed legislation to sanction employers for the use of undocumented workers in 1986, direct and indirect recruitment of undocumented labor has persisted.[129] Today, contractors for farm labor in the United States travel to Mexico to convince potential farm workers to cross the border for work.[130] Major agricultural companies in the United States created well-organized networks of contractors and contractor agents to further their interests by recruiting undocumented labor.[131] Many American companies are willing to risk the potential costs of using illegal labor or aiding illegal immigration.[132]

In the 1970s, the United States allocated more resources to Border Patrol and shifted its primary task to patrolling the southern border as public sentiment toward undocumented Mexican workers became increasingly negative.[133] By the mid 1990s, Border Patrol stationed eighty-eight percent of its agents on the southern border, and ninety-eight percent of all border apprehensions occurred on that border.[134]

For the first time, the United States imposed a quota on the number of visas for immigrants from Western Hemisphere countries in 1965.[135] Thus, while the rest of the world enjoyed an expansion of numerical limitations and a definite preference system after 1965, Mexico and the Western Hemisphere suddenly faced numerical restrictions in the United States immigration system.[136] The United States allotted a total of 120,000 immigrant visas for Western Hemisphere countries each year, and while the first-come, first-serve basis for immigration sounded fair, applicants were forced to adhere to strict labor certification requirements and demonstrate they would not be displacing United States workers.[137] Some waivers were available for certain applicants; for example, parents of citizen children could avoid labor certification requirements.[138] Within eleven years, the new requirements created a severe backlog of approximately three years and a waiting list with nearly 300,000 names.[139]

Congress further attempted to curtail Mexican migration in 1976 as Mexican immigration became the focus of more debate.[140] The law created

128. *Id.* at 327–28.
129. *Id.* at 328.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *See id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*; *see also* Immigration and Nationality Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703 (1976).

a 20,000 visa per country numerical limitation on Mexico and other countries in the Western Hemisphere.[141] As a result, Mexico's annual visa usage rate, about 40,000, was effectively cut in half, and thousands were stranded on the waiting list of the old system.[142] In 1978, Congress combined the 120,000 Western Hemisphere and 170,000 Eastern Hemisphere quotas into a single 290,000 worldwide numerical limit on immigration into the United States.[143]

While the INS budget increased during the 1970s and 1980s, the Supreme Court accorded more flexibility to INS enforcement strategies.[144] These cases, which involve Mexican nationals, illustrate the Court's role in institutionalizing racism in the United States.[145] As the case law evolved, the policy rationale from the Court became couched in terms of procedure and focused on non-racial "illegal aliens," rather than the reality of Mexicans coming to the United States seeking a better life.[146]

In 1973, the Supreme Court appeared to have put an end to the Border Patrol practice of "roving" near the United States-Mexico border to search vehicles, without a warrant or probable cause.[147] In *Almeida-Sanchez v. United States*, Immigration and Naturalization Service ("INS") officials unsuccessfully argued that as long as they were in the proximity of the border, their efforts in following and stopping cars located near the border was the "functional equivalent" of the border.[148]

Yet, within two years, the Supreme Court—overwhelmed by government claims of a crisis at the border—opened the door to stops by roving patrols near the border under certain circumstances.[149] In *United States v. Brignoni-Ponce*, two Border Patrol officers were observing northbound traffic from a patrol car parked at the side of Interstate 5, north of San Diego.[150] They pursued Brignoni-Ponce's car and stopped it because the three occupants appeared to be of Mexican descent.[151] The Supreme Court agreed that a roving patrol of the Border Patrol should not be allowed to stop a vehicle near the Mexican border and question its occupants, when the only ground for suspicion is that the occupants appear to be of Mexican ancestry.[152] But the Court went on to say that patrolling officers may stop vehicles if they are aware of specific articulable facts, together with rational inferences, reasonably warranting suspicion that the vehicles contain aliens

141. *Institutional Racism*, *supra* note 81, at 328.
142. *Id.* at 328–29.
143. *Id.* at 329.
144. *Id.*
145. *Id.*
146. *Id.*
147. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 268–75 (1973).
148. *Id.* at 273.
149. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 884–85 (1975).
150. *Id.* at 874–85.
151. *Id.* at 875.
152. *Id.* at 885–86.

who may be illegally in the country and the occupants can be questioned.[153] Something as small as aspects of the vehicle itself may justify suspicion.[154] The Court also acknowledged that trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut.[155]

The Court's deference to Border Patrol was influenced by claims that undocumented Mexican migration was getting out of hand. The Court explained its reasoning, relying on figures provided by the government:

> INS now suggests there may be as many as 10 or 12 million aliens illegally in the country. . . . [T]hese aliens create significant economic and social problems . . . . The Border Patrol's traffic-checking operations . . . succeed in apprehending some illegal entrants and smugglers, and they deter the movement of others by threatening apprehension and increasing the cost of illegal transportation.[156]

Within a year, in 1976, the Court carved out a major exception to the Fourth Amendment's protection against search and seizure to further accommodate the Border Patrol.[157] The case, *United States v. Martinez-Fuerte,* involved the legality of a fixed checkpoint located on Interstate 5 near San Clemente, California.[158] The checkpoint is sixty-six road miles north of the Mexican border.[159] "The 'point' agent, standing between the two lanes of traffic, visually screens all northbound vehicles, which the checkpoint brings to a virtual, if not a complete, halt."[160] In a small number of cases, the "point" agent will direct cars to a secondary inspection area for further inquiry.[161] In the three situations that were challenged in *Martinez-Fuerte*, the Government conceded that none of the three stops was based on articulable suspicion.[162]

The defendants argued that the routine stopping of vehicles at a checkpoint was invalid because *Brignoni-Ponce* must be read as prohibiting any stops in the absence of reasonable suspicion.[163] However, the Court recognized that maintenance of a traffic-checking program in the interior is necessary because "the flow of illegal aliens cannot be controlled effectively at the border," holding:

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153. *Id.* at 884–87.
154. *Id.* at 884–85.
155. *Id.* at 885.
156. *Id.* at 878–79.
157. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 566 (1976).
158. *Id.* at 545.
159. *Id.*
160. *Id.* at 546.
161. *Id.*
162. *Id.* at 547.
163. *Id.* at 556.

> A requirement that stops on major routes inland always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens.[164]

Fixed checkpoints, many miles away from the border, now were constitutional, even in the absence of articulable facts.[165] Again, the Court cited the importance of supporting the Border Patrol's efforts in enforcing immigration laws.[166]

The majority of the Supreme Court was not concerned with racial overtones, even though the Border Patrol was basing secondary inspections on those who looked Mexican.[167] A dissenting opinion by Justice William Brennan warned: "Every American citizen of Mexican ancestry and every Mexican alien lawfully in this country must know after today's decision that he travels the fixed checkpoint highways at [his] risk."[168]

Less than a decade later, in 1984, the Supreme Court made it quite clear that the Fourth Amendment's protection against illegal search and seizure was not available to aliens fighting deportation even if INS officials acted illegally.[169] In *INS v. Lopez-Mendoza*, INS agents arrested Lopez-Mendoza at his place of employment, a transmission repair shop.[170] The agents had no warrant to search the premises or to arrest any of its occupants.[171] "The proprietor of the shop refused to allow the agents to interview his employees during working hours.[172] Nevertheless, while one agent engaged the proprietor in conversation, another entered the shop and approached Lopez-Mendoza."[173] After the INS questioned Lopez-Mendoza and arrested him, Lopez-Mendoza admitted he was not a legal resident.[174] While the arrest was illegal, the Supreme Court refused to exclude Lopez-Mendoza's admission that he was not a legal resident.[175] The Court concluded that "[t]here comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches."[176] Applying the exclusionary rule

164. *Id.* at 556–57.
165. *Id.* at 558, 563–65.
166. *Id.* at 563–64.
167. *Id.* at 550, 566–67.
168. *Id.* at 572.
169. INS v. Lopez-Mendoza, 468 U.S. 1032, 1051 (1984).
170. *Id.* at 1035.
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at 1050.
176. *Id.* (quoting United States v. Janis, 428 U.S. 433, 459 (1976)).

would simply be too inconvenient for immigration enforcement officials—even when the Fourth Amendment is violated.[177]

3. The Immigration Reform and Control Act of 1986

The Immigration Reform and Control Act of 1986 ("IRCA") allowed three million immigrants to obtain lawful citizenship in the United States, but the codification of employer sanctions in IRCA was the driving force behind the legislation, not legalization.[178] Public concern regarding the number of undocumented workers (predominantly Mexican) in the United States grew in the 1970s and early 1980s.[179] Nobody knew exactly how many undocumented workers were present in the United States, but the highest estimates ranged from eight to twelve million.[180] The public viewed Border Patrol and INS efforts as ineffectual at best.[181] Employer sanctions were the most popular proposals to combat the perceived lack of control at the southern border, which endured through several iterations, and years of social, political, and congressional debate, before reaching the culmination codified in IRCA.[182] In 1952, the idea of penalizing employers for hiring undocumented workers was raised but not adopted.[183] Beginning in 1973, legislative proposals centered around employer sanctions were promoted as necessary to combat the undocumented alien "problem."[184] The Rodino Bill, pushed by House Democratic leader Peter Rodino in the late 1970s, was an example of one such employer sanctions bill.[185]

