

Institutional Racism, ICE Raids, and Immigration Reform

By BILL ONG HING*

Introduction

ON A COLD, RAW DECEMBER MORNING in Marshalltown, Iowa, Teresa Blanco woke up to go to work at the local Swift meat packing plant. Hundreds of others across the town were doing the same thing, in spite of the miserable mixture of sleet, mist, and slush that awaited them outside their front doors. As they made their way to the plant, the workers, who were from Mexico, did not mind the weather.¹

Unfortunately, the workers' day turned into a nightmare soon after they reported for work. Not long after the plant opened, heavily armed agents from the U.S. Immigration and Customs Enforcement agency ("ICE") stormed onto the scene. Pandemonium broke out. The workers panicked; many began to run; others tried to hide, some in dangerous and hazardous areas.² As the ICE agents began rounding up all the workers, they ordered those who were U.S. citizens to go to the cafeteria. Noncitizens were directed to a different section of the plant. Agents shouted out instructions: documenteds in one line, undocumented in another. If an agent suspected that the person in the citizens' line was undocumented, the agent would instruct the person to get into the undocumented line. More than one individual was told, "You have Mexican teeth. You need to go to that line [for undocumented persons] and get checked."³

* Professor of Law, University of California, Davis. Many thanks to Rhonda Magee, Jennifer Chacón, and David Thronson for their insightful comments on an early draft of this Article. Thanks also to Victoria Hassid who provided me with important research assistance and to the USF Law Review Symposium editors for their incredibly helpful suggestions.

1. NAT'L COMM'N ON ICE MISCONDUCT & VIOLATIONS OF FOURTH AMENDMENT RIGHTS, COMMISSION HEARING: DES MOINES, IOWA 95–99 (Apr. 29, 2008) (unpublished transcript, on file with author) [hereinafter IOWA HEARING].

2. *Id.* at 39–41.

3. *Id.* at 66.

The nightmare was only beginning. Although supervisory ICE agents carried a civil warrant for a few individuals, the squad demanded that all plant employees be held, separated by nationality. That included U.S. citizen workers who were interrogated and detained. No one was free to leave—not even those who carried evidence of lawful status or proof they were in the process of seeking proper permission to be in this country. Each was interrogated individually. The process took the entire day, and phone calls were not permitted until later in the day. By the end of the day, ninety were arrested, but hundreds, including citizens, had been detained for hours. The entire community was shaken to its core.

Although immigration raids are not a recent phenomenon, this Article focuses on a few egregious ICE raids that occurred after President Bush's push for immigration reform in 2004.⁴ I had the opportunity to learn more about several such raids first hand as part of a commission that was established by the United Food and Commercial Workers International Union in 2008.⁵ The Commission spent more than a year holding regional hearings, interviewing witnesses, and soliciting input from a wide range of workers, elected officials, policy experts, psychologists, and religious and community leaders. Commissioners learned about the abuse that ICE officials visited upon workers, their families, and the communities. This Article's discussion of ICE raids addresses racial profiling, the trauma to children and families, the damage to communities, and some legal considerations.

Descriptions of ICE raids challenge us to think more seriously about the underlying racial implications of those raids. The tragic effects on families and communities, as well as the serious constitutional violations committed by ICE agents during the raids, provide ample moral and legal justification to end the raids. The inherent racism at the center of the ICE raids and other ICE and Border Patrol operations raises further concern that receives little public attention. With few exceptions, the ICE operations targeted Latinos—usually Mexicans. The exceptions were Chinese restaurants and other businesses that relied on workers of color. That racial effect is the focus of this Article and the basis for advocating that both immigration policies and ICE enforcement need to be rethought.

4. *See Bush Pushes Guest-Worker Program*, CNN.COM, Mar. 21, 2006, <http://www.cnn.com/2006/POLITICS/03/31/bush.cancun/index.html>.

5. Professor Hing traveled with the Commission to Washington, D.C., Boston, Des Moines, Atlanta, and Los Angeles to gather information and learn firsthand how ICE raids really work.

The defenders of the Bush-era enforcement regime and the ongoing border militarization would argue that my claim of inherent racism is unfair because the vast majority of immigrants—documented and undocumented—are people of color. They would argue that if the undocumented were white, the raids would still have occurred. But this belies the lack of raids on undocumented Canadians today, or the undocumented Polish in Chicago in the 1980s and 1990s, or the undocumented Irish population in San Francisco during the same period. Raids on those white undocumented did not happen. Racism has become institutionalized in our immigration enforcement regime—a regime that focuses mostly on Latinos, especially Mexicans, and occasionally on Asians.

This Article argues that the structure of immigration laws has institutionalized a set of values that dehumanize, demonize, and criminalize immigrants of color. The result is that these victims stop being Mexicans, Latinos, or Chinese and become “illegal immigrants.” We are aware of their race or ethnicity, but we believe we are acting against them because of their status, not because of their race.⁶ This institutionalized racism made the Bush ICE raids natural and acceptable in the minds of the general public. Institutionalized racism allows the public to think ICE raids are freeing up jobs for native workers without recognizing the racial ramifications.⁷ Objections to ICE raids and the Border Patrol’s Operation Gatekeeper are debated in non-racial terms. However, not viewing these operations from an institutionalized racial perspective inhibits the total revamping of our immigration system that needs to take place.

Part I begins with a description of selected ICE raids. Part II follows with a discussion of the institutional racism that is grounded in the history of U.S. immigration laws and policies. Part III explains how

6. Some in the anti-immigrant movement may have racist motivations, and the connection between some anti-immigrant organizations and the white supremacy movement is well established. See Jill Garvey, *The John Tanton Network and the Anti-Immigrant Movement in America*, IMAGINE 2050, July 7, 2009, <http://imagine2050.newcomm.org/2009/07/07/the-john-tanton-network-and-the-anti-immigrant-movement-in-america/#more-2448>.

7. One of the largest ICE raids took place at a plant in Laurel, Mississippi on August 25, 2008. Almost 600 workers were arrested. The plant was the site of a labor-organizing dispute. Black and white employees jeered the Latinos as they were led out. “‘Bye-bye,’ some trilled in falsetto, fingers wagging. ‘Go back where you came from.’” See Associated Press, *Have-Nots Hail ICE Raids*, WASH. TIMES, Jan. 26, 2009, <http://www.washingtontimes.com/news/2009/jan/26/have-nots-hail-ice-raids>. These workers may have misunderstood how those deported might have been key to creating worker solidarity. The local union president, Clarence Larkin, lamented that the new Latino “members were now gone, and with them . . . went a budding sense of solidarity.” *Id.*; see also Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. OF INT’L L. & POL’Y 121 (2001).

the racial history of immigration policy has become institutionalized so that seemingly neutral policies actually have racial effects. Understanding the historical underpinnings of race-driven immigration policy offers a broader range of solutions to current policy and enforcement challenges. Recognizing the racist nature of the system allows for a framework to remedy a racist system.

I. Entering the ICE Age of Enforcement

The most recent ICE age began when Department of Homeland Security (“DHS”) was established in 2003. The new DHS took over the old Immigration and Naturalization Service (“INS”) from the Department of Justice. Repackaged, interior enforcement functions were channeled into the Immigration and Customs Enforcement agency. Border enforcement remains in the hands of the Border Patrol.

Immigration raids, including worksite operations, have been part of immigration enforcement for decades. However, the courts had placed constraints on INS and Border Patrol agent activities during raids. For example, in *INS v. Delgado*,⁸ although the U.S. Supreme Court did not find the particular worksite operation in question unconstitutional, the Court held that INS agents cannot seize an entire worksite, must allow workers to remain silent, and leave if agents have no reasonable suspicion that the workers are unauthorized to be in the United States. In *Illinois Migrant Council v. Pilliod*,⁹ a federal court of appeals upheld a trial court opinion in Chicago that INS agents could not stop and question individuals simply because of Latin appearance. And, in *International Molders’ and Allied Workers’ Local Union No. 164 v. Nelson*,¹⁰ a federal court of appeals required INS warrants to be very specific in naming suspected undocumented workers.

But in January 2004, after Republicans showed little interest for his guest worker proposal, Bush implemented the current ICE raid strategy to garner support for his plan. His detractors on the right argued the proposal was too lenient and amounted to amnesty. Bush responded with a strong enforcement program. In the process, ICE agents ignored the legal constraints that had been imposed on the old

8. 466 U.S. 210 (1984) (implying that if a seizure had occurred, it would have needed articulable suspicion).

9. 548 F.2d 715 (7th Cir. 1977).

10. 799 F.2d 547 (9th Cir. 1986).

INS raids.¹¹ The actions suggested that the well-established rules were no longer applicable to the new DHS. Homeland Security Secretary Michael Chertoff and ICE Assistant Secretary Julie Myers ushered in the new ICE age seemingly free of the old constraints.

A. The Swift Raids

Early on the morning of December 12, 2006, the feast day of Our Lady of Guadalupe and a holy day of special significance to Catholics of Mexican descent, ICE conducted a massive military style raid on six Swift & Company meatpacking plants across the nation's heartland. Hundreds of federal agents in riot gear, armed with assault weapons, descended upon plants in Cactus, Texas; Greeley, Colorado; Grand Island, Nebraska; Worthington, Minnesota; Marshalltown, Iowa; and Hyrum, Utah.

ICE was there to execute arrest warrants for a handful of named workers—less than one percent of the workforce. The sheer number of ICE agents on the scene and the manner in which the operation was conducted made clear that the execution of those warrants was not the government's real purpose. Rather, the raids seemed designed to ramp up the number of arrests and capture the headlines on the evening news.¹² ICE rounded up nearly 13,000 workers—the vast majority of them U.S. citizens—holding them against their will for hours.

According to witness testimony, there were, perhaps, 100 people standing at the fence in front of the Marshalltown plant by the end of the day. Many were people who had family members working the first shift.¹³

[They] were upset and many were crying since they had no solid information, only that immigration agents were in the plant, the lines had been shut down, and that it was serious. . . . [T]here was a certain panic outside, too, because of the uncertainty and lack of communication, as well as the fact that many of these people had

11. See, e.g., IOWA HEARING, *supra* note 1, at 39–99 (chronicling ICE procedures apparently out of line with the constitutional constraints, including apparent seizure of entire factories, suspicion based on Mexican appearance, etc.).

12. ICE alerted the local media in the Greeley, Colorado area the night before the raids, telling them that they should be at the plant in the morning. *Id.* at 121.

13. *Id.* at 24.

never experienced anything like this before.¹⁴ No one was allowed to go in and no information was coming out.¹⁵

Sister Christine said she approached the ICE agents at the gate to ask for information for the families:

They simply handed me a sheet of paper with a phone number to call, an 800 number, to call for information on family members, although the number, obviously, would not be up and running for some time. The information was in English and there were maybe 25 or 30 copies¹⁶

While Sister Christine and family members held vigil outside, the workers inside were caught in a frightening, military-style assault. Instead of searching out the 133 individuals named on the arrest warrants, heavily armed ICE agents fanned out through each of the affected plants, sealed the exits, and ordered workers into lines where they were patted down and searched for weapons. After the weapons search, ICE agents herded workers en masse into the plant cafeterias or other holding areas and divided them by race and national origin. Many were denied food, water, or the use of bathroom facilities; some were handcuffed. No one was advised of their rights nor provided access to legal representation at the raid site.¹⁷ The overwhelming majority of those held that day were U.S. citizens. In Marshalltown, Michael Graves got to work that morning and was instructed to go to the cafeteria.

[M]e and two other coworkers . . . [were] going our normal route to the cafeteria. . . . ICE agents that [were] heavily armed met us at the door and [one agent] asked us where we [were] going. We told him we were going to the cafeteria as we were instructed to go. He asked us, did we have any weapons on us and did I have any identification? I told him I had [my identification] in my locker. He told us to get against the wall and handcuffed us from behind.

So then he escorted us to the locker room. . . . He asked me, where's my identification? I told him it was in my pants pocket. So

14. Dr. Tom Renze, Principal of Woodbury Elementary School in Marshalltown, also described a "sense of panic" among family members the morning of the raid. While students normally begin arriving around 7:30 or 7:45 a.m., he said, by 7:50 a.m., parents were coming back to the school to pull their children out. Parents or other adults continued to come for their children throughout the day. *Id.* at 51–53.

