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IMMIGRATION AND BLACKNESS

What's Race Got to Do With It?

By Karla McKanders

Ms. L and her daughter S.S. entered the United States to apply for asylum in November 2017. The Catholic Church helped them flee persecution from their home country. They traveled through 10 countries over four months and requested asylum when they legally presented themselves at a port of entry near San Diego.

Ms. L entered California along with her seven-year-old daughter, S.S. Her seven-year-old child was separated from her and moved to a children's facility in Chicago, Illinois, without her mother or anyone she knew. When the officers separated them, Ms. L could hear her daughter in the next room screaming for her. No one explained to Ms. L why they were taking her daughter away from her, where her daughter was going, or when she would next see her daughter. In February 2018, the American Civil Liberties Union filed a lawsuit, *Ms. L. v. U.S. Immigration & Customs Enft.*, challenging the separation. 302 F. Supp. 3d 1149 (S.D. Cal. 2018). The lawsuit exposed egregious government conduct in separating young children from their parents.

Many people are unaware that Ms. L, the face of the family separation case, is an asylum seeker of African descent from the Democratic Republic of the Congo. Immigration and blackness are obscured in immigration debates. Only recently have conversations surrounding immigration and race surfaced when Immigration and Customs Enforcement detained rapper 21 Savage and when Black Lives Matter Activist Opal Tometi wrote a *New York Times* op-ed on blackness and immigration.

Nuances of Immigration

Ms. L's case, 21 Savage, and Opal Tometi expose the nuances of immigration policy at the intersection of nationality and race that are often glossed over in media stories highlighting this administration's con-



African immigrants at the March for America immigration rally in Washington, D.C., (March 21, 2010)

tentious immigration policies. According to the U.S. Census, there are around 4.2 million black immigrants in the United States, and, of that number, around 600,000 are undocumented. Forty-nine percent of the foreign-born immigrant population of African descent is from the Caribbean. 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.

The increase in detention of immigrants of African descent is, in part, a result of racial profiling, which mirrors the overrepresentation of African Americans in the criminal justice system due to mass incarceration.

Failing to pay attention to the nuances of immigration law and policy and its impact on immigrants of African descent is dangerous in that 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. This article examines the nuances at the intersection of race and immigration status. The goal is to

examine the impact of recent immigration policies on immigrants of African descent in order to highlight where the law operates in furtherance of the goal preventing the blackening and browning of America.

When we examine the history of immigration and its impact on immigrants of African descent, we learn how the law can amplify social norms and create a system that perpetuates tiered personhood—and how permitting discriminatory anti-immigrant laws and policies reinforces dangerous and divisive systems of oppression.

The History of the Civil Rights Movement and the Intersections with Immigration Law

There is a long history of the intersection of immigration, race, and civil rights in America. Immigration laws have operated in a manner to maintain homogeneity to the exclusion of immigrants of color. Immigration laws throughout America's history have traditionally utilized fear and exclusion to define what America should look like and have privileged some immigrant's over others.

The Immigration Act of 1924 required a quota system for nationalities—in which Japanese immigrants were banned and only a small number of eastern and southern European immigrants were permitted to enter, whereas Irish, Germans, and British immigrants were permitted to enter the United States in large numbers. The 1924 Act privileged European immigrants' migration to the United States.

At the height of the civil rights movement, the 1965 Immigration and Nationality Act (INA) was passed. In enacting the INA of 1965, Congress eliminated the quota system based on national origin. It was Congress' intent to equalize immigration opportunities for groups previously subjected to discriminatory immigration laws and practices. In signing the Act, President Lyndon B. Johnson stated:

This system [referring to the quota system in place] violates the basic principle of American democracy—the principle that values and rewards each man on the basis of his merit as a man. It has been un-American in the highest sense, because it has been untrue to the faith that brought thousands to these shores even before we were a country.

President Lyndon B. Johnson's Remarks at the Signing of the Immigration Bill Liberty Island, New York, October 3, 1965.

