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# IMMIGRATION AND RACIAL JUSTICE: ENFORCING THE BORDERS OF BLACKNESS

Karla M. McKanders\*

## ABSTRACT

*Black immigrants are invisible at the intersection of their race and immigration status. Until recently, conversations on border security, unlawful immigration, and national security obscured racially motivated laws seeking to halt the blackening and browning of America. This Article engages with the impact of immigration enforcement at the intersection of anti-Black racism and interrogates how foundational immigration laws that exist outside constitutional norms have rendered Black immigrants invisible. At this intersection, Black immigrants experience a double bind where enforcement of immigration laws and the criminal legal system have a disparate impact resulting in disproportionate incarceration and deportation.*

*First, the Article examines how the foundational immigration laws—limiting citizenship to white males—and the failure of immigration enforcement to adhere to constitutional norms reinforce racial hierarchies. Part II of the Article examines how anti-Black racism and lack of constitutional protections within the immigration system lead to disproportionate immigration enforcement against Black immigrants. This part also details how the legislative reforms of 1996, coupled with different executive enforcement policies, have had a disproportionate impact on the deportation of Black immigrants. Third, in line with the goal of the Georgia State University Law Review’s 2021 Symposium—examining solutions—the Article examines the concept of transformational solidarity as a*

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*method to address the failure of immigration laws to adhere to constitutional norms, creating the need for reform. The intersections between how both the grassroots abolition movements within criminal and immigration law enforcement—“defunding the police” with “abolishing ICE”—provide a starting point for addressing the disproportionate impact of immigration laws and enforcement policies on Black immigrants.*

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## INTRODUCTION

On October 7, 2020, in Boston, Immigration and Customs Enforcement (ICE) with the Department of Homeland Security, stopped Ben Apreala, a twenty-nine-year-old African American man, while he was jogging.<sup>1</sup> Two unmarked SUVs with tinted windows approached, one blocking the sidewalk in front of him and the other pulling up next to him along the street.<sup>2</sup> The officers had on tactical vests and masks. At least one officer was armed.<sup>3</sup>

The ICE officers began to question him: “They asked me what are you doing around here, where are you from, what are your whereabouts, why are you jogging down here . . . .”<sup>4</sup> Upon initial contact, Apreala believed that the officers were police officers until he saw one officer with an ICE badge: “When I saw the [ICE] badge and asked them if they were ICE officers and they said yes, and I explained that I wasn’t an immigrant, I’m born and raised in Boston and that I have no idea what they’re stopping me for, they said that immigration isn’t the only thing that they investigate and proceeded to question me . . . .”<sup>5</sup>

He pulled out his telephone and began to record. Through the camera, we see him ask the ICE officers if he was free to leave.<sup>6</sup> In response, another officer asked to see his arms to see if he had any

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1. Jaelyn Peiser, *ICE Agents Stopped a Black Jogger in Boston. Authorities Are Demanding Answers*, WASH. POST (Oct. 9, 2020, 4:13 AM), <https://www.washingtonpost.com/nation/2020/10/09/ice-black-jogger-boston-investigation/> [<https://perma.cc/SC3J-XQF5>].

2. Shannon Dooling, *ICE Confirms Immigration Officials Stopped Black Man Jogging in West Roxbury*, WBUR NEWS, <https://www.wbur.org/news/2020/10/07/ice-officers-west-roxbury-unexplained-stop-jogger> [<https://perma.cc/9AHW-YUX7>] (Oct. 7, 2020).

3. Beth Germano, *‘Anything Could Have Happened’: Runner Claims He Was Racially Profiled by ICE Agents*, CBS BOS. (Oct. 7, 2020, 11:57 PM), <https://boston.cbslocal.com/2020/10/07/ice-agents-stop-jogger-bena-apreala-boston-west-roxbury-aclu/>.

4. *Id.* (quoting Ben Apreala).

5. Dooling, *supra* note 2 (quoting Ben Apreala).

6. Peiser, *supra* note 1.

tattoos.<sup>7</sup> He again asked if he was free to leave and the ICE officers acquiesced.<sup>8</sup>

Apreala was racially profiled. ICE later released a statement disputing Apreala's account.<sup>9</sup> In the statement ICE indicated that they were looking for a previously deported Haitian national with multiple criminal convictions and pending drug charges.<sup>10</sup> In profiling Apreala, ICE stated he "matched their subject's description."<sup>11</sup>

Apreala's interaction with ICE occurred in the wake of the murder of Ahmaud Arbery, who, while jogging, was chased and murdered by armed white residents of a south Georgia neighborhood.<sup>12</sup> Around the same time, police racially profiled Mathias Ometu of San Antonio, Texas, and Joseph Griffin of Deltona, Florida, while they were jogging.<sup>13</sup> They both were handcuffed and detained.<sup>14</sup> These incidents demonstrate the normalcy of racial profiling in Black communities and the continuous violence of law enforcement against Black bodies.

Apreala's interaction with ICE demonstrates the prevalence of racial profiling as a law enforcement tactic.<sup>15</sup> Within immigration enforcement, racial profiling has been normalized as an acceptable law enforcement practice.<sup>16</sup> Although racial profiling is a tactic generally associated with criminal policing, this incident

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7. *Id.*

8. *Id.*

9. Dooling, *supra* note 2.

10. *Id.*

11. *Id.*

12. Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Feb. 28, 2021), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html> [<https://perma.cc/2AWC-75VP>].

13. Peiser, *supra* note 1.

14. *Id.*

15. *United States v. Brignoni-Ponce*, 422 U.S. 873, 884-87 (1975) (holding that "Mexican appearance" alone does not constitute a legitimate consideration under the Fourth Amendment when enforcing immigration laws near the border, but that it can be considered in conjunction with other factors, including "characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut"; "facts in light of [the officer's] experience in detecting illegal entry and smuggling"; "driver's behavior," such as "erratic driving or obvious attempts to evade officers"; and "characteristics of the area in which they encounter a vehicle").

16. *See id.*

demonstrates the intersection between racial justice and immigration enforcement. It highlights an issue not often discussed amongst immigration scholars: how immigrants of African descent are racialized as Black upon entering the United States. The Black Alliance for Just Immigration states: “[I]f being black makes you a police target, then being black and undocumented in a poor neighborhood will make you vulnerable to surveillance, punishment, and exile.”<sup>17</sup>

The Black Alliance for Just Immigration and the Pew Research Center estimate that there are between 4.2 to 5 million foreign-born Black individuals living in the United States.<sup>18</sup> In 2014, according to the U.S. Department of Homeland Security yearbook, “232,290 Black immigrants in the [United States] obtained lawful permanent resident (LPR) status.”<sup>19</sup> They represented 23% of all individuals who became LPRs in 2014.<sup>20</sup> This is important because this Article focuses on the prison-to-deportation pipeline, which disproportionately impacts Black noncitizens who have obtained LPR status. The Black Alliance for Just Immigration’s estimate includes both noncitizens and Black immigrants who have been naturalized.<sup>21</sup> Further, “[b]etween 2000 and 2013, about three-in-ten (28%) Sub-Saharan African immigrants entered as refugees or asylees, compared to only 5% for Caribbean immigrants and 13% for the overall immigrant population.”<sup>22</sup> In 2014, Black immigrants constituted 25% of the total 69,975 refugees who arrived in the

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17. 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> [<https://perma.cc/T5T6-DVCG>] (Feb. 5, 2020, 11:58 AM).

18. Monica Anderson & Gustavo López, *Key Facts About Black Immigrants in the U.S.*, PEW RSCH. CTR.: FACT TANK (Jan. 24, 2018), <http://pewrsr.ch/2E2rH4N> [<https://perma.cc/36PF-V4K4>]; JULIANA MORGAN-TROSTLE & KEXIN ZHENG, *Part I: A Statistical Portrait of Black Immigrants in the United States*, in THE STATE OF BLACK IMMIGRANTS 3, 10 (2016) [hereinafter MORGAN-TROSTLE & ZHENG, *Part I*], <http://stateofblackimmigrants.com/assets/sobi-fullreport-jan22.pdf> [<https://perma.cc/V7WY-SYF3>].

19. MORGAN-TROSTLE & ZHENG, *Part I*, *supra* note 18, at 14.

20. *Id.*

21. *Id.* at 10.

22. *Id.* at 16.

United States.<sup>23</sup> In addition, although “Black immigrants accounted for only 3.1% of the Black population in the [United States] in 1980, Black immigrants now account for nearly 10% of the nation’s Black population.”<sup>24</sup>

Statistics from the Department of Homeland Security demonstrate that at the intersection of immigration and race, immigrants of African descent are more likely to be detained and deported than other immigrants.<sup>25</sup> Between 2003 and 2015, Black immigrants comprised only 5.4% of the unauthorized population in the United States and 7.2% of the total noncitizen population but made up 10.6% of all immigrants in removal proceedings.<sup>26</sup>

Defining which populations constitute Black immigrants raises tensions of essentialism and reductive identities, which are hallmarks of systemic racism in the United States. Black immigrants come from different countries, are from different nationalities and cultures, and speak different languages and dialects. When they enter the United States, race—Blackness—becomes a primary identifier.<sup>27</sup> Defining who fits within the social construct of who is a Black immigrant displays the limits imposed within a racialized system where race is socially constructed.

Legal scholarship has analyzed the racialized impact of the intersection between criminal law and immigration (crimmigration); however, the impact on immigrants who are racialized as Black is

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23. *Id.*

24. *Id.* at 11.

