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Seeing Immigration and Structural Racism: It's Where You Put Your Eyes

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Seeing Immigration and Structural Racism: It's Where You Put Your Eyes

66 N.Y.L. SCH. L. REV. 277 (2021–2022)

ABOUT THE AUTHOR: Chair, Distinguished Professor of Immigration and Human Rights Law, New York Law School. The author thanks her colleagues in the Race, Bias, and Advocacy course, and their students, for their countless contributions to her thinking, and appreciates their willingness to share and learn together. The author is also grateful to Eolia Woodall, author, lawyer, and longtime friend, who gave detailed comments on this essay. The author received valuable assistance from Rebecca Carey '21, Racial Justice Fellow for the 2021–2022 academic year, and from Julia Miller '22, Pro Bono Scholar for the 2021–2022 academic year.

“Color is not a human or a personal reality; it is a political reality.”

—James Baldwin¹

I. INTRODUCTION

Immigration law is frequently a proxy for racial and ethnic discrimination. The legal fictions and rules that generate our immigration laws would be unconstitutional in any other context.² This essay asks you to interrogate your assumptions and to explore the intersection of race and immigration status. Part II begins with a discussion of the disparate treatment of individuals seeking to immigrate to the United States, namely, disparities based on national origin. In Parts III and IV, I discuss the history of racism and how it has been embedded in U.S. immigration and criminal law; I also explain its disproportionate effect on non-white individuals in the United States. Parts V and VI detail the dangers inherent in using race and national origin in immigration enforcement and challenges to provide proof of lawful presence. In Part VII, I conclude with a discussion of what the legal community can do to ameliorate racism in immigration law.

II. IT'S WHERE YOU PUT YOUR EYES³

In the United States, in 2019, nearly 14 percent of the population was foreign born.⁴ Do the terms “American” or “citizen” trigger a default image in your mind?⁵

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1. James Baldwin, *Letter from a Region in My Mind*, NEW YORKER, Nov. 17, 1962, at 59, 143.
 2. These are not new assertions. For many years, a number of scholars have written carefully and frequently about the racism inherent in many of our immigration laws. I cite several such scholars throughout the essay. See, e.g., Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 22 (1991) (quoting Ibrahim J. Wani, *Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law*, 11 CARDOZO L. REV. 51, 53–54 (1989)) (“[T]hese fictions are favored in immigration law primarily because of their expediency in allowing immigration law to achieve purposes that would otherwise be constitutionally and morally impermissible or at least suspect.”).
 3. I am grateful to Professor Sam Gill who asked me to read his essay with this title. Sam Gill, *It’s Where You Put Your Eyes,* 4 PARABOLA 91 (1979). The essay is about “seeing,” and how our own culture and role may shape what we see and perceive. *Id.* His essay concerns how we might approach the art of American Indians, or how we might examine the artifacts of cultures such as masks. *Id.* He gives examples of how our understanding and meaning shifts when we try to envision the context of the creative process or how an artifact might have been used. *Id.* Do we look at a mask or see through the eye holes of the mask? He writes, “[t]he shape of our own reality may blind us to the perspectives of others . . . that understanding is shaped by where you put your eyes.” *Id.* at 97.
 4. The U.S. Census Bureau estimates are not yet available from the 2020 census but this data is built upon a complex model used by demographers and the U.S. government. HOLLY STRAUT-EPPSTEINER, CONG. RSCH. SERV., IF11806, CITIZENSHIP AND IMMIGRATION STATUSES OF THE U.S. FOREIGN-BORN POPULATION 1 (2021) (13.7 percent); see also Abby Budiman et al., *Facts on U.S. Immigrants, 2018*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/hispanic/2020/08/20/facts-on-u-s-immigrants-current-data/> (reporting a U.S. foreign-born population of 44,760,622 in 2018).
 5. What is your definition of “American”? Does it include all residents of the American continent from Canada to the tip of Argentina, or do you use the term as a default to define residents of the United States? This essay uses the terms “noncitizen” or “immigrant” to describe people who are not U.S. citizens. Language can be very powerful. For more about how to consider the power of terms, see

For most of us, the default picture of a U.S. citizen is likely a white person of Western European descent. Now imagine an immigrant. Are you envisioning the diversity of races, religions, and national origins? In New York City, about one of every three people was born outside the United States.⁶ Of these New York City immigrants, 19 percent are Black, 19 percent are white, 31 percent are Hispanic, and 28 percent are Asian or Pacific Islander.⁷ The population of Newark, New Jersey, is similarly diverse with 32 percent of its population foreign born. This is in a city where almost 50 percent of the population is Black.⁸ From these broad categories it can be difficult to know what percentage of Blacks are native born and what percentage are foreign nationals.⁹ Diversity is not just about race but also immigration status.

How does the offensive but common adjective “illegal” change your image? Did your imaginary racial profile change? What informs your imagination? Television? Social media? Politicians? Perhaps you are not surprised that the largest group of immigrants who enter without inspection are from Mexico and Central America.¹⁰

DEFINE AM., *THE FIRST 100 DAYS OF THE BIDEN ADMINISTRATION: A ‘SURGE’ IN NEGATIVE LANGUAGE AROUND THE BORDER* (2022).

The Biden administration has issued a directive that noncitizens no longer be called “aliens.” Maria Sacchetti, *ICE, CBP to Stop Using ‘Illegal Alien’ and ‘Assimilation’ Under New Biden Administration Order*, WASH. POST (Apr. 19, 2021), https://www.washingtonpost.com/immigration/illegal-alien-assimilation/2021/04/19/9a2f878e-9ebc-11eb-b7a8-014b14aeb9e4_story.html. “Alien” is the technical term for everyone who is not a citizen as defined in the Immigration and Nationality Act (INA). INA § 101(a)(3), 8 U.S.C. § 1101(a)(3). This essay often refers to a section of the INA and then follows with that section’s codification in Title 8 of the U.S. Code. Specialists in the field use the statutory sections rather than the U.S. Code.

6. Weissman Ctr. for Int’l Bus., Baruch Coll., *Place of Birth and Citizen Status*, NYC DATA, https://www.baruch.cuny.edu/nycdata/population-geography/pop-native_foreign.htm (last visited Apr. 11, 2022) (reporting that 36 percent of the city’s residents are foreign born). For statewide data, see AM. IMMIGR. COUNCIL, *IMMIGRANTS IN NEW YORK* (2020). New York City is not alone in having a significant proportion of foreign-born residents. For a state-by-state analysis, see Budiman et al., *supra* note 4 (navigate to “Download Excel sheet with all region findings”).
7. MAYOR’S OFF. OF IMMIGRANT AFFS., N.Y.C., *A DEMOGRAPHIC SNAPSHOT: NYC’S ASIAN AND PACIFIC ISLANDER (API) IMMIGRANT POPULATION 3–4* (2021) (reporting data from 2019). In Queens, foreign-born Asians and Pacific Islanders make up 52 percent of the population. *Id.* at 1. For consistency with sources cited throughout this piece, “Hispanic” and “Latino” are used interchangeably.
8. *QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219> (last visited Apr. 11, 2022) (search for “Newark City, New Jersey”). Newark, New Jersey, is 32.5 percent foreign born and 49.5 percent Black. *Id.* In January of 2022, the Pew Research Center after studying recent census data found that one in ten Black people are immigrants and that the percentage of foreign-born Black immigrants is likely to grow. See Christine Tamir, *Key Findings About Black Immigrants in the U.S.*, PEW RSCH. CTR., <https://www.pewresearch.org/fact-tank/2022/01/27/key-findings-about-black-immigrants-in-the-u-s/> (Jan. 27, 2022).
9. As of 2019, the estimated Black immigrant population in the United States was 4,618,555. *Black Immigrants in the United States: Status, Challenges, and Impacts*, BOUNDLESS, <https://www.boundless.com/research/black-immigrants-in-the-united-states-status-challenges-and-impacts/> (last visited Apr. 17, 2022).
10. For data estimates of the U.S. undocumented population by country of origin, see *Estimates of Undocumented and Eligible-to-Naturalize Populations by State*, CTR. FOR MIGRATION STUD., <http://data.cmsny.org/> (last visited Apr. 11, 2022).

SEEING IMMIGRATION AND STRUCTURAL RACISM: IT'S WHERE YOU PUT YOUR EYES

How many undocumented Canadians do you know?¹¹ If a Canadian is coming to the United States as a tourist or for a short business visit, they can seek entry without a visa for a period of up to six months.¹² The ease of entry and the lack of formal structures perhaps understandably leads to many Canadians violating the immigration laws. In fact, as a strict empirical matter, more Canadians overstay their period of authorized stay (79,679 of 9.5 million expected to depart) than Mexican nationals who enter with a visa (43,137 of 2.9 million expected to depart).¹³ Despite negotiating the former North American Free Trade Agreement (NAFTA) and current United States–Mexico–Canada Agreement (USMCA), we do not treat the movement of people between our nations equally.¹⁴ Why? Could it be that our perceptions of race have ultimately led to a system that creates bureaucratic and administrative barriers to entry, and thus we perceive our Mexican entrants as law breakers but do not see our Canadian immigration violators?¹⁵ I certainly think so.

In an article on the history of racism in immigration law published in 2014, Jordana A. Hart opened with a quote from House Speaker Nancy Pelosi.¹⁶ Pelosi said that “race has something to do with” hindered efforts to change immigration laws, namely, efforts frustrated by objections from members of Congress who allegedly would tell their own Irish constituents that they would gladly support

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11. Canada is also a racially diverse country. See *Immigration and Ethnocultural Diversity in Canada*, STAT. CAN., <https://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-010-x/99-010-x2011001-eng.cfm> (July 25, 2018). Ask yourself if you have a default racial assumption about Canadian nationals. We all have to constantly test our assumptions about race.
 12. Documentary Requirements for Nonimmigrants, 8 C.F.R. § 212.1(a)(1) (2020); see also *Canadians Requiring Visas*, U.S. EMBASSY & CONSULATES CAN., <https://ca.usembassy.gov/visas/do-i-need-a-visa/> (last visited Apr. 11, 2022) (navigate to “Information for Canadians”). The waiver of a visa stamp used to be afforded to several other countries in North America such as the Bahamas and the British Virgin Islands. See 8 C.F.R. §§ 212.1(a)(3), 212.1(b).
 13. U.S. DEP’T OF HOMELAND SEC., FISCAL YEAR 2019 ENTRY/EXIT OVERSTAY REPORT 30 (2020). This data may be fairly inaccurate because U.S. Customs and Border Protection (CBP) does not currently measure the number of Canadian cars or foot traffic entering the United States, but only entries by air and sea. *Id.*
 14. The immigration provisions allow visa waiver for citizens and residents of Canada, but Mexican nationals must go to a U.S. Consulate and obtain a visa stamp before entering. Compare 8 C.F.R. § 212.1(a)(1) (Canadian immigration), with § 212.1(c) (Mexican immigration). From this, I infer a racial and ethnic bias at play.
 15. See Appendix *infra* for a chart illustrating changes in the foreign-born population of certain states from 2010 to 2019. It is easy to assume that immigration issues are only relevant in metropolitan communities or states assumed to have large immigrant populations. However, the top four states for growth in immigrant population over the past ten years are North Dakota, South Dakota, Kentucky, and Delaware, respectively. *Immigrant Population by State, 1990–Present*, MIGRATION POL’Y INST., <https://www.migrationpolicy.org/programs/data-hub/charts/immigrant-population-state-1990-present?width=1000&height=850&iframe=true> (last visited Apr. 11, 2022) (choose “Percent change in immigrant population” from “Select Indicator” dropdown menu). With these demographics in mind, it is likely that many federal and state laws will impact these growing communities differently than those comprised entirely of U.S. citizens.
 16. Jordana A. Hart, *Of Race and Politics: A History of U.S. Immigration*, VOICE, June 2014, at 8–10, American Immigration Lawyer Association, Doc. No. 14052842.

reform for their group.¹⁷ In fact, many in Congress supported offering aid to some Western European immigrants while generally opposing migration from the global south or Asia.¹⁸ Ironically, many in the early years of U.S. history feared Irish immigration as bringing people who would undercut the wages of U.S.-born workers, establish a Catholic hegemony, or introduce dangerous radicals.¹⁹

Of course, Canada, Ireland, and Mexico are multiracial countries, but the general stereotype assumes a particular race or ethnicity is dominant in each. We can also recognize that favoring or opposing migration from a nation might be explained by other factors.²⁰ Nevertheless, it is hard to ignore that many people opposed to

17. *Id.* at 9; see also H.R. 7164, 115th Cong. (2018). There is a long history of trying to expand Irish immigration in the past thirty years. For example, Rep. Brian Donnelly (D-Mass.) sponsored a visa lottery where 35 percent of the allocation went to the “lucky” Irish. A.P. Lobo & J.J. Salvo, *Resurgent Irish Immigration to the US in the 1980s and Early 1990s: A Socio-Demographic Profile*, 36 INT’L MIGRATION 257, 262 (1998). As the economy of Ireland improved in the 1990s, some of the pressure to “legalize the Irish” subsided. *Id.* at 269–70. Recent reporting indicates that there is a significant population of undocumented Irish who likely overstayed their visas. Donnie O’Sullivan, *White, Irish, and Undocumented in America*, CNN, <https://www.cnn.com/2017/03/16/us/white-irish-undocumented-trnd/index.html> (Mar. 16, 2017).