15. *Id.* at 25. Darrell Harrington's wife, Amelda Harrington, called the plant when she learned of the raid from a neighbor and was not only refused any information about what was occurring but was threatened with arrest if she persisted in her inquiries. Turning on the television, she said she saw an ICE agent "on the roof . . . dressed in black; he did have a gun." The first thing that came to her mind, she told the Commission was, "[am] I going to see my husband that night? When would I see him? Where was he? . . . I [didn't] know what was going to happen." *Id.* at 138–39.

16. *Id.* at 25.

17. *Id.* at 110–12.

he went in my pants pocket, pulled out my identification, and questioned me about [it].

[H]e questioned me about my status as a U.S. citizen and I said my mother and father were born and raised in Mississippi. He questioned me about that and asked me, did I know my route to Mississippi? And I said no, but I can find my way there because I had been there a lot of times with my parents. He looked at my I.D. again, told me to sit down with my hands behind my back, still handcuffed.¹⁸

Graves was forced to sit in that position for over an hour. ICE continued to hold him and coworkers—still deprived of food, water, and external communication—until he was finally released after eight hours of captivity and told to “go home.”¹⁹

U.S. citizen Melissa Broekemeier worked at the Swift plant in Marshalltown for more than eight years. But the “longest day [she] ever worked was on December 12, 2007.”²⁰ Broekemeier described her experience on the day of the Swift raid this way:

I, like all my coworkers that went to work that day . . . we were instructed by our supervisors to finish up . . . and report to the cafeteria, where we were inspected, and our private lives were scrutinized by ICE agents as if we were illegal convicts.

. . . .

The power that runs our machines should have been shut off first, but it was not.

. . . .

The Federal government jeopardized our safety and health without care. We were overlooked. We were ignored. We were treated like criminals. We were not free to leave.²¹

Debra Campbell, a coworker of Broekemeier’s and a nineteen-year-old Swift employee, was equally distressed by the raid. “My group,” explained Campbell, “was then walked around the plant to an out-building where we spent the rest of the working day. We were not free to leave.”²² Armed ICE agents “drove around in their cars making sure we weren’t going to run over that fence,” Broekemeier added. “We had people who really lost control, we had people rolling on the floor . . . upset and distressed. They really lost their dignity”²³

Outside the plant, throughout the day, fear continued to grow because of rumors that were spreading among the people waiting.

18. UNITED FOOD AND COMMERCIAL WORKERS UNION, RAIDS ON WORKERS: DESTROYING OUR RIGHTS 5–6 (2008).

19. IOWA HEARING, *supra* note 1, at 110–12.

20. *Id.* at 39.

21. *Id.* at 41.

22. *Id.* at 41.

23. *Id.* at 46.

There was no communication with the people inside the plant. “Around mid-afternoon some workers came out in handcuffs, were put on buses, and the buses drove away. Because the windows were dark, no one was sure who was on the buses and who might be released.”²⁴

During their interviews with ICE agents at the plant, the alleged undocumented workers were asked if they had children, but were not told that one of the parents would be allowed to remain to care for them. Many parents were afraid to say “yes” because they feared their children would be taken away from them and placed in foster care. In one case, a six-year-old and two-and-a-half-year-old stayed with a babysitter for three weeks until the mother was deported. In another family, an elderly woman had been living with her daughter. The daughter was detained, and the mother spoke no English, did not drive, and was not familiar with Marshalltown.

The fact that the Marshalltown arrestees were held at Camp Dodge, a military base almost sixty miles away, added a surreal effect. Camp Dodge is in Johnston, Iowa, run by the Iowa National Guard. The detainees were held inside the military compound without access to lawyers or clergy. Some detainees were released in the middle of the night, without the ability to make phone calls, without knowing anyone in the area, on a country road, miles from the nearest phone, miles from any help, miles from any transportation on a cold December night. Some detainees were brought to Camp Dodge from the more distant raids in Colorado and Nebraska. Many families did not know where their arrested loved ones had been taken; a week later approximately half the people were still not accounted for. They were desaparecidos (disappeared). As the Reverend Barbara Dinnen said, if “you’ve come from El Salvador, Argentina, or Guatemala or any of those countries that have been through civil wars, desipado sido for one week doesn’t mean anything good.”²⁵

Immigrant rights attorney, Sonia Konrad, concluded that the ICE agents “conducted themselves as if they were dealing with terrorists entering the premises in uniform, black jackets, strapped down guns, shouting and leaving no doubt to all workers that . . . they were not free to go.”²⁶

ICE made sure that people were uprooted and moved out of Iowa quickly, some of them within twenty-four hours of their arrests and

24. *Id.* at 25–26.

25. *Id.* at 84.

26. *Id.*

detention. Once arrested, people were coerced into signing stipulated orders of deportations without an opportunity to consult with an attorney. Konrad and her colleagues were relegated to quickly writing powers of attorneys and guardianships for those detainees. The hope was that at least the detainees could legally delegate care of their children and property. But the attorneys could not get through to many. Attorneys tried to straighten things out later, but ICE agents coldly argued that detainees had already had their chance. Any trust that the community or advocates may have had in local ICE officials was shattered in an instant.²⁷

B. Other Raids

1. Stillmore, Georgia

One ICE raid in Stillmore, Georgia, the Friday before Labor Day weekend in 2006, evoked outcry from local residents who labeled the ICE action as nothing short of “Gestapo tactics.”²⁸ Descending shortly before midnight, ICE agents swarmed the area, eventually arresting and deporting 125 undocumented workers.²⁹ Most of those rounded up were men, while their wives fled to the woods to hide children in tow.³⁰ In the weeks after the raid, at least 200 more immigrants left town. Many of the women purchased bus tickets to Mexico with their husband’s final paycheck.³¹ The impact underscored how vital undocumented immigrants were to the local economy. Trailer parks lie abandoned. The poultry plant scrambled to replace more than half its workforce. Business dried up at stores. The community of about a thousand people became little more than a ghost town. The operator of a trailer park that was raided, David Robinson, commented, “These people might not have American rights, but they’ve damn sure got human rights. There ain’t no reason to treat them like animals.”³²

Local residents witnessed the events, as ICE officials raided local homes and trailer parks, forcing many members of the community out

27. *Id.* at 109–16.

28. NAT’L COMM’N ON ICE MISCONDUCT & VIOLATIONS OF FOURTH AMENDMENT RIGHTS, COMMISSION HEARING: ATLANTA, GEORGIA 31, June 16, 2008 (unpublished transcript, on file with author) (detailing excessive brutality of ICE enforcement practices during the raids) [hereinafter GEORGIA HEARING].

29. Dahleen Glanton, *For Immigrants, Raid Dims Hope for a Better Life*, CHI. TRIB., Dec. 11, 2006.

30. *Id.*

31. *Id.*

32. Russ Bynum, *Immigration Raids Leave Georgia Town Bereft, Stunned*, SEATTLE TIMES, Sept. 16, 2006.

of Stillmore. Officials were seen stopping motorists, breaking into homes, and there were even reports of officials threatening people with tear gas.³³ Witnesses reported seeing ICE officials breaking windows and entering homes through floorboards.³⁴ Mayor Marilyn Slater commented, “This reminds me of what I read about Nazi Germany, the Gestapo coming in and yanking people up.”³⁵

2. San Rafael, California

On March 6, 2007, ICE officials raided the small communities of San Rafael and Novato in Marin County, arresting roughly thirty undocumented immigrants. This raid was also part of ICE’s “Operation Return to Sender,” the federal effort to crack down on immigrants who have stayed past their deportation orders. ICE officials armed with warrants bearing dated and/or incorrect information stormed homes and began arresting violators regardless of whether they were named in the original warrant. The San Rafael raid became a national symbol of the negative effects raids have on children. Juan Rodriguez, principal of Bahia Vista Elementary School, noted that on a typical day the school might have eight to ten children absent, but seventy-seven children were absent the day of the raid.³⁶ San Rafael’s Mayor Alberto Boro criticized federal officials, noting that the raid resulted in a drop in calls to local law enforcement agencies and signaled a heightened level of mistrust of police within the community.³⁷

3. New Bedford, Massachusetts

In March 2007, nearly 500 ICE officials descended upon the small southern New England community of New Bedford, Massachusetts. ICE officials targeted the local Michael Bianco, Inc. plant, a leather goods manufacturer that had manufactured goods for brands such as Coach, Rockport, and Timberland.³⁸ As with other larger raids, the event split families and underscored the negative effects the raids have

33. Press Release, Southern Poverty Law Center, SPLC Sues Immigration Agency (Nov. 1, 2006), http://www.splcenter.org/legal/news/article.jsp?site_area=1&aid=221.

34. Patrick Jonsson, *Crackdown on Immigrants Empties a Town and Hardens Views*, CHRISTIAN SCI. MONITOR, Oct. 3, 2006, at 1.

35. Bynum, *supra* note 32.

36. Mark Prado, *30 Illegal Immigrants Targeted in Canal Neighborhood Raid*, MARIN INDEP. J., Mar. 7, 2007, http://www.marinj.com/marin/ci_5372749.

37. Jesse McKinley, *San Francisco Bay Area Reacts Angrily to Series of Immigration Raids*, N.Y. TIMES, Apr. 27, 2008, at A14.

38. Ken Maguire, *Factory Struggles After Immigration Raid*, WASH. POST, Mar. 28, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/28/AR2007032801392.html>.

on communities. Because many of Bianco's employees were women, this created a crisis with caring for their children. Roughly 100 children were stranded with babysitters and other caregivers as their mothers were seized during the raid.³⁹ The majority of those arrested were moved to detention centers halfway across the country in Texas.

4. Postville, Iowa

One of the largest immigration raids in U.S. history occurred in April 2008 in the small, Midwest town of Postville, Iowa. The raid occurred at the kosher meat plant, Agriprocessors, Inc., the largest employer in town and one of the largest in northeastern Iowa. ICE seized over 400 undocumented workers, including eighteen juveniles.⁴⁰

Agriprocessors employed approximately 970 workers, eighty percent of whom were believed to have fraudulent identification.⁴¹ After the raid, the entire Postville community was in recovery mode. Mayor Robert Penrod speculated on the effect of a possible Agriprocessor closure, estimating that "two-thirds of the homes here will sit empty [and] 95% of downtown business . . . will dry up."⁴² One witness labeled the government strategy criminal as hundreds of women and children were faced with the threat of being left "homeless and starving."⁴³

39. Ray Henry, *Children Stranded After Immigration Raid*, BOSTON GLOBE, Mar. 7, 2007, http://www.boston.com/news/local/massachusetts/articles/2007/03/07/children_stranded_after_immigration_raid_1173298898.

40. Antonio Olivio, *Immigration Raid Roils Iowa Melting Pot*, CHI. TRIB., May 18, 2008, at C1. In a heavy-handed procedure, 302 of the workers were fast-tracked with criminal charges, most related to identity theft. Although the Supreme Court had ruled in another case that undocumented workers must use another actual person's identity to be guilty of identity theft, the Postville detainees' knowledge regarding the origin of fraudulent employment documents was not a factor. They were quickly convicted on identity theft-related charges. *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009).

41. Spencer S. Hsu, *Immigration Raid Jars a Small Town*, WASH. POST, May 18, 2008, at A01. The raid was not the first sign of trouble for Agriprocessors, Inc. The company had been under scrutiny for numerous violations of environmental laws, labor laws, and was on notice that there was an alleged methamphetamine lab being run from inside the plant. See also Steven Greenhouse, *Shuttered Meat Plant Edges Back into Business, But Its Town Is Still Struggling*, N.Y. TIMES, Dec. 4, 2008, at A29 (bankruptcy trustee authorizes re-opening of plant, Agriprocessors re-hires 200 employees); *Rubashkin Son Arrested, Agriprocessors Fined \$10 Million in Kosher Slaughterhouse Probe*, JEWISHJOURNAL.COM, Oct. 30, 2008, http://www.jewishjournal.com/food/article/rubashkin_son_arrested_agriprocessors_fined_10_million_in_kosher_slaughterh/ (four managers arrested, Agriprocessors fined \$9.98 million).