25. JULIANA MORGAN-TROSTLE & KEXIN ZHENG, *Part II: Black Immigrants in the Mass Criminalization System*, in *THE STATE OF BLACK IMMIGRANTS*, *supra* note 18, at 21, 25 [hereinafter MORGAN-TROSTLE & ZHENG, *Part II*].

26. *Id.* at 40.

27. *Id.* at 29. For this Article, the definition from the Black Alliance for Justice Immigrants will be used:

Black Immigrants, unless otherwise specified in this report, refers to any person who was born outside the United States, Puerto Rico or other U.S. territories and whose country of origin is located in Africa or the Caribbean. Where Census data is available, the definition of “Black immigrant” is any person who was born outside the United States, Puerto Rico or other U.S. territories and self-identified as “Black or African American alone” in 2000 and later U.S. Census Bureau surveys.

MORGAN-TROSTLE & ZHENG, *Part I*, *supra* note 18, at 7.



limited.<sup>28</sup> Legal scholars who study crimmigration have long theorized the connections between the ways in which both law enforcement systems adversely impact immigrants, with a focus on Latino immigrants.<sup>29</sup> Legal scholarship has not thoroughly theorized the implications of anti-Black racism, criminalization, immigration enforcement, and the exclusion of immigrants from constitutional protections on Black immigrants.<sup>30</sup>

My scholarship has examined how immigration laws have reified race by legislating cultural norms that reinforce racial divisions and hierarchy in the United States.<sup>31</sup> My scholarship has also focused on comparing Jim Crow laws and the Fugitive Slave Act's enforcement

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28. Tanya Golash-Boza, *Structural Racism, Criminalization, and Pathways to Deportation for Dominican and Jamaican Men in the United States*, 44 SOC. JUST. 137, 142 (2017) (arguing “that a primary factor contributing to a [Black male immigrant’s] arrest and incarceration was criminalization” and that “[w]hat mattered was that they were racialized as Black, male, poor, and living in underserved and over-policed urban areas”).

29. See generally Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO STATE L.J. 599 (2015); CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS* (2019).

30. Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 1027 (2016) (arguing that most crimmigration scholarship fails to analyze the institutionalized role of race in criminal law enforcement (such as “driving while [Black/Brown]”) and, as a result, ignores the similar implications of federal immigration deportation processes that specifically target criminal noncitizens). *But see* Bolatito Kolawole, *African Immigrants, Intersectionality, and the Increasing Need for Visibility in the Current Immigration Debate*, 7 COLUM. J. RACE & L. 373, 373 (2017) (arguing “that the intersectional identity of Black African immigrants, being Black and foreign, renders them effectively invisible in the immigration debate and vulnerable to policies that affect them both due to their Blackness as well as their status as foreigners”).

31. See generally Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 163 (2010) [hereinafter McKanders, *Sustaining*]; Karla Mari McKanders, *Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities*, 61 CATH. U. L. REV. 921 (2012) [hereinafter McKanders, *Immigration Enforcement*]; Karla Mari McKanders, *America’s Disposable Youth: Undocumented Delinquent Juveniles*, 59 HOW. L.J. 197 (2015); Karla Mari McKanders, *Unforgiving of Those Who Trespass Against U.S.: State Laws Criminalizing Immigration Status*, 12 LOY. J. PUB. INT. L. 331 (2011); Karla Mari McKanders, *Federal Preemption and Immigrants’ Rights*, 3 WAKE FOREST J.L. & POL’Y 333 (2013) [hereinafter McKanders, *Federal Preemption*] (evaluating whether states abrogate individual civil rights and civil liberties when exercising their police powers to regulate immigration); Karla Mari McKanders, *Gender, Islamophobia and Refugee Exceptionalism: Human Rights, Gender Politics, and Identity, in ARABS AT HOME AND IN THE WORLD: HUMAN RIGHTS, GENDER POLITICS, AND IDENTITY* (Karla M. McKanders ed., 2019); Karla Mari McKanders, *Immigration and Blackness: What’s Race Got to Do with It?*, 44 HUM. RTS. 20 (2019) [hereinafter McKanders, *Immigration and Blackness*].

system to existing immigration enforcement systems, focusing on historical comparisons but not specifically engaging in an analysis of the impact of present-day immigration laws on Black immigrants.<sup>32</sup>

Immigration scholar Kevin Johnson has given the most comprehensive treatment of the issue within legal scholarship, addressing the impact of immigration enforcement and racial profiling on both Latinx and Black immigrants.<sup>33</sup> In his 2003 article *The Case for African American and Latina/o Cooperation in Challenging Racial Profiling in Law Enforcement*, he argued that “judicially-sanctioned race profiling” is a core element of immigration enforcement policies.<sup>34</sup> Within this system, he asserts that immigrants of African descent are presumed not to have the proper documentation to enter and are often subjected to being strip searched, shackled, detained, or having their immigration status unlawfully investigated.<sup>35</sup>

Johnson has explored the connection between over-policing in minority communities and the likelihood that criminal noncitizens will enter into the prison-to-deportation pipeline.<sup>36</sup> When I was writing this piece, Johnson published *Bringing Racial Justice to Immigration Law*.<sup>37</sup> This Article explores the commonalities between immigrant demands and the goals of the Black Lives Matter movement, positing that both demand an end to racialized law enforcement and the removal of race from the criminal legal system.<sup>38</sup>

The Black Alliance for Just Immigration and New York University Law School’s Immigration Clinic, directed by Clinical Law Professor

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32. See generally McKanders, *Sustaining*, *supra* note 31; McKanders, *Immigration Enforcement*, *supra* note 31.

33. See generally Kevin R. Johnson, *The Case for African American and Latina/o Cooperation in Challenging Racial Profiling in Law Enforcement*, 55 FLA. L. REV. 341 (2003).

34. *Id.* at 347.

35. *Id.* at 349–50 (citing *Orhorhaghe v. Immigr. & Naturalization Serv.*, 38 F.3d 488, 490 (9th Cir. 1994)).

36. Johnson, *supra* note 30, at 996.

37. See generally Kevin R. Johnson, *Bringing Racial Justice to Immigration Law*, 115 NW. U. L. REV. (forthcoming 2021) (on file with the Georgia State University Law Review).

38. *Id.* (manuscript at 1–2).

Alina Das, produced a comprehensive report, entitled *The State of Black Immigrants*.<sup>39</sup> This report extensively documents how immigration laws, executive policies, and administrative actions have resulted in over-policing and deportation of Black immigrants.<sup>40</sup> This is the most comprehensive report to date.

Outside legal scholarship, sociologist Tanya Golash-Boza has noted that scholars who study Black immigrants rarely mention mass incarceration.<sup>41</sup> Golash-Boza is one of few scholars who has studied how the structures that contribute to mass incarceration have also affected the incorporation trajectories of Black male immigrants.<sup>42</sup> She conducted a case study of over two dozen Jamaican and Dominican immigrants to demonstrate how criminalization directly contributes to the deportation of Black immigrants in the United States.<sup>43</sup> She focused on Jamaicans and Dominicans because they are more likely to be deported on criminal grounds and are more likely to be deported than other immigrant groups, even after they have obtained LPR status.<sup>44</sup> At the time of her study in 2017, Golash-Boza recognized the gap in legal scholarship, placing mass incarceration and criminalization in conversation with the deportation of Black immigrants.<sup>45</sup>

This Article addresses the impact of immigration laws, enforcement policies, and the lack of constitutional protections on Black immigrants. This Article engages in a critical conversation around the impact of immigration enforcement at the intersection of anti-Black racism. The particular and disproportionate harms that immigration laws and enforcement policies have had on Black immigrants illuminate how immigration laws fail to adhere to constitutional norms of equality. The failure of anti-discrimination norms to provide redress results in differential racialization and

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39. See generally MORGAN-TROSTLE & ZHENG, *Part 1, supra* note 18.

40. *Id.* at 5.

41. Golash-Boza, *supra* note 28, at 137.

42. *Id.*

43. *Id.* at 137–38.

44. *Id.* at 142.

45. *Id.* at 137.

essentialist paradigms that render Black immigrants invisible at the intersection of their race and immigration status. The goal of this Article is to examine how, at the intersection of anti-Black racism and immigration status, the immigration laws and enforcement policies operate to reinforce structural racism in America. At this intersection, Black immigrants experience a double bind where enforcement of immigration laws and the criminal legal system disparately impact them, resulting in over incarceration and deportation.

The Article proceeds in three parts. First, the Article examines how the first immigration laws—limiting citizenship to white males—continue to reinforce racial hierarchies in the United States. Specifically, this Part focuses on how Black immigrants are particularly vulnerable within a system that does not recognize constitutional norms of equality. Part II of the Article examines how anti-Black racism and the lack of constitutional protections within the immigration system leads to disproportionate immigration enforcement against Black immigrants. Relying on the Black Alliance for Just Immigration and Golash-Boza studies, this Part details how the legislative reforms of 1996, coupled with different executive enforcement policies, have had a disproportionate impact on the detention and deportation of Black immigrants. Third, in line with the goal of the *Georgia State University Law Review's* 2021 Symposium—examining solutions—the Article examines the concept of transformational solidarity as a method to address the failure of immigration laws to adhere to constitutional norms. The intersection of the grassroots abolition movements in criminal and immigration law enforcement—“defunding the police” and “abolishing ICE”—provides a starting point for addressing the disproportionate impact of immigration laws and enforcement policies on Black immigrants. This Symposium, “Social Justice and Racial Equality: What’s Next?,” provides the space for legal scholars to engage in questions of how Black immigrants are racialized as Black at the border and how structural racism impacts their

experience of tiered personhood and discrimination in the United States.