18. See, e.g., Edward C. Carter II, *A “Wild Irishman” Under Every Federalist’s Bed: Naturalization in Philadelphia, 1789–1806*, 133 PROC. AM. PHIL. SOC’Y 178, 182–85 (1989) (noting policies contributing to the Irish as “an amazingly high proportion of all aliens naturalized”).

As this essay was going to press, many are noting the disparate treatment of Asian, Brown, and Black asylum seekers as opposed to white European people fleeing the terrible war in Ukraine. See, e.g., Alexandra Hutzler, *U.S. Criticized for Welcoming Ukrainians as Haitians Face Deportation*, NEWSWEEK, <https://www.newsweek.com/us-criticized-welcoming-ukrainians-haitians-face-deportation-1691620> (Mar. 24, 2022); Philip Marcelo, *African Refugees See Racial Bias as US Welcomes Ukrainians*, AP NEWS (Apr. 1, 2022), <https://apnews.com/article/russia-ukraine-war-refugees-racial-bias-c36828f28316641670a507b384019a39>.

My own view is that we must be as welcoming as we can to all people, regardless of race. Under the narrow definition of persecution on account of a protected ground, many people fleeing the war in Ukraine may not have a particular claim to refugee protection because they are victims of the displacement created by war, not by “persecution.” Essentially, I question whether race is part of our governmental and societal response.

19. See JAMES MORTON SMITH, *FREEDOM’S FETTERS* 23–25 (1956). Harrison Gray Otis, a congressman from Massachusetts, spoke of fearing the “wild Irish” and advocated for controls on the admission of French and Irish citizens in 1798. *Id.* Indeed, that same year, an Irish attempt at joining with the French to overthrow British rule was thwarted and some of the suspected organizers fled to the United States. See *id.*

20. See generally NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995) (discussing changing cultural and socioeconomic circumstances leading to Irish acceptance in white society). Some advocate an immigration policy based on high educational achievement and professional training. STEPHEN YALE-LOEHR & MACKENZIE EASON, *RECRUITING FOR THE FUTURE: A REALISTIC ROAD TO A POINTS-TESTED VISA PROGRAM IN THE UNITED STATES* 46–53 (2020). While these types of “point” systems offer many advantages, if the system is unduly rigid it could exclude many people from poor countries or those who lack the opportunity in the country of origin to learn English fluently. Relatedly, Congress authorized a special path to permanent residence for Cubans who entered the United States. Cuban Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966) (codified as amended at 8 U.S.C. § 1255 note (Cuban Refugees: Adjustment of Status)). For an analysis of the history and changing circumstances of Cuban immigration to the United States, see Brittany Blizzard & Jeanne Batalova, *Cuban Immigrants in*

immigration reforms openly fear a dilution of the current demographics of the United States. This is an old fear, and one espoused by no less a luminary than Ben Franklin:

[T]he number of purely white people in the world is proportionably very small. All *Africa* is [B]lack or tawny. *Asia* chiefly tawny. . . . And in *Europe*, the *Spaniards*, *Italians*, *French*, *Russians* and *Swedes*, are generally of what we call a swarthy complexion; as are the *Germans also*, *the Saxons only excepted*, who with the *English*, make the principal body of white people on the face of the earth. I could wish their numbers were increased. . . . [W]hy should we in the sight of superior beings, darken its people? [W]hy increase the sons of *Africa*, by planting them in *America*, where we have so fair an opportunity, by excluding all [B]lacks and tawneys, of increasing the lovely white and red? But perhaps I am partial to the complexion of my Country, for such kind of partiality is natural to Mankind.²¹

Every new concern in immigration policy is echoed from our past. Fears of language or cultural differences, of religious practices, or even of high fertility rates, have perennially been raised in immigration debates. The point here is that we seem to ignore many who have broken the immigration rules when the person is white and from Western Europe or our neighbor to the north.²² We want to preserve our assumptions that immigration laws and procedures are free from racial bias. But we cannot refuse to see or try to remain innocent of such racial bias, for as James Baldwin wrote, “[i]t is the innocence which constitutes the crime.”²³

the United States, MIGRATION POL’Y INST. (June 11, 2020), <https://www.migrationpolicy.org/article/cuban-immigrants-united-states-2018>.

21. BENJAMIN FRANKLIN, OBSERVATIONS CONCERNING THE INCREASE OF MANKIND, PEOPLING OF COUNTRIES, &c., at ¶ 24 (William Abbatt 1918) (1755); see also Annalisa Merelli, *A History of American Anti-Immigrant Bias, Starting With Benjamin Franklin’s Hatred of the Germans*, QUARTZ (Feb. 12, 2017), <https://qz.com/904933/a-history-of-american-anti-immigrant-bias-starting-with-benjamin-franklins-hatred-of-the-germans/>. For other works that trace the history of racial fears in immigration law, see FRANK H. WU, *YELLOW* (2002); George A. Martinez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321 (1997); and IAN F. HANEY LÓPEZ, *WHITE BY LAW* (1996).
22. See generally NATSU TAYLOR SAITO, *SETTLER COLONIALISM, RACE, AND THE LAW* 111–45 (2020) (arguing that U.S. immigration policy has favored those of European origin). This is a remarkable book with many historical and sociological issues to fully explore.
23. JAMES BALDWIN, *My Dungeon Shook: Letter to My Nephew on the One Hundredth Anniversary of the Emancipation*, in *THE FIRE NEXT TIME* 1, 6 (Vintage Books 1993) (1963). James Baldwin is writing here of the refusal of those with power in society to recognize the suppression and harm to Black people. *Id.*
 [T]his is the crime of which I accuse my country and my countrymen, and for which neither I nor time nor history will ever forgive them, that they have destroyed and are destroying hundreds of thousands of lives and do not know it and do not want to know it.
Id. at 5. I use the quote here to say that our society is similarly unwilling to examine how law is used to divide people, and creates categories of immigration status that make people vulnerable to great harm. While some borders and divisions may be necessary, we cannot be innocent of the racial roots and continued use of the tools of law that have subjugated so many people, including Black immigrants. See Peniel Ibe, *Immigration Is a Black Issue*, AM. FRIENDS SERV. COMM., <https://www.afsc.org/blogs/news-and-commentary/immigration-black-issue> (Feb. 16, 2021).

III. EMBEDDING RACE IN U.S. IMMIGRATION LAW

When we study U.S. history or begin to examine the structure of institutional racism, the myth of open borders diverts our understanding of the ways in which immigration status and barriers to naturalization supported other forms of economic and social discrimination. Historically, race not only constrained movement into the country but also the freedom to relocate to some states. Until the adoption of the Fourteenth Amendment, the U.S. Constitution was silent on the definition of who is a “citizen” of the United States. The original Constitution did not explore the power over immigration law except for two express provisions contained in Article I. The first of these two constitutional provisions gave Congress the power to adopt a uniform law of naturalization and removed the power to define national citizenship from the individual states.²⁴ In 1790, Congress enacted a statute defining the criteria for naturalization.²⁵ The applicant had to be male, free, and “white.”²⁶ Congress did not eliminate the “white” criterion until 1952.²⁷ The second constitutional provision expressly forbade Congress from passing any law regarding the importation or migration of persons until 1808.²⁸ It was designed to prevent any federal exclusion of the importation of enslaved persons.²⁹

The first case to define the power over immigration as inherent in federal sovereignty was *Chae Chan Ping v. United States*, decided in 1889.³⁰ In that case, sometimes called the “Chinese Exclusion Case,” a unanimous Supreme Court found that Congress had the authority to ban the admission of all Chinese persons. The Court based this power on a conception of inherent sovereignty granting any government the power to determine who should be allowed to enter. Given the size of the country and the inability to monitor all possible points of entry for purposes of

24. U.S. CONST. art. I, § 8, cl. 4.

25. Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103–04 (repealed 1795); see also Kevin R. Johnson, *Racial Restrictions on Naturalization: The Recurring Intersection of Race and Gender in Immigration and Citizenship Law*, 11 BERKELEY WOMEN’S L.J. 142, 146 (1996) (reviewing LÓPEZ, *supra* note 21).

26. Naturalization Act of 1790 § 1; see also, e.g., John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817, 833–841 (2000) (noting how people of Armenian descent had to fight to establish whiteness).

27. Immigration and Nationality Act of 1952, Ch. 477, § 311, 66 Stat. 163, 239 (codified as amended at 8 U.S.C. § 1422); see also ROGERS M. SMITH, *CIVIC IDEALS* 511 (1997); KUNAL M. PARKER, *MAKING FOREIGNERS* 151 (2015).

28. U.S. CONST. art. I, § 9, cl. 1.

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

Id.

29. THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP* 202 (6th ed. 2008); see also LENNI B. BENSON ET AL., *IMMIGRATION AND NATIONALITY LAW* 40 (2d ed. 2020) [hereinafter *IMMIGRATION & NATIONALITY LAW*].

30. 130 U.S. 581 (1889).

barring admission, Congress exercised this power against Chinese nationals found within the territory.³¹ Specifically, Congress created a new statute that allowed for the expulsion of Chinese persons who could not prove they had entered lawfully prior to the ban.³²

Long-term residents of the United States volunteered to be arrested to test the constitutionality of the new deportation statute. These men became the defendants in the 1893 case of *Fong Yue Ting v. United States*, where they objected to the deportation of people without the protections afforded to criminal defendants and to the statutory requirement that a Chinese person could only avoid deportation upon the testimony of a “white witness” verifying their lawful entry.³³ The Supreme Court upheld the federal statute, reasoning that Congress could remove even the friendly alien who had not naturalized.³⁴ Yet nowhere in the Court’s opinion is there any recognition of the statutory bar to naturalization for those who could not prove they were white.³⁵ Unlike the white immigrants who could naturalize, the statutes kept the Chinese immigrant forever outside.

While the dissenters warned that Congress could one day change the immigration rules for races other than the “obnoxious Chinese,”³⁶ the principle established in *Fong Yue Ting* has never been reversed: Congress has plenary authority to write laws that can end permanent residence and subject an individual to deportation.³⁷ Thus, from the earliest moments in U.S. immigration history, race and the requirement of whiteness have been controlling concepts in the application of the law. The Chinese

31. See BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850–1990* (1993), for a discussion by one of the great analysts and historians of the Chinese exclusion and its impact on immigration policy.