Near the end of the Carter Administration in 1980, the Select Commission on Immigration and Refugee Policy proposed legalization to balance sanctions.[186] However, the story of congressional support for IRCA is complicated. Although some members of Congress may have supported more generous legislation, Congress' support for any legalization was decidedly underwhelming.[187]

The most prominent feature of the 1986 amendments was federal employer sanctions.[188] Legalization (amnesty) provisions were included in the legislation, passing by a slim majority.[189] For the first time, IRCA

177. *Id.*
178. *Institutional Racism*, *supra* note 81, at 332.
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*; *see also* U.S. Gov't Accountability Off., REP. TO CONG., GGD-76-101, *Immigration - Need to Reassess U.S. Policy*, 4 (1976).
186. *Institutional Racism*, *supra* note 81, at 332.
187. *Id.*
188. *Id.*
189. *Id.*

prohibited employers from hiring workers who were not authorized to work in the United States, imposing civil and criminal penalties on violators.[190]

Guided by lobbying from civil rights advocates and concerned members of Congress, protections intended were included in the law to safeguard against discrimination.[191] Mandated by IRCA, the Government Accountability Office ("GAO") conducted annual studies from 1987 to 1989 to determine whether employer sanctions caused "widespread discrimination."[192] Another provision provided that employer sanctions could be repealed if the GAO found that compliance caused employers to discriminate.[193]

The GAO reports quickly found "one in every six employers in GAO's survey who were aware of the law may have begun or increased the practice of (1) asking only foreign-looking persons for work authorization documents, or (2) hiring only United States citizens."[194] Despite GAO's, and independent researchers, findings of widespread IRCA-related employment discrimination, Congress did not repeal employer sanctions.[195] The findings were routinely dismissed by anti-immigrant groups, Senator Alan Simpson (a co-sponsor of IRCA), and the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), describing the findings as insignificant or unreliable.[196]

4. The Asian Exclusion Era

"The discovery of gold, a rice shortage, and the recruitment of Asian labor led to noticeable Asian migration in the nineteenth century, in turn triggering a backlash against those immigrants."[197] Examining the impetus and development of exclusion laws directed first at Chinese and eventually at all Asian immigrants reveals a sordid tale of racism and xenophobia.[198] The antipathy demonstrated toward Asians parallels the antipathy that America showed to individuals of Mexican descent discussed earlier.[199] The attack on Asian immigrants in the nineteenth and twentieth centuries displayed comprehensive federal immigration regulation that would later serve as a model for exclusion of eastern and southern Europeans.[200]

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190. *Id.* at 333.
191. *Id.*
192. *Id.*; *see e.g.*, U.S. Gen. Acct. Off., REP. TO CONG., GGD-89-16, *Immigration Reform: Status of Implementing Employer Sanctions After Second Year* (1988).
193. *Institutional Racism*, *supra* note 81, at 333.
194. *Id.* (quoting U.S. Gen. Acct. Off., *supra* note 192).
195. *Id.*
196. *Id.*
197. *Id.*
198. *See infra* Section II(B)(4).
199. *See supra* Section II(B)(2).
200. *Institutional Racism*, *supra* note 81, at 333.

Early in American history, Chinese people were officially welcomed in the United States.[201] American companies recruited Chinese workers to fill labor needs in industries like railroad construction, laundries, and domestic service.[202] In 1852, the governor of California recommended using land grants to induce Chinese immigration and settlement.[203] After the Civil War, Southern plantation owners considered substituting Chinese labor for Black labor, worried that newly freed slaves would be "unmanageable."[204] Southern plantation owners traveled to California with this in mind during the 1870s, and Chinese workers were imported to states like Louisiana and Mississippi to compete with Black workers.[205] By 1882, about 300,000 Chinese had entered the United States and worked on the West Coast.[206]

By the late 1860s, Chinese immigration became a focal point in the politics of California and Oregon.[207] White workers felt threatened by the perceived competition from Chinese immigrants, while employers favored Chinese workers as inexpensive laborers and subservient domestics.[208] Employment of Chinese by the Central Pacific Railroad was at its peak. Anti-coolie clubs, organized against Chinese immigrant labor, increased in numbers and size, causing a sharp increase in frequency of mob attacks against Chinese people.[209] Most of the resentment toward Chinese immigrants stemmed from a need to preserve "racial purity" and "Western civilization."[210]

Sinophobic sentiment prevailed in Congress. First, Chinese immigrants were judged unworthy of citizenship in the Nationality Act Amendments of 1870.[211] Congress amended the Nationality Act of 1790, extending the right of naturalization to aliens of African descent, but Chinese people were intentionally denied the same right because Chinese people had "undesirable qualities."[212] In 1875, Congress passed legislation prohibiting the importation of Chinese women for immoral purposes, after hearing claims from law enforcement that such importation of Chinese prostitutes was occurring.[213] Referred to as the Page Law, overzealous

201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*; *see also* EDWARD P. HUTCHINSON & BACH INSTITUTE FOR ETHNIC STUDIES, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798-1965, 57 (1981) [hereinafter HUTCHINSON & BACH INSTITUTE].
212. *Institutional Racism*, *supra* note 81, at 334 (quoting HUTCHINSON & BACH INSTITUTE, *supra* note 211).
213. *Id.*

enforcement of the statute effectively barred Chinese women from entering the United States, exacerbating an already imbalanced sex ratio among the Chinese population in America.[214]

The Page Law, and the resulting exclusion of Chinese women assumed to be prostitutes marked the beginning of direct federal regulation of immigration.[215] Twenty-five anti-Chinese petitions were presented during the 1881 Congressional session by several civic groups, like the Methodist Church and the New York Union League Corps, and from many states, including Alabama, Ohio, West Virginia, and Wisconsin.[216] Of course, California was at the center for demands of exclusion due to its position on the West coast and closest proximity to Chinese immigrants at the time.[217]

Next, Congress enacted the Chinese Exclusion Act of May 6, 1882.[218] The law excluded laborers for ten years and otherwise halted all Chinese immigration.[219] Chinese women were defined as laborers, so Chinese immigrants already in the United States could not bring wives and families previously left behind.[220] The ban on laborers' spouses reinforced the bar on immigration for Chinese women which began under the Page Law, preventing family formation for Chinese immigrants.[221]

In 1904, Chinese exclusion was extended indefinitely, cementing thirty-five years of laws that limited or otherwise excluded Chinese immigration.[222] Congress would not reconsider any barrier to Chinese immigration until the United States and China became allies in World War II,[223] and Congress would not substantially alter any other laws aimed at keeping Chinese people marginalized until 1965.[224]

Uncoincidentally, an appreciable number of Japanese immigrants entered the United States at the height of the Chinese exclusion movement.[225] Agricultural labor demands, particularly in Hawaii and California, resulted in increased efforts to recruit Japanese workers after the exclusion of Chinese workers.[226] Like the initial wave of Chinese immigrants, American employers were happy to acquire Japanese laborers and those workers felt, at first, warmly received.[227] So many Japanese

214. *Id.*
215. *Id.* at 335.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*; *see also* Chinese Exclusion Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943).
220. *Institutional Racism*, *supra* note 81, at 335.
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*

immigrants came to Hawaii alone that the Japanese became the largest group of foreigners on the Islands.[228] "In San Francisco in 1869, the new immigrants were described as 'gentlemen of refinement and culture . . . [who] have brought their wives, children, and . . . new industries among us.'"[229]

By the turn of the century, American sentiments toward Japanese laborers grew unfavorable as Japanese workers began migrating increasingly to the western United States.[230] After Hawaii's annexation in 1898, Japanese immigrants used it as a stepping stone to the continental United States, where the majority of immigrant laborers engaged in agricultural work.[231] Economic competition with white farm workers soon erupted. Nativists formed, with the backing of organized labor in California, the Japanese and Korean Exclusion League (later renamed the Asiatic Exclusion League)—motivated by racial prejudice toward Asians.[232] Exclusion once again became a major political issue—this time the target was the Japanese.