Taking cues from the civil rights movement, the 1965 Immigration and Nationality Act banned national quotas and shifted to an immigration system based on family unity and skilled laborers. As we examine the Trump administration's immigration policies, it is important to keep in mind how America's history of immigration policies has traditionally operated to the exclusion of immigrants of color.

Impact of Trump Administration's Immigration Policies on Immigrants of African Descent

The Trump administration's immigration policies are reminiscent of the pre-1964 race-based immigration policies that attempted to exclude immigrants of color. Since 2016, the Trump administration has followed through on its promise to *make America great again* by signing Executive Orders that restrict immigration from

Africa, the Middle East, Central America, and Latin America. The ultimate goal is to shape what America looks like and prevent the blackening and browning of America. The administration's policies have resulted in skyrocketing rates of deportations of migrants from African countries.

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.

Haitian Immigrants

In *National Association for the Advancement of Colored People (NAACP) v. U.S. Department of Homeland Security*, the NAACP filed a lawsuit against the administration after it sought to cancel temporary protected status (TPS) for Haiti. 1:18-cv-00239-MJG (D. Md. Jan. 25, 2018). TPS is a temporary form of relief granted to immigrants who cannot return to their home country due to ongoing armed conflicts, environmental disasters, or epidemics. The NAACP, along with Haitian organizations, alleged that the Department of Homeland Security (DHS) violated the Fifth Amendment's due process clause when it rescinded TPS for Haitians. In the recent trial that took place, the NAACP argued that "the termination of TPS for Haiti was based on President Donald Trump's 'categorical and defamatory assertions about all Haitians,

which the Haitian TPS recipients were given no opportunity to challenge." The lawsuit alleged that the president's statements, coupled with the fact that the conditions in Haiti that gave rise to the original January 2010 TPS designation continue to exist, demonstrate a discriminatory motive.

Ramos, et al. v. Nielsen, also challenged the president's motives in terminating TPS. 321 F. Supp. 3d 1083 (N.D. Cal. 2018). In October 2018, the U.S. District Court for the Northern District of California enjoined DHS from implementing and enforcing the decision to terminate TPS for Sudan, Nicaragua, Haiti, and El Salvador. The court ruled that:

the administration was guided by racism—not a sober consideration of the facts on the ground—when it canceled Temporary Protected Status designations for El Salvadoran, Haitian, Sudanese, and Nicaraguan escapees from political and natural disasters.

While the TPS injunction in the Northern District of California is a small step in challenging the president's discriminatory motives and public declarations, the president, claiming sweeping authority over immigration, has invoked national security as a shield against any discriminatory public statements on immigration he makes. The decision in *NAACP v. DHS* is forthcoming. The forthcoming opinion will determine whether the same deference to immigration and national security that the U.S. Supreme Court upheld in *Trump v. Hawaii*, 138 S.

Ct. 2392 (2018), will operate to uphold the president's decision to rescind TPS.

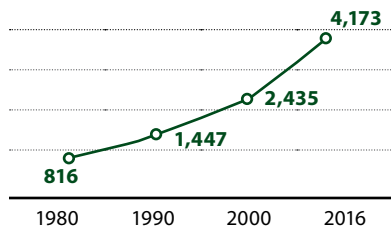
Somali Immigrants Have Had the Highest Immigration Arrest Rate under the Trump Administration

The Pew Research Center found that even though there has been a drop in the overall numbers of removals, the



Around 500 people gathered in St. Paul, Minnesota, to march in support of immigrants and protest Republican President Donald Trump's immigration policies (January 20, 2018).

Black immigrant population in the U.S. rose to 4.2 million in 2016
Total foreign-born black population in the U.S. in thousands



Note: In 2000 and later, foreign-born blacks include single-race black and multiracial blacks, regardless of Hispanic origin. Prior to 2000, blacks include only single-race blacks, regardless of Hispanic origin because a multiracial option was not available.

Source: Pew Research Center tabulations of the 2016 American Community Survey (1% IPUMS) and the 1980, 1990, and 2000 censuses (5% IPUMS).

removal of African nationals from the United States increased in 2017. Somali, in addition to Libya, Chad, and Sudan, were African countries on the president's travel ban list.