### I. NOT CITIZENS, NOT IMMIGRANTS: THE INVISIBILITY OF BLACK IMMIGRANTS

Black immigrants' invisibility within immigration legal discourse stems from a progression of the Black–white binary within the social construct of race that categorizes and creates racialized hierarchies. The first immigration laws and emergence of the doctrine of immigration exceptionalism work in tandem to racialize Black immigrants at the border and contribute to their continued invisibility at the intersection of their race, nationality, and immigration status. Black immigrants are particularly vulnerable in an immigration system that does not recognize constitutional norms of equality. Until recently, Black immigrants have been largely invisible in immigration policy debates because they are Black but not citizens of the United States and not viewed as fitting within other immigrant groups. This Part examines how the foundational immigration laws, coupled with the current doctrine of immigration exceptionalism (i.e., exemption from the protection of constitutional norms), result in their invisibility, which leads to the disproportionate policing and deportation of Black immigrants.

The foundational naturalization laws excluded African Americans from obtaining citizenship. In 1790, the first naturalization law limited citizenship to “free white person[s].”<sup>46</sup> The first citizenship law naturalized white identity by codifying the legal equivalency between citizen as a rightsholder and whiteness.<sup>47</sup> Limiting naturalization to whites to the exclusion of all other groups signified core concepts of membership and belonging that still permeate immigration laws today. Affirming this principle, in reference to the

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46. Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed 1795).

47. IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 18 (Richard Delgado & Jean Stefancic eds., 2d ed. 2006) (“The prerequisite cases are literally about the legal naturalization of Whites; they are also figuratively about naturalizing White identity.”).

first naturalization laws, scholar Ian Haney Lopez asserted: “The operation of law does far more than merely legalize race; it defines as well the spectrum of domination and subordination that constitutes race relations.”<sup>48</sup> “At different times and in differing degrees in the history of the United States, the law has functioned to perpetuate tiered personhood based on race or ethnicity, forming different groups and classes of persons.”<sup>49</sup> Thus, personhood rights are those rights granted regardless of citizenship status.

The 1857 *Dred Scott v. Sanford* case further elucidates the racialized norms of citizenship in the United States, excluding African Americans from citizenship.<sup>50</sup> In *Dred Scott*, the Supreme Court affirmed that slaves could not become citizens.<sup>51</sup> Justice Taney stated:

The term free inhabitant, in the generality of its terms, would certainly include one of the African race who had been manumitted. But no example, we think, can be found of his admission to all the privileges of citizenship in any State of the Union after these Articles were formed, and while they continued in force. And, notwithstanding the generality of the words “free inhabitants,” *it is very clear that, according to their accepted meaning in that day, they did not include the African race, whether free or not . . .*<sup>52</sup>

Justice Taney also noted the concern that if African Americans were given full membership and belonging through citizenship rights they would have:

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48. *Id.* at 7–8 (“The law’s construction of whiteness defined and affirmed critical aspects of identity (who is white); of privilege (what benefits accrue to that status); and of property (what legal entitlements arise from that status).” (quoting Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707, 1725 (1993))).

49. McKanders, *Sustaining*, *supra* note 31, at 171.

50. 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

51. *Id.* at 419.

52. *Id.* at 418 (emphasis added).

[T]he right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished . . . .<sup>53</sup>

Justice Taney further stated that Black people “had no rights which the white man was bound to respect.”<sup>54</sup>

African Americans’ exclusion from citizenship established the foundational boundaries for the legal enforcement of racialized immigration policies. Both the 1790 naturalization limitation to free white persons and *Dred Scott*’s limitation on the rights afforded to African Americans created an interdependent relationship between race and immigration laws’ reinforcement of racialized borders and defined the spectrum of domination and subordination that constitutes race relations.

In 1868, the Fourteenth Amendment of the U.S. Constitution acknowledged that African Americans were citizens at birth.<sup>55</sup> The Fourteenth Amendment overturned the *Dred Scott* decision but did not eliminate the decision’s pronouncement that individuals of African descent are not entitled to the same rights that come with the membership as a white citizen.<sup>56</sup>

Between 1878 and when the racial restrictions on naturalization were lifted in 1952, courts considered approximately fifty naturalization cases.<sup>57</sup> It is important to note that in all but one case argued by the applicants for citizenship “presented claims of [w]hite

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53. *Id.* at 417.

54. *Id.* at 407.

55. U.S. CONST. amend. XIV, § 1.

56. See Irene Scharf, *Second Class Citizenship? The Plight of Naturalized Special Immigrant Juveniles*, 40 CARDOZO L. REV. 579, 612 (2018) (describing how the Fourteenth Amendment failed to provide African Americans with the same rights afforded to white citizens).

57. LÓPEZ, *supra* note 47, at 35 app. a.

racial identity.”<sup>58</sup> The key point is “that the social stigma and harsh discrimination imposed on those with Black status discouraged applicants for citizenship from seeking admission on that basis.”<sup>59</sup> This created a norm by which immigrants inherently attempt to distance themselves from being identified as Black. The implications of which influence how Black immigrants experience a particular invisibility within immigration discourses.

Similar to the foundational naturalization laws, the foundational doctrine permitting the exclusion of immigration laws from adhering to constitutional norms have been about non-Black immigrants, most notably Chinese and Japanese immigrants. Immigration laws continued to further the inclusion of whites to the exclusion of other non-Black immigrant groups. The Page Act of 1875 (repealed in 1974) limited the entrance of Asian immigrants and unskilled Chinese and Indian workers.<sup>60</sup> In 1882, Congress passed the Chinese Exclusion Act, which barred the migration of Chinese nationals to the United States.<sup>61</sup> In a series of Supreme Court cases (Chinese Exclusion Act cases), the Court upheld the ban on the entry of Chinese nationals.<sup>62</sup> The Chinese Exclusion Act cases largely exempt the federal government from adhering to constitutional norms.

Further, in 1924, the Johnson-Reed Act excluded immigrants who were not white.<sup>63</sup> This Act excluded Asians, Africans, and Europeans who were not white from migrating to the United States.<sup>64</sup> The racist,

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58. *Id.*

59. *Id.* at 37.

60. Page Act of 1875, ch. 141, § 1, 18 Stat. 477 (repealed 1974).

61. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943). There were a series of Chinese exclusion statutes from 1882 to 1892. *See* Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943) (executing certain treaty stipulations relating to Chinese); Act of July 5, 1884, ch. 220, 23 Stat. 115 (repealed 1943) (amending treaty stipulations relating to Chinese); Act of Oct. 1, 1888, ch. 1064, §§ 1–2, 25 Stat. 504 (repealed 1943) (supplementing prior treaty stipulations); Act of May 5, 1892, ch. 60, §§ 1–3, 27 Stat. 25 (repealed 1943) (prohibiting the immigration of Chinese).

62. *See generally* *Fong v. United States*, 149 U.S. 698 (1893); *Ping v. United States*, 130 U.S. 581 (1889); *Chew v. United States*, 112 U.S. 536 (1884).

63. *See generally* Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924) (repealed 1952).

64. Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST. 67, 69 (1999) (“The central theme of [the Immigration Act of 1924 quotas] was a race-based nativism, which favored the ‘Nordics’ of northern and western Europe over the ‘undesirable races’ of eastern and southern Europe.”); *see also id.* at 72 (“The Quota Board



exclusionary nature of the foundational immigration laws has focused on the exclusion of non-Black immigrants.

The racist foundation of immigration law, when placed in context with the political branches' unfettered discretion over the enactment and enforcement of immigration, results in the denial of the personhood of Black immigrants who are not citizens nor seen as immigrants. The wide discretion has resulted in courts deferring to the political branches' authority to regulate immigration. Accordingly, the plenary powers doctrine has emerged where Congress enacts immigration laws with very little judicial oversight, and the Executive branch enforces immigration laws with very little interference.<sup>65</sup>

"Traditionally, immigration laws are considered within a nation's prerogative as a nation-state has the ability to discriminate against who is permitted to enter."<sup>66</sup> When evaluating whether the political branches are adhering to constitutional norms, courts have been very deferential to the political branches, citing sovereignty and national security as justifications for evading constitutional norms. This is immigration exceptionalism.<sup>67</sup> In explaining the impact of immigration exceptionalism, Immigration scholar Jennifer Chacón asserts: "[W]e are witnessing what happens when courts consistently fail to acknowledge and redress the harms caused by racism in the political process."<sup>68</sup> Immigration exceptionalism results in a failure to recognize how systemic racism impacts the enforcement of immigration laws.

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used census race categories to make its calculations. It subtracted from the total United States population all blacks and mulattoes, eliding the difference between the 'descendants of slave immigrants' and the descendants of free Negroes and voluntary immigrants from Africa.").

65. Karla Mari McKanders, *Deconstructing Invisible Walls: Sotomayor's Dissents in an Era of Immigration Exceptionalism*, 27 WM. & MARY J. WOMEN & L. 95, 99–100 (2020).

66. *Id.* at 107 (alteration in original) (quoting McKanders, *Federal Preemption*, *supra* note 31, at 340).

67. *Id.* at 119.