After the 1906 San Francisco earthquake, fierce anti-Japanese rioting caused numerous incidents of physical violence and injuries.[233] Authorities ordered Japanese students in San Francisco to attend segregated schools—irritating the Japanese government and later becoming a major stumbling block in negotiations over restrictions on Japanese immigrant laborers.[234] Eventually, the United States and Japanese governments reached a solution to qualms regarding Japanese immigration, but not in conventional legislative fashion.[235] Japan's emergence as a major world power (having defeated China in 1895 and Russia in 1905 wars) meant the United States could not restrict Japanese immigration in the heavy-handed, self-serving fashion with which it had curtailed Chinese immigration.[236] The United States did not want to jeopardize its access to Japan's markets, and overzealous immigration restrictions on Japanese people would have offended the increasing Japanese world power.[237] As a result, President Roosevelt negotiated an informal agreement with Japan in 1907 and 1908 which minimized potential disharmony between the two nations while the United States retained the initiative to control immigration.[238]

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228. *Id.*

229. *Id.* (quoting PETER H. IRONS, JUSTICE AT WAR 9 (Oxford Univ. Press 1983)).

230. BILL ONG HING, DEFINING AMERICA THROUGH IMMIGRATION POLICY 41 (2012) [hereinafter Defining America].

231. *Id.*

232. *Id.* at 42.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

Under the terms of the so-called Gentlemen's Agreement, the Japanese government refused to issue travel documents to laborers that wished to go to the United States.[239] In exchange for this severe but voluntary limitation, The United States government permitted Japanese wives and children to reunite with their husbands and fathers in the United States, and promised that it would pressure the San Francisco school board into rescinding its previous segregation order.[240] However, by then anti-Asian sentiment had been codified, and citizenship through naturalization to Japanese migrants was denied. In *Takao Ozawa v. United States,* the Supreme Court endorsed the racism inherent in the naturalization law concluding:

> [T]o adopt the color test alone would result in a confused overlapping of races and a gradual merging of one into the other, without any practical line of separation. . . . [T]he federal and state courts, in an almost unbroken line, have held that the words "white person" were meant to indicate only a person of what is popularly known as the Caucasian race. . . . With the conclusion reached in these several decisions we see no reason to differ.[241]

Finally, United States history demonstrates racial prejudice toward Filipinos and other Asian nations from the beginning of international relationships with those countries, but particular legislative discrimination toward these groups became relevant during times of Chinese and Japanese exclusion. After the United States victory in the Spanish-American War of 1898, President McKinley reported that the people of the Philippines were "unfit for self-government" and "there was nothing left for [the United States] to do but to take them all, and to educate the Filipinos, and uplift and civilize and Christianize them."[242] Naturally, the Filipinos did not take kindly to more colonial rule, and the United States' takeover was met with violent resistances.[243]

Ironically, because the Philippines became a United States colony, Filipinos automatically became noncitizen nationals of the United States rather than aliens.[244] They enjoyed the ability to travel to and from the United States without hindrance from immigration laws, and relaxed requirements for obtaining full citizenship.[245] When appreciable numbers of Filipinos came to the continental United States after World War I (when

239. *Id.*
240. *Id.*
241. 260 U.S. 178, 197 (1922).
242. Defining America, *supra* note 230, at 44.
243. *Id.*
244. *Id.*
245. *Id.*

Chinese and Japanese workers could no longer be recruited) exclusionary efforts directed at them began.[246]

Other Asians began to enter the United States at the beginning of the twentieth century, only in smaller numbers, like educated Asian Indians for one example.[247] Some of the newly arriving Asian Indians agitated the Asiatic Exclusion League, a movement originally focused on Japanese and Korean immigration.[248] The commissioner of state labor statistics in California stated: "Hindu is the most undesirable immigrant in the state. His lack of personal cleanliness, his low morals and his blind adherence to theories and teachings, so entirely repugnant to American principles, make him unfit for association with American people."[249] Eventually, Asian Indians were prevented from immigrating through the enactment of the Asiatic Barred Zone in 1917.[250]

Lower federal courts allowed lawful Asian Indian immigrants to naturalize, reasoning that these immigrants were Caucasians and thus eligible "white persons" under the citizenship laws of 1790 and 1870.[251] However, the Supreme Court reversed this racial stance in *United States v. Bhagat Singh Thind,* ruling that Indians, like Japanese, would no longer be considered white persons, and were therefore ineligible to become naturalized citizens.[252]

> The landmark national origin quota law enacted in 1924 restructured criteria for admission to respond to nativist demands and represented a general selection policy that remained in place until 1952.[253] The new statutory scheme limited immigration from any particular country to two percent of its nationality in 1890.[254] The law eliminated the few remaining categories for Asians[255] establishing a policy of permanent exclusion of any "alien ineligible to citizenship."[256] Filipinos remained exempt from these quotas due to their status as nationals, but they settled into a similar pattern of immigration despite the exemption.[257]

246. *Id.*
247. *Id.*
248. *Id.* at 45.
249. *Id.* (quoting CALIFORNIA BOARD OF CONTROL, CALIFORNIA AND THE ORIENTAL: JAPANESE, CHINESE, AND HINDUS 101–02 (Sacramento State Printing Office, 1920)).
250. *Id.* at 46.
251. *Id.* at 45.
252. *Id.*; 261 U.S. 204, 215 (1923).
253. Defining America, *supra* note 230, at 46.
254. *Id.*
255. *Id.* at 47.
256. *Id.*
257. *Id.*

Limitations on Japanese immigrants led to an intense recruitment of Filipino laborers because of their open travel status as noncitizen nationals. By the late 1920s, the call to exclude Filipino workers was seen by Congress as an uncomplicated proposal that promised relief for the Great Depression's high unemployment.[258] However, dealing with anti-Filipino agitation was not as simple as responding to earlier anti-Chinese, anti-Asian Indian, and even anti-Japanese campaigns. As United States nationals, they could travel in and out of the country without constraint. Until the Philippines were granted independence, Congress could not exclude Filipinos.[259]

The Tydings-McDuffie Act, passed in 1934, paved the way for exclusion.[260] When their nation became independent on July 4, 1946, Filipinos lost their status as nationals of the United States.[261] Any Filipinos remaining in the United States were deported unless they formally immigrated and attained citizenship.[262] Between 1934 and 1946, the Philippines were given an annual quota of only fifty visas.[263] Tydings-McDuffie was the formal cap on this era of exclusion. The refusal to extend Asians the right to naturalize, the laws against the Chinese, the Gentlemen's Agreement with Japan, the 1917 and 1924 Immigration Acts, and Tydings-McDuffie were the legacy of xenophobia that explicitly codified racial exclusion.

5. The 1965 Framework for Immigration Categories Selection

In 1952, Congress overhauled the immigration laws, but failed to address concerns over the national origins quota system of the 1920s, continuing the blatant form of racial and ethnic discrimination that epitomized the system.[264] Although the new law repealed the Asian exclusion laws, in their place a new "Asia-Pacific Triangle" was established with a trivial 2,000 visa annual quota.[265] Since the 1952 Act changed little in the immigration selection system, the question over which immigrants to admit to the United States remained a battlefront. The law continued to exasperate many observers, including President Truman, whose veto of the 1952 legislation (due in large part to its failure to repudiate the quota system) was overridden by Congress.[266] President Truman did not relent, appointing a special Commission on Immigration and Naturalization to

258. *Id.* at 49.
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.* at 75.
265. *Id.* at 77.
266. *Id.* at 75.

study the system.[267] The Commission issued a 319-page report in 1953 strongly advocating for the abolition of the national origins system and recommending a quota system without regard to national origin, race, creed, or color.[268] President Eisenhower embraced the findings, and pushed for corrective legislation to no avail.[269]

Entering office in January 1961, President Kennedy submitted a comprehensive program that provided the impetus for ultimate reform.[270] President Kennedy called on Congress to repeal the discriminatory national origins quota system and to end racial exclusion from the Asia-Pacific triangle. [271] President Kennedy's hopes for abolishing the quota system were only partially realized when the 1965 amendments were enacted.[272] The racial quotas and the Asia-Pacific Triangle geographic restrictions were both repealed, but his egalitarian vision of visas on a first-come, first-serve basis gave way to a narrower and more historically parochial framework that provided few obvious advantages for prospective Asian immigrants. The new law provided 20,000 immigrant visas annually for every country in the Eastern Hemisphere.[273] The United States granted such 20,000 allotment regardless of the size of a country, so that China had the same quota as, for example, Tunisia.[274] Of the 170,000 visas designated for the Eastern Hemisphere, seventy-five percent were earmarked for "preference" relatives of citizens and lawful permanent residents in the United States, and an unlimited number of visas remained available to immediate relatives (parents of adults, minor unmarried children, and spouses) of United States citizens.[275] The per country limitation of 20,000 visas eventually led to severe backlogs in high visa demand countries.[276]

6. Affirmative Action for Western Europeans: the "Diversity" Visa Program

Despite growing visa demands and backlogs for Mexico and Asian countries since the 1970s, legislation to address those challenges has never been forthcoming.[277] In 1986, Congress added a provision to IRCA, in an effort to curtail the increasing immigration numbers from Asia and the