In 2017, Somali nationals experienced the highest rate of removal. Last year, a class action lawsuit *Ibrahim v. Acosta*, 326 F.R.D. 696 (S.D. Fla. 2018), was filed on behalf of 92 Somali men and women who were being subject to deportation. The *Miami New Times* euphemistically called their deportation flight "Deported by ICE on a Slave Ship." Somalis say they were shackled and beaten for almost two days, including over 20 hours when the plane sat on the runway in Dakar, Senegal. The lawsuit cited U.S. asylum law and the Refugee 1952 Convention, which the United States ratified in 1980. The Convention forbids the removal of individuals to countries where they would face a likelihood of persecution or torture. Under the lawsuit, a preliminary injunction was granted staying the removal of the Somali nationals until they were provided an opportunity to apply for reopening of their deportation orders and relief under the Refugee Convention.

Administration's Migrant Protection Protocols' Impact on Immigrants of African Descent in the "Migration Caravan"

On January 28, 2019, the administration, through an Executive Order and emergency federal regulations, instituted a policy where asylum seekers must wait in Mexico to apply for asylum in the United States. Notice of Availability for Policy Guidance for Implementation of the Migrant Protection Protocols, by the Homeland Security Department on 01/28/2019, FR Doc. 2019-03541 Filed 2-27-19. The policy implements into law unwritten policies that this administration has been informally enforcing at the border.

This past December, two students from Vanderbilt Law School, where I direct the Immigration Practice Clinic, traveled with me to the Mexican border at Tijuana to volunteer to provide legal assistance to refugees. Refugees waiting to apply for asylum at the border included Central Americans as well as a significant number of Haitians and migrants from African countries. The last day I was there, I led a team of lawyers providing consultations to women and children asylum seekers at a shelter. In particular, we assisted a woman (whose identifying information has been omitted to preserve confidentiality) from a West African country.

This West African country is known for its political instability, which has caused forced migration due to unrest, torture, and abuse by security forces, including in military and unofficial detention facilities. The West African asylum seeker was raped by government security forces who were responding to unrest. She immediately researched visa-free countries to which she could apply, got on a flight to South America, and, through the generosity of many people, made her way to the U.S.-Mexico border. When she arrived at the U.S. border in November 2018, prior to the implementation of the administration's Migrant Protection Protocols, she could not walk up to the border and apply for asylum. There was a list controlled by refugees with oversight from Mexican migration authorities, "Los Beta." Los Beta would approach the U.S. border each day and obtain a number from U.S. Customs and Border Protection on how many asylum seekers they were taking that day. She had a three-month wait in the women's shelter before she could even approach the border.

As I counseled her about the process,

what to expect when she approached the border, and to expect to be detained during her asylum application, she began to cry. She had experienced a triple trauma—in her country of origin, migrating to the United States, and the shock of not finding any protection when she reached the border.

This woman's story demonstrates the direct impact of the Trump administration's policies and the operation of once informalized structures now formalized through the Migrant Protection Protocols. The administration's policies bypass the INA's established protections that provide a right to apply for asylum and prevent the removal of individuals facing persecution in accordance with the Refugee Convention to which the United States is a signatory.

Civil Rights and Immigration

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. The concept of personhood is "a placeholder for deeper concepts that ground our [society's] moral intuitions about human rights." A "person" is defined as any being whom the law regards as capable of rights and duties. Thus, personhood rights are those rights granted regardless of citizenship status. While the Fourteenth Amendment provides that all persons are entitled to equality under the law, this constitutional requirement can be bypassed, essentially by defining certain immigrants as non-persons based on differences between the dominant and subordinate groups.

This administration's statements coupled with its immigration policies operate as more than just a proscription on who can immigrate to the United States. The discriminatory statements and implementation of those statements have reinforced a tiered system of personhood.