42. *Raids Could Make Postville a Ghost Town*, KAALTV.COM, May 14, 2008, <http://www.crownheights.info/index.php?itemid=11931>.

43. Jonah Newman, Letter to the Editor, N.Y. TIMES, June 3, 2008, at A24.

As in other communities, the school system also felt the immediate impact of the raids. The local school district estimated that 150 of the 220 students from immigrant families were absent the day after the raid.⁴⁴

5. Northern California Chinese Restaurants

On September 17, 2008, ICE special agents executed federal criminal search warrants at four sites in the northern California towns of Vacaville, Vallejo, and Hercules, in the North Bay area northeast of San Francisco, as part of an investigation into the hiring and possible harboring of unauthorized workers at local Chinese restaurants. ICE agents made no criminal arrests but arrested twenty-one workers on administrative immigration violations. The arrested workers were from five countries: nine from China, five from Mexico, three from Guatemala, two from Indonesia, one from Singapore, and one from Honduras.

C. Racial Profiling

The United Food and Commercial Workers (“UFCW”) Commission heard repeated testimony about racial profiling. Witnesses testified that workers who appeared to be of Latino national origin or minorities were singled out by ICE and subjected to the greatest scrutiny. John Bowen, General Counsel for UFCW Local 7, said “race was, almost without question, the sole criteria for harsher interrogations” to which the workers were subjected at the Greeley, Colorado plant.⁴⁵ Fidencio Sandoval, a U.S. citizen and Swift worker at the Grand Island, Nebraska, plant, recounted how he was treated differently by ICE agents because he appeared to be Latino:

When they said all the U.S. citizens come over to this place, I went up there and I stood right by my boss. My boss showed his driver’s license and then he was free to go. I showed my driver’s license and my voting registration card and that was not enough. [The ICE agent] said, no, you need either your passport or citizenship certificate.⁴⁶

44. Mary Ann Zehr, *Iowa School District Left Coping with Immigration Raid’s Impact*, EDUC. WK., May 21, 2008, at 7.

45. IOWA HEARING, *supra* note 1, at 109.

46. *Id.*

Eventually, he was able to produce his documents, after his sister was able to go to his home, “break the window from my kitchen and go straight to my closet and get my citizen certificate.”⁴⁷

Other U.S. citizen coworkers were not as fortunate. Those who did not have a way to prove their citizenship were arrested and taken to Camp Dodge, located nearly 300 miles from Grand Island. Manuel Verdinez was one of those U.S. citizen workers from the Marshalltown plant who was detained, arrested, handcuffed, and taken into custody. “I said I was a U.S. citizen, and then the [ICE] agent started scratching my ID. The agent . . . said they could not find my status. They put plastic cuffs around my wrists and put all of my belongings into a plastic bag.”⁴⁸ After twelve hours in detention, “they found my record . . . and said they had made a mistake. Then [the ICE agent] finally took off my handcuffs . . . [t]hey called a cab for me and I had to pay \$90 for the cab ride back.”⁴⁹

ICE raids and increased enforcement are poisoning communities, spawning scores of state and local anti-immigrant laws and ordinances that target Latinos. All of this increases discrimination. According to Sam Zamarripa, president of the Board of Directors of the Georgia Association of Latino Elected Officials and a former State Senator in Georgia, these policies are led and advanced by white supremacist organizations.⁵⁰

The increased racial profiling and selective enforcement is also evident in the manner in which local police enforce immigration law pursuant to section 287(g) of the Immigration and Nationality Act.⁵¹

47. NAT'L COMM'N ON ICE MISCONDUCT & VIOLATIONS OF FOURTH AMENDMENT RIGHTS, COMMISSION MEETING: BOSTON, MASSACHUSETTS 109 (2008) (unpublished transcript, on file with author) [hereinafter MASS. HEARING].

48. *Id.* at 111.

49. *Id.* at 111–13.

50. See UNITED FOOD AND COMMERCIAL WORKERS UNION, *supra* note 18, at 30–31; see also Georgia Association of Latino Elected Officials, Reports & Publications, http://www.galeo.org/reports_listing.php (last visited Oct. 24, 2009) (listing reports documenting contemporary Civil Rights developments).

51. Immigration and Nationality Act, § 287(g), 8 U.S.C. § 1357(g) (2006). Section 287(g) authorizes the Secretary of Homeland Security to enter into agreements with state and local law enforcement agencies, permitting designated officers to perform immigration law enforcement functions. The University of North Carolina Immigration & Human Rights Policy Clinic (with Professor Deborah Weissman as Director of Clinical Programs) and the American Civil Liberties Union of North Carolina Legal Foundation have released a report on section 287(g) in North Carolina titled *The Policies and Politics of Local Immigration Enforcement Laws*. This report represents valuable cooperation between advocates and academia in a state at the forefront of immigration collaborations between the federal government and local law enforcement. Here is a portion of the executive summary of the report's findings:

In Nashville, Tennessee, a police officer pulled over Juana Villegas, who was nine months pregnant at the time, for a routine traffic violation.⁵² The arrest was made pursuant to a section 287(g) agreement and resulted in Villegas’ detention in county jail. According to the *New York Times*, Villegas went into labor and delivered her baby with a “sheriff’s officer standing guard in her hospital room, where one of her feet was cuffed to the bed most of the time.”⁵³

Zamarripa maintains that the state enforcement of immigration law in Georgia “has created an arbitrary and capricious application of the rule of law.”⁵⁴ The Georgia Latino Alliance for Human Rights issued a special report, concluding that most arrests conducted under section 287(g) in Cobb County were for the offense of driving without a license, hardly the serious crime or threat to national security that section 287(g) agreements contemplate.⁵⁵ Zamarripa claims that, “there is an overriding assumption that all immigrants are essentially guilty. . . . a public view that it is open season on immigrants. Anything goes in this wild, [W]ild [W]est anarchy. This is . . . why the misconduct is so pervasive within our law enforcement community, including ICE.”⁵⁶

D. Trauma to Children and Families

Family separation and the special damage to children have been particularly tragic consequences of the ICE raids.⁵⁷ Most of the chil-

The 287(g) program was originally intended to target and remove undocumented immigrants convicted of “violent crimes, human smuggling, gang/organized crime activity, sexual-related offenses, narcotics smuggling and money laundering.” However, MOAs [memoranda of agreements] are in actuality being used to purge towns and cities of ‘unwelcome’ immigrants and thereby having detrimental effects on North Carolina’s communities.

ACLU AND IMMIGR. & HUM. RTS. POL’Y CLINIC, THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS: 287(G) PROGRAM IN NORTH CAROLINA 8 (2009).

52. Julia Preston, *Immigrant, Pregnant, Is Jailed Under Pact*, N.Y. TIMES, July 20, 2008, at A13.

53. *Id.*

54. GEORGIA HEARING, *supra* note 28.

55. UNITED FOOD AND COMMERCIAL WORKERS UNION, *supra* note 18, at n.85.

56. GEORGIA HEARING, *supra* note 28, at 33.

57. One particularly tragic example is that of Diego and Maria, two sibling high school students from Marshalltown. IOWA HEARING, *supra* note 1, at 63–78. They testified before the Commission about the day their mother was arrested during the raid at the Swift plant in Iowa. Their mother was detained for two days, and during that time they were responsible for the care of their younger siblings, ages five and three. *Id.* at 69–71. Maria told the Commission, “At night, I had to do the hardest thing in the world; explain to a three-year-old and a five-year-old what was happening and why their mother wasn’t coming home.” *Id.* Diego recalled: “when I woke [on the day of the raid] it was like a

R
R
R
R

dren impacted by raids were U.S. citizens and most were very young—about two-thirds were under ten and about one-third were under age five.⁵⁸ In three sites studied by the National Council of La Raza, researchers found that “families and relatives scramble[d] to rearrange care, children spent at least one night without a parent, often in the care of a relative or non-relative babysitter, in some cases neighbors and in some cases even landlords; some children were cared for by extended families for weeks and months.”⁵⁹ Families directly affected by the raid also suffered economic hardship and financial instability that “creates conditions that are detrimental to children’s development.”⁶⁰ The National Council of La Raza study also analyzed the emotional and mental side effects upon children. While the long-term effects of the raids are still unraveling, psychologists have already observed and are concerned about long-term depression and other mental illness in family members. The report found that younger children translated the temporary parental absence as abandonment. One parent reported that her child feared that her father “love[s] money more than he loves me.”⁶¹

According to Dr. Amaro Laria, Director of the Lucero Latino Mental Health Training Program at the Massachusetts School of Professional Psychology and faculty of the psychiatry department at Harvard Medical School, “[o]ne of the most well established facts in mental health is that abrupt separation of children from their parents, particularly their mothers, are among the most severely traumatic experiences that a child can undergo.”⁶² He testified that in the case of the raid, the “traumatic separations [were] perpetrated and sanctioned by our nation’s law enforcement agencies, ironically in the

nightmare. My sister came in crying and told me that there was a raid at the Swift plant.” *Id.* at 64. Diego testified that when he got to school that day “there was crying and despair” and the parking lot was half empty. *Id.* at 64–67. Diego went home after lunch when he learned that his uncle had been detained. “At that time I had no idea what happened to my mother.” *Id.* at 64–65. In Maria’s testimony, she recalled that when she learned of the raid at Swift, the plant where her mother worked, “I froze and I felt like I couldn’t breathe. . . . I felt so much hate and sorrow in my heart, a feeling that I had never felt before.” *Id.* at 70.

58. GEORGIA HEARING, *supra* note 28, at 89. According to Ms. Rosa Maria Castaneda, “nationally there are about 5 million children with undocumented parents in the U.S., two-thirds are U.S. citizens and a similar share are age 10 or under.” *Id.*; see also NAT’L COUNCIL OF LA RAZA, PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA’S CHILDREN (2007).

59. GEORGIA HEARING, *supra* note 28, at 91–92.

60. *Id.* at 93–94.

61. NAT’L COUNCIL OF LA RAZA, *supra* note 58, at 50–51.

62. MASS. HEARING, *supra* note 47, at 96.

R

R

R

name of protecting citizens.”⁶³ In his opinion, ICE had engaged in terrorism against these families and children.

Dr. Laria told the Commission about a young girl, Deanna, who said, “she wanted to kill herself because her mother had abandoned her.”⁶⁴ Dr. Laria also testified about a girl who called 911 looking for her mother and a young “desperate father, who, after his wife was imprisoned, had to rush their infant daughter to the emergency room with severe dehydration because she hadn’t been breastfed for days.”⁶⁵

E. Damage to Communities

ICE raids and increased enforcement have caused severe social and civic damage and major setbacks for many communities. In Iowa, communities had developed several successful initiatives designed to stimulate the assimilation of immigrants into the fabric of the communities where they resided. Great progress toward integration and understanding had taken place in Marshalltown.⁶⁶ But the ICE raid undid much of that progress. The raid had given some members of the community “a justification for discriminating against all immigrants, documented or not.”⁶⁷

Raids also hurt local economies. Jorge Avellanada, city council member and a business leader in Chelsea, Massachusetts, told the Commission that the raids resulted in a thirty percent decline in sales due in part to the fear that workers had about going to work, shopping, or going about their normal business.⁶⁸

63. *Id.*

64. *Id.* at 98.

65. *Id.*

66. IOWA HEARING, *supra* note 1, at 20. Marshalltown was cited as a model community during former Governor Tom Vilsack’s administration. *Id.* Sponsored by former Governor Vilsack, the “New Iowan Centers” proved to be extremely helpful in promoting integration of new immigrants and Iowans into the state. *Id.* at 107–08.

67. *Id.* at 30.

68. MASS. HEARING, *supra* note 47, at 56. Steven Pitts, Ph.D., presented a statement at a town hall meeting on immigration before Congresswoman Barbara Lee on the impact of ICE raids on the economy. In his written statement, Mr. Pitts referenced a study conducted by the Los Angeles Economic Development Corporation that identified the impact that raids would have on the Los Angeles economy. Based on the impact of (1) direct job loss; (2) secondary job loss to business where the undocumented spent money; and (3) loss of tax revenue, the study projected that an ICE raid would cost L.A. County “between 74,000 and 500,000 jobs and between \$8.7 million and \$57.2 million in tax revenue.” See STEVEN PITTS, PH.D., THE IMPACT OF THE ICE RAIDS ON THE ECONOMY (on file with the Commission).