267. *Id.* at 93.
268. *Id.* at 93–94.
269. *Id.* at 94.
270. *Id.*
271. *Id.*
272. *Id.* at 95.
273. *Id.*
274. *Id.*
275. *Id.*
276. David Weissbrodt & Laura Danielson, *Chapter 1: The History of U.S. Immigration Law and Policy*, THE IMMIGR. NUTSHELL 7 (2004), http://hrlibrary.umn.edu/immigrationlaw/chapter1.html [https://perma.cc/PCB6-B6L9].
277. *See id.*

Philippines, to help thirty-six countries that had been "adversely affected" by the 1965 changes.[278] A country was considered "adversely affected," if the United States issued fewer visas to its nationals after 1965 than before.[279] As a result, the "adversely affected countries" included Great Britain, Germany, and France, but no countries from Africa which sent few immigrants prior to 1965.[280] This "diversity" initiative for immigration was, in reality, an affirmative action program for natives of countries whose ethnicity already constituted a majority of the United States.[281]

The 1986 law granted 5,000 visas to the "adversely affected countries" per year in 1987 and 1988, but the number increased to 15,000 per year in 1989 and 1990.[282] The visas provided by the 1986 amendment were in addition to the 20,000 visas already available for immigrants from each of the "adversely affected countries" under the preference system. The program required applicants to meet only nationality, health, and moral qualifications of United States immigration laws.[283]

Another impetus for the 1986 "diversity" program included many Irish nationals in the United States that did not fit into any regular immigration category.[284] In the 1980s, many Irish nationals traveled to the United States on temporary visas in search of opportunity amidst the downtrodden Irish economy.[285] Many overstayed their visas, and the Irish government estimated that 50,000 Irish nationals resided in the United States without documentation as of 1989.[286]

In 1988, Congress allocated 20,000 extra visas for two more years to further increase immigration diversity.[287] Now, the government opened the "OP-1" lottery for visas to nationals of countries that were "underrepresented," or a foreign state that used less than twenty-five percent of its 20,000 available preference visas in 1988.[288] All but thirteen countries in the world were eligible, and the ineligible countries included Mexico, the Philippines, China, Korea, and India.[289] Over 3.2 million applications were received for the 20,000 visas.[290]

Legislation in 1990 extended the diversity visa concept even further. Until October 1, 1994, a transition diversity program offered 40,000 visas per year for the thirty-six countries "adversely affected" by the 1965

278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.* at 78.
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.*

amendments, but the government effectively designated forty percent of the available visas for Irish nationals.[291] After October 1, 1994, the United States offered 55,000 diversity visas annually in a lottery-type program to natives of countries from which immigration fell under 50,000 over the preceding five years—clearly excluding Mexico, China, South Korea, the Philippines, and India.[292] In this new scheme, applicants needed a high school education, or, within five years of application, applicants needed to attain at least two years of work experience in an occupation that required such training or experience.[293] That left out most Africans who wanted to immigrate.

7. Institutionalized Racism in the United States' Immigration System

The evolution of immigration policy, beginning with the forced migration of African workers through the infamous Asian exclusionary period and then to the southwest border regime, is critical in understanding today's policies and enforcement approaches. This Part explains how that evolution affects today's outcomes. It also points to other institutions that exacerbate the effects of the racialized immigration system.

The construction of United States immigration laws and policies that began with the forced migration of Black labor, then vis-à-vis the history of Mexican and Asian immigration to the United States, has evolved into a framework that is inherently racist. The current numerical limitation system, while not explicitly racist, operates in a manner that severely restricts immigration from Mexico and the high visa demand countries of Asia.

The 1965 amendments represented a welcome change, but the new law was no panacea. President Kennedy originally proposed a large pool of immigration visas to be issued on a first-come, first-serve basis without quotas for any country.[294] Between 1965 and 1976, Mexico and other countries in the Western Hemisphere faced strict numerical limits on available immigration visas while the rest of the world enjoyed a definite preference system. Today's selection system is disruptive to families and individuals; there is simply no room for many relatives of immigrants because of numerical limitations and no room for those who are simply displaced workers. They do not qualify for special visas set aside for professionals and management employees of multinational corporations, or for those visas that require substantial funds for investment. Similarly, persons in low-income regions controlled by trade agreements and business

291. *Id.*
292. *Id.*
293. *Id.*
294. David Bacon & Bill Hing, *The Rise and Fall of Employer Sanctions*, 38 FORDHAM URB. L. J. 77 (2010).

globalization find no place in American immigration, as global corporations relocate to other sites where their production costs are cheaper.

The system results in severe backlogs in certain family immigration categories—particularly for adult unmarried sons and daughters of lawful permanent residents, and siblings or married children of United States citizens. For some countries, such as the Philippines and Mexico, the waiting periods for certain categories are ten to twenty years![295] Given the severe backlogs and the continuing allure of the United States (not simply in terms of economic opportunities, but because relatives are already here due to recruitment efforts or political stability), many would-be immigrants are left with little choice. Inevitably they explore other ways of entering the United States without waiting. By doing so, they fall into the jaws of the immigration exclusion laws that provide civil and criminal penalties for circumventing the proper immigration procedures.[296]

The basic civil sanction of removal (deportation) applies to individuals who fall into the immigration trap while trying to reunify with families or seeking economic opportunities. There are four relevant categories of deportable aliens: "those who are in the United States in violation of the immigration laws (e.g., entry without inspection, false claim to citizenship); those non-immigrants who overstay their visas or work without authorization; those who have helped others enter (smuggled) without inspection; and those who are parties to sham marriages."[297] Aliens can also incur additional civil penalties, including fines, for things like forging or counterfeiting immigration documents, failing to depart pursuant to a removal order, entering without inspection, and entering into a sham marriage for citizenship purposes.[298]

Congress has also enacted criminal provisions that go far beyond the civil sanctions. For example, the following acts are subject to imprisonment and/or expensive monetary fines:

> Falsifying registration information about the family; bringing in (smuggling), transporting, or harboring (within the United States) an undocumented alien (including family members); entering without inspection or through misrepresentation; reentering of an alien (without permission) after he or she has been removed or denied

295. *Average Green Card Processing Times*, BOUNDLESS IMMIGR. INC., https://www.boundless.com/immigration-resources/average-green-card-wait-times [https://perma.cc/29XV-U4Y5] (last visited Dec. 16, 2021).

296. IIona Bray, *Is It a Crime to Enter the U.S. Illegally?*, ALL LAW, https://www.allaw.com/articles/nolo/us-immigration/crime-enter-illegally.html [https://perma.cc/77V2-PW5V] (last visited Jan. 19, 2022).

297. Immigration Law, *supra* note 6, at 37.

298. *Id.*

> admission; and making a false claim of United States citizenship.[299]

The action of traveling to the United States by circumventing the current structure can easily result in civil and, at times, criminal liability.

Based on the manner in which immigration laws and enforcement policies have evolved, racism has been institutionalized in those laws and policies. However, writers such as john powell implore readers to examine the ways in which various institutions interrelate with one another to produce sinister dynamics.[300] powell looks beyond the institutionalized racism within the structure of United States immigration laws and enforcement policies, and looks toward the interaction between institutions for what he terms "structural racism."[301] Whatever the terminology, powell evaluates the institution of immigration laws and policies and explains how that institution relates to other institutions to produce racial outcomes.[302]

While immigration laws and enforcement policies evolved in a manner that continues to prey on Mexicans, Asians, Black, and other Latin migrants, the relationship of those laws and policies with other racialized institutions underscores the structural challenges that immigrants of color face. Consider NAFTA and the World Trade Organization ("WTO"). NAFTA has placed Mexico at such a competitive disadvantage with the United States in the production of corn that Mexico now imports most of its corn from the United States, and Mexican corn farm workers have lost their jobs. The United States-embraced WTO, which advocates global free trade, favors lowest-bid manufacturing nations like China and India, so that manufacturers in a country like Mexico cannot compete and must lay off workers. Is there little wonder that so many Mexican workers look to the United States for jobs? Think also of refugee resettlement programs as an institution. When Southeast Asian refugees are resettled in public housing or poor neighborhoods, their children find themselves in an environment that can lead to bad behavior or crime. Consider the United States' involvement in wars and civil conflict abroad. Think of the United States' involvement in places like Vietnam, Afghanistan, or Iraq—places that have produced involuntary migrants of color to our shores. Other racialized institutions that interact with immigration laws and enforcement also come to mind: the criminal justice system, poor neighborhoods, and inner-city schools. Even coming back full circle to enslavement of people—today's

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299. *Id.*

300. *Institutional Racism*, *supra* note 81, at 42. john a. powell declines to capitalize his name as a political statement. *See* Katy Steinmetz, *A War of Words' Why Describing the George Floyd Protests as 'Riots' Is So Loaded*, TIME (June 8, 2020), https://time.com/5849163/why-describing-george-floyd-protests-as-riots-is-loaded [https://perma.cc/T6CH-EZ7S].