We must be aware, as Martin Luther King Jr. stated, that we are all tied together in an "inescapable network of mutuality" that binds all of our stories together. In her dissent in the travel ban case, Justice Sonia Sotomayor made an analogy between the federally sanctioned internment of Japanese Americans in concentration camps in 1942 and cautioned:

By blindly accepting the Government's

misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one “gravely wrong” decision with another.

Our Constitution demands, and our country deserves, a Judiciary willing to hold the coordinate branches to account when they defy our most sacred legal commitments. Because the Court’s decision today has failed in that respect, with profound regret, I dissent.

Trump v. Hawaii, 138 S. Ct. 2392, 2448 (2018). In examining past and current immigration policies, we must pay attention to immigration at the intersection of race and how the law can act to subordinate multiple groups.

The present-day targeting of immigrants of color demonstrates a need to overhaul and rebuild immigration system so that individuals who contribute and participate in the United States daily can live here lawfully. This means examining how fear and exclusion have operated within the system to exclude immigrants of color and examining practices that are not aligned with our obligations as signatories to the Refugee Convention, the U.S. Constitution, or the Immigration and Nationality Act.

Karla McKanders is a clinical professor of law and the director of the Immigration Practice Clinic at Vanderbilt University, where she also teaches immigration and refugee law. McKanders was a law clerk for Judge Damon J. Keith with the United States Federal Court of Appeals for the Sixth Circuit.

Perceptions of Police

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your perspective. What’s important for them to hear?

Keyonne: They have not seen what I’ve seen. So instead of trying to tell them, I’ll try to show them. You can tell somebody anything, but that don’t mean they believe it until they see it. I have proof. So, I wouldn’t tell someone who’s never seen bad police anything, I’d actually just invite them to just show them. Come to this location and let me show you, let me prove to you that there is bad policemen out here.

Chaclyn: You know how police officers do ride-alongs? I wonder about doing ride-alongs with you guys, people come down and spend an hour. You walk them through your neighborhood, so they could get a sense of what you live every day.

Keyonne: See the difference, the proof. Yes.

This is a real invitation. Reach out: chaclyn@invisibleinstitute.com.

Chaclyn: Makes me think about body cameras—proof. If we only have reports to go on, the police fill those out themselves and can lie if they want to. Instead, we might have video. Take the video of the murder of Laquan McDonald, leading to the first on-duty officer charged with murder in 35 years. [Since the writing of this article, the officer has been convicted of murder.]

Keyonne: Body cameras are definitely necessary. It will bring out people’s true colors. Just like you said, everybody in that case lied on their paperwork, but then the video showed. Body cameras brought a positive ending. I’d rather you turn your body camera on when you’re searching my house. If anything comes up broken, it’s video footage. On the opposite side, when it come to privacy, certain people don’t want everybody to know what’s in they house. It’s still your true colors though, fair is fair.

Though body camera footage has led to unprecedented accountability, the American Civil Liberties Union recently updated their model legislation, adding

protections against surveillance in response to concerns held by civil rights attorneys across the country (<https://www.aclu.org/other/model-act-regulating-use-wearable-body-cameras-law-enforcement>).

Chaclyn: Obviously there’s not one reform, but give me an example of a policy you would like to see.

Keyonne: Communication works. Not everything has to end in violence. Let’s find a solution where your gun is the very last thing that comes to your mind. That’s what I want to reform, let’s make strategies on how not to end with violence. Not to start or bring the violence to the scene.

Keyonne told me her favorite answers, and I didn’t cut them. Our kids are co-creators in our work—they have veto power over everything we publish about them. Our project cares as much about our methods as we do about our output. In order to deeply understand unconstitutional policing, we turn to those who live each day with it. We have kids in the room while we work, often and consistently. They interrupt and argue and comment on our investigations. We love them, we take care of them, and they take care of us.

Keyonne Barnes is a senior at a neighborhood Chicago Public School. She is interested in media/broadcast technology, journalism, and law.

Chaclyn Hunt is a civil rights attorney and codirector of the Youth/Police Project with the Invisible Institute. The other codirector is Kahari Blackburn.

Maira Khwaja contributed to this article.