68. Jennifer M. Chacón, *The Failure of Equal Protection and the Fragility of Temporary Protection*, 43 UCLA L. MAG., Fall 2020, <https://uclalawmagazine.com/the-failure-of-equal-protection-and-the-fragility-of-temporary-protection/> [<https://perma.cc/2B7J-VX4V>] (discussing *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1891 (2020)).

The Chinese Exclusion Act cases began the consistent failure to redress racism in the political process and demonstrate depth of immigration exceptionalism. These cases provide the foundation for precluding immigration laws from judicial review even when there is a discriminatory animus.<sup>69</sup> Since the Chinese Exclusion Act cases, immigration laws have been upheld even when they violate constitutional norms.<sup>70</sup> They are ostensibly based upon the principle that countries as sovereigns have the ability to create laws in furtherance of the state's interest; however, they have operated to exclude noncitizens who are considered "non-white."<sup>71</sup> Traditionally, immigration laws are considered within a nation's prerogative because a nation-state has the ability to discriminate against who is permitted to enter.<sup>72</sup> The doctrine of immigration exceptionalism exempts immigrants from having their rights protected from

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69. See *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909))); *Ping v. United States*, 130 U.S. 581, 603–04 (1889) (laying out the plenary powers doctrine which attributed the power as inherent to a sovereign nation); see also Chris Nwachukwu Okeke & James A.R. Nafziger, *United States Migration Law: Essentials for Comparison*, 54 AM. J. COMP. L. 531, 544 (2006) (stating that a cardinal doctrine of U.S. constitutional law is that Congress has an inherent, plenary power in matters of immigration); Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1630 (1997) ("[T]he federal government has enjoyed a virtual *carte blanche* on immigration matters.").

70. Kevin R. Johnson, *Keynote to Immigration in the Trump Era Symposium: Judicial Review and the Immigration Laws*, 48 SW. L. REV. 463, 465 (2019) (defining characteristic of plenary powers doctrine as "immigration exceptionalism"). See generally Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601 (2013).

71. See *Plyler v. Doe*, 457 U.S. 202, 225 (1982) ("Drawing upon [its Article I, Section 8] power, upon its plenary authority with respect to foreign relations and international commerce, and upon the inherent power of a sovereign to close its borders, Congress has developed a complex scheme governing admission to our Nation and status within our borders." (first citing *Mathews v. Diaz*, 426 U.S. 67, 96 (1976); and then citing *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1982))); see also *Fiallo*, 430 U.S. at 792 ("Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments . . .'" (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953))); *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 768 (C.D. Cal. 1995) (recognizing the inherent power of a sovereign nation to control its borders (first citing *Ekiu v. United States*, 142 U.S. 651, 659 (1892); and then citing *Plyler*, 457 U.S. at 225)); *Ping*, 130 U.S. at 581 (stating that the government's power to exclude aliens from the United States is not open to controversy). See generally *Fong v. United States*, 149 U.S. 698 (pointing out that the Constitution vests the national government with absolute control over international relations).

72. See *Plyler*, 457 U.S. at 225; see also *Fiallo*, 430 U.S. at 792; *League of United Latin Am. Citizens*, 908 F. Supp. at 768; *Ping*, 130 U.S. at 581. See generally *Fong*, 149 U.S. 698.

discriminatory government action, which would not be acceptable in other regulatory fields.<sup>73</sup>

The foundations of immigration law, coupled with immigration exceptionalism facilitating the exclusion of non-white immigrants, create a system of tiered personhood where constitutional norms do not apply to immigrants, especially immigrants of color.<sup>74</sup> The foundation of U.S. immigration laws furthered systemic racism, which sought to maintain inequality based on race with the intent to exclude non-whites from full membership in American society and entitlement to basic rights.<sup>75</sup> The concept of personhood is “a placeholder for deeper concepts that ground [society’s] moral intuitions about human rights.”<sup>76</sup> A “person” is defined as “any being whom the law regards as capable of rights and duties.”<sup>77</sup> Accordingly, personhood rights should be recognized regardless of citizenship status. If an individual belongs to a non-white category or is racialized as Black, members of these groups are denied legal and social protections.<sup>78</sup> Although the Fourteenth Amendment provides that all persons are entitled to equality under the law, immigration law, through the plenary powers doctrine and immigration exceptionalism, has bypassed this requirement, creating subordinate groups who are outside the protections of the law.<sup>79</sup> Essentially,

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73. David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 584–85 (2017) (stating that immigration law is exceptional, especially when it comes to immigrants’ rights that “do not apply to other regulatory fields and enable government action that would be unacceptable if applied to citizens”).

74. Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 6 (1998) (“[T]he plenary power doctrine is said to make racial discrimination in the immigration context lawful per se.”). See generally McKanders, *Sustaining*, *supra* note 31.

75. Chin, *supra* note 74, at 5–6.

76. Jens David Ohlin, *Is the Concept of the Person Necessary for Human Rights?*, 105 COLUM. L. REV. 209, 248–49 (2005).

77. See *Person*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“Any being that is so capable is a person, whether a human being or not, and no being that is not so capable is a person, even though he be a man. Persons are the substances of which rights and duties are the attributes. It is only in this respect that persons possess juridical significance, and this is the exclusive point of view from which personality receives legal recognition.”).

78. *Id.*

79. *Id.*; see also Kevin R. Johnson, *Federalism and the Disappearing Equal Protection Rights of Immigrants*, 73 WASH. & LEE L. REV. ONLINE 269, 270 (2016) (“[W]e must examine the continuing

tiered personhood guarantees that the basic humanity of subordinate groups is denied because of their race, ethnicity, or nationality.

The exemplar case demonstrating the failure of the Constitution—the Equal Protection Clause—to apply to the federal government is the 1976 Supreme Court case, *Mathews v. Diaz*.<sup>80</sup> In *Diaz*, the Supreme Court evaluated the constitutionality of excluding noncitizens from eligibility for a federal medical insurance program.<sup>81</sup> The Court held, congruent with the plenary powers and immigration exceptionalism doctrines:

In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. The exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government's power to regulate the conduct of its own citizenry.<sup>82</sup>

This decision affirms the creation of a system of tiered personhood where constitutional norms do not apply to immigrants, especially immigrants of color.

More recently, the Supreme Court's failure to even review constitutional challenges to Executive branch policies continues to further this system of tiered personhood. In the case challenging the Executive branch's rescission of the Deferred Action for Childhood Arrivals program (DACA), the plaintiffs alleged that DACA's rescission was motivated by a discriminatory animus towards Latinx community in violation of the Equal Protection Clause.<sup>83</sup> The

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vitality of the plenary power doctrine. That exceptional doctrine shields from judicial review invidious classifications under the U.S. immigration laws, including discrimination that would be patently unconstitutional if applied to U.S. citizens; those laws historically have discriminated against noncitizens who are racial minorities, poor, disabled, women, political dissidents, and others. Dismantling what is known as 'immigration exceptionalism' has long puzzled immigration law scholars.”)

80. See generally *Mathews v. Diaz*, 426 U.S. 67 (1976).

81. *Id.* at 68.

82. *Id.* at 79–80 (footnotes omitted).

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

majority opinion did not evaluate the plaintiffs' equal protection claims, stating that the allegations were insufficient.<sup>84</sup>

Further, although not an equal protection claim, in *Trump v. Hawaii*, the Supreme Court failed to evaluate whether the Executive's actions violated the Establishment Clause of the First Amendment to the U.S. Constitution where the plaintiffs alleged that orders were "motivated not by concerns pertaining to national security but by animus toward Islam."<sup>85</sup> Notably, in the majority opinion, Chief Justice Roberts relied on *Diaz*'s restriction on the application of constitutional norms to noncitizens.<sup>86</sup> Chief Justice Roberts reaffirmed the doctrine of immigration exceptionalism, indicating that courts defer to the political branches in the enforcement of immigration.<sup>87</sup> He stated: "'Any rule of constitutional law that would inhibit the flexibility' of the President 'to respond to changing world conditions should be adopted only with the greatest caution,' and our inquiry into matters of entry and national security is highly constrained."<sup>88</sup>

Operating under a binary paradigm that excludes all non-whites and defers to concepts of sovereignty, immigration law has precluded the application of constitutional norms to immigrants of color. The rigid binary of white (inclusion) and others (exclusion) is reinforced through legal standards exempting the application of constitutional norms to noncitizens in the United States.<sup>89</sup>

Certainly, the immigration exceptionalism framework does not take into account the intersectionality—the particularity of an immigrant group based upon their multiple identities—of being Black and an immigrant.<sup>90</sup> Intersectionality is not common parlance

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84. *Id.* at 1892.

85. *Trump v. Hawaii*, 138 S. Ct. 2392, 2406 (2018).

86. *Id.* at 2418–20.

87. *Id.* at 2419–20.

88. *Id.* (citing *Mathews v. Diaz*, 426 U.S. 67, 81–82 (1976)).

89. See generally *id.*; *Regents of the Univ. of Cal.*, 140 S. Ct. 1891.

90. RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 10 (3d ed. 2017) ("[T]he idea that each race has its own origins and ever-evolving history—is the notion of intersectionality and antiessentialism.").

to understand the unique harms Black immigrants experience at the intersection of their race, class, gender, nationality, and immigration status.<sup>91</sup> Moving away from rigid binary understandings of identity into multidirectional, diverse understandings is a concept in which this legal framework does not engage. Identity formation beyond categorization is not a paradigm used to understand immigrants of color and in particular Black immigrants. Black immigrants do not fit within existing paradigms for African Americans nor immigrants; this makes them particularly vulnerable in an immigration system that does not recognize constitutional norms of equality.