301. *Id.*

302. *Id.* (quoting Andrew Grant-Thomas & john a. powell, *Toward a Structural Racism Framework*, 15 RACE & POVERTY 3, 4 (2006)).

human trafficking institutions—we begin to realize a sad interaction with immigration laws that requires greater attention. All of these institutions can lead to situations that spell trouble within the immigration enforcement framework.

The immigration admission and enforcement regimes may appear neutral on their face, but (1) they have evolved in a racialized manner and (2) when the immigration framework interacts with other racialized institutions it becomes evident that the structure generates racial group disparities. NAFTA and WTO form a big part of why many migrants of color cannot remain in their native countries. The criminal justice system and poverty prey heavily on poor communities of color, leading to deportable offenses if defendants are not United States citizens.

High profile ICE raids also evidence racism in their operations. "A commission empaneled by the United Food and Commercial Workers following a series of ICE raids during the George W. Bush administration heard repeated testimony about racial profiling."[303] Witnesses testified that employees with physical characteristics that appeared to be of Latinx national origin or other minorities were singled out by ICE and subjected to the greatest scrutiny during ICE raids.[304] John Bowen, General Counsel for UFCW Local 7, claimed "race was, almost without question, the sole criteria for harsher interrogations" to which the workers were subjected.[305]

II. PRACTICING IMMIGRATION LAW WITH A RACIAL JUSTICE STRATEGY

Immigrant rights advocates and immigration lawyers have some obvious ways of incorporating racial justice strategies into their work. Raising racism in lawsuits such as *Ramos v. Nielson* and *Ibrahim v. Acosta,* discussed above, are good examples.[306] And at least Justice Sotomayor noted the racial animus of President Trump in the DACA revocation case decided by the Supreme Court.[307] And of course, the admonitions of BAJI, Undocublack, and the ILCTR to make sure that Black migrant voices are included at legislative and immigration policy reform tables must be heeded.

303. *Id.*

304. *Id.* at 13.

305. *Id.* (quoting Nat'l Comm'n on ICE Misconduct & Violations of Fourth Amend. Rights, Comm'n Hearing: Des Moines, Iowa 109 (Apr. 29, 2008) (unpublished, transcript with author).

306. *See generally* Ramos v. Wolf*,* 975 F.3d 872, 889 (9th Cir. 2020); Ibrahim v. Acosta*,* 326 F.R.D. 696, 698 (S.D. Fla. 2018).

307. *See generally* Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*,* 140 S. Ct. 1891 (2020).

A. Abolish ICE

Defunding the police is among the many racial justice reform proposals that have been advanced by Black Lives Matter and other racial justice reform advocates. In the immigration realm, a corollary call for abolishing ICE has been voiced.

"Defund the Police" is commonly understood as a political slogan that arose out of the killing of George Floyd in 2020.[308] Generally, the term means to encompass a variety of different meanings. The meanings vary from partial divestments of police departments, with funds going toward community outreach, to a total abolishment of police departments.[309] "Defund the Police" is typically understood as one of the ideologies under the Black Lives Matter movement umbrella.[310]

Unlike Defund the Police, which is generally understood as a political slogan, "Abolish ICE" is a political movement that seeks to abolish the Immigrations and Customs Enforcement agency.[311] "Abolish ICE" came to mainstream attention during the presidency of Donald Trump in response to the Trump Administration's policy with regards to the family separation policy among other unconscionable policy decisions.[312]

The two movements overlap with regards to their overall message, both movements or ideologies seek to abolish some form of policing. The Abolish ICE movement is primarily supported by members of the Latinx community because ICE typically targets the Latinx community due to the reality of illegal immigration the United States.[313] The Defund the Police ideology/movement is mainly supported by the African American community with the general intent to abolish police departments across the United States. The two movements/ideologies have potential for convergence because they both contemplate the removal of a police department or agency. Both movements are supported by members who have been subject to historically racial discrimination at the hands of law enforcement departments and agencies.

Where the two movements/ideologies begin to diverge from each other is with regards to the feasibility of effectuating the groups ultimate

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308. *See, e.g.*, Hoppy Kercheval, *Hoppy's Commentary: Politicians and the Public Want a Refund on Defund*, W. VA. METRO NEWS (Nov. 2, 2021, 12:55 AM), https://wvmetronews.com/2021/11/02/politicians-and-the-public-want-a-refund-on-defund-the-police/ [https://perma.cc/9HMF-PK6Z].

309. *Id.*

310. *Id.*

311. Dara Lind, *"Abolish ICE," explained*, VOX (June 28, 2018, 5:39 PM), https://www.vox.com/policy-and-politics/2018/3/19/17116980/ice-abolish-immigration-arrest-deport [https://perma.cc/9AZW-9T7G].

312. *Id.*

313. Ashton Pittman, *'No one is coming out': Ice raids leave Latino community paralyzed with fear*, THE GUARDIAN (Aug. 11, 2019, 1:10 PM), https://www.theguardian.com/us-news/2019/aug/11/ice-raids-latino-community-mississippi-fear [https://perma.cc/6F64-NQXM].

intent. The goal of abolishing Immigrations and Customs Enforcement is arguably more feasible as there has, surprisingly, been put forth a number of possibilities by agents within ICE itself.[314] In 2018, nineteen senior ICE agents wrote a letter to then Homeland Security Secretary, Kirstjen Nielsen, asking for the agency to be abandoned.[315] The letter came in light of the increased pressure upon ICE during the Trump administration.[316] The agency was facing severe backlash because of the policies under Donald Trump, which significantly hindered the agency's ability to effectively conduct operations.[317] The nineteen senior ICE agents noted in their letter that ICE is split in two primary divisions, Enforcement and Removal Operations (ERO), and Homeland Security Investigations (HSI).[318] The HSI division focuses primarily on national security issues that crossover with immigration, typically human trafficking, firearms, and drug trafficking.[319] Whereas ERO focuses on deporting individuals back to their countries of origin.[320]

Unlike the Defund the Police movement/ideology, the Abolish ICE movement seeks to have ICE abolished and to be replaced by an alternative immigration enforcement agency. The immigration system is in a bad need of an overhaul.

The Defund the Police movement/ideology, on its face, is not feasible to many without an adequate replacement. Scholars and intellectuals have debated this concept for some time and ideas are being tossed around such that there does not appear to be a coherent goal.[321] Scholars have noted that policing in the United States has grown from community policing to a step below militarized patrols.[322] It goes without saying that policing in the United States has been plagued with racism that has created a rift between the general public and the police. Some scholars and activists have indicated that some type of reform is long overdue, but it must be calculated and methodical.[323]

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314. *See* Letter from Nineteen Homeland Security Agents to Kirstjen Nielson, Sec'y U.S. Dep't of Homeland Sec., https://www.documentcloud.org/documents/4562896-FILE-3286.html [https://perma.cc/6TFW-Z94G] [hereinafter Letter].

315. *Id.*

316. Alexia Campbell, *19 top ICE investigators ask DHS officials to split up the agency*, VOX (June 29, 2018), https://www.vox.com/policy-and-politics/2018/6/29/17517870/ice-agents-dhs-break-up-ice [https://perma.cc/XC6C-7RNS].

317. *Id.*

318. *See* Letter, *supra* note 314, at 2.

319. Oliver Laughland, *More than a dozen ICE agents call for agency to be disbanded*, THE GUARDIAN (June 29, 2018, 4:25 PM), https://www.theguardian.com/us-news/2018/jun/29/ice-abolish-letter-agents-trump-immigration-crackdown [https://perma.cc/PNJ9-ZXL7].

320. *Id.*

321. *See generally* Matthew Yglesias, *The End of Policing left me convinced we still need policing*, VOX (June 18, 2020, 3:50 PM), https://www.vox.com/platform/amp/2020/6/18/21293784/alex-vitale-end-of-policing-review [https://perma.cc/T6RK-2SUD].

322. *See, e.g., id*.

323. *Id.*; Justin Nix & Scott Wolfe, *Guest Post: Defunding or disbanding the police is a dangerous idea if done hastily*, WASH. POST (June 18, 2020), https://www.washington

An example of what it would look like for a police free system was recreated in Seattle, Washington in 2020. The City of Seattle effectively backed down after the murder of George Floyd and allowed protestors to claim a couple of city blocks to themselves, under the name of Capitol Hill Occupied Protest. Protesters battled for days with police at the precinct located in Capitol Hill. Eventually the police boarded up the building and left to attempt to de-escalate the situation. A "no cop zone" was declared that encompassed six or seven city blocks with roadblocks along the border. What resulted has left many scholars hesitant to jump on the Defund the Police bandwagon. With a zero police presence, what ensued within those city blocks was akin to Snake Pliskin's Escape from New York.[324] A militia was formed to provide some level of protection, but this effectively replaced one police department with another. Crime was rampant and shootings were frequent for a month. After a sixteen-year-old was shot to death and a fourteen-year-old was left in critical condition, the city decided to reenter the zone and reclaim it.[325]

It is difficult to envision what a post-police state would look like and now many social scientists and scholars do not see much of an alternative. The only feasible alternative would be to divert some of the funding to an extent to provide more social services for those susceptible to police encounters. This has occurred in several cities across the country.[326] Only time will tell if these policies will be effective.