R

R

The negative ramifications of the raids on communities manifest themselves in other ways. Increased enforcement and high profile military-style raids have resulted in the immigrant community being afraid to report abuse or crime for fear of being turned over to ICE.⁶⁹

II. Institutional Racism and U.S. Immigration Policy

This Article contends that the evolution of immigration laws and the manner in which immigration laws operate have institutionalized bias against Latino immigrants—Mexicans in particular—and Asian immigrants. This has occurred through laws that initially manifested racist intent and/or impact, amendments that perpetuated that racism, and enforcement strategies and legal interpretations reinforcing the racism. Racism has been institutionalized in our immigration laws and enforcement policies.

Kwame Ture (a.k.a. Stokely Carmichael) coined the phrase “institutional racism” in the 1960s. He recognized it was important to distinguish personal bias from institutional bias, which is generally long-term and grounded more in inertia than in intent. Institutional racism has come to describe societal patterns that impose oppressive or otherwise negative conditions against identifiable groups on the basis of race or ethnicity.

In the United States, institutional racism resulted from the social caste system of slavery and racial segregation. Much of its basic structure still stands to this day. By understanding the fundamental principles of institutionalized racism we begin to see the application of the concept beyond the conventional black-white paradigm. Institutional racism embodies discriminating against certain groups of people through the use of biased laws or practices. Structures and social arrangements become accepted, operate, and are manipulated in such a way as to support or acquiesce in acts of racism. Institutional racism can be subtle and less visible, but is no less destructive than individual acts of racism.

Charles Lawrence’s discussion of unconscious racism also is relevant. Lawrence teaches us that the source of much racism lies in the unconscious mind. Individuals raised in a racist culture unknowingly absorb attitudes and stereotypes that influence behavior in subtle, but

69. MASS. HEARING, *supra* note 47, at 58.

pernicious ways. “Unconscious prejudice . . . is not subject to self-correction within the political process.”⁷⁰

The forces of racism have become embodied in U.S. immigration laws.⁷¹ As these laws are enforced, they are accepted as common practice, in spite of their racial effects. We may not like particular laws or enforcement policies because of their harshness or their violations of human dignity or civil rights, but many of us do not sense the inherent racism because we are not cognizant of the dominant racial framework. Understanding the evolution of U.S. immigration laws and enforcement provides us with a better awareness of the institutional racism that controls those policies. This Part focuses on the evolution of immigration laws and enforcement policies. The history begins with slavery. Forced African labor migration set the stage for the Mexicans and the Chinese. This Part reviews the history of Mexican migration, the enforcement of the southwest border, and the sea change to enforcement through employer sanctions enacted in 1986.

A. Enslavement of African Workers As Forced Immigration Policy

In her contribution to this Symposium, Professor Rhonda Magee writes convincingly that the notion of immigrant must include the forced immigration system of chattel slavery and that the law and policy of chattel slavery is a relevant historical antecedent to today’s immigration law.⁷² She points out:

[S]lavery was, in significant part (though hardly exclusively), *an immigration system* of a particularly reprehensible sort: a system of state-sponsored forced migration human trafficking, endorsed by Congress, important to the public fisc as a source of tax revenue, and aimed at fulfilling the need for a controllable labor population in the colonies, and then in the states, at an artificially low economic cost.⁷³

Professor Magee concludes:

Viewing immigration as a function of slavery helps us articulate an important irony: that with respect to immigration, slavery—our racially based forced migration system—laid a foundation for both a

70. Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 349 (1987).

71. Kevin Johnson has recognized that “U.S. immigration laws . . . are nothing less than a ‘magic mirror’ into the nation’s collective consciousness about its perceived national identity—and the exclusion of poor and working people of color from that identity as well as from full membership in American social life.” Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. (forthcoming 2009).

72. Rhonda V. Magee, *Slavery as Immigration?*, 44 U.S.F. L. REV. 273, 277 (2009).

73. *Id.* at 289–99.

racially segmented labor-based immigration system, and a racially diverse (even if racially hierarchical) “nation of immigrants.” These legacies which the founders may not have set out to leave, but which are among the United States’ most pernicious and most precious gifts to civilization.⁷⁴

Scholars generally trace the beginning of racially restrictive U.S. immigration policies to laws directed at various immigrant groups. Prior to 1870, the subordination of people of African descent was further underscored by the fact that people from Africa could not become U.S. citizens through naturalization. The Nationality Act of 1790 limited naturalization to “free white persons” and specifically excluded African Americans and Native Americans.⁷⁵ However, in 1870, Congress extended naturalization rights to anyone of African descent.⁷⁶

Throughout the immigration history of the United States, Africans have been underrepresented as a voluntary immigrant group. Before 1965, Africans represented less than one percent of the total immigrant population.⁷⁷ In 1990, Africans still constituted only 2.3% of all immigrants.⁷⁸ By 2008, African immigrants made up 9.6% of all immigrants.⁷⁹

The effect of forced immigration in the African American population today is readily apparent. The U.S. Census Bureau reported that in 2007, African Americans make up 13.5% of the total U.S. population.⁸⁰ The descendants of slavery make up the vast majority of today’s African American population.

B. Mexican Immigration

Rightly or wrongly, today the so-called “illegal immigration” problem has become synonymous with the control, or lack thereof, of the

74. *Id.*

75. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103–04 (1790). Years later, when Japanese immigrants unsuccessfully sought naturalization as “free white persons,” the Supreme Court reaffirmed that the 1790 naturalization statute intended that “Negroes and Indians” were to be denied naturalization. *Ozawa v. United States*, 260 U.S. 178, 196 (1922).

76. Act of July 14, 1870, ch. 254, 16 Stat. 254 (1870).

77. U.S. IMMIGR. AND NATURALIZATION SERVICE STAT. Y.B. OF THE IMMIGR. AND NATURALIZATION SERV., 1989, at xvii (1990).

78. U.S. IMMIGR. AND NATURALIZATION SERVICE STAT. Y.B. OF THE IMMIGR. AND NATURALIZATION SERV., 1990, at 53 tbl.3 (1991).

79. U.S. DEPT. OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, U.S. LEGAL PERMANENT RESIDENTS: 1990, at 4 tbl.3 (2008), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2008.pdf. The number of new lawful permanent residents from Africa that year was 105,915. *Id.*

80. U.S. CENSUS BUREAU, 2007 POPULATION ESTIMATES, at tbl.T3–2007 (2007).

southwest border. As such, the “problem” is synonymous with Mexican migration, and Mexican immigrants have come to be regarded by many anti-immigrant voices as the enemy. The anti-immigrant activists do not regard themselves as racist; they view themselves as the voice for law and order. The history of the border, labor recruitment, and border enforcement explains how the institutionalization of anti-Mexican immigration policies have created the structure to allow these voices to claim racial and ethnic neutrality and for many Americans to accept that claim.

1. Migration Between 1848 and the 1960s

Gerald López provides a clear picture of the historical relationship between Mexican migration and the United States.⁸¹ Long before the North American Free Trade Agreement (“NAFTA”) and terms like *globalization* or *transnationalism* were in vogue, Mexicans and Americans were living the reality of interconnected economies and societies. The southwest border essentially became an open border in 1848, when the United States forced Mexico to sign the Treaty of Guadalupe. The United States gained California and New Mexico (including present-day Nevada, Utah, and Arizona) and recognition of the Rio Grande as the southern boundary of Texas.⁸² This amounted to fifty-five percent of Mexico’s former territory. The treaty gave all Mexicans living in the ceded territory the option of becoming U.S. citizens or relocating within Mexican borders. In the years immediately following the treaty, many Mexicans thought of the territories as part of Mexico.⁸³ “Mexicans and Americans paid little heed to the newly created international border, which was unmarked and wholly unreal to most.”⁸⁴

López argues that promotion of Mexican immigration was part of a larger pattern of labor recruitment that began to emerge in the United States in the late nineteenth century.⁸⁵ From 1910 to 1920, approximately 200,000 Mexicans were admitted into the United States, many actively recruited to fill severe manpower shortages resulting from war and the curtailment of cheap European labor migra-

81. Gerald P. López, *Undocumented Mexican Migration*, 28 UCLA L. REV. 615, 641–72 (1981).

82. *See id.* at 642.

83. *Id.* at 642–43.

84. J. Martinez, *Mexican Emigration to the U.S. 1910–1930*, at 1 (1971) (unpublished dissertation, on file with UCLA Research Library).

85. López, *supra* note 81, at 644.

tion.⁸⁶ In the decade after World War I, U.S. recognition of Mexican labor's value grew out of economic necessity. Nearly 500,000 Mexican workers crossed the border during the 1920s.⁸⁷

In 1942, the United States negotiated a treaty with Mexico known as the Bracero Program, providing for the use of Mexicans as temporary workers in U.S. agriculture.⁸⁸ With the exception of slavery, in terms of servicing U.S. economic interests, the program was a historical first.⁸⁹ The Bracero Program was renewed consecutively throughout the administrations of five U.S. presidents. Braceros constituted a quarter of the farm labor force in California, Arizona, New Mexico, and Texas, contributing to U.S. dominance in agriculture.⁹⁰

In spite of the program, undocumented Mexican migration was significant during this era. United States policy makers "must have been aware that recruitment activities designed to promote the Bracero Program would encourage poor Mexicans to believe the United States was a land of opportunity, thereby encouraging those who could not be admitted legally to enter" without inspection.⁹¹ López continues: "The relative attractiveness of illegal entry was increased by the failure to enforce the promises that had been made in connection with the adoption of the Bracero Program."⁹² But when the number of undocumented workers became politically intolerable, the response was all too familiar. In 1954, over one million undocumented Mexicans were deported as part of an INS initiative dubbed Operation Wetback.⁹³

Over time, reports of depressed wages and poor working conditions endured by the braceros plus complaints by organized labor about unfair wage competition led to the cancellation of the program.⁹⁴ The "emergency wartime measure" survived twenty-two years through 1964 and employed nearly five million Mexican workers. Employers almost exclusively used the undocumented program after their defeat on the issue of the Bracero Program and a related H-2 workers provision. The period between 1964 and 1986 evidenced an

86. *Id.* at 655–56.

87. *Id.* at 660–61.

88. *Id.* at 664.

89. *Id.* at 666.

90. *Id.*

91. *Id.* at 668.

92. *Id.*

93. *Id.* at 670.

94. See Marjorie S. Zatz, *Using and Abusing Mexican Farm-Workers: The Bracero Program and the INS*, 27 L. & SOC'Y REV. 851–63 (1993).

effective campaign to insure the continued existence of the undocumented program focused primarily on preserving immunity for those employing undocumented workers.

Direct and indirect recruitment has continued in spite of the implementation of employer sanctions legislation in 1986. Even today, farm labor contractors travel to Mexican cities and towns to convince potential farm workers to cross the border into the United States. The process involves well-organized networks of contractors and contractor agents representing major U.S. agricultural companies. Many U.S. companies are willing to foot the costs of illegally bringing the workers into the country.

As organized labor and public sentiment toward undocumented Mexican workers became increasingly negative in the 1970s, resources for border enforcement were enhanced, and the Border Patrol's primary task became patrolling the southern border. By the mid 1990s, eighty-eight percent of the Border Patrol's agents were stationed along the Mexican border, and southern border apprehensions accounted for ninety-eight percent of all border apprehensions.⁹⁵

2. Restraints on Mexican Immigration in the 1970s

For the first time, a quota on the number of visas was imposed on Western Hemisphere countries in 1965. Thus, while the rest of the world enjoyed an expansion of numerical limitations and a definite preference system after 1965, Mexico and the Western Hemisphere were suddenly faced with numerical restrictions. The Western Hemisphere was allotted a total of 120,000 immigrant visas each year, and while the first-come, first-serve basis for immigration sounded fair, applicants had to meet strict labor certification requirements and demonstrate they would not be displacing U.S. workers. Waivers of the labor certification requirement were available, however, for certain applicants, such as parents of U.S. citizen children. As one might expect, by 1976 the procedure had resulted in a severe backlog of approximately three years and a waiting list with nearly 300,000 names.⁹⁶

As the immigration of Mexicans became the focus of more debate, Congress enacted legislation in 1976, further curtailing Mexican migration. The law imposed the preference system on Mexico and the Western Hemisphere along with a 20,000 visa per country numerical limitation. Thus, Mexico's annual visa usage rate, which had been

95. U.S. IMMIGR. AND NATURALIZATION SERVICE, *supra* note 77, at tbl.349.

96. See CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE § 1.4c (1993).

about 40,000, was virtually cut in half overnight, and thousands were left stranded on the old system's waiting list.⁹⁷ In 1978, the 120,000 Western Hemisphere and 170,000 Eastern Hemisphere quotas were merged into a single 290,000 worldwide numerical limit on immigration.⁹⁸

3. Supreme Court Blessings to Target Mexicans

As the INS enforcement budget grew larger and larger during the 1970s and 1980s, the Supreme Court, swayed by arguments that the undocumented alien problem was worsening, gave more flexibility to INS enforcement strategies. These cases, which involve Mexican nationals, demonstrate the Court's role in institutionalizing racism. As the case law evolved, the policy became couched in terms of procedure and about non-racial "illegal aliens," rather than about the fact that these were Mexicans coming to the United States seeking a better life.