32. Geary Act, Ch.60, 27 Stat. 25 (1892) (repealed 1943).

33. 149 U.S. 698, 727 (1893). In the decades that followed, criminal protections were repeatedly held inapplicable to immigration cases. See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580, 595 (1952). The Supreme Court has also repeatedly treated immigration law as civil. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963) (limiting Sixth Amendment right to counsel to indigent criminal defendants); *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001) (prohibiting detention of noncitizens in excess of six months); *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 33 (2006) (allowing retroactive application of certain Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) provisions to noncitizens who immigrated into the United States prior to its enactment); see also Tania N. Valdez, *Pleading the Fifth in Immigration Court: A Regulatory Proposal*, 98 WASH. U. L. REV. 1343, 1372 (2021) (citing *U.S. ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 154 (1923) (permitting immigration judge to draw adverse inference against noncitizen who “pleaded the Fifth”)).

34. See *Fong Yue Ting*, 149 U.S. at 711, 732; see also Shoba Sivaprasad Wadhia, *Discretion and Disobedience in the Chinese Exclusion Era*, 29 ASIAN AM. L.J. (forthcoming 2022) (manuscript at 8–9) (on file with *New York Law School Law Review*).

35. This statutory bar came from the Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103–04 (repealed 1795).

36. *Fong Yue Ting*, 149 U.S. at 743 (Brewer, J., dissenting); see Merelli, *supra* note 21 (summarizing the history of anti-immigrant bias in the United States from the founding to the beginning of the twenty-first century).

37. 149 U.S. at 724 (majority opinion).

exclusions were soon expanded to apply to other people of Asian descent.³⁸ Eventually, most of the Eastern Hemisphere would be formally excluded from immigration to the United States through a variety of statutory bars and administrative interpretations. These barriers would not be formally removed until 1965.³⁹

In the early twentieth century, Congress began to expand the categories of people to be excluded from the United States and also the power to deport undesirable aliens. Many of these statutory expansions remain on the books today. For example, people may be classified by agency inspectors as undesirable due to physical or mental defects, political views, or criminal conduct.⁴⁰ People may also be barred if deemed at risk of becoming a pauper; to enforce this expansion, immigration inspectors began to question immigrants about their personal assets and ready cash.⁴¹ Poor people might have to indenture themselves to arrange the capital to meet the immigration criteria. Moreover, Congress authorized a plenary power to deport any person who was technically inadmissible at their time of entry.⁴² In sum, if you want to be protected from the power of the federal government to deport you, you must naturalize.

Congress similarly began to increase the substantive and procedural requirements to naturalize. For example, Congress requires a knowledge of U.S. history and the English language for naturalization, which, in turn, require the opportunity to

38. MAE M. NGAI, IMPOSSIBLE SUBJECTS 7, 37 (2004); see also *Asians and Asian Exclusion, The Pluralism Project*, HARV. UNIV., <https://pluralism.org/asians-and-asian-exclusion> (last visited Apr. 11, 2022) (summarizing the expansion of Asian exclusion throughout the nineteenth century from Chinese immigrants to all Asian immigrants, including Japanese, Indian, and Korean, influenced largely by religious animosity); 2 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 17.02, LexisNexis (database updated 2022).

[T]he Act of March 3, 1875, reflected the growing opposition to the coming of Asians, generally, and Chinese, particularly. That law is generally cited for prohibiting the immigration of felons and prostitutes. However, it also made it a crime to bring any subject of China, Japan, or other Asian country, involuntarily, or to import labor for the “coolie-trade.”

Id.

39. See Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.) (removing “race” and “national origin” as selection criteria for naturalization); see also Pawan Dhingra, *Racial Capitalism and (Im)Mobility: Asian Americans in the Contemporary Economy*, in 1 THE ROUTLEDGE HANDBOOK ON THE AMERICAN DREAM 31 (Robert C. Hauhart & Mitja Sardoč eds., 2021); Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 275 (1996).

40. For a list of the grounds of “inadmissibility,” formerly called grounds of “exclusion,” see INA § 212, 8 U.S.C. § 1182. The list now runs almost nineteen pages, and it seems Congress rarely removes a ground of inadmissibility. For example, Congress has used a broad range of mental illnesses to exclude, and until 1990, homosexuals and bisexuals were inadmissible because the American Psychiatric Association classified non-heterosexual orientation as a mental deviation. Lyn G. Shoop, *Health Based Exclusion Grounds in United States Immigration Policy: Homosexuals, HIV Infection and the Medical Examination of Aliens*, 9 J. CONTEMP. HEALTH L. & POL’Y 521, 526–30 (1993).

41. See Kitty Calavita, *The Paradoxes of Race, Class, Identity, and “Passing”: Enforcing the Chinese Exclusion Acts, 1882–1910*, 25 L. & SOC. INQUIRY 1, 13 (2000) (noting wealth-based “exemptions” from exclusionary immigration laws).

42. INA § 237(a)(1).

attend classes or to learn to read.⁴³ People unable to find economic support or educational opportunities are likely unable to meet these hurdles to naturalization. While each new ground for exclusion or deportation or a new naturalization requirement might appear facially neutral, most reinforced and continue to reinforce systemic barriers without resort to overt racial discrimination.

In addition to imposing new requirements, Congress delineated certain bars to naturalization. One such bar stems from an area of criminal law enforcement that has come under sharp criticism for its racial disparities: the war on drugs.⁴⁴ Many scholars have documented that some of the motivation to criminalize the use of cannabis was rooted in racism, for marijuana was perceived as a drug used by Blacks and grown and sold by Latinos.⁴⁵ Critics, legislatures, and progressive prosecutors are realizing how negatively Black people are impacted by the over-policing of marijuana drug possession, and disparate prosecution and sentencing practices.⁴⁶ These disparities are compounded on the immigrant community. In addition to possible criminal penalties for immigrants, the federal consequence of a marijuana conviction may end their lawful residence, bar their naturalization, or even permanently preclude their future immigration.

While in many jurisdictions marijuana use has been decriminalized, U.S. immigration law has not kept up with this trend. Immigrants can still suffer federal

43. INA § 312(a). The civics and English language requirements were not added until the twentieth century. 4 GORDON ET AL., *supra* note 38, § 95.03[4]. Similar to poll taxes and literacy tests that were part of the Jim Crow laws and employed to deny suffrage, these new requirements could be used to deny citizenship. *E.g.*, 1850 Cal. Stat. 135, *amended by* CAL. CONST. art. XIII, § 12 (repealed 1914) (poll tax); 1965 *Alabama Literacy Test, The Rise and Fall of Jim Crow*, THIRTEEN, https://www.thirteen.org/wnet/jimcrow/literacy_popup.html (last visited Apr. 11, 2022) (literacy test). There were standardized tests, and government adjudicators had discretion to determine if a person was qualified. *See* 4 GORDON ET AL., *supra* note 38, § 95.03. Remember, non-whites had no path to naturalize until 1952. *See* Immigration and Nationality Act of 1952, Ch. 477, § 311, 66 Stat. 163, 239 (codified as amended at 8 U.S.C. § 1422) (prohibiting racial discrimination in naturalization).

44. Congress also barred naturalization for persons who cannot establish good moral character. INA § 101(f). A DHS determination of a lack of good moral character is very difficult to overcome—courts often defer to the agency, and federal court litigation is expensive.

Relatedly, in an important recent study, Professors Emily Ryo and Reed Humphrey analyzed naturalization data secured through a Freedom of Information Act request. Emily Ryo & Reed Humphrey, *The Importance of Race, Gender, and Religion in Naturalization Adjudication in the United States*, PROC. NAT'L ACAD. SCI., Feb. 22, 2022, at 1, 1. They found that race, gender, and religion impacted the approval of naturalization applications. *Id.* They also found that Black naturalization applicants had a lesser chance of approval than white applicants by 41 percent. *Id.* at 3.

45. JOHN HUDAK, MARIJUANA 50 (2016).

46. *See, e.g.*, Press Release, House Comm. on the Judiciary, House Judiciary Passes MORE Act to Decriminalize Marijuana at Federal Level (Nov. 20, 2019); Allan Smith, *Progressive DAs are Shaking Up the Criminal Justice System. Pro-Police Groups Aren't Happy*, NBC NEWS, <https://www.nbcnews.com/politics/justice-department/these-reform-prosecutors-are-shaking-system-pro-police-groups-aren-t1033286> (Aug. 19, 2019); Ashoka Mukpo, *For Black Immigrants, Police and ICE Are Two Sides of the Same Coin*, ACLU (Sept. 3, 2020), <https://www.aclu.org/news/criminal-law-reform/for-black-immigrants-police-and-ice-are-two-sides-of-the-same-coin>.

penalties even in jurisdictions that have legalized or decriminalized marijuana use.⁴⁷ Further, even where state expungements can remove the consequences of many crimes, federal immigration agencies reject expungements for drug-related crimes.⁴⁸ The immigration courts have gone a step further, requiring greater proof of rehabilitation or extreme hardship to seek waivers of removal for people with drug convictions.⁴⁹ Moreover, for persons not placed in deportation proceedings, a past drug-related conviction could still result in a bar to naturalization.⁵⁰

In other words, the absence of an affirmative statutory bar to naturalization is not necessarily cause for celebration—a long-term resident with a drug-related conviction may nevertheless receive a discretionary denial by the adjudicating officer.⁵¹ Racial policing of drug offenses will mean the same patterns in eligibility for citizenship.⁵²

Additionally, the criminalization of immigration itself has a disparate impact on race.⁵³ In the 1920s, with the rise of nativism and eugenics, Congress created

47. For example, if an immigrant admits to using marijuana, even if legalized in the relevant jurisdiction, they may be barred from obtaining immigration relief. KATHY BRADY ET AL., IMMIGRANT LEGAL RES. CTR., IMMIGRANTS AND MARIJUANA 3 (2021).

48. See, e.g., *Nunez-Reyez v. Holder*, 646 F.3d 684, 688–90, 693 (9th Cir. 2011) (“[A]n expunged state-law conviction for simple possession *will* have adverse [federal] immigration consequences.”).

49. See *In re C-V-T*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998). Immigration law does not limit drug convictions in this context to those for narcotics; rather, a relevant drug conviction may be one for any controlled substance, including for marijuana. INA §§ 212(a)(2), 237(a)(2). In many situations there are no waivers at all for drug-related convictions. See DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES: STATE AND FEDERAL § 4:22, Westlaw (database updated Nov. 2021). One of the best treatises discussing the impact of convictions related to controlled substances is *Immigration Law and Crimes*. See *id.* § 4.

50. See Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 83–85 (2005). There is very deep literature on the intersection of criminalization and immigration law consequences. One person who taught me a great deal about this field was Teresa “Teri” Miller. Sadly, Teri died in the summer of 2021; we will miss her leadership.

51. INA § 101(f).

52. Relatedly, some estimate that a significant percentage of all removals begin when a person seeks naturalization or to regularize their status. See MIKE GUO, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2019, at 2 (2020); cf. Policy Memorandum, U.S. Citizenship & Immigr. Servs., U.S. Dep’t of Homeland Sec., Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens (June 28, 2018) (on file with *New York Law School Law Review*) (prioritizing removal of noncitizens for national security, misrepresentation, fraud, abuse of public benefits, criminal activity, unlawful presence in the United States, and other special circumstances). In 2018, 36.3 percent of all removal proceedings were initiated by U.S. Citizenship and Immigration Services (USCIS). Guo, *supra*, at 7 tbl.4. This number includes referrals from denied naturalization cases, adjustment of status cases, and affirmative asylum cases. See *id.* at 2 (listing circumstances where USCIS may issue a notice to appear).

53. See Kelly Lytle Hernández, *The Crimes and Consequences of Illegal Immigration: A Cross-Border Examination of Operation Wetback, 1943 to 1954*, 37 W. HIST. Q. 421, 421–22 (2006) (detailing the U.S. government’s strategy for punishing Mexican nationals for illegal migration); see also Kelly Lytle Hernández, “Persecuted Like Criminals”: *The Politics of Labor Emigration and Mexican Migration Controls in the 1920s and 1930s*, 34 AZTLÁN 219, 229–31 (2009) (same).