On the other hand, the Abolish ICE movement could potentially lead to different results than the practical application of the Defund the Police movement, even if the two appear facially similar. For a movement to be effective it needs backing from the public. Polls show a growing support for the abolishment of ICE. The Pew Research Center conducted a poll in 2018 and found that ICE is the most unfavorable law enforcement agency among Americans.[327] Around seventy-two percent of Democrats

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post.com/crime-law/2020/06/18/guest-post-defunding-or-disbanding-police-is-dangerous-idea-if-done-hastily/?outputType=amp [https://perma.cc/5ZYK-SB43]; Marshall Terrill, *Is defunding the police a good idea?*, ARIZ. STATE UNIV. SCH. OF CRIMINOLOGY AND CRIM. JUST. (June 8, 2020), https://ccj.asu.edu/content/defunding-police-good-idea [https://perma.cc/6XRU-CUGQ]; Yglesias, *supra* note 321.

324. *See generally Snake Plissken*, WIKIPEDIA, https://en.wikipedia.org/wiki/Snake_Plissken [https://perma.cc/TB2G-5DG8] (last accessed Jan. 19, 2021).

325. *See generally* Sydney Brownstone et al., *Shooting at Seattle's CHOP protest site kills 16-year-old boy, leaves 14-year-old seriously injured*, SEATTLE TIMES (June 29, 2020, 5:38 AM), https://www.seattletimes.com/seattle-news/law-justice/shooting-at-seattles-chop-protest-site-leaves-2-in-critical-condition/ [https://perma.cc/PRL5-HG2F].

326. *See generally* Sam Levin, *These US cities defunded police: 'We're transferring money to the community*,*'* THE GUARDIAN (Mar. 11, 2021, 11:13 AM), https://www.theguardian.com/us-news/2021/mar/07/us-cities-defund-police-transferring-money-community [https://perma.cc/D8EM-G6LY].

327. *Growing Partisan Differences in Views of the FBI; Stark Divide Over Ice*, PEW RSCH. CTR. (July 24, 2018), https://assets.pewresearch.org/wp-content/uploads/sites/5/2018/07/24122119/07-24-2018-Federal-Agencies-release1.pdf [https://perma.cc/2MVE-J62R].

held unfavorable views of ICE, and seventy-two percent of Republicans held favorable views of ICE.[328] However, Politico also conducted a poll at the same time asking the same questions, it found that only twenty-five percent of Americans favored abolishing ICE, a majority favored keeping ICE.[329]

With regards to Defund the Police, a majority of Americans do not support the defunding of police. A Gallup poll conducted in June and July of 2020, a month after George Floyd's death, found that around sixty-one percent of African Americans wanted policing to remain the same.[330] FiveThirtyEight, in June of 2020, compiled a number of polls and found that thirty-one percent of Americans favored defunding the police, while fifty-eight percent opposed defunding the police.[331]

Both ideologies share a significant amount of common ground. However, there is a possibility that one movement might dilute, or overshadow the other. "Abolish ICE" presents a feasible goal that can be effectuated by the federal government, and is currently supported by a variety of politicians. Among politicians, the Abolish ICE movement is premised upon the idea that the current immigration enforcement system will be replaced with another similar immigration enforcement system. The difference being that the new system will still focus on immigration enforcement but, presumably, without the unconscionable behavior that was rampant under ICE.

On the other hand, the reality of defunding the police has led to a mess of ideas with no coherent vision. Many Democrat leaders do not embrace the Defund the Police rhetoric arguing that the debate hurts their electoral chances. The general consensus among the Defund the Police movement/ideology is that police departments need to be defunded in their entirety. Politicians are hesitant to climb on board because, unlike "Abolish ICE," the Defund the Police movements are eager to abolish the current enforcement system and replace it with a non-enforcement system. If the two movements/ideologies were to morph together the Abolish ICE movement may lose its voice.

Nonetheless, for immigrant rights advocates, the Abolish ICE movement presents a racial justice advocacy opportunity.

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328. *Id.*

329. Steven Shepard, *Poll: Voters oppose abolishing ICE*, POLITICO (July 11, 2018, 6:22 AM), https://www.politico.com/story/2018/07/11/immigration-ice-abolish-poll-708703 [https://perma.cc/U4DY-5E5W].

330. Lydia Saad, *Black Americans Want Police to Retain Local Presence*, GALLUP (Aug. 5, 2020), https://news.gallup.com/poll/316571/black-americans-police-retain-local-presence.aspx [https://perma.cc/WX32-G7CL].

331. Nathaniel Rakich, *How Americans Feel About 'Defunding The Police,'* FIVETHIRTYEIGHT (June 19, 2020, 5:58 AM), https://fivethirtyeight.com/features/americans-like-the-ideas-behind-defunding-the-police-more-than-the-slogan-itself/ [https://perma.cc/7A8F-GWD7].

B. Courtroom Strategies

1. Murgia *motions*

In the criminal law context, defendants can raise racial justice issues in their defense under certain circumstances. For example, in California, a *Murgia* motion can be made requesting dismissal of a case on the grounds that the prosecution of a defendant is being conducted in an arbitrary or discriminatory manner.[332] The motion is made to request that the defendant's criminal charges be dismissed upon a showing of selective prosecution for improper purposes, amounting to a violation of right to equal protection of law.[333] It requires a showing by a defendant that he or she would not have been criminally prosecuted except for an invidious discrimination against them that establishes a violation of equal protection.[334] The California Supreme Court approved the procedure adopted by defendants to raise the issue by a pretrial motion to dismiss.[335] If allegations are sufficient to support a prima facie claim of invidious discrimination, discovery must be permitted.[336]

The facts in the case that gave rise to this avenue of defense are instructive. *Murgia v. Municipal Court* involved six misdemeanor prosecutions resulting from picketing and organizing activities of the United Farm Workers (UFW) in Kern County, California.[337] All six defendants were UFW members charged with a variety of minor offenses including driving without a license, malicious mischief, and reckless driving.[338] The defendants alleged that all the charged incidents occurred while they were engaged in union activities.[339] Prior to trial, they sought dismissal of the charges on the grounds that the prosecutions violated their constitutional right to equal protection.[340] They alleged that the Kern County District Attorney and Sheriff brought the charges as part of a "deliberate, systematic pattern of discriminatory enforcement" of penal laws against UFW members and supporters.[341] Their pre-trial motion included a discovery motion and included more than 100 affidavits detailing incidents of discriminatory behavior toward UFW members and

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332. *See generally* Murgia v. Mun. Ct., 15 Cal. 3d 286, 306 (1975).

333. *See generally What Is Discriminatory Prosecution? What Is a Murgia Motion?*, GREG HILL & ASSOCS., https://www.greghillassociates.com/what-is-discriminatory-prosecution-what-is-a-murgia-motion.html [https://perma.cc/7YMR-YVBF] (last visited Jan. 19, 2022).

334. *See id*.

335. *See id*.

336. *See id*.

337. 15 Cal. 3d 286, 290–93 (1975).

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.* at 290.

supporters engaged in by Kern County law enforcement officials.[342] The trial court found that the declarations established a prima facie case of discriminatory enforcement of the laws, but denied the defendants' motion without clear legal authority that a defense of discriminatory prosecution was available to the instant defendants.[343]

The California Supreme Court acknowledged that no one has a right to commit a crime.[344] However, the Court reminded that under equal protection principles, law enforcement authorities may not enforce a facially fair criminal statute, for example, "if it was explicitly directed only at blacks."[345] The rules do "not insulate particular lawbreakers from prosecution, but simply require that the authorities enforce the laws evenhandedly."[346] Thus, as a matter of general constitutional matter, "discriminatory enforcement may be invoked as a defense in a criminal action."[347] Thus, the Court ruled:

> The principal objective of the equal protection guarantee with respect to administrative enforcement of statutes is to safeguard individuals from administrative officials who utilize their discretionary powers of selective enforcement as a vehicle for intentional invidious discrimination. Such discriminatory law enforcement conduct poses as significant a denial of equal protection if officials misuse a variety of statutory enactments as if officials abuse only a single provision. Thus, the breadth of the prosecutorial policy allegedly pursued in the instant case provides no immunity to the prosecutors.[348]

Without ruling on whether defendants' showing was adequate on its face, the Court ordered that discovery on the discriminatory prosecution claim should not be foreclosed.[349]