## II. IMPACT OF ANTI-BLACK RACISM ON THE INVISIBILITY OF BLACK IMMIGRANTS

Any person who is not a citizen can be deported from the United States.<sup>92</sup> Noncitizens include lawful permanent residents (green card holders), visa holders, and undocumented immigrants.<sup>93</sup> There are two immigration law enforcement entities within the Department of

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91. Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CALIF. L. REV. 1213, 1216 (1997) ("A paradigm is a shared set of understandings or premises which permits the definition, elaboration, and solution of a set of problems defined within the paradigm. A paradigm is an accepted model or pattern that, 'like an accepted judicial decision in the common law . . . is an object for further articulation and specification under new or more stringent conditions.'" (footnotes omitted)).

92. 8 U.S.C. § 1227(a) (enumerating the grounds for deportation: "[a]ny alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens" and that an alien is a noncitizen).

93. § 1101(a)(3) (defining noncitizens as aliens, stating, "[t]he term 'alien' means any person not a citizen or national of the United States"). *But see Fact Sheet: President Biden Sends Immigration Bill to Congress As Part of His Commitment to Modernize our Immigration System*, THE WHITE HOUSE (Jan. 20, 2021) [hereinafter THE WHITE HOUSE], <https://buildbackbetter.gov/press-releases/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/> [https://perma.cc/MR7X-MXTH] (proposing a comprehensive immigration bill to remove the term "alien" with the Immigration and Nationality Act); Catherine E. Shoichet, *Biden Wants to Remove This Controversial Word from US Laws*, CNN, <https://www.cnn.com/2021/01/21/politics/alien-biden-immigration-law/index.html> [https://perma.cc/K648-D9SW] (Jan. 21, 2021, 2:13 PM) ("The term 'illegal alien,' long decried as a dehumanizing slur by immigrant rights advocates, became even more of a lightning rod during the Trump era—with some top federal officials encouraging its use and several states and local governments taking up measures to ban it.").

Homeland Security (DHS)<sup>94</sup>—Immigration and Customs Enforcement (ICE)<sup>95</sup> and Customs and Border Protection (CBP).<sup>96</sup> ICE handles the interior enforcement of immigration laws (i.e., deportation of noncitizens inside the United States),<sup>97</sup> and CBP handles the exterior enforcement prevention and deportation of noncitizens at the border.<sup>98</sup> A noncitizen's violation of the Immigration and Nationality Act can result in being placed in deportation proceedings.<sup>99</sup> The interior enforcement of immigration laws also occurs through the criminal legal system. If a noncitizen commits a crime, after the criminal proceedings have concluded, they may be transferred to ICE custody, placed in deportation proceedings, and processed for removal.<sup>100</sup> At the intersection of policing and immigration enforcement, Black immigrants experience a double bind. Mass incarceration disproportionately impacts both African Americans and Black immigrants. Accordingly, Black immigrants are disproportionately criminalized, which results in deportation from the United States.

Irrefutable data demonstrates that Black residents are more likely to be detained in “traffic and street” stops than white or Latinx people.<sup>101</sup> This point is exemplified by the fact that “[m]ore than [one] in [six] Black residents who were pulled over in a traffic stop or stopped on the street had similar interactions with police multiple times over the course of the year.”<sup>102</sup> Over-policing in Black

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94. See generally Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135 (codified as amended in scattered sections of 6 U.S.C. and 8 U.S.C.) (creating the DHS).

95. See generally § 1357 (listing the duties of ICE officers).

96. 6 U.S.C. § 211, amended by Pub. L. 116–277, 134 Stat. 3368 (2020) (listing the duties of Customs and Border Protections).

97. See generally 8 U.S.C. § 1357.

98. 6 U.S.C. § 211, amended by Pub. L. 116–277, 134 Stat. 3368.

99. 8 U.S.C. § 1229(a)(2) (“An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.”).

100. See generally § 1357.

101. Alexi Jones, *Police Stops Are Still Marred by Racial Discrimination, New Data Shows.*, PRISON POL’Y INITIATIVE (Oct. 12, 2018), <https://www.prisonpolicy.org/blog/2018/10/12/policing/> [<https://perma.cc/TR86-QGMQ>].

102. *Id.*

communities exposes the ways in which Black immigrants experience increased exposure to the criminal legal system, which is the primary way in which Black immigrants are placed in deportation proceedings.<sup>103</sup>

In her study, Golash-Boza documented how working-class Black male deportees are primarily funneled into the prison-to-deportation pipeline through the criminal justice system.<sup>104</sup> Reviewing data from the DHS, the Black Alliance for Just Immigration similarly documented that Black immigrants “make up 20.3% of immigrants facing deportation before the EOIR [the immigration courts] on criminal grounds . . . compared to 10% of all immigrants in deportation proceedings before EOIR who have criminal grounds of removability.”<sup>105</sup> The report also found that, in 2013, more than 75% of Black immigrants were removed from the United States based on criminal grounds, compared to less than 50% of immigrants overall.<sup>106</sup>

The data demonstrate that the racialized criminal legal system, in conjunction with immigration laws and enforcement norms, has had a disproportionate impact on Black immigrants, resulting in increased convictions and ultimately deportation.<sup>107</sup> Immigration laws criminalizing noncitizens have become “a coded system that works to funnel [B]lack and Latinx immigrants from the criminal court system into Immigration Customs and Enforcement . . . custody to the immigration court system, and ultimately back to their nations of birth—with very little recourse or space for adjudication.”<sup>108</sup>

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103. Golash-Boza, *supra* note 28, at 141 (“Black and dark-skinned immigrants ‘face more systematic and authoritative racial boundaries’ than their lighter-skinned counterparts. . . . Dominican West Indian males in [the] survey were as likely to report problems with the police as African Americans.” (citing PHILIP KASINITZ ET AL., *INHERITING THE CITY: THE CHILDREN OF IMMIGRANTS COME OF AGE 303* (2008))).

104. *Id.* at 139 (“Working-class Black male deportees are often funneled first through the criminal justice system rather than the immigration law enforcement apparatus. Nearly all the Jamaican and Dominican deportees I interviewed had been arrested by police officers who had then handed them over to immigration authorities.”).

105. MORGAN-TROSTLE & ZHENG, *Part II, supra* note 25, at 40.

106. *Id.* at 41.

107. *See id.* at 40–41.

108. Ibrahim, *supra* note 17.



The funneling of Black immigrants from the criminal legal system into deportation proceedings has euphemistically been referred to as “the prison-to-deportation pipeline.”<sup>109</sup> The intersection of criminal and immigration enforcement results in immigrants serving their criminal sentences after which they are deported—in some instances—to countries where they have had little or no contact.<sup>110</sup>

The rest of this Part explains how immigration laws and enforcement policies work in tandem with each other to fuel the prison-to-deportation pipeline. In 1996, Congress amended the Immigration and Nationality Act of 1952 (INA) by passing the Antiterrorism and Effective Death Penalty Act (AEDPA)<sup>111</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).<sup>112</sup> AEDPA was a comprehensive bill that expanded the grounds for detaining and deporting immigrants, including LPRs (green card holders).<sup>113</sup> AEDPA was the first law to authorize expedited deportation procedures.<sup>114</sup> Specifically, AEDPA expanded the number of crimes for which a noncitizen could be deported and restricted the forms of discretionary relief.<sup>115</sup> For example, after AEDPA a noncitizen “convicted of a crime for which a sentence of one year or longer may be imposed is deportable.”<sup>116</sup> IIRIRA also expanded the definition of what constitutes an aggravated felony to make a noncitizen deportable.<sup>117</sup> Prior to 1996, a noncitizen could

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109. *Id.*

110. Esther Yu Hsi Lee, *The Prison-to-Deportation Pipeline That Keeps Punishing Immigrants*, THINKPROGRESS (Nov. 7, 2015, 2:00 PM), <https://archive.thinkprogress.org/the-prison-to-deportation-pipeline-that-keeps-punishing-immigrants-a5522d0645c6/> [<https://perma.cc/74FL-VVVK>] (“Advocates say that the pipeline into deportation proceedings amounts to a kind of double punishment because these immigrants have already served out their prison sentences and repaid their debt to society.”).

111. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104–132, 110 Stat. 1214, 1259–281 (1996) (codified as amended in scattered sections of 8 U.S.C. and 28 U.S.C.).

112. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009 (1996) (codified in scattered sections of 8 U.S.C.).

113. *See generally* Antiterrorism and Effective Death Penalty Act, 110 Stat. 1214.

114. *See id.*

115. *Id.* § 501.

116. 8 U.S.C. § 1227(a)(2)(A)(i)(II).