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restrictive national origin quotas that limited migration from southern and eastern Europe.⁵⁴ Many in Congress also wanted to bar Mexican migration but were unsuccessful due to western dependence on Mexican agricultural workers. Instead, the proponents of restricting Mexican migration passed new statutes that criminalized entry without a visa and made entry after deportation a felony.⁵⁵

In 1952, immigration law was restructured through the Immigration and Nationality Act (INA).⁵⁶ The INA was praised for eliminating many of the racial classifications that had existed in prior acts,⁵⁷ but Congress left in place the criminal reentry statutes that I strongly believe were motivated by racial animus.⁵⁸ In 2019, the illegal entry misdemeanor and illegal reentry prosecutions represented the single largest category of federal criminal cases.⁵⁹

Once caught in the discriminatory criminal prosecution system, immigrants are trapped in the removal machinery. In recent cases regarding the illegal reentry statute, the Supreme Court unanimously agreed that Congress expressly limited a defendant's ability to collaterally attack the validity of prior orders of removal under 8 U.S.C. § 1326(d), or more commonly known as section 276(d) of the INA.⁶⁰ Thus, even when every justice agrees that a deportation hearing was based on an erroneous application of the law, a noncitizen defendant could still be convicted for illegal reentry. This was the outcome in the 2021 case of *United States v. Palomar-Santiago*, in which the Court also

54. See Immigration Act of 1924, Ch. 185, § 11, 43 Stat. 153, 159–60 (repealed 1952) (creating nationality quotas based on the amount of persons of that nationality already in the United States).

55. Undesirable Aliens Act of 1929, ch. 690, 45 Stat. 1551 (repealed 1952).

56. Immigration and Nationality Act of 1952, Ch. 477, 66 Stat. 163 (amended 1965). However, the 1952 act kept the national origin-based quota system in place. *The Immigration and Nationality Act of 1952 (The McCarran-Walter Act)*, OFF. HISTORIAN, <https://history.state.gov/milestones/1945-1952/immigration-act> (last visited Apr. 11, 2022). It was not until the Immigration Act of 1965, Pub. L. No. 89-236, 79 Stat. 911, that these quotas were abolished. Tom Gjelten, *In 1965, A Conservative Tried to Keep America White. His Plan Backfired*, NPR (Oct. 3, 2015), <https://www.npr.org/2015/10/03/445339838/the-unintended-consequences-of-the-1965-immigration-act>.

57. See, e.g., 98 CONG. REC. 8254 (1952) (statement of Sen. Patrick McCarran (D-NV)) (describing the national origin quota system as “fair and just”); *id.* at 8214–15 (statement of Rep. Francis E. Walter (D-PA)) (applauding the bill for improving U.S. domestic and international relations). *But see* Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality, 182 PUB. PAPERS 441 (June 25, 1952) (criticizing the bill because it “continue[d], practically without change, the national origins quota system”).

58. INA § 276, 8 U.S.C. § 1326. In a recent decision, a federal district court ruled against the government and found no “nondiscriminatory motivation” for the implementation of section 276’s criminal reentry policy. *United States v. Carrillo-Lopez*, No. 20-cr-00026, 2021 WL 3667330, at *24–25 (D. Nev. Aug. 18, 2021).

59. GLENN R. SCHMITT & AMANDA RUSSELL, U.S. SENT’G COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2019, at 12 (2020); AM. IMMIGR. COUNCIL, PROSECUTING PEOPLE FOR COMING TO THE UNITED STATES 2 (2021); *Illegal Reentry Becomes Top Criminal Charge*, TRAC IMMIGR. (June 10, 2011), www.trac.syr.edu/immigration/reports/251/.

60. See, e.g., *United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1620–22 (2021).

did not address supplemental arguments that section 276 was unconstitutional despite amici briefs detailing the statute's historic racial motivations.⁶¹

Two recent cases demonstrate the difficulty of this equal protection argument. The attorneys in both cases attacked the racist history of section 276 and argued that use of the statute violated the Fifth Amendment's guarantee of equal protection.⁶² In the first case, the U.S. District Court for the District of Oregon found that the defendant provided enough evidence to show that section 276 has had a disparate impact on Latinos, but ruled that Supreme Court precedent requires proof of intentional bias in the creation of the statute.⁶³ Those cases that have set this nearly impossible standard insist on the illusion of neutrality and "colorblind" law.⁶⁴

Less than two weeks later, the federal district court in Nevada found that, but for racial animus toward Latinos, Congress would not have created the illegal entry statute.⁶⁵ Citing to both the history of racism and eugenics behind the enactment of the original unlawful reentry statute,⁶⁶ and the failures of the 1952 Immigration Act to rectify that racial animus, the judge found that the defendant demonstrated that section 276 was enacted with a racially discriminatory intent.⁶⁷ This fulfilled the necessary elements required by the 1977 case of *Village of Arlington Heights v. Metropolitan Housing Development Corp.* to declare a facially neutral law unconstitutional.⁶⁸

61. See generally Brief for Professors Kelly Lytle Hernández, Mai Ngai, and Ingrid Eagly as Amici Curiae Supporting Respondent at 5–30, *Palomar-Santiago*, 141 S. Ct. 975 (No. 20-437) (accounting for the racial origin of section 276(d) and insisting that this "history can and should inform the Court[.]"). But see Petition for Writ of Certiorari in I, *Palomar-Santiago*, 141 S. Ct. 975 (No. 20-437) (asking the Court to review only the issue of section 276(d)'s statutory construction and not its constitutionality).

62. *United States v. Machic-Xiap*, 552 F. Supp. 3d 1055, 1060 (D. Or. 2021); *United States v. Carrillo-Lopez*, No. 20-cr-00026, 2021 WL 3667330, at *1 (D. Nev. Aug. 18, 2021).

63. *Machic-Xiap*, 552 F. Supp. 3d at 1072–73, 1076. The court relied on the disparate impact framework established in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264–68 (1977).

64. See *Machic-Xiap*, 552 F. Supp. 3d at 1078. The difficulty of proving racial discrimination as motivation for a statute is discussed in Edward A. Purcell, Jr., *Race and the Law: The Visible and the Invisible*, 66 N.Y.L. SCH. L. REV. 141, 158–67 (2021–2022).

65. *Carrillo-Lopez*, 2021 WL 3667330, at *20.

66. Undesirable Aliens Act of 1929, ch. 690, 45 Stat. 1551 (repealed 1952).

67. *Carrillo-Lopez*, 2021 WL 3667330, at *20. For additional reading on the need for the Supreme Court to address the racial animus upon which many sections of the INA are founded, see Kevin R. Johnson, *Bringing Racial Justice to Immigration Law*, 116 Nw. U. L. REV. 1, 21 (2021). A review of this article by Angela Banks can be found at *A Positive Immigration Agenda for Racial Justice*, JOTWELL (July 7, 2021), <https://lex.jotwell.com/a-positive-immigration-agenda-for-racial-justice/>.

68. 429 U.S. at 264–68.

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It is important to note that a person may become trapped in the removal machinery without ever being formally notified⁶⁹ or appearing in court,⁷⁰ often because punishment for violations of section 276 include a felony conviction followed by removal after the prison time has been served.⁷¹ Racial discrimination activates a process that also bars the individual from obtaining legal status.⁷²

IV. BEYOND NATURALIZATION: WHAT IS IT ABOUT “ILLEGAL” THAT YOU DON’T UNDERSTAND?⁷³

For years, people have used this taunt to justify hostile attitudes toward immigrants. But which behaviors are legal and which illegal? Here is a member of *The New York Times* editorial board discussing the concept:

69. *See, e.g.,* *Pereira v. Sessions*, 138 S. Ct. 2105, 2113–14 (2018) (concluding that the notice to appear, which failed to apprise the noncitizen of the time and place of their removal proceeding, was not effective in ending their period of continuous presence in the United States); *Giron-Ardon v. Garland*, No. 19-3957, 2022 WL 52882, at *1 (2d Cir. Jan. 6, 2022) (adding that a deficient notice to appear that is supplemented with the missing information is still effective).

70. Some people do not realize that the piece of paper they may have received from a border patrol officer is a formal order of removal, usually because they had not appeared before an immigration law judge. *See* INA § 235(b), 8 U.S.C. § 1225(b) (authorizing expedited removal in the absence of an immigration judge). For example, in 2013, 44 percent of all removal orders were issued in this informal manner. ALISON SISKIN, CONG. RSCH. SERV., R43892, *ALIEN REMOVALS AND RETURNS: OVERVIEW AND TRENDS* 16 (2015); *see also* Lenni B. Benson, *Immigration Adjudicator: The Missing “Rule of Law,”* 5 J. ON MIGRATION & HUM. SEC. 331, 331 n.3 (2017) [hereinafter *Immigration Adjudicator*]. And in 2019, the number was 46 percent. GUO, *supra* note 52, at 8.

People might also be subject to removal even if they do not appear in immigration court. This is called an “in absentia order,” and is authorized under INA § 240(b)(5)(A). In a recent report, the Congressional Research Service reported that between 2011 and 2020, in absentia orders were issued in 38 percent of all initial case completion decisions (which includes orders of removal, grants of asylum, voluntary departures, and proceeding terminations). HOLLY STRAUT-EPPSTEINER, CONG. RSCH. SERV., IF11892, *AT WHAT RATE DO NONCITIZENS APPEAR FOR THEIR REMOVAL HEARINGS? MEASURING IN ABSENTIA REMOVAL ORDER RATES* 1 (2021). There are well-documented problems with respondents not being notified about the location and time of their hearings, and many in absentia orders are set aside due to this lack of notice. *See* LAUREN HARTLEY ET AL., PRACTICE ADVISORY 14–15, 18 n.71 (American Immigration Council 2019) (2014) (advising on notices to appear).

Nevertheless, none of this can be challenged in a criminal prosecution because the statute precludes collateral attack unless certain requirements are met. INA § 276(d); *see also* SARAH ROSE WEINMAN ET AL., NAT’L IMMIGRANT JUST. CTR., *ILLEGAL REENTRY PRACTICE ADVISORY FOR FEDERAL DEFENDERS* 38–40 (2020).

71. *Illegal Reentry Offenses*, U.S. SENT’G COMM’N, www.ussc.gov/research/research-publications/illegal-reentry-offenses (last visited Apr. 17, 2022).

72. A fine may also be imposed instead of or in conjunction with a sentence of imprisonment. INA § 276(b). A person who has been removed must seek a waiver to reenter the United States. INA § 212(a)(9)(A)(ii). For some people, reentry or criminal conviction may result in a permanent bar to admission to the United States. *See id.* But *see I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/i-212> (Mar. 23, 2022) (exercising prosecutorial discretion to allow reentry without a waiver).

73. The “illegal” argument is common in the immigration debate but difficult to answer in a short reply. One clever artist created a diagram illustrating some of the complexities of the legal immigration system as

I am a human pileup of illegality. I am an illegal driver and an illegal parker and even an illegal walker, having at various times stretched or broken various laws and regulations that govern those parts of life. The offenses were trivial, and I feel sure I could endure the punishments—penalties and fines—and get on with my life. Nobody would deny me the chance to rehabilitate myself. . . .

Good thing I am not an illegal immigrant. There is no way out of that trap. It's the crime you can't make amends for. Nothing short of deportation will free you from it, such is the mood of the country today. And that is a problem.