In 1973, the Supreme Court appeared to have put an end to the Border Patrol practice of "roving" near the United States-Mexico border to search vehicles, without a warrant or probable cause. In *Almeida-Sanchez v. United States*,⁹⁹ INS officials unsuccessfully argued that as long as they were in the proximity of the border, their efforts in following and stopping cars located near the border was the "functional equivalent" of the border.¹⁰⁰

But, within two years, the Supreme Court—overwhelmed by government claims of a crisis at the border—opened the door to stops by roving patrols near the border under certain circumstances. In *United States v. Brignoni-Ponce*,¹⁰¹ two Border Patrol officers were observing northbound traffic from a patrol car parked at the side of Interstate 5 north of San Diego.¹⁰² They pursued Brignoni-Ponce's car and

97. Act of Oct. 20, 1976, Pub. L. No. 94-571, 90 Stat. 2703 (1976); *Silva v. Bell*, 605 F.2d 978, 980–82 (1978). Backlogs have resulted from too few immigrant visas available to Mexicans each year, which in turn contributes to family members who enter without inspection to reunite with relatives already in the United States. See David B. Thronson, *You Can't Get Here From Here: Toward a More Child-Centered Immigration Law*, 14 VA. J. SOC. POL'Y & L. 58, 75 (2006). Of course, most aliens who have entered without inspection are from Mexico, and they are purportedly punished for their surreptitious entry, not because they are Mexican.

98. See Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703 (1976) (creating basis for future visa allocations).

99. 413 U.S. 266, 272 (1973).

100. *Id.*

101. 422 U.S. 873 (1975).

102. *Id.*

stopped it because the three occupants appeared to be of Mexican descent. The Supreme Court agreed that a roving patrol of the Border Patrol should not be allowed to stop a vehicle near the Mexican border and question its occupants, when the only ground for suspicion is that the occupants appear to be of Mexican ancestry. But the Court went on to say that patrolling officers may stop vehicles if they are aware of specific articulable facts, together with rational inferences, reasonably warranting suspicion that the vehicles contain aliens who may be illegally in the country and the occupants can be questioned. Something as small as aspects of the vehicle itself may justify suspicion. The Court also acknowledged that trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut.

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

INS now suggests there may be as many as 10 or 12 million aliens illegally in the country. . . . [T]hese aliens create significant economic and social problems.

. . . .

The Border Patrol's traffic-checking operations . . . succeed in apprehending some illegal entrants and smugglers, and they deter the movement of others by threatening apprehension and increasing the cost of illegal transportation.¹⁰³

Within a year, in 1976, the Court carved out a major exception to the Fourth Amendment's protection against search and seizure to further accommodate the Border Patrol. The case, *United States v. Martinez-Fuerte*,¹⁰⁴ involved the legality of a fixed checkpoint located on Interstate 5 near San Clemente, California. The checkpoint is sixty-six road miles north of the Mexican border. The "point" agent, standing between the two lanes of traffic, visually screens all northbound vehicles, which the checkpoint brings to a virtual, if not a complete, halt. In a small number of cases, the "point" agent will direct cars to a secondary inspection area for further inquiry. In the three situations that were challenged in *Martinez-Fuerte*, the Government conceded that none of the three stops was based on articulable suspicion.

The defendants argued that the routine stopping of vehicles at a checkpoint was invalid because *Brignoni-Ponce* must be read as prohibiting any stops in the absence of reasonable suspicion. However, the

103. *Id.*

104. 428 U.S. 543 (1976).

Court recognized that maintenance of a traffic-checking program in the interior is necessary because “the flow of illegal aliens cannot be controlled effectively at the border,” holding:

A requirement that stops on major routes inland always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens.¹⁰⁵

Fixed checkpoints, even miles and miles away from the border, now were constitutional, even in the absence of articulable facts. Again, the Court cited the importance of supporting the Border Patrol’s efforts in enforcing immigration laws.

The Supreme Court majority was not concerned with racial overtones even though the Border Patrol was basing secondary inspections on those who looked Mexican. A dissenting opinion by Justice William Brennan warned: “Every American citizen of Mexican ancestry and every Mexican alien lawfully in this country must know after today’s decision that he travels the fixed checkpoint highways at [his] risk.”¹⁰⁶

Less than a decade later, in 1984, the Supreme Court made it quite clear that the Fourth Amendment’s protection against illegal search and seizure was not available to aliens fighting deportation even if INS officials acted illegally. In *INS v. Lopez-Mendoza*,¹⁰⁷ INS agents arrested Lopez-Mendoza at his place of employment, a transmission repair shop. The agents had no warrant to search the premises or to arrest any of its occupants. The proprietor of the shop refused to allow the agents to interview his employees during working hours. Nevertheless, while one agent engaged the proprietor in conversation, another entered the shop and approached Lopez-Mendoza. After questioning and arrest, Lopez-Mendoza admitted he was not a legal resident. While the arrest was illegal, the Supreme Court refused to exclude the Lopez-Mendoza’s admission that he was not a legal resident. The Court concluded that “[t]here comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches.”¹⁰⁸ Applying the exclusionary rule would simply be too in-

105. *Id.*

106. *Id.* at 573 (Brennan, J. dissenting).

107. 468 U.S. 1032, 1050 (1984) (citing *United States v. Janis*, 428 U.S. 433, 459 (1976)).

108. *Id.*

convenient for immigration enforcement officials—even when the Fourth Amendment is violated.

C. The Immigration Reform and Control Act of 1986

Although three million undocumented immigrants obtained lawful status under the legalization provisions of the Immigration Reform and Control Act of 1986 (“IRCA”), the codification of employer sanctions in IRCA was the driving force behind the legislation, not legalization. Concerns over the number of undocumented workers (predominantly Mexican) in the United States deepened in the 1970s and early 1980s. While no one knew the exact number, some of the more hysterical estimates ranged from eight to twelve million.¹⁰⁹ Border Patrol and INS efforts were perceived as ineffectual. Penalizing employers for hiring undocumented workers became a popular proposal. IRCA represented the culmination of years of social, political, and congressional debate about the perceived lack of control over our southern border. Employer sanctions proposals went through several iterations. In 1952, the notion of punishing employers for hiring undocumented Mexicans was raised, but got nowhere. Beginning in 1973, legislative proposals featuring employer sanctions as a centerpiece reappeared and were touted as the tool needed to resolve the undocumented alien “problem.”¹¹⁰ The Rodino Bill, pushed by powerful House Democratic leader Peter Rodino in the late 1970s, was an employer sanctions bill.¹¹¹

By the end of the Carter Administration in 1980, the Select Commission on Immigration and Refugee Policy portrayed legalization as a necessary balance to sanctions. However, the story of congressional support for IRCA is complicated. Although some broader-minded members of Congress may have wanted legalization to be implemented generously once enacted, Congress’ support for legalization itself was decidedly underwhelming.

The 1986 federal employer sanctions were enacted as the major feature of reform. By a bare swing vote of only four members of the House of Representatives, legalization (amnesty) provisions were in-

109. See U.S. GOV’T ACCOUNTABILITY OFF., REPORT TO THE CHAIRMAN OF THE SUBCOMMITTEE ON IMMIGRATION AND REFUGEE POLICY, GAO/IPE-82-9, PROBLEMS AND OPTIONS IN ESTIMATING THE SIZE OF THE ILLEGAL ALIEN POPULATION (1982).

110. See U.S. GOV’T ACCOUNTABILITY OFF., REPORT TO THE CONGRESS, GGD-76-101, IMMIGRATION—NEED TO REASSESS U.S. POLICY 4 (1976).

111. See ANTOINETTE SEDILLO LOPEZ, LATINO EMPLOYMENT, LABOR ORGANIZATIONS, AND IMMIGRATION 201–13 (1995).

cluded in the legislation. Under IRCA, for the first time, Congress prohibited employers from hiring workers who were not authorized to work in the United States, imposing civil and criminal penalties on violators.

In response to intense lobbying by civil rights advocates and concerned members of Congress, protections intended to safeguard against discrimination were included in the law. IRCA mandated the Government Accountability Office (“GAO”) to conduct three annual studies from 1987 to 1989 to determine whether employer sanctions had resulted in “widespread discrimination.”¹¹² A sunset provision further stipulated that employer sanctions could be repealed if the GAO concluded that compliance caused employers to discriminate.

The first two status reports on employer sanctions by the GAO found that “one in every six employers in GAO’s survey who were aware of the law may have begun or increased the practice of (1) asking only foreign-looking persons for work authorization documents or (2) hiring only U.S. citizens.”¹¹³ Despite the GAO’s findings of widespread IRCA-related employment discrimination and similar evidence by independent researchers in its final two reports, Congress did not repeal employer sanctions. Anti-immigrant groups, Senator Alan Simpson (a co-sponsor of IRCA), and the American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”) routinely dismissed the findings as insignificant or unreliable.¹¹⁴

III. The Chinese Exclusion Era and Beyond

The discovery of gold, a rice shortage, and the recruitment of Asian labor led to noticeable Asian migration in the nineteenth century, in turn triggering a backlash against those immigrants. Examining the impetus and development of exclusion laws directed first at Chinese and eventually at all Asian immigrants reveals a sordid tale of racism and xenophobia. The antipathy demonstrated toward Asians

112. GOV’T ACCOUNTABILITY OFF., IMMIGRATION REFORM STATUS OF IMPLEMENTING EMPLOYER SANCTIONS AFTER ONE YEAR (1987) [hereinafter GAO, SANCTIONS AFTER ONE YEAR]; GOV’T ACCOUNTABILITY OFF., IMMIGRATION REFORM STATUS OF IMPLEMENTING EMPLOYER SANCTIONS AFTER TWO YEARS (1988) [hereinafter GAO, SANCTIONS AFTER TWO YEARS]; GOV’T ACCOUNTABILITY OFF., IMMIGRATION REFORM STATUS OF IMPLEMENTING EMPLOYER SANCTIONS AFTER THREE YEARS (1989) [hereinafter GAO, SANCTIONS AFTER THREE YEARS].

113. See GAO, SANCTIONS AFTER ONE YEAR, *supra* note 112; GAO, SANCTIONS AFTER TWO YEARS, *supra* note 112.

114. By 2001, organized labor, including the AFL-CIO, realized that its future viability rested solidly on the shoulders of immigrant workers; unions called for the repeal of employer sanctions and for the legalization of undocumented workers.

paralleled the antipathy that America showed to individuals of African descent. The attack on Asian immigrants represented the first comprehensive federal regulation of immigration that would later serve as the model for exclusion of eastern and southern Europeans.