The *Murgia* motion is similar to, but different from, a *Pitchess* motion in which a defendant claims that police engaged in racial profiling in arresting him, excessive force, planting evidence, coerced a confession or destroying evidence.[350] This type of discriminatory prosecution denies the criminal defendant equal protection of the law, as guaranteed by the Fourteenth Amendment.[351] If proven, a judge has the power to dismiss the

342. *Id.* at 291.
343. *Id.* at 293.
344. *Id.* at 295–96.
345. *Id.* at 296.
346. *Id.* at 297.
347. *Id.* at 301.
348. *Id.* at 305.
349. *Id.*
350. Pitchess v. Super. Ct., 11 Cal. 3d 531 (1975).
351. *See* Baluyut v. Super. Ct., 12 Cal. 4th 826, 832 (1996).

case against the defendant on the ground that the prosecution is being conducted in an arbitrary or discriminatory manner.[352]

Could evidence of selective prosecution or racial profiling by DHS officials be used or useful in representing noncitizens in removal proceedings? It is worth thinking this through. We must begin by acknowledging two significant hurdles to raising criminal procedure-type claims in removal proceedings: (1) removal proceedings are civil proceedings, and (2) immigration judges cannot terminate proceedings on equitable or humanitarian grounds without statutory or regulatory authority.[353]

One of the starkest reminders that removal proceedings are civil rather than criminal in nature is the Supreme Court decision in *INS v. Lopez-Mendoza*.[354] One client in the case, Sandoval-Sanchez, was questioned and arrested at a potato processing plant where uniformed Border Patrol agents were stationed at the exits questioning those who were "evasive" or "averted" their heads.[355] Sandoval-Sanchez was questioned under those circumstances, and unaware of his right to remain silent, he admitted that he had entered the United States unlawfully.[356] At the removal hearing, the immigration judge rejected Sandoval-Sanchez's claim that he had been illegally arrested and ruled in the alternative that the legality of the arrest was not relevant to the deportation hearing.[357] On appeal, Sandoval-Sanchez objected to the evidence of his admission as obtained in violation of his constitutional rights.[358] However, the Court refused to apply the Fourth Amendment exclusionary rule in removal proceedings even when there is clear evidence that immigration agents have violated the noncitizen's Fourth Amendment rights in obtaining evidence of removability. "[C]redible evidence gathered in connection with peaceful arrests [albeit in violation of the Fourth Amendment] . . . need not be suppressed in [a] civil deportation hearing."[359]

In terms of the statutory and regulatory constraints on an immigration judge's authority to act, *Lopez-Telles v. INS* is instructive. In that case, Lopez-Telles was granted a visitor's visa to the United States from her native Nicaragua following a devastating earthquake that destroyed her home and killed her relatives.[360] After she overstayed her visa, removal proceedings were instituted against her.[361] She asked the

352. *Murgia*, 15 Cal. at 291.
353. Lopez-Telles v. INS, 564 F.2d 1302 (9th Cir. 1977).
354. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).
355. *Id.* at 1036–37.
356. *Id.* at 1037.
357. *Id.* at 1037–38.
358. *Id.* at 1038.
359. *Id.* at 1051.
360. Lopez-Telles v. INS, 564 F.2d 1302, 1303 (9th Cir. 1977).
361. *Id.*

immigration judge to terminate proceedings for "humanitarian reasons."[362] The immigration judge declined on the ground that he had no authority to do so.[363] The Ninth Circuit agreed, ruling that immigration judges are "creatures of statute, receiving some of their powers and duties" by statute and some by implementing regulations. Immigration judges have no "inherent" powers of the judiciary without "independent powers" nor "broad discretionary authority."[364]

Despite these challenges to the application of *Murgia*-type arguments in removal proceedings, some arguments can still be viable. Consider *Lopez-Mendoza.* The court's refusal to extend the exclusionary rule was in the context of "peaceful arrests."[365] Importantly, the Court reserved the possible application of the exclusionary rule if Fourth Amendment violations by immigration agents were "widespread." The court also suggested that a different outcome might be warranted in the face of "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained."[366] So, for example, in *Oliva-Ramos v. Attorney General,* the Third Circuit was troubled by the BIA's refusal to allow potential evidence of egregious and widespread violations of the Fourth Amendment.[367] In that case, over Oliva-Ramos's objection, the government introduced evidence of his noncitizen status that was obtained during an early morning raid and hours long detention.[368] He sought to introduce evidence not only of the particular circumstances of his experience, but also of a consistent pattern of ICE conducting those raids during unreasonable hours.[369] The court ruled that it was "error to categorically refuse the remedy of suppression without affording [Oliva-Ramos] an opportunity to establish that the Government was engaging in the kind of egregious or widespread abuses that justifies suppression under *Lopez-Mendoza.*"[370] Importantly, whether the violation is an egregious violation of the Fourth Amendment is not necessarily synonymous with early morning raids or hours long questioning without the opportunity to eat or drink. In *Gonzalez-Rivera v. INS,* the Ninth Circuit suppressed evidence gathered as a result of a stop based solely on the individual's Latin appearance.[371] The court held that egregiousness was established because

362. *Id.*
363. *Id.* at 1303.
364. *Id.*
365. INS v. Lopez-Mendoza, 468 U.S. 1032, 1051 (1984).
366. *Id.* at 1050.
367. *See* Oliva-Ramos v. Att'y Gen. of the U.S., 694 F.3d 259, 275 (3d Cir. 2012).
368. *See id.* at 263–64.
369. *Id.* at 263, 281.
370. *Id.* at 282.
371. 22 F.3d 1441, 1442 (9th Cir. 1994).

the stop was made in bad faith.[372] In essence, racial profiling by ICE can give rise to a suppression motion under the right circumstances.[373]

Thus, in spite of the fact that in *Lopez-Mendoza* the Supreme Court refused to extend the Fourth Amendment exclusionary rule to civil deportation proceedings resulting from "peaceful arrests," the Court recognizes that a different approach is in order when "notions of fundamental fairness" are "transgress[ed]."[374] Therefore, racial enforcement of immigration laws may very well provide space for *Murgia*-type motions to terminate in removal proceedings that are fundamentally unfair.

2. Necessity Defense

At the immigration clinic that I help to direct at the University of San Francisco School of Law, the vast majority of the clients are from the northern triangle of Central America—Honduras, Guatemala, and El Salvador—with a significant additional number from Mexico. I was fortunate enough to secure funding to start the clinic through grants from the City and County of San Francisco and the State of California. Those funds were made available in response to the surge of unaccompanied minors in 2014 and 2015; those governmental entities recognized the need to support more immigration legal services to provide representation to minors and adults fleeing gang, cartel, and domestic violence in those countries. As such, more than ninety percent of our clients are asylum seekers. And although we have a great success rate, obtaining asylum is challenging for several reasons.

Representing asylum clients from Central America requires regular research and updating of country conditions to support asylum applications. Becoming familiar with the root causes of migration is part and parcel of being a good asylum lawyer. And perhaps not surprisingly, one begins to wonder what are the so-called "root causes' of the migration. Eventually, this causes one to delve into the history of the United States' involvement in those countries.

It turns out that the United States has played a big role in creating many of the driving forces of migration from Central America, from the effects on the economy, gang formation, and now even climate migration. Some of the contributing factors include CIA involvement in coups and support of right-wing military groups; support for United States

372. *Id.* at 1442–43.

373. *See also* Almeida-Amaral v. Gonzales, 461 F.3d 231, 235 (2d Cir. 2006) ("even where the seizure is not especially severe, it may nevertheless qualify as an egregious violation if the stop was based on race.").

374. INS v. Lopez-Mendoza, 468 U.S. 1032, 1050–51 (1984).

multinational corporations in Central America;[375] the United States deportation of gang members from southern California to countries where those individuals formed extensions of MS-13 and 18th Street gangs; and the fact that the United States has the biggest effect on climate change, affecting agriculture in Central America. Those United States actions have affected the societal, economic, and political structures in the nations that are akin to the institutionalized and systemic racism against Blacks that we find in the United States.

Thus, the case can be made that many migrants from Central America are left with little choice but to migrate and, indeed, to flee. For our asylum clients, we try to fit their stories into the framework of United States asylum law, but not without difficulties and challenges. However, given what we know about the role that the United States has played in the forced migration, the immigration or asylum system should be open to claims related to the United States' role in the root causes. Aviva Chomsky offers this perspective:

> Isn't it finally time that the officials and citizens of the United States recognized the role migration plays in Central American economies? Where U.S. economic development recipes have failed so disastrously, migration has been the response to these failures and, for many Central Americans, the only available way to survive . . . . At present, migration is a concrete way that Central Americans are trying to solve their all-too-desperate problems. Since the nineteenth century, Indigenous and peasant communities have repeatedly sought self-sufficiency and autonomy, only to be displaced by U.S. plantations in the name of progress. They've tried organizing peasant and labor movements to fight for land reform and workers' rights, only to be crushed by U.S.-trained and sponsored militaries in the name of anti-communism. With other alternatives foreclosed, migration has proven to be a twenty-first-century form of resistance and survival.[376]

This idea of migration as a "form of resistance and survival" suggests that many migrants from Central America are migrating due to phenomena that are way beyond their control. Yes, they may be attempting

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375. *See Push or Pull Factors: What drives Central American Migrants to the U.S.?*, NAT'L IMMIGR. F. (July 23, 2019), https://immigrationforum.org/article/push-or-pull-factors-what-drives-central-american-migrants-to-the-u-s/ [https://perma.cc/H58A-38GB].