America has a big problem with illegal immigration, but a big part of it stems from the word "illegal." It pollutes the debate. It blocks solutions. Used dispassionately and technically, there is nothing wrong with it. Used as an irreducible modifier for a large and largely decent group of people, it is badly damaging. And as a code word for racial and ethnic hatred, it is detestable.⁷⁴

We usually recognize that law is nuanced and complex. We do not typically re-label an individual based solely on an incidence of violating civil law. If we copy software without a license, we may be participating in illegal activity. Are we illegals? The determination of illegality in immigration law is not as simple as crossing a border without a visa stamp. Yet we are so engaged in the myth that immigrants can be divided between legal and "illegal" that it can be hard to break through the shadow cast by this dichotomy. Worse, the shadow of illegality masks much of the racism endemic in immigration law and enforcement policies. We have to look deeper into the shadows.

One of the difficulties in discussing race and immigration is that our published official data does not report on race.⁷⁵ When we do not measure racial categories we might celebrate the colorblind nature of the law, but the lack of detailed information may also conceal systemic barriers to immigration for people of color. If we do not measure, we do not see. In this section, I explore a few of the barriers to immigration that might be exacerbated by race but have been unaccounted for by contemporary data.

Under current immigration law, no one nation can receive more than 7 percent of the total allocation of employment- or family-based visas in a given year.⁷⁶ However,

retort. *Immigration Flow Chart-Roadmap to Green Card, Green Card*, IMMIGRATIONROAD.COM, <https://immigrationroad.com/green-card/immigration-flowchart-roadmap-to-green-card.php> (July 12, 2009).

74. Lawrence Downes, *What Part of 'Illegal' Don't You Understand?*, *Opinion*, N.Y. TIMES (Oct. 28, 2007), <https://www.nytimes.com/2007/10/28/opinion/28sun4.html>.

75. See generally OFF. OF IMMIGR. STAT., U.S. DEP'T OF HOMELAND SEC., 2019 YEARBOOK OF IMMIGRATION STATISTICS 5–35 (2020) (reporting the country of last residence, country of birth, state or territory of residence, type and class of admission, sex, age, marital status, and occupation of those who obtained lawful permanent resident status). For a table displaying the share of persons who obtained lawful permanent resident status by country of birth, which could be a rough proxy for racial composition, see *id.* at 12–15. Data on the racial makeup of immigrant groups, however, is seemingly imprecise and frequently generated by later community surveys and census data.

76. INA § 202(a)(2). The per-country caps have been challenged politically as inherently "racist." See DAVID SCOTT FITZGERALD & DAVID COOK-MARTÍN, *CULLING THE MASSES* 120–23, 127–28, 132 (2014). Employment-based visas are divided into five categories: priority workers and persons of extraordinary ability; professionals holding advanced degrees and persons of exceptional ability; skilled workers, professionals, and unskilled workers; certain special immigrants; and immigrant investors. *Employment-*

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demand is not equal across all nations and thus, put simply, we still have formal national origin barriers to modern immigration. Given that the vast majority of immigrant visas are allocated to immediate and close family members, groups with lower rates of legal presence in the United States may have fewer opportunities to immigrate. This is an issue when one considers that only an estimated 10 percent of all immigrants residing in the United States are Black.⁷⁷ Behind immediate relatives of U.S. citizens and those who arrive as refugees or asylees, the third largest group of African immigrants⁷⁸ come to the United States through the “lottery” or on a diversity visa.⁷⁹

However, the lucky lottery winner must show that they have completed high school and at least two years of college or employment.⁸⁰ Considering the reality that, in many countries, poverty and racial barriers make satisfying this requirement

Based Immigrant Visas, U.S. DEP'T STATE: BUREAU CONSULAR AFFS., <https://travel.state.gov/content/travel/en/us-visas/immigrate/employment-based-immigrant-visas.html#overview> (last visited Apr. 17, 2022); see INA § 203(b) (delineating hierarchy of employment-based visa distribution). Family-based visas grant permanent resident status to “certain noncitizens who are family members of U.S. citizens and lawful permanent residents.” *Green Card for Family Preference Immigrants*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/green-card/green-card-eligibility/green-card-for-family-preference-immigrants> (last visited Apr. 17, 2022); see INA § 203(a) (delineating hierarchy of family-based visa distribution).

77. Jeanne Batalova et al., *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL'Y INST. (Feb. 11, 2021), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states-2020> (citing the racial makeup of U.S. immigrants in 2019).

78. Again, not all Africans are Black and this is a rough proxy, and Black people immigrate from other regions.

79. *Table 10. Persons Obtaining Lawful Permanent Resident Status by Broad Class of Admission and Region and Country of Birth: Fiscal Year 2019*, U.S. DEP'T HOMELAND SEC., <https://www.dhs.gov/immigration-statistics/yearbook/2019/table10> (Oct. 28, 2020). The total immigrant population originating from Africa in 2019 was 111,194, broken down as follows: 48,500, immediate relatives; 11,859, family-sponsored preferences; 6,898, employment-based visas; 18,584, diversity visas; 25,073, refugees and asylees; and 280, other. *Id.*

Diversity visas are awarded under section 203(c) of the INA on a lottery-basis to individuals from countries with low rates of immigration to the United States. See *Green Card Program Through the Diversity Immigrant Visa Program*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/green-card/green-card-eligibility/green-card-through-the-diversity-immigrant-visa-program> (last visited Apr. 17, 2022). Lottery winners are randomly selected by the U.S. Department of State. *E.g.*, BUREAU OF CONSULAR AFFS., U.S. DEP'T OF STATE, INSTRUCTIONS FOR THE 2023 DIVERSITY IMMIGRANT VISA PROGRAM (DV-2023) (2021). Only countries of origin are reported annually by the State Department. See *id.* (omitting race from diversity visa paperwork). However, other studies accounting for race can be used to estimate the sources of Black immigration. See, *e.g.*, BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., USDL-21-0905, FOREIGN-BORN WORKERS: LABOR FORCE CHARACTERISTICS—2020 (2021) (reporting on foreign-born participation in the labor market).

President Donald Trump claimed that the diversity lottery brought undesirable immigrants to the United States; his assumptions were analyzed carefully in Rose Cuison-Villazor & Kevin R. Johnson, *The Trump Administration and the War on Immigration Diversity*, 54 WAKE FOREST L. REV. 101, 111–21 (2019).

80. INA § 203(c). The process is controlled by the State Department. See 22 C.F.R. § 42.33 (2019).

sufficiently difficult to prevent a person from obtaining a visa, our apparently neutral per-country cap does not fall equally on all would-be immigrants.

Similarly, many people who receive employment-based visas (which encompass not only professionals but also skilled and unskilled workers) originally entered the United States as students.⁸¹ To qualify for a student visa, the applicant must convince their U.S. Consulate that they can afford to attend school in the United States without needing to work and that they will depart the United States at the end of the degree program. A poor student or one who comes from a country our officials deem to be a source of undocumented migrants will likely be denied the opportunity to come to the United States.⁸² These factors also make it unlikely that an employer will sponsor that person for permanent immigration. Unable to overcome the legal barriers, the individual may choose to come without permission. Once here, they may find themselves trapped outside the legal system with few paths to permanent residence.

The provision of the INA that punishes overstay or residing unlawfully in the United States also contains one of the most significant barriers to legal status.⁸³ Upon removal, this provision bars migration back to the United States for ten years, even if sponsored properly.⁸⁴ Once people learn of these bars, they usually resign themselves to remaining without status. And often there are simply no petitions or waivers to be obtained to come out of the shadows. Even those married to U.S. citizens may face barriers to immigration for prior violations of the entry or work rules. Put simply, immigration is complex, the barriers are many, and there are millions of people who have lived in the United States for lengthy periods with extensive family and economic ties but cannot secure legal status.

81. See NEIL G. RUIZ, BROOKINGS & JPMORGAN CHASE, *THE GEOGRAPHY OF FOREIGN STUDENTS IN U.S. HIGHER EDUCATION: ORIGINS AND DESTINATIONS* 26 (2014) (reporting that 45 percent of foreign students studying in the United States “stayed in their school’s metropolitan area to work”).

82. This observation is based on my personal experience that it is nearly impossible to obtain a student visa without substantial scholarships and economic support, or personal wealth. These obstacles have only been exacerbated by the COVID-19 pandemic. See Mark Honegger & Rose Honegger, *The Lived Experiences of International Students in Higher Education During COVID-19*, 5 *RSCH. ISSUES CONTEMP. EDUC.* 72, 73–74 (2020).

83. INA § 212(a)(9)(B)(i). Added in 1996, the stated purpose of this provision was to deter unlawful presence or overstays. Cf. H.R. REP. NO. 104-828, at 1 (1996) (Conf. Rep.). Instead, it created a barrier to regularizing legal status except through exceptional humanitarian programs such as asylum or the protections for victims of crime, domestic abuse, or trafficking. INA § 212(a)(9)(B)(iii).

Prior to this provision, a person who could secure a sponsor would return to their home country and complete the immigration process within a few weeks. Now, they are trapped. This is the main reason young people known as “Dreamers” cannot find status in the United States. AM. IMMIGR. COUNCIL, *THE DREAM ACT: AN OVERVIEW* 1 (2021) (describing “dreamers” as “young undocumented immigrants” who “came to the United States as children but are vulnerable to deportation”). If they found a sponsor and departed the country to obtain their visa at a U.S. Consulate, they would almost universally be subject to the ten-year bar. See INA § 212(a)(9)(B)(i).

84. INA § 212(a)(9)(B) (“Any alien (other than an alien lawfully admitted for permanent residence) who . . . has been unlawfully present in the United States for one year or more, and who again seeks admission within [ten] years of the date of such alien’s departure or removal from the United States, is inadmissible.”).

V. THE DANGERS OF IMMIGRATION ENFORCEMENT—FOR ALL OF US

A. *Do You Have Your Working Papers?*

In 1986, Congress enacted the Immigration Reform and Control Act (IRCA) which included two major changes to the INA: amnesty and a path to status for millions of unauthorized residents and agricultural workers,⁸⁵ balanced against new sanctions that would fine employers who hired people unauthorized to work in the United States.⁸⁶ IRCA included section 274B of the INA, codified at 8 U.S.C. § 1324b, to address concerns that requiring employers to check the identity and work authorization documents of employees would lead to increased employment discrimination.⁸⁷ Not surprisingly, the General Accounting Office (GAO) (now the Government Accountability Office) shortly thereafter estimated a roughly 20 percent increase in employment discrimination based on perceived nationality, ethnicity, or language.⁸⁸ One of the first groups that experienced widespread discrimination were Puerto Ricans.⁸⁹ Employers insisted that they present “green cards” despite the fact that Puerto Ricans are citizens of the United States.⁹⁰ Still, Congress took no remedial action. Employer sanctions and the anti-discrimination provisions remain in our law today.⁹¹

Similarly, many people who speak accented English or who appear to be of Asian, South Asian, or Latino descent are frequently challenged as to their country of

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85. Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.). The amnesty required that the person be out of legal status and have entered the United States before January 1, 1982, or five years before passage of the statute. *Id.* § 201(a) (adding section 245A(a)(2) to the INA). IRCA also created a special path for those who had worked or continued to work in agriculture for at least three years. *Id.* § 302(a) (adding section 210(a)(1) to the INA); *see also* BRYAN C. BAKER, U.S. DEP'T OF HOMELAND SEC., NATURALIZATION RATES AMONG IRCA IMMIGRANTS: A 2009 UPDATE 1-2 (2010).
86. § 101(a), 100 Stat. at 3360 (adding section 274A(c)(4) to the INA). Congress also allowed for criminal prosecution of employers, and specifically removed employment as an exception in criminal statutes related to harboring an unauthorized noncitizen. *See id.* at 3367-68 (adding sections 274A(f) and (h) to the INA and preempting the “Texas Proviso” that exempted employer-employee relationships from the scope of illegally harboring immigrants).
87. *See id.* § 102(a) (adding section 274B to the INA).
88. *See* U.S. GEN. ACCT. OFF., GAO/GGD-90-62, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 5-7 (1990). GAO released its estimates in three statutorily-mandated reports, in 1987, 1988, and 1990. *Id.* at 1. The final report “estimate[d] that 891,000 (19 percent) of the 4.6 million employers in the survey population nationwide began one or more discriminatory practices as a result of [IRCA].” *Id.* at 7. The immediately preceding GAO report, issued in 1988, estimated “that since IRCA’s enactment, 528,000 employers [of the 4.2 million in the survey population, or 12.6 percent] began or increased unfair employment practices (e.g., began a new policy to hire only U.S. citizens).” *Id.* at 22 (citing U.S. GEN. ACCT. OFF., GAO/GGD-89-16, IMMIGRATION REFORM: STATUS OF IMPLEMENTING EMPLOYER SANCTIONS AFTER SECOND YEAR 5 (1988)).
89. *Cf. id.* at 38 n.2.
90. The Conversation, *Are Puerto Ricans American Citizens?*, U.S. NEWS & WORLD REP. (Mar. 3, 2017), <https://www.usnews.com/news/national-news/articles/2017-03-03/are-puerto-ricans-american-citizens>.
91. INA § 274B, 8 U.S.C. § 1324b.