Early on, the Chinese were officially welcomed in the United States. Chinese were actively recruited to fill labor needs in railroad construction, laundries, and domestic service. In 1852, the governor of California even recommended a system of land grants to induce the immigration and settlement of Chinese. After the Civil War, Southern plantation owners, who were worried that freed slaves would be “unmanageable,” considered substituting Chinese coolie labor for Black labor. Southern plantation owners visited California with this in mind. And, during the 1870s, Chinese workers were imported to states like Louisiana and Mississippi and pitted against Black workers. By 1882, about 300,000 Chinese had entered and worked on the West Coast.¹¹⁵

By the late 1860s, the Chinese question became a major issue in California and Oregon politics. Many white workers felt threatened by the perceived competition from the Chinese, while many employers continued to seek them as inexpensive laborers and subservient domestics. Employment of Chinese by the Central Pacific Railroad was at its peak. Anti-coolie clubs increased in number, and mob attacks against Chinese became frequent. Much of this resentment was transformed into or sustained by a need to preserve “racial purity” and “Western civilization.”¹¹⁶

Sinophobic sentiment prevailed in Congress. First, Chinese immigrants were judged unworthy of citizenship. In 1870, Congress amended the Nationality Act of 1790 extending the right of naturalization to aliens of African descent, but Chinese were deliberately denied that right because of their “undesirable qualities.”¹¹⁷ In 1875, responding to law enforcement claims that Chinese women were being imported for prostitution, Congress passed legislation prohibiting their importation for immoral purposes. Overzealous enforcement of the statute, commonly referred to as the Page Law,¹¹⁸ effectively barred Chinese women, exacerbating an already imbalanced sex ratio among Chinese.

115. ROGER DANIELS, *THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION* 19 (Univ. of Cal. Press 1962).

116. *Id.*

117. EDWARD P. HUTCHINSON & BALCH INSTITUTE FOR ETHNIC STUDIES, *LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798-1965*, at 57 (1981).

118. Page Law, ch. 143, 18 Stat. 147 (1875).

The exclusion of prostitutes marked the beginning of direct federal regulation of immigration. During the 1881 session of Congress, twenty-five anti-Chinese petitions were presented by a number of civic groups, like the Methodist Church and the New York Union League Corps, and from many states, including Alabama, Ohio, West Virginia, and Wisconsin. Of course, California was at the center for demands of exclusion.

Responding to this national clamor, Congress enacted the Chinese Exclusion Act of May 6, 1882.¹¹⁹ The law excluded laborers for ten years and effectively slammed the door on all Chinese immigration. Because Chinese women were defined as laborers, Chinese laborers who had already immigrated had no way to bring wives and families left behind. The ban on laborers' spouses effectively halted the immigration of Chinese women, preventing family formation for Chinese immigrants.

In 1904, Chinese exclusion was extended indefinitely, marking the culmination of a thirty-five-year series of laws that limited and then excluded Chinese immigrants. Not until the alliance with China during World War II would Congress reconsider any aspect of those barriers to membership. And not until 1965 would Congress substantially alter nearly a century of laws aimed at keeping the Chinese marginalized.

A. The Gentlemen's Agreement with Japan

Not coincidentally, the first appreciable number of Japanese immigrants entered at the height of the Chinese exclusion movement. Agricultural labor demands, particularly in Hawaii and California, led to increased efforts to attract Japanese workers after the exclusion of the Chinese.

Like the initial wave of Chinese immigrants, Japanese laborers were at first warmly received by employers. So many of them came that the Japanese became the largest group of foreigners on the Hawaiian Islands. In San Francisco in 1869, the new immigrants were described as "gentlemen of refinement and culture . . . [who] have brought their wives, children, and . . . new industries among us."¹²⁰

By the turn of the century, unfavorable sentiment toward the Japanese laborers grew as they began to migrate to the western United States. After Hawaii was annexed in 1898, the Japanese were able to

119. Chinese Exclusion Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943).

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

use it as a stepping stone to the mainland, where the majority engaged in agricultural work. Economic competition with white farm workers soon erupted. Nativists—many motivated by racial dislike for Asians—with the backing of organized labor in California formed the Japanese and Korean Exclusion League (later renamed the Asiatic Exclusion League). Exclusion once again became a major political issue—this time the target was the Japanese.

In the wake of the 1906 San Francisco earthquake, fierce anti-Japanese rioting resulted in countless incidents of physical violence. Japanese students in San Francisco were ordered to segregated schools—an act that incensed Japan and later proved a major stumbling block in negotiations over restrictions on Japanese laborers. Demands for limits on Japanese immigration resonated.

Japanese laborers were eventually restricted but not in conventional legislative fashion. Japan's emergence as a major world power (having defeated China in 1895 and Russia in 1905 wars) meant the United States could not restrict Japanese immigration in the heavy-handed, self-serving fashion with which it had curtailed Chinese immigration. To do so would have offended an increasingly assertive Japan when the United States was concerned about keeping an open door to Japanese markets. To minimize potential disharmony between the two nations while retaining the initiative to control immigration, President Roosevelt negotiated an informal agreement with Japan.

Under the terms of the so-called Gentlemen's Agreement reached in 1907 and 1908, the Japanese government refrained from issuing travel documents to laborers destined for the United States. In exchange for this severe but voluntary limitation, Japanese wives and children could be reunited with their husbands and fathers in the United States, and the San Francisco school board would be pressured into rescinding its segregation order. In *Takao Ozawa v. United States*,¹²¹ the Supreme Court endorsed the racism inherent in the naturalization law concluding:

[T]o adopt the color test alone would result in a confused overlapping of races and a gradual merging of one into the other, without any practical line of separation. . . . [T]he federal and state courts, in an almost unbroken line, have held that the words "white person" were meant to indicate only a person of what is *popularly known* as the Caucasian race. . . . With the conclusion reached in these several decisions we see no reason to differ.¹²²

121. 260 U.S. 178 (1922).

122. *Id.* at 197 (emphasis added).

B. Filipinos and Asian Indians

After the U.S. victory in the 1898 Spanish-American War, President McKinley concluded that the people of the Philippines were “unfit for self-government” and “there was nothing left for [the United States] to do but to take them all, and to educate the Filipinos, and uplift and civilize and Christianize them.”¹²³ The U.S. takeover was met with violent resistance from many Filipinos.

Ironically, because the Philippines became a U.S. colony, Filipinos automatically became noncitizen nationals of the United States rather than aliens. They could travel in and out of the United States without regard to immigration laws, and requirements for obtaining full citizenship were relaxed. When appreciable numbers of Filipinos came in after World War I (when Chinese and Japanese workers could no longer be recruited) exclusionary efforts directed at them began.

The advent of the twentieth century witnessed the entry of other Asians, such as Asian Indians, but in small numbers. A small number of more educated Indians also entered. Even small numbers of Asian Indians managed to agitate the Asiatic Exclusion League, which had sprung up in response to Japanese and Korean immigration. The California commissioner of state labor statistics concluded that the “Hindu is the most undesirable immigrant in the state. His lack of personal cleanliness, his low morals and his blind adherence to theories and teachings, so entirely repugnant to American principles, make him unfit for association with American people.”¹²⁴ Eventually, Asian Indians were prevented from immigrating through the enactment of the Asiatic Barred Zone in 1917.

Lower federal courts had granted lawful Asian Indian immigrants the right to naturalize on the grounds they were Caucasians and thus eligible “white persons” under the citizenship laws of 1790 and 1870. But, in *United States v. Bhagat Singh Thind*,¹²⁵ the Supreme Court reversed this racial stance, deciding that Indians, like Japanese, would no longer be considered white persons, and were therefore ineligible to become naturalized citizens.

The landmark national origin quota law enacted in 1924 restructured criteria for admission to respond to nativist demands and represented a general selection policy that remained in place until 1952.

123. JAMES T. PATTERSON, *AMERICA IN THE TWENTIETH CENTURY: A HISTORY* 102 (1976).

124. CALIFORNIA STATE BOARD OF CONTROL, *CALIFORNIA AND THE ORIENTAL: JAPANESE, CHINESE AND HINDUS* 111–21 (1920).

125. 261 U.S. 204, 214–15 (1923).

The scheme limited immigrants of any particular country to two percent of their nationality in 1890. The law eliminated the few remaining categories for Asians. The 1924 Act provided for the permanent exclusion of any “alien ineligible to citizenship.” The only Asians not affected by the 1924 Act were Filipinos, who remained exempt as nationals and who by then had settled into a familiar pattern of immigration. Limitations on Japanese immigrants led to an intense recruitment of Filipino laborers because of their open travel status as noncitizen nationals.

By the late 1920s, the call to exclude Filipino workers was seen by Congress as an uncomplicated proposal that promised relief for the Great Depression’s high unemployment. However, dealing with anti-Filipino agitation was not as simple as responding to earlier anti-Chinese, anti-Asian Indian, and even anti-Japanese campaigns. As U.S. nationals, they could travel in and out of the country without constraint. Until the Philippines were granted independence, Congress could not exclude Filipinos.

The Tydings-McDuffie Act, passed in 1934, paved the way for exclusion.¹²⁶ When their nation became independent on July 4, 1946, Filipinos lost their status as nationals of the United States. Those in the United States were deported unless they had become immigrants. Between 1934 and 1946, the Philippines were given an annual quota of only fifty visas! Tydings-McDuffie signaled the formal end of an era. The refusal to extend Asians the right to naturalize, the laws against the Chinese, the Gentlemen’s Agreement with Japan, the 1917 and 1924 Immigration Acts, and Tydings-McDuffie were the legacy of xenophobia that explicitly codified racial exclusion.

C. The 1965 Framework for Selection

In 1952, Congress overhauled the immigration laws, but failed to address concerns over the national origins quota system of the 1920s, continuing the blatant form of racial and ethnic discrimination that epitomized the system. Although the new law repealed the Asian exclusion laws,¹²⁷ in their place a new “Asia-Pacific Triangle” was established with a trivial 2000 visa annual quota. Since the 1952 Act

126. Philippine Independence Act of 1934, ch. 84, 48 Stat. 459 (1934) (current version at 22 U.S.C. § 1391 (2006)).

127. Immigration and Nationality Act of 1952, ch. 477, Pub. L. No. 82-414, 66 Stat. 163 (1952). The Chinese exclusion laws were repealed in 1943 in recognition of China’s alliance with the United States in the war against Japan, but the annual quota was set at 105. Chinese Exclusion Acts Repeal, ch. 344, 57 Stat. 600-01 (1943).

changed little in the immigration selection system, the question over which immigrants to admit to the United States remained a battlefield. The law continued to exasperate many observers, including President Truman, whose veto of the 1952 legislation (due in large part to its failure to repudiate the quota system) was overridden by Congress. President Truman did not relent, appointing a special Commission on Immigration and Naturalization to study the system. A 319-page report issued in 1953 strongly urged the abolition of the national origins system and recommended quotas without regard to national origin, race, creed, or color.¹²⁸ President Eisenhower embraced the findings, but his push for corrective legislation failed.

Entering office in January 1961, President Kennedy submitted a comprehensive program that provided the impetus for ultimate reform. President Kennedy called for the repeal of the discriminatory national origins quota system and the racial exclusion from the Asia-Pacific triangle. President Kennedy's hopes for abolishing the quota system were only partially realized when the 1965 amendments were enacted. The racial quotas were repealed as was the Asia-Pacific Triangle geographic restrictions. But his egalitarian vision of visas on a first-come, first-serve basis gave way to a narrower and more historically parochial framework that provided few obvious advantages for prospective Asian immigrants. The new law allowed 20,000 immigrant visas annually for every country not in the Western Hemisphere. The allotment was made regardless of size of a country, so that China had the same quota as Tunisia. Of the 170,000 visas set aside for the Eastern Hemisphere, seventy-five percent were for specified "preference" relatives of citizens and lawful permanent residents, and an unlimited number was available to immediate relatives (parents of adults, minor unmarried children, and spouses) of U.S. citizens. The per country limitation of 20,000 visas eventually led to severe backlogs in high visa demand countries.¹²⁹

D. Affirmative Action for Western Europeans: "Diversity" in the 1980s and 1990s

In spite of growing visa demands and backlogs for Mexico and Asian countries since the 1970s, legislation to address those challenges has never been forthcoming. In 1986, Congress responded to the rising domination of Asian and Latinos in immigration totals in a differ-

128. U.S. PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION, *WHOM WE SHALL WELCOME* (1953).

129. *See supra* text accompanying note 96.

ent manner. Although the country's population was still overwhelmingly white and of European descent, Congress added a little publicized provision in IRCA to help thirty-six countries that had been "adversely affected" by the 1965 changes. To be considered "adversely affected," a country must have been issued fewer visas after 1965 than before. Thus, the list included such countries as Great Britain, Germany, and France, but no countries from Africa who sent few immigrants prior to 1965. The "diversity" program was actually an affirmative action program for natives of countries whose ethnicity already made up the vast majority of the United States.