117. § 1101(a)(43).

only be deportable for an aggravated felony if they received a sentence of five years or more.<sup>118</sup>

Both AEDPA and IIRIRA resulted in deportations with minimal due process rights, mandatory detention, and deportations of LPRs who have minimal ties to their home countries.<sup>119</sup> For example, in a study, the Pew Research Center documented from 2007 to 2012 that AEDPA and IIRIRA resulted in a 43% increase in drug conviction-related deportations.<sup>120</sup> Around the same time, the Black Alliance for Just Immigration's report documented from "2003–2013, drug offenses, including simple drug possession, accounted for almost a quarter of all criminal removals."<sup>121</sup> The practical impact has been that a noncitizen will most likely be deported after conviction of crime, even if the crime is relatively minor.<sup>122</sup>

Golash-Boza documented the direct impact of AEDPA and IIRIRA changes on the disproportionate numbers of Jamaican and Dominican immigrants being deported.<sup>123</sup> Relying on DHS data, she found that "[i]n 2005, 83 percent of Jamaican and 78 percent of Dominican deportees were deported after having been convicted of crimes."<sup>124</sup> She further found that "[a]bout 20 percent of legal permanent resident deportees were Dominican, yet Dominicans make up less than 4 percent of the legal permanent resident population. Thus, both Jamaican and Dominican legal permanent residents are about five times as likely as other legal permanent residents to be

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118. Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939 (2000). It should be noted that the INA defines what constitutes an aggravated felony in section 1101(a)(43). *Id.* This means that whether a conviction (also defined in the INA, which targets criminal conduct not just adjudications of guilt) leads to deportation will vary based upon how a particular state criminalizes conduct within its criminal code. *Id.*

119. See generally MORGAN-TROSTLE & ZHENG, *Part I*, *supra* note 18.

120. Ibrahim, *supra* note 17.

121. MORGAN-TROSTLE & ZHENG, *Part II*, *supra* note 25, at 36.

122. Golash-Boza, *supra* note 28, at 138.

123. *Id.* at 137–38.

124. *Id.* at 142 (citing MARY DOUGHERTY ET AL., DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2005 (2006), [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/Enforcement\\_AR\\_05.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/Enforcement_AR_05.pdf) [<https://perma.cc/7RXV-BSNS>]).

deported.”<sup>125</sup> Her study revealed that Jamaican and Dominican noncitizens were “more likely to be deported on criminal grounds and more likely to be deported as legal permanent residents than other groups.”<sup>126</sup>

There is a long history of collaboration between federal, state, and local law enforcement that reinforces the prison-to-deportation pipeline.<sup>127</sup> Federal, state, and local collaboration in enforcing immigration laws is authorized under section 287(g) of the INA.<sup>128</sup> Under this provision, immigration enforcement entities may enter into agreements with state and local law enforcement officials to enforce immigration laws.<sup>129</sup> For example, in 2010, along with many other states and localities, Arizona enacted Senate Bill 1070, which requires police to ask about immigration status if they suspect someone is unlawfully in the country.<sup>130</sup> State and local law enforcement entities will refer noncitizens to ICE after they have been convicted of a crime or, in some instances, if a noncitizen is suspected to be in the United States without proper authorization. After referral, state and local law enforcement officers can place an “ICE hold” on a noncitizen in custody for forty-eight hours until ICE takes the noncitizen into custody.

In addition to the 1996 laws, the Executive branch has considerable discretion over the enforcement of immigration laws.<sup>131</sup>

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125. *Id.* at 143 (citing JONATHAN BAUM ET AL., IN THE CHILD’S BEST INTEREST?: THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION (2010), [http://www.law.berkeley.edu/files/Human\\_Rights\\_report.pdf](http://www.law.berkeley.edu/files/Human_Rights_report.pdf) [<https://perma.cc/UF8S-5VNV>]).

126. *Id.* at 142.

127. Karla Mari McKanders, *The Constitutionality of State and Local Laws Targeting Immigrants*, 31 UNIV. ARK. LITTLE ROCK L. REV. 579, 581–90 (2009).

128. 8 U.S.C. § 1357.

129. § 1357(g) (“[T]he Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.”).

130. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010); ARIZ. REV. STAT. ANN. § 13-1509 (preempted by *Arizona v. United States*, 567 U.S. 387 (2012)).

131. Shoba Sivaprasad Wadhia, *Immigration Enforcement and the Future of Discretion*, 23 ROGER

The Executive branch has wide prosecutorial discretion in determining enforcement priorities.<sup>132</sup> The rest of this Part evaluates Executive polices from the Obama, Trump, and Biden Administrations and how they have (and may) impact the criminalization and disproportionate deportation of Black immigrants.

In 2014, under the Obama Administration, the Secretary of Homeland Security shifted its enforcement priorities to the deportation of noncitizens convicted of crimes.<sup>133</sup> President Obama indicated that the prosecutorial policy would focus on “[f]elons, not families. Criminals, not children. Gang members, not a mom who’s working hard to provide for her kids.”<sup>134</sup> The Obama administration stated: “[A]ny immigrant—including legal non-citizens—will be a priority for deportation if he or she has been convicted of an ‘aggravated felony’ or certain misdemeanor crimes, such as driving under the influence.”<sup>135</sup>

President Obama deported the most (2,749,854)<sup>136</sup> undocumented immigrants in the history of the United States and was known as the “Deporter in Chief.”<sup>137</sup> During the Obama Administration, noncitizens deported based upon their criminal records increased

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WILLIAMS U. L. REV. 353, 356 (2018) (“Congress has delegated the responsibility of setting priorities in immigration enforcement to DHS, and has further charged it with administering and enforcing the immigration laws in section 103 of the INA.” (citing 8 U.S.C. § 1103)).

132. *Id.*

133. Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski et al., (Nov. 20, 2014) [hereinafter Memorandum], [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf) [<https://perma.cc/6TNL-W895>].

134. Christie Thompson, *Deporting ‘Felons, Not Families’: Obama’s Immigration Plan Has No Room for Criminals. But What’s a Criminal?*, THE MARSHALL PROJECT (Nov. 21, 2014, 5:22 PM), <https://www.themarshallproject.org/2014/11/21/deporting-felons-not-families> [<https://perma.cc/LX4M-BAZ7>]; MORGAN-TROSTLE & ZHENG, *Part II*, *supra* note 25, at 32.

135. Thompson, *supra* note 134.

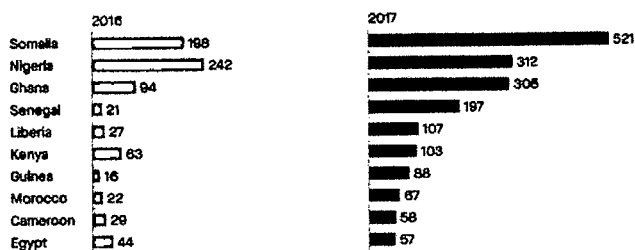
136. *2015 Yearbook of Immigration Statistics*, U.S. DEP’T HOMELAND SECURITY (Dec. 2016), <https://www.dhs.gov/immigration-statistics/yearbook/2015> [<https://perma.cc/PS8C-ZJ2T>].

137. Muzzaffar Chishti et al., *The Obama Record on Deportations: Deporter in Chief or Not?*, MIGRATION POL’Y INST. (Jan. 26, 2017), <https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not> [<https://perma.cc/3D7U-QXVX>] (confirming that “the Obama-era policies represented the culmination of a gradual but consistent effort to narrow its enforcement focus to two key groups: The deportation of criminals and recent unauthorized border crossers” and that those policies resulted in increased deportations).

from 82% in 2013 to 91% in 2015.<sup>138</sup> In 2015, one in three Black immigrants was removed on criminal grounds.<sup>139</sup>

The Trump Administration's immigration policies were explicitly intended to exclude immigrants of color.<sup>140</sup> The Trump Administration signed numerous executive orders, enacted regulations, and changed enforcement policies that disproportionately impacted and increased the deportation rates of migrants from African countries. In 2017, after Trump entered office, ICE removals decreased; however, the deportation of African migrants went up—in some cases, more than doubling, as shown in the graph below.<sup>141</sup>

### ICE removal of African migrants are rising



138. MORGAN-TROSTLE & ZHENG, *Part II, supra* note 25, at 36.

139. *Id.* at 39; see also Angélica Cházaro, *Challenging the "Criminal Alien" Paradigm*, 63 UCLA L. REV. 594, 653 (2016).

140. McKanders, *Immigration and Blackness, supra* note 31, at 21 ("The administration has promoted racist narratives, asking why migrants from 'shithole countries' are coming to the United States. Senator Durbin stated that the president made these comments in a White House meeting with 23 members of Congress. He allegedly repeatedly referred to Haiti and African countries as 'shitholes,' stating the United States should get more people from countries like Norway to migrate to the United States."); see also Ali Vitali et al., *Trump Referred to Haiti and African Nations As 'Shithole' Countries*, NBC NEWS, <https://www.nbcnews.com/politics/white-house/trump-referred-haiti-african-countries-shithole-nations-n836946> [<https://perma.cc/Z8MK-E8NU>] (Jan. 12, 2018, 7:47 AM); Jeremy Raff, *The 'Double Punishment' for Black Undocumented Immigrants*, THE ATLANTIC (Dec. 30, 2017), <https://www.theatlantic.com/politics/archive/2017/12/the-double-punishment-for-black-immigrants/549425/> [<https://perma.cc/99J2-XTHZ>] ("The Haitians 'all have AIDS,' Trump said in a June meeting with his top advisers according to the *Times*, while the Nigerians would not 'go back to their huts' after seeing America, he said. (The White House denied the comments.)").