origin. How many Texans and Californians are asked, “are you Mexican?”⁹² This widespread stigmatization often creates anti-immigrant sentiments—even within minority communities.⁹³ In the mid-2000s, anti-immigrant local ordinances spread across the United States.⁹⁴ Many states adopted statutes that required law enforcement to hold and report to the Department of Homeland Security (DHS) people who could not establish their lawful presence.⁹⁵ Some states such as Arizona even tried to criminalize seeking work or remaining within the state without immigration authorization.⁹⁶ While the U.S. Supreme Court found that federal law preempted these attempts, it upheld the limited authority of the states to inquire about status after a lawful stop or arrest.⁹⁷ However, Arizona’s application of this authority was ultimately enjoined due to its discriminatory impact on Hispanics and non-whites.⁹⁸

Recently, immigration enforcement has taken on the cloak of public safety. While overt racial profiling is no longer accepted, some government officials still use racial profiling to target immigrant communities.⁹⁹ In several recent settlements,

92. As of 2021, more than 39 percent of both people in California and Texas identify as Hispanic or Latino. *QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219> (last visited Apr. 17, 2022) (search for “California” and then repeat for “Texas”). California has a Black population of 6.5 percent, and Texas 12.9 percent. *Id.*
93. In 1994, the people of California adopted Proposition 187 to bar persons without authorized immigration status from secondary schools and colleges. *See* League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244, 1249 (C.D. Cal. 1997). Although Proposition 187 was later enjoined, its passage enjoyed the support of Mexican Americans and Asian Americans likely tired of being constantly challenged about their nationality. *See Prop. 187 Approved in California*, MIGRATION NEWS (Dec. 1994), <https://migration.ucdavis.edu/mn/more.php?id=492> (“According to exit polls, 64 percent of whites, 57 percent of Asian-Americans, 56 percent of African-Americans, and 31 percent of Latinos voted in favor of Prop. 187.”). Proposition 187 is carefully explained and its impact on California is analyzed in Kevin R. Johnson, *Proposition 187 and Its Political Aftermath: Lessons for U.S. Immigration Politics After Trump*, 53 U.C. DAVIS L. REV. 1859 (2020).
94. *E.g.*, S. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), *partially invalidated by* Arizona v. United States, 567 U.S. 387 (2012); S. 4, 85th Leg., Reg. Sess. (Tex. 2017) (enacted); *see also* Advisory Model Policy for Law Enforcement Applying SB 1070, Ariz. Att’y Gen. Op. No. I16-010 (Sept. 20, 2016).
95. *See* HILLEL R. SMITH, CONG. RSCH. SERV., LSB10375, IMMIGRATION DETAINERS: BACKGROUND AND RECENT LEGAL DEVELOPMENTS 2 (2020) (citing FLA. STAT. § 908.105 (LEXIS through Ch. 13 of 2022 Reg. Sess.)). The National Council of State Legislatures reports that 127 new immigration-related laws were enacted by states in 2020, and 181 in 2019. ANN MORSE, NAT’L CONF. OF STATE LEGISLATURES, REPORT ON STATE IMMIGRATION LAWS, 2020, at 1 (2021).
96. ARIZ. REV. STAT. ANN. § 11-1051(B) (LEXIS through 55th Legis. 2d Reg. Sess. as of April 19, 2022)
97. *Id.* at 414.
98. Melendres v. Arpaio, 989 F. Supp. 2d 822, 851, 910–12 (D. Ariz. 2013) (finding discrimination by the Maricopa County sheriff in asking people for proof of citizenship or immigration status), *adhered to*, No. CV-07-02513, 2013 WL 5498218 (D. Ariz. Oct. 2, 2013), *aff’d in part, vacated in part*, 784 F.3d 1254 (9th Cir. 2015).
99. Shamira Ibrahim, *Ousman Darboe Could Be Deported Any Day. His Story Is a Common One for Black Immigrants.*, VOX, <https://www.vox.com/identities/2019/9/30/20875821/black-immigrants-school-prison-deportation-pipeline> (Feb. 5, 2020); *see, e.g.*, Millan-Hernandez v. Barr, 965 F.3d 140, 149 (2d Cir. 2020) (per curiam) (discussing racial profiling by a New York State trooper).

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local authorities have agreed to stop using traffic stops to hold people who may appear to be Hispanic or Latino for ICE enforcement.¹⁰⁰

In another example of targeting immigrants, mostly non-whites, and despite scientific evidence suggesting that the unvaccinated caused the rise in COVID-19 variant cases,¹⁰¹ Texas Gov. Greg Abbott blamed “illegal immigration.”¹⁰² Through an executive order, he empowered law enforcement to pull over vehicles driven by migrants or transporting migrants, allegedly to reduce the risk of COVID-19 exposure,¹⁰³ while contemporaneously forbidding local governments from issuing mask mandates.¹⁰⁴ Immigration advocates rightfully called out this order for encouraging, or even ordering, racial profiling by troopers with the Department of Public Safety (DPS).¹⁰⁵ It has also invited lawsuits by the U.S. Department of Justice (DOJ) and the American Civil Liberties Union (ACLU).¹⁰⁶

B. Enforcement Expanded at the Border and Beyond: Do You Have Your Papers?

In fiscal year 2023 alone, the DHS budget and its resources will exceed \$97 billion.¹⁰⁷ Today, the DHS is the largest law enforcement agency in the world with

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100. See Press Release, Nat'l Immigrant Just. Ctr., ICE's Ability to Detain Immigrants Through Mass Raids and Traffic Stops Significantly Limited by New Court Settlement (Feb. 8, 2022) (on file with *New York Law School Law Review*) (discussing a settlement requiring ICE to stop “making unlawful ‘collateral arrests’ through vehicle stops”); Press Release, Pa. Pressroom, PSP Announces Settlement with ACLU in *Marquez v. Commonwealth* (Apr. 6, 2022) (on file with *New York Law School Law Review*) (limiting the authority of Pennsylvania state troopers to use their authority for internal immigration enforcement unless the use of a prolonged traffic stop to detain people is permitted by a judge or based on probable cause); Kate Goettel, *Settlement Thwarts ICE's Ability to Conduct Warrantless Sweeps*, IMMIGR. IMPACT (Feb. 25, 2022), <https://immigrationimpact.com/2022/02/25/settlement-ice-conduct-warrantless-sweeps/#.Yh7hkOjMJqU> (limiting ICE's authority to conduct “warrantless arrests”).
101. Roz Plater, *Unvaccinated People Are Increasing the Chances for More Coronavirus Variants—Here's How*, HEALTHLINE (Aug. 10, 2021), <https://www.healthline.com/health-news/unvaccinated-people-are-increasing-the-chances-for-more-coronavirus-variants-heres-how>.
102. See Joel Rose, *Some Republicans Blame Migrants for COVID-19 Surges. Doctors Say They're Scapegoating*, NPR (Aug. 10, 2021), <https://www.npr.org/2021/08/10/1026178171/republicans-migrants-covid-19-surges>.
103. Tex. Exec. Order No. GA-37 (July 28, 2021). The order has been temporarily blocked by a federal judge. *United States v. Texas*, No. EP-21-CV-173, 2021 WL 4848743, at *8 (W.D. Tex. Aug. 26, 2021).
104. Dave Montgomery, *Gov. Greg Abbott Bars Mandates for Vaccinations and Masks in Texas*, N.Y. TIMES, <https://www.nytimes.com/2021/07/31/world/greg-abbott-mask-vaccine-mandate.html> (Oct. 30, 2021).
105. Uriel J. García, *Gov. Greg Abbott Draws Criticism for Ordering State Troopers to Pull Over Vehicles with Migrants, Saying It Will Stem COVID-19 Risk*, TEX. TRIB. (July 28, 2021), <https://www.texastribune.org/2021/07/28/greg-abbott-texas-migrants-covid-19/>.
106. Complaint at 7–8, *United States v. Texas*, No. 21-cv-173 (W.D. Tex. July 28, 2021), <https://int.nyt.com/data/documenttools/doj-lawsuit-challenging-tx-executive-order-no/46e51606e3b22e30/full.pdf> (DOJ challenge); Complaint at 17, *Annunciation House v. Texas*, No. 21-cv-178 (W.D. Tex. Aug. 4, 2021), <https://www.aclu.org/legal-document/complaint-annunciation-house-v-abbott> (ACLU challenge).
107. Alejandro N. Mayorkas, *Message from the Secretary to U.S. DEP'T OF HOMELAND SEC., FY 2023: BUDGET IN BRIEF* (2022).

twenty-two distinct subdivisions and some 240,000 federal employees.¹⁰⁸ Over the years, Congress has greatly expanded the DHS's authority to arrest and detain immigrants.¹⁰⁹ On average, more than fifty thousand people are held in civil immigration detention each day—often for months or years while awaiting adjudication of their individual right to enter or to remain.¹¹⁰

After the 1995 domestic terrorist attack at the Alfred P. Murrah Federal Building in Oklahoma City¹¹¹—an event some erroneously blamed on foreign terrorists—Congress authorized expedited removal and limited judicial review of many DHS and immigration court decisions.¹¹² After 9/11, the DHS expanded this tool to effectuate rapid removal of people apprehended at the border or within one hundred miles of the interior.¹¹³ Expedited removal soon grew to reflect more than 80 percent of all removals.¹¹⁴ The procedures are almost purely administrative and occur outside of any tribunal and without a right to free legal counsel.¹¹⁵ Those not expeditiously removed appear in administrative hearings before judges who are neither independent nor guaranteed any term of office.¹¹⁶ Moreover, the DOJ has increased criminal enforcement of illegal entry statutes such that immigration-related violations are the fastest growing category of criminal prosecution in our federal courts: “Today’s expulsion and exclusion of undocumented Mexicans and Central Americans is only the most current example of national power used to manage perceived threats to white society.”¹¹⁷

108. *About DHS*, DEP’T OF HOMELAND SEC., <https://www.dhs.gov/about-dhs> (Apr. 5, 2022).

109. See Spencer Woodman, *U.S. Isolates Detained Immigrants from Majority-Black Countries at High Rate, Study Finds*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS (Apr. 21, 2020), <https://www.icij.org/investigations/solitary-voices/u-s-isolates-detained-immigrants-from-majority-black-countries-at-high-rate-study-finds/>; Liz Vinson, *Cruel, Unfair and Racist: Black Immigrants Whose Fathers Are U.S. Citizens Push to Overturn Law That Keeps Them from Obtaining Citizenship*, S. POVERTY L. CTR. (Aug. 20, 2021), <https://www.splcenter.org/news/2021/08/20/cruel-unfair-and-racist-black-immigrants-whose-fathers-are-us-citizens-push-overturn-law>.

110. U.S. IMMIGR. & CUSTOMS ENF’T, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 4–8 (2019).

111. *Oklahoma City Bombing, History*, FBI, <https://www.fbi.gov/history/famous-cases/oklahoma-city-bombing> (last visited Apr. 17, 2022).

112. Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1412, 1444, 1449 (1997) (tracing the history of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and IIRAIRA).

113. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877 (Aug. 11, 2004). See generally IMMIGRATION & NATIONALITY LAW, *supra* note 29, at 189–209.

114. See *Immigration Adjudication*, *supra* note 70.

115. See Stephen W. Yale-Loehr & Jeffrey C. O’Neill, *Rendition: The Legality of Maher Arar’s Treatment Under U.S. Immigration Law*, in IMMIGRATION & NATIONALITY LAW, *supra* note 29, at 204–05 (adding that a noncitizen subjected to expedited removal is not entitled to a proceeding before an immigration judge unless a credible fear of persecution or torture is expressed).

116. See *id.* at 204 (outlining regular removal procedures).

117. U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-172, IMMIGRATION ENFORCEMENT: IMMIGRATION-RELATED PROSECUTIONS INCREASED FROM 2017 TO 2018 IN RESPONSE TO U.S. ATTORNEY GENERAL’S

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The Trump administration increased criminal enforcement of illegal reentry statutes,¹¹⁸ reopened many cases closed for family unity or discretionary reasons,¹¹⁹ and revived section 287(g) agreements¹²⁰ to allow closer coordination between the DHS and local law enforcement.¹²¹ Further, the Trump administration implemented extraordinary turn-back procedures at the southwest border,¹²² famously implemented national origin bans,¹²³ and, after the onset of the pandemic in spring 2020, created new blanket limits on both long-term and temporary migration.¹²⁴ Most importantly,

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- DIRECTION 2 (2019); Juan F. Perea, On the Management of Non-Whites: Deportation and Exclusion as Techniques of White Supremacy 1 (Feb. 25, 2020) (unpublished manuscript) (on file with *New York Law School Law Review*). Professor Juan Perea's excellent paper traces the historical management of non-whites and explores the controls now used against people from Mexico and Central America. *Id.* Professor Perea has also written about the need to see beyond purely Black and white issues. See Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213, 1238–39 (1997).
118. See *Major Swings in Immigration Criminal Prosecutions During Trump Administration*, TRAC IMMIGR. (Dec. 18, 2020), <https://trac.syr.edu/immigration/reports/633/>; Jeremy Raff, *The 'Double Punishment' for Black Undocumented Immigrants*, ATLANTIC (Dec. 30, 2017), <https://www.theatlantic.com/politics/archive/2017/12/the-double-punishment-for-black-immigrants/549425/>.
119. Memorandum from Tracy Short, Principal Legal Advisor, U.S. Immigr. & Customs Enf't, to All OPLA Attorneys 2 (Aug. 15, 2017) (on file with *New York Law School Law Review*).
120. INA § 287(g), 8 U.S.C. § 1357(g). Section 287(g) of the INA “authorizes the Director of ICE to enter into agreements with state and local law enforcement agencies [to] permit designated officers to perform limited immigration law enforcement functions.” *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/identify-and-arrest/287g> (last visited Apr. 17, 2022).
121. E.g., *ICE Announces 18 New 287(g) Agreements in Texas*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/news/releases/ice-announces-18-new-287g-agreements-texas> (Oct. 8, 2020). For a list of the active section 287(g) agreements as of November 2021, see *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, *supra* note 120.
122. Memorandum from Kirstjen M. Nielsen, Sec'y, U.S. Dep't of Homeland Sec., to L. Francis Cissna, Dir., U.S. Citizenship & Immigr. Servs., Kevin K. McAleenan, Comm'r, U.S. Customs & Border Prot., and Ronald D. Vitiello, Deputy Dir. & Senior Off. Performing the Duties of Dir., U.S. Immigr. & Customs Enf't (Jan. 25, 2019) (on file with *New York Law School Law Review*).
123. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2418–20 (2018). The Biden administration also started summarily deporting Venezuelans to Colombia if they arrived at the southwest border and had first lived in Colombia. Steven Nelson, *Biden Deporting Venezuelans to Colombia—Despite Attack on Trump Flights*, N.Y. POST, <https://nypost.com/2022/02/01/biden-deporting-venezuelans-to-colombia-despite-attack-on-trump-flights/#> (Feb. 1, 2022). The administration relied on the Title 42 order and cited health policy as the ground for doing so. Public Health Reassessment and Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 86 Fed. Reg. 42,828 (Aug. 5, 2021); Alexandra Martinez, *The Biden Administration Is Deporting Venezuelan Migrants Through Third Countries*, PRISM (Feb. 14, 2022), <https://prismreports.org/2022/02/14/the-biden-administration-is-deporting-venezuelan-migrants-through-third-countries/>. These provisions are referred to as “Title 42” expulsions.
124. Border apprehensions sharply decreased in 2020 due to COVID-19 pandemic procedures that repelled all people from immigrating to the United States, including unaccompanied children. Ana Gonzalez-Barrera, *After Surging in 2019, Migrant Apprehensions at U.S.-Mexico Border Fell Sharply in Fiscal 2020*, PEW RSCH. CTR., <https://www.pewresearch.org/fact-tank/2020/11/04/after-surging-in-2019-migrant-apprehensions-at-u-s-mexico-border-fell-sharply-in-fiscal-2020-2/> (Nov. 4, 2020); see also Julián

the Trump administration expanded the tools of border controls throughout the U.S. interior.¹²⁵ Since July of 2019, the DHS has authorized the expedited removal of any person anywhere in the United States who cannot prove continuous residence of two years after a lawful admission.¹²⁶ Although the Biden administration repealed this expansion, the statutory authority for expeditious removal remains.¹²⁷

C. Immigration Enforcement and the Future

“The Constitution’s equal protection guarantee, at least as currently interpreted by the Supreme Court, is a poor tool for sorting out the racial harms of this set of laws. Those waiting to be saved by the courts and the equal protection doctrine have a long wait ahead of them.”

—Jennifer Chacón¹²⁸

Are we ready to live in a society where people are challenged about their status potentially anywhere within the United States? In recent years, the DHS has arrested and detained many citizens and deported at least seventy U.S. citizens.¹²⁹ It is very possible that every person in the United States, not just those crossing borders or

Aguilar, *Border Apprehensions Down Sharply in 2020 but Spiked in September*, TEX. TRIB., <https://www.texastribune.org/2020/10/14/texas-border-immigrants-apprehensions/> (Oct. 14, 2020) (charting the pandemic’s impact on apprehensions at the southern border).

The Biden administration announced a plan to repeal the use of the Title 42 pandemic controls, effective May 23, 2022. Press Release, U.S. Dep’t of Homeland Sec., Statement by Secretary Mayorkas on CDC’s Title 42 Order Termination (Apr. 1, 2022) (on file with *New York Law School Law Review*). For an article explaining the impact of Title 42 and supporting Biden’s plan to stop using the COVID-19 pandemic as a pretext for expulsion, see Zefitret Abera Molla, *Ending the Title 42 Expulsion Policy Is the Right Thing to Do*, CTR. FOR AM. PROGRESS (Apr. 6, 2022), <https://www.americanprogress.org/article/ending-the-title-42-expulsion-policy-is-the-right-thing-to-do/>. The article notes that Haitian immigrants have been dramatically impacted, with over twenty thousand returned to Haiti; none of these individuals were in immigration proceedings. *Id.* Three states—Missouri, Arizona, and Louisiana—immediately filed a suit to try to preempt the repeal of the Title 42 controls. Complaint, *Arizona v. CDC*, No. 22-cv-00885 (W.D. La. Apr. 3, 2022).

125. See Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 200–203 (2019).
126. Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409 (July 23, 2019).
127. See INA § 235(b), 8 U.S.C. § 1225; Rescission of the Notice of July 23, 2019, Designating Aliens for Expedited Removal, 87 Fed. Reg. 16,022 (Mar. 21, 2022).
128. Jennifer M. Chacón, *The 1996 Immigration Laws Come of Age*, 9 DREXEL L. REV. 297, 320 (2017) (footnote omitted). The 1996 immigration laws that expanded many tools of enforcement were ironically motivated by the attack on the federal building in Oklahoma—an attack perpetrated by white nationalists. *Id.* at 300 & n.14 (citing Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1851–52 (2007)). Indeed, fear of the other, particularly those who are not white, may motivate border controls.
129. Melissa Cruz, *ICE May Have Deported as Many as 70 US Citizens in the Last Five Years*, IMMIGR. IMPACT (July 30, 2021), <https://immigrationimpact.com/2021/07/30/ice-deport-us-citizens/>; U.S. GOV’T ACCOUNTABILITY OFF., GAO-21-487, IMMIGRATION ENFORCEMENT: ACTIONS NEEDED TO BETTER TRACK CASES INVOLVING U.S. CITIZENSHIP INVESTIGATIONS 24 tbl.5 (2021). This is not a new phenomenon. In the past, the United States has conducted mass deportations of Mexicans, and with it,

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within one hundred miles of an international border, may have to prove their right to be present in the territory. If you are white or speak English well, you may not be too worried about this immigration enforcement tool. The impact will be felt most keenly on immigrants and citizens who speak English with an accent or who live in neighborhoods with large immigrant populations or who “appear” to be an immigrant.

With its great authority and vast network of operations and personnel, immigration law enforcement has become entwined in domestic law. The most well known example is the field of “crimmimm” or “crimmigration”—which considers the immigration consequences of criminal law enforcement.¹³⁰ But immigration law also impacts an individual’s or family’s access to education, healthcare, public housing, loans, and some professions. In any field where systemic bias or racism has led to institutional discrimination or de facto segregation, the impacts reverberate in immigrant communities as well.

VI. EXPLICIT RACIAL DISCRIMINATION IN IMMIGRATION LAW IS GONE, BUT WE NEED TO LOOK DEEPER

“As we view images of families and unaccompanied children attempting to flee violence in their home countries for a better life [in the United States], one cannot help but wonder if they weren’t from Latin America but white immigrants from Europe, would they be treated differently?”

—Charles Kamasaki¹³¹

There are numerous examples where purportedly race-neutral laws directly target immigrants and raise issues of racial bias. Take for example the 2017 “Muslim

swept up many U.S. citizens. See Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139, 1162.

130. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376–77 (2006); see also Chacón, *supra* note 128, at 302.

131. Charles Kamasaki, *US Immigration Policy: A Classic, Unappreciated Example of Structural Racism*, BROOKINGS (Mar. 26, 2021), <https://www.brookings.edu/blog/how-we-rise/2021/03/26/us-immigration-policy-a-classic-unappreciated-example-of-structural-racism/> (exploring numerous examples of past immigration law violations by white European immigrants, and how those violations were ignored or easily overcome).