The 1986 law provided an extra 5000 such visas a year for 1987 and 1988, but the number increased to 15,000 per year for 1989 and 1990 through additional legislation. These visas were above and beyond the 20,000 visas that were already available for immigrants from each of the "diversity" countries under the preference system. The program required only that applicants meet the nationality, health, and morals qualifications of immigration laws.

Part of the impetus for the "diversity" program was the fact that many Irish nationals who came to the United States were unable to fit into the regular immigration categories. In the 1980s, discouraged by the Irish economy, many of Ireland's young residents traveled to the United States on temporary visas.¹³⁰ Eventually they overstayed their visas. By 1989, the Irish government estimated that perhaps 50,000 Irish nationals resided in the United States without documentation.

In 1988, Congress set aside 20,000 extra visas to increase immigration diversity over a period of another two years. This time, the "OP-1" lottery for the visas was available to nationals of countries that were "underrepresented," namely a foreign state that used less than twenty-five percent of its 20,000 preference visas in 1988. As a result, all but thirteen countries in the world were eligible. Mexico, the Philippines, China, Korea, and India were among the countries that were not eligible. Over 3.2 million applications were received for the 20,000 visas.

Legislation in 1990 extended the diversity visa concept even further. Until October 1, 1994, a transition diversity program would provide 40,000 visas per year for countries "adversely affected" by the 1965 amendments, except that forty percent of the visas were effectively designated for Irish nationals. After October 1, 1994, 55,000 diversity visas would be available annually in a lottery-type program to

130. See Ray Moseley, *In Ireland, an Election, a Dilemma*, CHI. TRIB., Feb. 8, 1987, at C12; see also *Poorest of the Rich*, ECONOMIST, Jan. 16, 1988, at 10.

natives of countries from which immigration was lower than 50,000 over the preceding five years—certainly not Mexico, China, South Korea, the Philippines, or India. Under the 1990 diversity program, the applicant had to have a high school education, or, within five years of application, have at least two years of work experience in an occupation that required at least two years of training or experience. That left out most Africans who wanted to immigrate.

IV. Contextualizing the Racialized Evolution of Immigration Laws

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

A. Institutionalizing Racism

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

The 1965 amendments represented a welcome change, but the new law was no panacea. President Kennedy originally had proposed a large pool of immigration visas to be doled out on a first-come, first-serve basis without country quotas. Between 1965 and 1976, while the rest of the world enjoyed an expansion of numerical limitations and a definite preference system, Mexico and other countries of the Western Hemisphere were suddenly faced with numerical limitations for the first time. Today's selection system is disruptive to families and individuals; there is simply no room for many relatives of immigrants because of numerical limitations and no room for those who are simply displaced workers. They do not qualify for special visas set aside for professionals and management employees of multi-national corporations, or for those visas that require substantial funds for investment. Similarly, the system has no slot for anyone whose livelihood is controlled by trade agreements and globalization that cause job loss in

low-income regions, as multi-national corporations, the beneficiaries of free trade, relocate to other sites where their production costs are cheaper.

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

The basic civil sanction of removal (deportation) applies to individuals who fall into the immigration trap while trying to reunify with families or seeking economic opportunities. The categories of deportable aliens include the following: those who are in the United States in violation of the immigration laws (e.g., entry without inspection, false claim to citizenship); those non-immigrants who overstay their visas or work without authorization; those who have helped others enter (smuggled) without inspection; and those who are parties to sham marriages. Additional civil penalties, including fines, can be imposed for forging or counterfeiting an immigration document, failing to depart pursuant to a removal order, entering without inspection, and entering into a sham marriage.

For many of these actions, Congress has also enacted criminal provisions that go far beyond the civil sanctions. For example, the following acts are criminalized (subject to imprisonment and/or monetary fines): falsifying registration information about the family; bringing in (smuggling), transporting, or harboring (within the United States) an undocumented alien (including family members); entering without inspection or through misrepresentation; reentering of an alien (without permission) after he or she has been removed or denied admission; and making a false claim of U.S. citizenship. The action of traveling to the United States by circumventing the current structure can easily result in civil and, at times, criminal liability.

B. From Dehumanization and Demonization to Criminalization

The institutionalized racism of U.S. immigration laws and enforcement policies reflects the evolution of immigration laws that grappled with constant tension over who is and who is not acceptable as a true American. Early in U.S. history, a western European perspective was constantly asserted in battles over immigration laws. That perspective was apparent in the forced migration of African workers and in Asian exclusion laws, as well as in the anti-southern and eastern European quota system of the 1920s, and is maintained to this very day in the controversy over our southwest border. The Euro-centrism of the nation's identity has enabled the institutionalization of an immigration regime that commodifies those immigrants who are left out—namely, newcomers of color—into a faceless group that can more easily be demonized and even criminalized.

The process of criminalizing the immigrant and her dreams requires multiple steps. First the immigrant is dehumanized, she is then demonized and labeled a problem, then further dehumanized until at last her actions or conditions are criminalized.¹³¹ This parallels what Charles Lawrence terms “stigmatization . . . the process by which the dominant group in society differentiates itself from others by setting them apart, treating them as less than fully human, denying them acceptance by the organized community, and excluding them from participating in that community as equals.”¹³²

As Professor Magee has pointed out, the immigration system began the dehumanizing dynamics of racism with the forced migration of Black laborers called slaves.¹³³ Although early Chinese immigrants were welcomed with mixed greetings, eventually the anti-Chinese lobby that could not tolerate this “yellow peril” prevailed. Recruited then rejected through efforts like Operation Wetback, Mexican migrants also felt the sting of racial animus. All these groups were dehumanized through racism.

The next step, identifying immigrants as a problem through demonization involves familiar allegations: they take jobs; they cost a lot; they commit crimes; they do not speak English; they damage the environment; they do not share our values; and they simply are different. This problematization-demonization process is implemented by the

131. I understand that the multiple steps toward criminalization I use overlap quite a bit. Perhaps others might even suggest that immigrants of color are demonized before being dehumanized depending on the action of the dominant group.

132. Lawrence, *supra* note 70, at 350.

133. See Magee, *supra* note 72.

likes of Patrick Buchanan, Lou Dobbs, Tom Tancredo, the Center for Immigration Studies, and the Federation of American Immigration Reform. And their tactics are successful in many quarters despite questionable empirical support for their positions. They attack with hysterical statements. They do not mention race in their attacks and find a ready audience in members of the public (some gullible, others who themselves are malevolent) who look around, see immigrants with accents working, and facilely conclude that they must be taking jobs that Americans would otherwise be holding. This brand of xenophobia is recycled from the worst nativist periods of the nation's history.

After hysteria is heightened, the demonization process continues by asking the public if immigration is a problem. Modern day polls and surveys claim to reveal that if asked specifically about immigration, eighty percent of respondents think that current immigration is bad for the country. But when general polls ask respondents to name serious societal problems, immigration is either ranked low or not mentioned. Or when the public is asked whether legalization should be granted to undocumented workers and families who pay a fine, the resounding answer is yes. The surveys that suggest immigration is a problem are reminiscent of what happened in California in 1879. A specific measure was placed on the state ballot to determine public sentiment towards Chinese immigration: 900 favored the Chinese, while 150,000 were opposed. The demonization process continued as the California legislature declared a legal holiday to facilitate anti-Chinese public rallies that attracted thousands of demonstrators and was completed when anti-Chinese groups presented anti-Chinese petitions in Congress.

Even in the midst of a robust economy, the modern problematization-demonization process was wildly successful. Restrictionist strategies have worked, as their proponents define the issues largely in their own terms of alleged economic and fiscal impact. Pro-immigrant sentiment and immigrant rights groups essentially are silenced in the media. The media offers seat-of-the-pants economic claims that blame immigrants for job loss and wage depression in place of the more complex reality. Nuanced findings are not good material for headlines. Similarly, politicians point fingers at the disenfranchised, voiceless alien to grab the attention of voters. The media and these politicians serve as convenient and effective conduits for demonizing aliens. Their effectiveness is striking, as little attention is paid to the pro-immigrant economic position.

As the level of demonization through anti-immigrant rhetoric reaches new heights, hot talk radio hosts, conservative columnists, and politicians, Democrats and Republicans alike, chime in. The notion of America as the land of immigrants is brushed aside. The neo-nativists claim that things are different today; times have changed from even just a few years ago. Much of the rhetoric strikes a chord with well-meaning, but misguided, members of the public who have sensed a lack of control over a variety of issues that affect their lives and who are looking for simple answers. Scapegoating is in, and the blame can be dispensed in non-racial terms, using phrases like “porous” borders, “illegal” aliens, workers without “legal papers,” or “criminal” aliens because the structures of the visa and enforcement systems do the work of exclusion and deportation that quietly impact immigrants of color.

Once demonized, immigrants can be further dehumanized. Dehumanization at this stage commodifies immigrants, stripping them of race and ethnicity. The dominant group racializes the immigrant-as-commodity notion to ignore race and view the immigrant as a worker commodity. This facilitates the dehumanization that follows. Like the Black-migrant commodities (enslaved African workers), the modern immigrant commodity is not treated as human. Rather, immigrant commodities are likened to “hazardous waste dumps.”¹³⁴ Although the Supreme Court has ruled that dangerous and hazardous materials are “commerce” subject to Commerce Clause scrutiny, the immigrant-toxic-waste-dump commodity has little constitutional protection in this dehumanized state.¹³⁵ Dehumanization thus silences the immigrants. Dehumanization allows the public to ignore their faces and their names. Dehumanization further allows the powers that be to separate the immigrants into deportation categories, ignoring and never asking why particular migrants come here in the first place.

134. In *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), the Supreme Court refused to extend the exclusionary rule derived from the Fourth Amendment to deportation proceedings. In the process, Justice O'Connor reasoned:

Presumably no one would argue that the exclusionary rule should be invoked to prevent an agency from ordering corrective action at a leaking hazardous waste dump if the evidence underlying the order had been improperly obtained, or to compel police to return contraband explosives or drugs to their owner if the contraband had been unlawfully seized.

Id. at 1046.

135. See *id.*; see also Kevin R. Johnson, “Aliens” and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 U. MIAMI INTER-AM. L. REV. 263 (1997) (explaining that even the use of the term “alien” may very well contribute to the demonization-dehumanization process).

Employer sanctions—the statutory provision that justifies the arrest of undocumented workers—is a final step in the dehumanization-demonization-dehumanization-criminalization process. As noted above, at the end of World War II, initial efforts to completely demonize the immigrant worker by imposing employer sanctions on a labor displacement theory failed. In the mid-1970s, the Rodino proposal was constantly debated. Finally, the employer sanctions effort was accomplished as part of IRCA in 1986. Throughout the debate, Mexican workers were largely the focal point, but they became dehumanized and commodified simply as “unauthorized” workers once sanctions were enacted.

C. Structural Relationships

Based on the manner in which immigration laws and enforcement policies have evolved, racism has been institutionalized in those laws and policies. However, writers such as John Powell¹³⁶ urge us to do more and to examine how different institutions interrelate with one another to produce an even more sinister dynamic.¹³⁷ Thus, Powell encourages us to look beyond the institutionalized racism within U.S. immigration laws and enforcement policies that has become part of the “structure” of those laws and policies, and to look at the interaction between institutions for what he terms “structural racism.”¹³⁸ Whatever the terminology, Powell invites us to take the institution of immigration laws and policies and see how that institution relates to other institutions that can produce racial outcomes.

It does not take long to realize that while immigration laws and enforcement policies have evolved in a manner that continues to prey on Mexicans, Asians, and other Latin migrants, the relationship of those laws and policies with other racialized institutions underscores the structural challenges that immigrants of color face. Consider the NAFTA and the World Trade Organization. NAFTA has placed Mexico at such a competitive disadvantage with the United States in the production of corn that Mexico now imports most of its corn from the

136. John Powell does not capitalize his name as a political statement. About Us, John A. Powell, Executive Director, <http://kirwaninstitute.org/about-us/john-a-powell.php> (last visited Nov. 15, 2009).