141. Samira Sadeque, *ICE Removal of African Migrants Are Rising*, ATLAS (citing to U.S. IMMIGR. & CUSTOMS ENF'T, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 15 (2017), <https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf> [<https://perma.cc/38FM-F9GQ>]), <http://www.theatl.com/charts/r18q5Gq8M> [<https://perma.cc/RE3Z-D9F9>]). Despite a six percent drop in overall removals, there was a significant rise in removal of migrants from countries such as Gambia, Niger, and Senegal. *Id.*

In 2017, Somali nationals experienced the highest rate of deportation after the Trump Administration decided to remove approximately 5,000 Somali nationals with prior deportation orders.<sup>142</sup> Most of the Somali nationals were convicted of crimes.<sup>143</sup> As justification, ICE cited its enforcement priority focus on “individuals who pose a threat to national security, public safety and border security” as the reason for targeting Somali nationals.<sup>144</sup>

Prior to the Trump Administration, Somali nationals who were deported for criminal convictions were issued “orders of supervision.”<sup>145</sup> Orders of supervision allowed Somali nationals to remain in the United States because Somalia did not have a functioning central government.<sup>146</sup> After the Somali government changed in 2017, the Trump Administration began deporting Somali nationals.<sup>147</sup>

In December 2017, ICE attempted to deport eighty-two Somali men and women from a Louisiana immigration detention facility.<sup>148</sup> Sixty-eight of the Somali nationals had previous criminal convictions.<sup>149</sup> ICE shackled everyone by their wrists, waists, and ankles,<sup>150</sup> and loaded them onto a chartered airplane to Somalia.<sup>151</sup> The plane landed in Dakar, Senegal, where it stayed on the runway for twenty-three hours.<sup>152</sup> The plane then returned, landing in

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142. Mohamed Olad Hassan, *US Planning to Return 5,000 Somali Migrants to Their Homeland*, VOICE AM. NEWS (Apr. 8, 2017, 7:39 PM), <https://www.voanews.com/usa/us-planning-return-5000-somali-migrants-their-homeland> [https://perma.cc/BR2P-F6XB].

143. *Id.*

144. *Id.*

145. *Ibrahim v. Acosta*, No. 17-CV-24574, 2019 WL 1206327, at \*1 (S.D. Fla. Mar. 14, 2019) (citing 8 C.F.R. § 241.5).

146. *Id.*

147. *Id.*

148. Hassan, *supra* note 142; Jerry Iannelli, *Somalis in South Florida Deported by ICE on “Slave Ship” File Class-Action Suit*, MIAMI NEW TIMES (Dec. 19, 2017, 2:54 PM), <https://www.miaminewtimes.com/news/92-somalis-sue-ice-after-deportation-on-slave-ship-9924187> [https://perma.cc/U6D8-R8Y8].

149. Hassan, *supra* note 142 (“According to a statement from ICE, 68 of those detained . . . had previous criminal convictions, for crimes including armed robbery, larceny and drug offenses.”).

150. Iannelli, *supra* note 148.

151. *Id.*

152. *Id.*

Miami.<sup>153</sup> The deportees were kept shackled in the airplane for at least forty-eight hours straight.<sup>154</sup> While on the plane, ICE agents allegedly beat them, restrained them, and dragged them down the aisle.<sup>155</sup> The accounts reported agents laughing as toilets overflowed, and some men urinated on themselves.<sup>156</sup>

The Miami New Times euphemistically called their deportation flight “Deported by ICE on a Slave Ship.”<sup>157</sup> In 2018, Somali nationals filed a class action lawsuit against the Trump Administration.<sup>158</sup> The lawsuit alleged that the plaintiffs were subjected to inhumane conditions and egregious abuse on the December 7, 2017 flight.<sup>159</sup>

During the last few months in office, the Trump Administration continued to push the deportation of African nationals. There was a rise in the deportation of African nationals who received orders of supervision but could not return to their countries of origin because their countries were unsafe.<sup>160</sup>

During the Trump Administration, the number of deportation cases before the immigration courts increased from 542,411 to 1,290,766.<sup>161</sup> It is unclear whether the Biden Administration will continue the trajectory of enforcement policies that disproportionately impact Black immigrants.

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153. *Id.*

154. *Id.*

155. *Id.*

156. Iannelli, *supra* note 148.

157. *Id.*

158. Ibrahim v. Acosta, No. 17-CV-24574, 2019 WL 1206327, at \*1 (S.D. Fla. Mar. 14, 2019).

159. *Id.*

160. Julian Borger, *ICE Flies African Asylum Seekers to Nairobi in Last-Minute Deportation Push*, THE GUARDIAN (Jan. 16, 2021, 5:00 PM), <http://www.theguardian.com/us-news/2021/jan/16/ice-african-deportation-flight-asylum-seekers-nairobi> [https://perma.cc/ZA6P-F6TC] (“According to statistics compiled by Witness at the Border, [ICE] conducted 1,008 deportation flights in 2020, to at least 31 countries in Latin America, the Caribbean [and] Africa.”).

161. *The State of the Immigration Courts: Trump Leaves Biden 1.3 Million Case Backlog in Immigration Courts*, TRAC IMMIGR. (Jan. 19, 2021), [https://trac.syr.edu/immigration/reports/637/?utm\\_source=AILA+Mailing&utm\\_campaign=25dc1403d6-AILA8-01-20-2021&utm\\_medium=email&utm\\_term=0\\_3c0e619096-25dc1403d6-291970253](https://trac.syr.edu/immigration/reports/637/?utm_source=AILA+Mailing&utm_campaign=25dc1403d6-AILA8-01-20-2021&utm_medium=email&utm_term=0_3c0e619096-25dc1403d6-291970253) [https://perma.cc/3MVE-89RU].

The Biden Administration has initially focused on reinstating the system back to the status quo. On January 20, 2021, the Biden Administration proposed a comprehensive immigration bill.<sup>162</sup> On January 26, 2021, Biden signed an executive order, entitled “Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities,” aimed at addressing mass incarceration.<sup>163</sup> This executive order resulted from a campaign promise to end “the federal government’s use of private prisons” and “make clear that the federal government should not use private facilities for any detention, including detention of undocumented immigrants.”<sup>164</sup> The order, however, addresses ending only the use of private prisons by the Department of Justice, not by the Department of Homeland Security. The hope is that the Biden Administration recognizes the connection between the criminal legal system and immigration enforcement and does not continue to institute immigration enforcement policies that have a documented, disproportionate impact on Black immigrants.

The statistics, changes in the law, and cases demonstrate the disproportionate impact of anti-Black racism within the immigration enforcement on Black immigrants. The data demonstrate how immigration laws have had a disproportionate impact on Black immigrants, who have largely been invisible in our conversations at the intersection of anti-Black racism and immigration.

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162. THE WHITE HOUSE, *supra* note 93.

163. Exec. Order No. 14006, 86 Fed. Reg. 7483 (Jan. 26, 2021); *see also Executive Order on Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities*, THE WHITE HOUSE (Jan. 26, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/executive-order-reforming-our-incarceration-system-to-eliminate-the-use-of-privately-operated-criminal-detention-facilities/> [<https://perma.cc/M235-7QLU>].

164. Laura Barrón-López et al., *Biden Weighs Putting an End to Private Immigration Detention Facilities*, POLITICO (Jan. 26, 2021, 7:13 PM), <https://www.politico.com/news/2021/01/26/biden-private-immigration-detention-facilities-undocumented-462884> [<https://perma.cc/K5CF-X3TT>].



## III. TRANSFORMATIONAL SOLIDARITY

The failure of the immigration system to even evaluate the constitutionality of immigrants' rights leads to grassroots calls to abolish ICE or to reimagine immigration enforcement. This Part addresses these calls in conjunction with calls to defund the police. The goal—aligned with this Symposium's goal—is to develop solutions to present-day racial justice issues. This Part examines the concept of transformational solidarity, its promise and challenges, to address the unique problems facing Black immigrants.

Grassroots movements seek to abolish, reimagine, and transform existing systems of power and are predicated on existing legal frameworks' inability to address the systemic racism. Immigration exceptionalism's exemption from constitutional norms coupled with the disproportionate impact of immigration laws on Black immigrants demonstrate how systemic racism is embedded in the immigration system's structure.

Over the past few years, there have been increasing calls from grassroots organizations to “defund the police,” “abolish policing,” and “abolish ICE.” These movements are targeted at systemic changes that require a complete reimagining of law enforcement in both the criminal and immigration contexts. These grassroots movements are based in a critique of failed liberal civil rights reforms to halt mass incarceration, criminalization, and deportation of Black and Brown people. The movements have a shared understanding in the failure of both law enforcement mechanisms within a hierarchal racialized system.<sup>165</sup> Criminal and immigration law enforcement cannot be separated from each other. From the Fugitive Slave Act's certificate of removal of slaves to present-day criminal and immigration law enforcement techniques, law

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165. Peter L. Markowitz, *After ICE: A New Humane & Effective Immigration Enforcement Paradigm*, 55 WAKE FOREST L. REV. 89, 90–93 (2020).

enforcement has been riddled with reinforcing legalized systemic racism.<sup>166</sup>

The calls to reimagine or abolish law enforcement is premised on what legal scholar Amna Akbar characterizes as grassroots abolition “non-reformist reforms.”<sup>167</sup> Relying on 1960s French Economist André Gorz, she explains that a reform program is aimed at transformation, while non-reformist reforms require a “modification of relations of power,” and, in particular, “the creation of new centers of democratic power.”<sup>168</sup> They are “changes that, at the end of the day, unravel rather than widen the net of social control through criminalization.”<sup>169</sup> Non-reformist reforms are not policy solutions. They “unleash people power against the prevailing political, economic, and social arrangements toward new possibilities.”<sup>170</sup>

The non-reformist reform then provides a framework for demands that will undermine the prevailing political, economic, social system *from reproducing itself and make more possible a radically different political, economic, social system*. For abolitionists, the underlying system to undermine is the prison industrial complex and the horizon to build toward is abolition democracy. For socialists, the underlying system is capitalism and the horizon socialism. In theory and practice, these are intertwined, variegated, and debated political projects.<sup>171</sup>

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166. See generally McKanders, *Immigration and Blackness*, *supra* note 31.

167. Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 100–01 (2020).

168. *Id.* at 101 (quoting ANDRÉ GORZ, STRATEGY FOR LABOR: A RADICAL PROPOSAL 7–8 (Martin A. Nicolaus Victoria Ortiz trans., 1967)).

169. *Id.* (quoting RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 242 (2007)).

170. *Id.* at 102.

171. *Id.* at 104 (emphasis added).

At its core, the grassroots movements seek to either rebuild or abolish existing legal institutions that historically have been at the center of perpetuating systemic racism in the United States.<sup>172</sup>

The Defund the Police movement seeks non-reformist reforms. It shifts the focus away from normative reform techniques that simply further systemic racism to reimagining the ways in which police respond to communities, invest in communities, and work with communities in crisis.<sup>173</sup> For example, the ACLU posits that the failure of the criminal legal system can be attributed to “[f]unneling so many resources into law enforcement instead of education, affordable housing, and accessible health care,” which “has caused significant harm to communities.”<sup>174</sup> “When people ask for police reform, many are actually asking for this oppressive system to be dismantled and to invest in institutions, resources, and services that help communities grow and thrive.”<sup>175</sup> This movement recognizes that law enforcement practices are not the product of individuals; rather, they result from systemic racism.<sup>176</sup>

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172. *Id.* at 103 (“[R]eformist reforms draw on and advance critiques of our system—whether that be capitalism or the carceral state—that do not question underlying premises or advance alternative futures. In fact, reformist reforms ‘reject[] those objectives and demands—however deep the need for them—which are incompatible with the preservation of the system.’” (alteration in original) (quoting GORZ, *supra* note 168, at 7)).

173. Akbar, *supra* note 167, at 107 (“[C]onventional approaches to police reform . . . typically focus on relegitimizing police in response to crisis and reinvesting in police through trainings, technologies, and policies.”).

174. Paige Fernandez, *Defunding the Police Will Actually Make Us Safer*, ACLU (June 11, 2020), <https://www.aclu.org/news/criminal-law-reform/defunding-the-police-will-actually-make-us-safer/> [<https://perma.cc/5E54-MXCA>].

175. *Id.*

176. Akbar, *supra* note 167, at 108 (“In turn, defund the police calls into question the fundamental premise of policing shared by liberal reformers: that it produces safety. By pointing to violence as central and routine, rather than occasional and aberrant, organizers argue that training, policy, and technology will not remediate police violence. Once that violence is understood as central, Mariame Kaba explains, it becomes clear that the ‘only way to diminish police violence is to reduce contact between the public and the police.’” (footnotes omitted) (quoting Mariame Kaba, *Opinion, Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<https://perma.cc/6FC2-3RZD>])); *see also id.* at 107–08 (“Defund the police challenges reforms that redress police violence as if it is a product of bad behavior or poor decisionmaking by an individual officer or insufficient institutional oversight, incentives, and training. Wide-ranging research shows the limited or negligible efficacy of mainstream reforms to mitigate police violence.”).

The summer of 2018 saw grassroots organizing to abolish ICE.<sup>177</sup> Like the Defund the Police movement, supporters of abolishing ICE assert that immigration enforcement mechanisms have failed and cannot be disconnected from their racist roots.<sup>178</sup> The Abolish ICE movement is similarly premised on the theory that the defects in immigration enforcement cannot be remedied through reform. It is predicated on an overhaul of the entire system.<sup>179</sup>

Both grassroots movements contest liberal reforms and traditional civil rights paradigms to address systemic racism.<sup>180</sup> The Defund the Police and Abolish ICE movements call for a reimagining of the entire framework of law enforcement, recognizing that Black and Brown people are disproportionately impacted by an unjust system that targets, profiles, and subjects them to mass incarceration. At the foundation is a call to reimagine or abolish existing unworkable systems that were never created to protect and provide equality to non-white persons.

Transformational solidarity means thinking beyond existing ways in which we view the struggles of other groups as “us” and “them.” Black Lives Matter co-founder Opal Tometi, who is of Nigerian descent, exemplifies transformational solidarity in recognizing that law enforcement in the United States has a disproportionate impact on both African Americans and Black immigrants.<sup>181</sup> With this recognition, she also started the organization the Black Alliance for Just Immigration.<sup>182</sup> Transformational solidarity is also present in the Freedom Cities Movement, “an organization that tackles the

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177. Markowitz, *supra* note 165, at 90.

178. *Id.* at 95.

179. Akbar, *supra* note 167, at 97 (“Social movements are essential to contesting the strangled domain of democratic politics under neoliberal capitalism and its unrelenting expansion of the market economy.”).

180. *Id.*

181. Amanda D. Clark et al., *Black Lives Matter: (Re)Framing the Next Wave of Black Liberation*, 42 SOC. MOVEMENTS CONFLICTS & CHANGE 145, 159–60 (2018).

182. Opal Tometi, *What Pew's New Report Didn't Tell You About Black Immigrants*, HUFFPOST, [https://www.huffpost.com/entry/what-the-pews-new-report-didnt-tell-you-about-black-immigrants\\_b\\_7174070](https://www.huffpost.com/entry/what-the-pews-new-report-didnt-tell-you-about-black-immigrants_b_7174070) [<https://perma.cc/PTD5-PZFX>] (June 30, 2015).

intersection of crimmigration through a pro Black abolitionist lens.”<sup>183</sup>

There are some inherent tensions in solidarity.<sup>184</sup> As mentioned *supra* in Part II, the prerequisite naturalization cases demonstrate the distancing of immigrants from African Americans that occurred in arguing white identity in order to naturalize.<sup>185</sup> The foundational naturalization cases demonstrate the value of whiteness, which impacts immigrants’ desire to distance themselves from Blackness today. Further, immigration scholar Kevin Johnson notes that there is some resentment on both sides.<sup>186</sup> Johnson provides examples of Black scholars who openly view Latinas/os as adjacent to white Americans, which illustrate the fear that many Black Americans have about the negative impacts of immigration on their communities and employment prospects.<sup>187</sup> Johnson also describes the racism against Black people that runs deep within the Latina/o community as another reason why the two groups are hesitant to form one unified coalition.<sup>188</sup>

For African Americans, author Toni Morrison noted the tension between the struggles of recent arrivals and Blacks.<sup>189</sup> She highlights how “[i]n race talk the move into mainstream America always means buying into the notion of American [B]lacks as the real aliens. Whatever the ethnicity or nationality of the immigrant, his nemesis is understood to be African American.”<sup>190</sup>

These longstanding tensions warrant further exploration as they present real barriers to understanding and coalescing around systemic and institutionalized racism. In this context, it is important to develop

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183. *About Us*, FREEDOM CITIES, <https://freedomcities.org/aboutus/> [<https://perma.cc/L2U4-BQGV>].

184. Johnson, *supra* note 33 (analyzing the importance of multiracial coalitions, specifically Latinas/os and African Americans, to challenge race-based law enforcement while acknowledging the difficulty of bringing these groups together).

185. *See supra* Part II.

186. Johnson, *supra* note 33, at 357–60.

187. *Id.* at 360.

188. *Id.* at 359.

189. Perea, *supra* note 91, at 1230 (citing Toni Morrison, *On the Backs of Blacks*, reprinted in ARGUING IMMIGRATION 97 (Nicolaus Mills ed., 1994)).

190. *Id.* (quoting Morrison, *supra* note 189, at 98).

multiracial coalitions between African Americans and immigrants, realizing that the issues that manifest from the criminal legal and immigration systems are simply spokes on a wheel that find its central force in systemic racism.

### CONCLUSION

Like a boil that can never be cured so long as it is covered up but must be opened with all its ugliness to the natural medicines of air and light, injustice must be exposed, with all the tension its exposure creates, to the light of human conscience and the air of national opinion before it can be cured.<sup>191</sup>

The statistics demonstrating the disproportionate impact of immigration laws and enforcement policies on Black immigrants exemplify how the law reifies race by legislating cultural norms that reinforce racial divisions and hierarchy in our country. The particular and disproportionate harms immigration laws and enforcement policies have had on Black immigrants illuminate how immigration laws fail to adhere to constitutional norms of equality. The failure of anti-discrimination norms to provide redress results in differential racialization and essentialist paradigms that render Black immigrants invisible at the intersection of their race and immigration status. Until recently, conversations on border security, unlawful immigration, and national security obscured racially motivated laws seeking to halt the Blackening and Browning of America. Failing to pay attention to the nuances of immigration law and policy and its impact on Black immigrants is dangerous because it hinders a comprehensive understanding of how racism has operated in the U.S. legal system and how it continues to operate in many facets of immigration laws.

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191. Martin Luther King, Jr., *Letter from a Birmingham Jail*, in GOVERNMENT POLITICS AND PROTEST: ESSENTIAL PRIMARY SOURCES 71, 72–73 (K. Lee Lerner et al. eds., 2006).