Until 1996, if someone was able to secure a sponsor to access the legal immigration system, and they then left the United States to formally apply at a U.S. Consulate abroad for a visa, the person could likely clear or correct almost all past immigration violations. See Andrew M. Baxter & Alex Nowrasteh, *A Brief History of U.S. Immigration Policy from the Colonial Period to the Present Day*, CATO INST. (Aug. 3, 2021), <https://www.cato.org/policy-analysis/brief-history-us-immigration-policy-colonial-period-present-day#colonial-period-1607-1776>. Since 1996, people with unlawful presence of more than one year risk a ten-year bar on return even if they qualify for an immigrant visa, and some are subject to lifetime bars. IIRAIRA, 8 U.S.C. § 1182(a)(9) (amending § 212(a) of the INA). This single statutory change has fundamentally altered the ability of immigrants to find a path to legal status. Silva Mathema et al., *Reinstating the LIFE Act and Eliminating Entry Bars Would Allow Millions of Immigrants to Stay with Their Families*, CTR. FOR AM. PROGRESS (May 27, 2021), <https://www.americanprogress.org/issues/immigration/news/2021/05/27/500074/reinstating-life-act-eliminating-entry-bars-allow-millions-immigrants-stay-families/>.

ban.”¹³² Despite numerous legal challenges and lower court injunctions, a narrow majority of the U.S. Supreme Court ruled that the travel bans, as amended, were racially and religiously neutral and that President Donald Trump’s pre-election statements could not be used to prove religious or racial animus.¹³³ Litigation as to the implementation of the ban is ongoing, but it already appears that federal district courts have found discriminatory patterns against Muslims.¹³⁴

The Trump administration also pursued ways to punish so-called “sanctuary” jurisdictions.¹³⁵ After unsuccessfully attempting to freeze discretionary grants for uncooperative local governments, the administration announced that it would reduce the census count by asking about citizenship status, sharing citizenship information from the DHS with the U.S. Census Bureau, and potentially excluding unauthorized immigrants from the count of all “persons” residing in a jurisdiction.¹³⁶ The immediate effect created fear among immigrant communities with the intention of lowering the census response rate.¹³⁷ These communities are often in dense, impoverished urban areas where head counts are used to allocate block grants for education, transportation, housing, and myriad other programs. Thus, the most damage likely would have been felt in the poorest communities, which are often disproportionately non-white.¹³⁸

132. See Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017).

133. Trump v. Hawaii, 138 S. Ct. 2392, 2418 (2018); *id.* at 2447 (Sotomayor, J., dissenting).

134. See, e.g., Arab Am. C.R. League v. Trump, 399 F. Supp. 3d 717, 729 (E.D. Mich. 2019).

135. See Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 30, 2017) (withholding federal funding from jurisdictions that fail to comply with 8 U.S.C. § 1373). In fact, no city or state is a true “sanctuary.” Rather, these “sanctuary” policies are refusals of local governments to share, for example, arrest or conviction information about noncitizens with the DHS. MICHAEL JOHN GARCIA & KATE M. MANUEL, CONG. RSCH. SERV., R43457, STATE AND LOCAL “SANCTUARY” POLICIES LIMITING PARTICIPATION IN IMMIGRATION ENFORCEMENT 12 (2015). Even the most generous of these policies have exceptions for national security concerns or particularly serious crimes. *E.g.*, *id.* at 12 n.72.

136. Exec. Order No. 13,880, 84 Fed. Reg. 33,821 (July 16, 2019) (mandating executive departments and agencies to share citizenship information with the U.S. Census Bureau); Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44,679 (July 23, 2020). The Trump administration’s decision to reinstate the citizenship question on the 2020 decennial census was struck down by the Supreme Court in *Department of Commerce v. New York*, 139 S. Ct. 2551, 2575–76 (2019).

137. See *Dep’t of Com. v. New York*, 139 S. Ct. at 2566 (examining the citizenship question); *New York v. Trump*, 485 F. Supp. 3d 422, 447–48 (S.D.N.Y. 2020) (per curiam) (examining noncitizen exclusion from the “person” count), *vacated*, 141 S. Ct. 530 (2020); see also Suzanne Gamboa, *Latinos, Asian Americans Still Fear 2020 Census over Citizenship Question, Witnesses Tell Congress*, NBC NEWS (Jan. 9, 2020), <https://www.nbcnews.com/news/latino/latinos-asian-americans-still-fear-2020-census-over-citizenship-question-n1113066>.

138. See *Dep’t of Com. v. New York*, 139 S. Ct. at 2565 (finding that noncitizens would be disproportionately undercounted, leading to a loss of federal funding). The Court also found that the Department of Commerce’s justification for adding a question about citizenship on the U.S. census was pretextual. *Id.* at 2575. The Department of Commerce withdrew its proposal to include the citizenship question in the summer of 2019. Michael Wines, *2020 Census Won’t Have Citizenship Question as Trump Administration Drops Effort*, N.Y. TIMES, July 3, 2019, at A1. While some of the litigation has settled, the disarray generated in the census process continues to be controversial and initially some litigation continued to determine whether fear in mixed households and immigrant communities suppressed a response to the

It is difficult to predict the long-term damage caused by the Trump administration generating so much fear in immigrants of state and local officials. In the administration's last year, the DHS issued new regulations that increased scrutiny of immigrants who have used public benefits.¹³⁹ Ultimately, these regulations were vacated,¹⁴⁰ but demographers and public health analysts believe that the fear of being deported or losing immigration status caused many immigrants to avoid health care and food assistance.¹⁴¹ To mitigate the policy's ongoing impact, we must find ways to engage these communities and build trust so that immigrants will not fear seeking the aid of the police but will instead report crimes and seek needed health care.

VII. WHAT IS TO BE DONE?

One of the goals of interdisciplinary teaching is to understand how racial and ethnic discrimination impacts many fields—even when the law is facially neutral. Ideally, some aspects of immigration law and the vulnerability of immigrants would be integrated into all courses. Criminal Law faculty would discuss the asymmetric punishment for immigrants, the potential bias amongst jurors, and the distinctions between civil and criminal detention. Civil Procedure, Torts, Contracts, and Property professors would discuss the treatment of the foreign born in the context of the governing common and statutory law.

If we do not measure and teach our students about the behavior of government actors, we will allow racial impacts and discrimination to thrive. We need transparency and accountability. We have to ask whether U.S. Customs and Border Protection (CBP) officials reject, for example, Haitians more than Hondurans

2020 census. See Kelly Percival & Madiba Dennie, *The State of Census Lawsuits on the Eve of Key Data Releases*, BRENNAN CTR. FOR JUST. (Apr. 23, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/state-census-lawsuits-eve-key-data-releases> (discussing the status of census lawsuits). Now, lawsuits involve challenges to redistricting maps built on the undercount of many people of color. *Redistricting Litigation Roundup*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/redistricting-litigation-roundup-0> (Apr. 26, 2022). The Brennan Center keeps track of the redistricting litigation. *Id.* For an article reporting an estimate of 18.8 million undercounted Black, Latino, and Indigenous people, see Press Release, League of Women Voters, League of Women Voters Reacts to 2020 US Census Bureau Report Undercount of Black, Latino, & Indigenous People (Mar. 10, 2022) (on file with *New York Law School Law Review*). In March of 2022, the U.S. Census Bureau released a formal report on the undercount. SHADIE KHUBBA ET AL., U.S. CENSUS BUREAU, PES20-G-01, NATIONAL CENSUS COVERAGE ESTIMATES FOR PEOPLE IN THE UNITED STATES BY DEMOGRAPHIC CHARACTERISTICS 4–12 (2022).

139. See *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019); see also Claire R. Thomas, *The Invisible Wall: Public Charge Policy Impacts on Immigrant Families*, 65 N.Y.L. SCH. L. REV. 197, 199–201 (2020–2021).

140. *Cook County v. Wolf*, 498 F. Supp. 3d 999, 1007 (N.D. Ill. 2020), *appeal dismissed*, No. 20-3150, 2021 WL 1608766 (7th Cir. Mar. 9, 2021). The Department of Homeland Security then issued a vacatur of the regulation, implementing this judgment. *Inadmissibility on Public Charge Grounds; Implementation of Vacatur*, 86 Fed. Reg. 14,221 (Mar. 15, 2021).

141. Donald Kerwin & Robert Warren, *US Foreign-Born Workers in the Global Pandemic: Essential and Marginalized*, 8 J. ON MIGRATION & HUM. SEC. 282, 283 (2020) (health care); Thomas, *supra* note 139, at 218 (food assistance).

because of race.¹⁴² Does CBP reject claims of fear¹⁴³ in Black Hondurans more than in those with a white appearance? Do people seeking benefits before U.S. Citizenship and Immigration Services (USCIS) face disparities based on their racial background or perceived race? What we do not see, we cannot fix.

Another step we can each undertake is to question everything. If you see a statute, regulation, process, or benefit that is only open to U.S. citizens and lawful residents, ask yourself why. Consider whether the exclusion of some noncitizens is actually a proxy for racial or ethnic discrimination. If you see a program that is designed to improve our immigration system but imposes costs or requires skills and education found only in wealthy classes or nations, examine the purpose of the law more fully. Learn to ask whether alienage makes a difference—in the passage of legislation, in the enforcement of laws, in the interpretation of legal principles, in the application of policy, and in the structure of our institutions and practices. When we have learned that it matters “where we put our eyes,” we can begin to dismantle the barriers to equality and inclusion.

I am an invisible man. . . . I am a man of substance, of flesh and bone, fiber and liquids—and I might even be said to possess a mind. I am invisible, understand, simply because people refuse to see me. . . . That invisibility to which I refer occurs because of a peculiar disposition of the eyes of those with whom I come in contact. A matter of the construction of their inner eyes, those eyes with which they look through their physical eyes upon reality.

—Ralph Ellison¹⁴⁴

142. See *Black Immigrant Lives are Under Attack*, REFUGEE AND IMMIGRANT CTR. FOR EDUC. & LEGAL SERVS., <https://www.raicetexas.org/2020/07/22/black-immigrant-lives-are-under-attack/> (last visited Apr. 15, 2022) (finding that 44 percent of Haitian families were in detention during the pandemic while the number was 6 percent for Honduran families); Jack Herrera, *Black Immigrants Matter*, NATION, Apr. 5/12, 2021, at 14, 31 (“[O]n the first day of Black History Month, ICE forced 102 Haitians onto a plane.”).

143. A person who seeks entry has a chance to make a “claim of fear” of persecution. See INA § 235(b), 8 U.S.C. § 1225. The standard in expedited removal is a “credible fear,” which is the lowest standard of proof in the immigration context. *Id.* For a discussion on the “credible fear” standard, see HUM. RTS. FIRST, CREDIBLE FEAR: A SCREENING MECHANISM IN EXPEDITED REMOVAL (2018).

144. RALPH ELLISON, *INVISIBLE MAN* 3 (Vintage Books 1972) (1952). Of course, author Ralph Ellison is speaking about the Black man in U.S. society, but a deeply similar invisibility hides the humanity and dignity of so many in our country—including the immigrant. If we allow the invisibility to continue, we become part of the systemic patterns that exploit and harm. We cannot claim innocence.

SEEING IMMIGRATION AND STRUCTURAL RACISM: IT'S WHERE YOU PUT YOUR EYES

APPENDIX: Comparing Immigrant Growth by State¹⁴⁵

State	Population	Immigrant Population Estimate	Percent of Total State Population	Percent Change in Immigrant Population Estimate, 2000–2019	Rank Out of 50 States in Rate of Growth
Cal.	39,237,836	10,564,220	26.9%	19.2%	44
Tex.	29,527,941	4,951,156	16.7%	70.8%	20
Fla.	21,781,128	4,526,428	20.7%	69.5%	14
N.Y.	19,835,913	4,360,291	21.98%	12.7%	47
Ga.	10,799,566	1,091,880	10.1%	89.1%	27
N.J.	9,267,130	2,074,686	22.3%	40.5%	34
Wash.	7,738,692	1,132,834	14.6%	84.4%	7
Ariz.	7,276,316	976,301	13.4%	48.8%	31
Ky.	4,509,394	196,618	4.3%	144.9%	11
Nev.	3,143,991	610,652	19.4%	92.9%	19
Del.	1,003,384	97,270	9.6%	116.6%	4

145. *Immigrant Population by State, 1990–Present*, *supra* note 15 (scroll to the bottom and click “GET THE DATA”). This chart reflects American Community Survey and U.S. Census Bureau data, tabulated by the Migration Policy Institute, and includes an interactive data tool for users to explore. *Id.* The population reflected includes naturalized citizens, lawful permanent residents, certain legal nonimmigrants (for example, persons on student or work visas), persons admitted under refugee or asylee status, and persons illegally residing in the United States. *Id.*

As you can see, even outside of the New York Metropolitan area, immigrant communities are growing in many parts of the country. *Id.* (choose “Percent change in immigrant population” from the “Select Indicator” dropdown). While you might have been able to guess the states with the greatest percentage of immigrant residents, it may surprise you to see that the rate of immigrant growth is largest in some of our smaller, more rural communities. *Id.* Looking at some of the data about immigrant population changes can help us all assess how well we are prepared to examine the legal issues that such migration may present.