137. Andrew Grant-Thomas & John A. Powell, *Toward a Structural Racism Framework*, 15 RACE & POVERTY 3, 4 (2006).

138. *Id.*; see also The Applied Research Center, About Us, <http://www.arc.org/content/blogsection/4/200/> (urging a focus on “structural racism and systemic inequality rather than simply personal prejudice”).

United States, and Mexican corn farm workers have lost their jobs.¹³⁹ The U.S.-embraced World Trade Organization, which advocates global free trade, favors lowest-bid manufacturing nations like China and India, so that manufacturers in a country like Mexico cannot compete and must lay off workers.¹⁴⁰ Is there little wonder that so many Mexican workers look to the United States for jobs? Think also of refugee resettlement programs as an institution. When Southeast Asian refugees are resettled in public housing or poor neighborhoods, their children find themselves in an environment that can lead to bad behavior or crime.¹⁴¹ Consider U.S. involvement in wars and civil conflict abroad. Think also of U.S. involvement in places like Vietnam, Afghanistan, or Iraq—places that have produced involuntary migrants of color to our shores. Other racialized institutions that interact with immigration laws and enforcement also come to mind: the criminal justice system, poor neighborhoods, and inner city schools. Even coming back full circle to enslavement of people—today's human trafficking institutions—we begin to realize a sad interaction with immigration laws that requires greater attention. All of these institutions can lead to situations that spell trouble within the immigration enforcement framework.

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

D. Contemplating Remedies

Understanding that the nation's laws and enforcement policies resulted from institutionalized racism lends a wholly separate ratio-

139. Keith Sealing, *Indigenous Peoples, Indigenous Farmers: NAFTA's Threat to Mexican Teosinte Farmers and What Can Be Done About It*, 18 AM. U. INT'L L. REV. 1383 (2003).

140. *Id.*; see generally Bill Ong Hing, *NAFTA, Globalization, and Mexican Migrants*, 5 J. L. ECON. & POL. 87 (2009).

141. Deborah Sontag, *In a Homeland Far From Home*, N.Y. TIMES, Nov. 16, 2003, at SM48; see also Duc Ta, *We All Make Mistakes One Day I'll Be Free Thirty-Five Years to Life*, 31 AMERASIA J. 113 (2005); Bill Ong Hing, *Detention to Deportation—Rethinking the Removal of Cambodian Refugees*, 38 U.C. DAVIS. L. REV. 891 (2005).

nale for immigration reform.¹⁴² Establishing a case of intentional discrimination under the challenging standards required by the Supreme Court in racial discrimination cases would be difficult.¹⁴³ Yet when serious negative racial effects of laws and policies are evident, even if unintended or unconscious, then right thinking policy makers and leaders can be motivated to do the right thing, legislatively and administratively, for moral and practical reasons. Contemplating creative ways to remedy the damage is appropriate. In facing structural racism, Anne Kubisch encourages us to be bold: “Though the structural approach may seem ‘too big,’ we ignore it at our peril and end up placing unrealistic expectations on narrow, programmatic, bandaid-like solutions. Instead, we must be ambitious and creative about strategies”¹⁴⁴

The premise that reform is needed to rectify the effects of institutional racism challenges us to come up with innovative solutions. Because institutions are not race-neutral, dismantling structural racism requires us to be race-conscious in our solutions, not colorblind. In the visa context, we could take a page from the diversity program that was extended to Irish and many other western European immigrants in the 1980s and 1990s and create an affirmative action effort to finally give fair and equitable treatment to immigrants of color.

Given what we now know about the evolution of the immigration selection system, initial attention should be paid to the number of visas that are available to Latin and Asian countries. Options to be considered would include:

142. Joe Hansen, the president of the UFCW, understands the racism that underlies immigration enforcement:

[W]hether it's deliberate or not, the actions of our government is [sic] fostering racism and it's fostering discrimination, and that hurts every one of us, and we ought to be very, very careful about that, and that will continue if somebody doesn't stand up and stop it, and try to put an end to this abuse, and we do that when we are silent.

IOWA HEARING, *supra* note 1, at 141.

143. Charles Lawrence has argued forcefully against the requirement, which demands that a litigant seeking redress for racial discrimination show that the defendant intended to handicap the plaintiff on the basis of race, and bars recovery if the defendant inadvertently acted in a way that harmed the plaintiff. This requirement makes little sense, Lawrence asserts, because the source of much racism lies in the unconscious mind. Lawrence, *supra* note 70. I believe that the requirement makes even less sense when racism is institutionalized.

144. Anne C. Kubisch, *Why Structural Racism? Why a Structural Racism Caucus?*, 15 POVERTY & RACE 1, 3 (2006).

R

R

- Clearing the serious backlogs faced by prospective immigrants on the waitlist from Mexico, the Philippines, and other Asian countries;
- Making available permanently extra visas to remedy the history of exclusion and visa limitations that created the backlogs;
- Expanding family immigration categories so that unrestricted family reunification could begin to take place for those immigrants that were numerically restricted;
- Creating flexible visas that allow individuals to spend substantial time each year in their native country as well as the United States—visas that reflect the transnational-globalized world in which we now live;
- Replacing the per country numerical limitations system with a first-come, first-served application system that would give countries with the highest demand the most visas;
- Providing special treatment for Mexico because of our long-standing relationship and because NAFTA has cost Mexico a large number of jobs; and
- Creating a generous legalization program for the undocumented to rectify the history of exclusionary treatment.

In the deportation area, a discretionary waiver—much like the one repealed in 1996 legislation—should be reinstated for longtime lawful resident aliens and refugees who have committed a deportable offense. The fact that so-called “criminal aliens” often entered as infants and toddlers who grew up in low-income inner cities or other challenging neighborhoods means that they are products of a part of U.S. society that preys on people of color. Falling victim to those institutions is double-trouble for non-citizens, who then face criminal removal grounds in federal immigration laws. Without an opportunity to present their case of rehabilitation, remorse, or family hardship, they are deported—casualties of structural racism.

Employer sanctions must be a primary target in the efforts to remedy the effects of institutional racism. Understanding NAFTA, globalization, and U.S. economic influence is enough for us to realize that many immigrants are truly economic refugees. This understanding and the human rights costs are sufficient bases for ending workplace raids of the nature that occurred during the Bush administration.

The rationale for employer sanctions always has been that the law would dry up jobs for the undocumented and discourage them from coming. Those of us who served on the UFCW commission that studied ICE raids across the country learned that, in reality, the law has had disastrous effects on all workers. Instead of reinforcing or tweaking employer sanctions, we would be much better off if we ended them. Our experience shows that raids and workplace enforcement

leave severe emotional scars on families. Workers were mocked. Children were separated from their parents and abandoned at schools or daycare. Increased enforcement has poisoned communities, spawning scores of state and local anti-immigrant laws and ordinances that target workers and their families. Most importantly, employer sanctions do not address the real question: why can't migrant workers find work back home instead of coming to the United States to feed their families? While the racial effects of globalization are ignored, the racial effects of employer sanctions are manifested in the arrests of "unauthorized" workers.

Trying to discourage workers from migrating by arresting them for working without authorization is doomed to fail in the face of such economic pressure. To reduce undocumented migration, we need to change our trade and economic policies so that they do not produce poverty in countries like Mexico. In early 2009, Ken Georgetti, president of the Canadian Labour Congress, and John Sweeney, president of the AFL-CIO, wrote to President Barack Obama and Canadian Prime Minister Stephen Harper, reminding them that NAFTA and other failed neo-liberal trade policies have left many Mexicans impoverished and caught in a desperate hunt for jobs and income wherever those might be. Shortly thereafter, a new joint immigration position of the AFL-CIO and Change to Win organizations recognized that "an essential component of the long-term solution is a fair trade and globalization model that uplifts all workers."¹⁴⁵ Continued support for work authorization and employer sanctions contradicts this understanding. Even if a legalization program is enacted as part of comprehensive immigration reform, millions of people will remain without papers as more come every year. For them, work without "authorization" will still be a crime. And while employer sanctions have little effect on migration, they will continue to make workers vulnerable to employer pressure.

The alternative to employer sanctions is enforcing the right to organize, minimum wage, overtime, and other worker protection laws. Eliminating sanctions will not change the requirement that people immigrate to the United States legally. ICE will still have the power to enforce immigration law. And if a fair legalization program were passed at the same time sanctions were eliminated, many undocumented workers currently in the United States would normalize their status. A more generous policy for issuing residence and family-unifi-

145. AFL-CIO & CHANGE TO WIN, THE LABOR MOVEMENT'S FRAMEWORK FOR COMPREHENSIVE IMMIGRATION REFORM I (2009).

cation visas would allow families to cross the border legally, without the servitude-like restrictions of guest worker programs.

Conclusion

The construction of the U.S. immigration policy and enforcement regime has resulted in a framework that victimizes Latin and Asian immigrants. These immigrants of color end up being the subject of ICE raids. They are the ones who comprise the immigration visa backlogs. They are the ones that attempt to traverse the hostile southwest border. Their victimization has been institutionalized.

Any complaint about immigrants, fiscal or social, can be voiced in non-racial, rule-of-law terms because the institution has masked the racialization with laws and operations that are couched in non-racial terms. Anti-immigrant pundits are shielded from charges of racism by labeling their targets “law breakers” or “unassimilable.” Deportation, detention, and exclusion at the border can be declared race-neutral by the DHS because the system has already been molded by decades of racialized refinement. Officials are simply “enforcing the laws.” Like white privilege, institutionalized racism generally goes unrecognized by those who are not negatively impacted.¹⁴⁶

We should know better. The cards are stacked against immigrants of color. The immigration law and enforcement traps are set through a militarized border and an anachronistic visa system. It is no surprise that Latin and Asian immigrants are the victims of those traps. They have been set up by the vestiges of blatantly racist Asian exclusion laws, a border history of labor recruitment like the Bracero Program, Supreme Court deference to enforcement, and border militarization that laid the groundwork for current laws and enforcement policies.

Many in the immigrant rights movement argue that the appalling effects of ICE raids, deaths at the border that result from its militarization, horrible backlogs in family immigration categories, immigration detention conditions, and the lack of second chance opportunities for longtime, lawful permanent residents convicted of aggravated felonies

146. Sylvia Law puts it this way:

[W]hile white people benefit from white privilege, it is systemic and invisible, and not a matter of individual wrong doing or guilt. I am not guilty of racism because a cab picks me up. I do not discriminate when cops don't stop me for no reason, and then let me talk them out of a ticket. I am not a racist because my daddy got a good VA mortgage that parleyed into good housing for the rest of our lives. That is not the point. Like it or not, we white people do benefit from white privilege. And most of the time we do not even notice it.

Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603, 616 (1999).

are sufficient bases for overhauling immigration laws and enforcement policies. If we are indeed a nation of immigrants, fairness, and family values, then without a doubt, we need a fairer border policy and more open immigration. Other critics of the Bush ICE raids focus on employers or process as the solution. One standard demand that has been made by Beltway experts is to focus more on employers rather than on employees when it comes to enforcement. Another tactic is that advanced by Senator John Kerry who asked that ICE raids be conducted in a more humane manner.

I am not sure that these positions will get us much satisfaction. Senator Kerry's proposal would essentially result in kinder, gentler raids, but raids nonetheless. And the focus-on-employer-enforcement position still results in the removal of undocumented workers. For example, while Homeland Security Secretary Janet Napolitano has directed federal agents to focus more on arresting and prosecuting employers than undocumented workers, she also made it clear that there will be no halt to arrests of undocumented workers the investigations uncover.¹⁴⁷ As long as we remain mired in the belief that we need to prevent undocumented workers from working in the country through an employer sanctions system, workers will continue to get deported, families will be separated, and communities will suffer damage.

The seemingly neutral logic that flows from an institutionally racist immigration system need not carry the day. We should not be left to object to ICE raids, border enforcement, and even criminal alien enforcement solely on non-racial terms. Understanding these operations from an institutionalized racial perspective provides another basis for arguing that our system of immigration laws and enforcement policies must be overhauled in order to address the menacing vestiges of racism within that system.

147. Rick Pedraza, *Napolitano Says Raids to Target Employers*, NEWSMAX.COM, Apr. 16, 2009, http://www.newsmax.com/insidecover/napolitano_ice_raids/2009/04/16/203976.html.