376. Aviva Chomsky, *Migration as Resistance*, MASS. PEACE ACTION (July 21, 2021), https://masspeachttps://masspeaceaction.org/migration-as-resistance/ [https://perma.cc/PW3R-DWF6].

to cross United States borders without proper documents (although truth be told, the vast majority are trying to present themselves at the ports of entry to seek asylum and are not trying to cross illegally). But in a sense, they have no other choice.

In many ways, this conjures up the notion of the defense of necessity in criminal law. Occasionally, a person faces a situation that requires doing something illegal to prevent serious harm. In such a situation, the defense of necessity, which is also called the "lesser of two evils" defense, may come into play.[377] A defendant who raises the necessity defense admits to committing what would normally be a criminal act, but claims the circumstances justified it. Normally, to establish a necessity defense, a defendant must prove that:

- there was a specific threat of significant, imminent danger,
- there was an immediate necessity to act,
- there was no practical alternative to the act,
- the defendant did not cause or contribute to the threat,
- he or she acted out of necessity at all times, and
- the harm caused was not greater than the harm prevented.[378]

Consider these examples**:**

A defendant was convicted of driving with a suspended license for traveling to a telephone to call for help for his pregnant wife.[379] He did not have his own phone, and his wife was experiencing back and stomach pains.[380] He first walked to his only neighbor's house to use the phone but found no one home.[381] He then drove a mile and a half to the nearest phone to call his mother-in-law for help.[382] On the drive back home, the police stopped him for a broken taillight and arrested him for driving with a suspended license.[383] Recognizing that circumstances beyond one's control sometimes force a defendant to engage in illegal conduct, the appellate court ruled that the trial court should have allowed the defendant to present a necessity defense.[384]

In *United States v. Contento-Pachon*, the Ninth Circuit found duress and necessity could be used when a man smuggled drugs into the United States based on the threat that if he did not, his wife and child would be murdered.[385]

In *U.S. v. Alzate*, Alzate presented a duress defense.[386] Under the law of the Eleventh Circuit, to establish a defense of duress a defendant

377. *See* United States v. Schoon, 971 F.2d 193, 195 (9th Cir. 1991).
378. *See generally id.*
379. State v. Cole, 403 S.E.2d 117, 118 (S.C. 1991).
380. *Id.* at 118.
381. *Id.*
382. *Id.*
383. *Id.*
384. *Id.* at 119.
385. 723 F.2d 691, 693 (9th Cir. 1984).
386. United States. v. Alzate, 47 F.3d 1103, 1104 (11th Cir. 1995).

must show that he acted under an immediate threat of death or serious bodily injury, that he had a well-grounded fear that the threat would be carried out, and that he had no reasonable opportunity to escape or inform [the] police.[387] Alzate argued that men to whom he owed a debt forced him to transport a suitcase containing drugs by threatening immediate harm to Alzate and his family.[388] The Court held that Alzate deserved a fair trial on that issue.[389] In a separate case, the Eleventh Circuit affirmed the availability of duress as a defense if threats were made toward the person's spouse or children.[390]

In many asylum cases that we have, it is quite evident that clients have fled their home countries out of duress and necessity. It is definitely a matter of survival when they have suffered violence or been threatened by gangs, cartels, or domestic violence. As such, they should be excused for entering or attempting to enter the United States without proper documentation. Their assertion of duress or necessity should be accepted as a matter of fundamental fairness. Yes, their actions may be an attempt to break the law of entry without documentation. However, their acts are definitely the lesser of two evils—the other evil is being subject to violence. They are generally facing a threat of significant, imminent danger. There is an immediate necessity to act. There is no practical alternative to the act. They have neither caused nor contributed to the threat. Rather, they have acted out of necessity. The harm (entry without documents) is certainly not greater than the harm prevented—being victimized by violence.

3. Black Rage Defense

Being victimized by United States imperialism or an institutionally racist immigration system raises issues that are of a different nature. I have presented evidence of United States imperialism. I have presented evidence of the racist immigration system. So how can that translate for migrants who are victims of those situations?

As early as 1925, defense attorney Clarence Darrow introduced the notion of an environmental hardship defense while defending a black family who shot into a drunken white mob that had encircled their home.[391] Much later, William Kunstler and Ronald Kuby unsuccessfully tried to argue that Colin Ferguson (accused of killing six and wounding nineteen others on the Long Island Railroad) had been driven to temporary

387. *Id.* at 1104.
388. *Id.*
389. *Id.* at 1110.
390. *See* United States v. Blanco, 754 F.2d 940, 943 (11th Cir. 1985).
391. *See* Paul Harris, BLACK RAGE CONFRONTS THE LAW, ch. 8 (NYU PRESS 1997).

insanity by a psychiatric condition they termed "black rage."[392] Kunstler and Kuby argued Ferguson had been driven insane by racial prejudice and could not be held criminally liable for his actions even though he had committed the killings.[393] The attorneys compared it to the utilization of the battered woman defense, posttraumatic stress disorder and the child abuse syndrome in other cases to negate criminal liability.[394] In 1971, Paul Harris successfully defended a young black man charged with armed bank robbery.[395] He points out that "a person's environment can, and does, affect their life and actions, [and] even the most rational person can become criminally deranged, when bludgeoned into hopelessness by exploitation, racism, and relentless poverty."[396]

Forced undocumented migration resulting from United States imperialism or a racist immigration system is not a deranged act. Being victimized by exploitation, racism, and relentless poverty is evident in many of the clients we see. Making that evident to an immigration judge is an important goal in contextualizing the actions of individuals facing removal. And while immigration judges have little authority to simply terminate proceedings out of sympathy in a manner analogous to jury nullification in the criminal courtroom, at the very least, perhaps that contextualization can positively influence the immigration judge's weighing of factors in exercising the discretion that is part of many forms of immigration relief.

4. Seeking Justice

Raising matters of racial justice should be practiced not just in the realm of advocacy for immigration policy change, but also in the immigration courtroom. When victims of racism are before an immigration judge, the evidence of that racism should be accepted into evidence when offered as relevant to relief sought. We have witnessed some significant success in that regard, for example, in motions to exclude evidence obtained as a result of racial profiling.[397]

While resistance to the claims of racism as relevant to viable defenses or relief may be offered by the immigration court, we should persist in making the record for appeal. And if those appeals in the judicial

392. Michael Peil, *The Long-Island Railroad Murder – "Black Rage" or "So Crazy He Thinks He's Sane*?," LEGAL INFO. INST. (Dec. 21, 1997, 1:18 PM), https://www.law.cornell.edu/background/unabom/lirr.html [https://perma.cc/RW3J-Y2RH].

393. *Id.*

394. *See generally The Shame of 'Black Rage' Defense*, CHI. TRIB. (June 6, 1994), https://www.chicagotribune.com/news/ct-xpm-1994-06-06-9406060097-story.html [https://perma.cc/75QE-PLV7].

395. *See* Paul Harris, *Introduction to* BLACK RAGE CONFRONTS THE LAW, Book Summary (NYU PRESS 1997).

396. *Id.*

397. *See supra* Section III(B)(a).

system bear no fruit, then perhaps an appeal to rulemaking and legislative authorities should follow. At the very least, the evidence of racism must be displayed for all to see the very nature of the system in which we practice.

If the events following the murder of George Floyd have taught us anything, we must be committed to seeking justice when victims of racism at the hands of official misconduct, policies, or law are identified. Excluding evidence of that racism silences the victim. In the immigration enforcement world, we would do well to remember a wise admonition of the Board of Immigration Appeals years ago: "immigration enforcement obligations do not consist only of initiating and conducting prompt proceedings that lead to removals at any cost. Rather, . . . the government wins when justice is done."[398]

CONCLUSION

The intersection between racial justice and immigrant rights is clear. Immigration enforcement has been practiced in a racist manner. The immigration laws have been constructed in a racist manner, and the system now displays institutionalized racism. As such, we need to practice immigration law in a bold manner that raises issues of racism in the courtroom while simultaneously advocating for policy change that demands racial justice.

398. Matter of S-M-J-, 21 I. & N. Dec. 722, 727 (BIA 1997).