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Ethno-Nationalism and Asylum Law

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Cover Page Footnote

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ETHNO-NATIONALISM AND ASYLUM LAW

Anna Welch & Emily Gorrivan

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ETHNO-NATIONALISM AND ASYLUM LAW

Anna Welch & Emily Gorrivan*

ABSTRACT

The myth that asylum laws were once more equitable and humanitarian is belied by the reality of the system's racist origins. This Essay explains that the U.S. asylum system, like much of the U.S. immigration system, was designed to disadvantage people of color. Indeed, although former President Trump's reference to Haiti, El Salvador, and African nations as "shithole countries" while advocating for immigration from "countries like Norway" exacerbated systemic challenges, racism has been deeply ingrained in the U.S. asylum system since its inception. Not only do U.S. laws and policies have a disparate impact on black asylum seekers but, when placed in their historical context, one would be hard pressed to argue that these laws are neutral. The pervasive foreign policy and national security concerns continually invoked by the U.S. government to justify this discrimination ring hollow in light of this injustice. This Essay posits that the first step towards reform is simply understanding the problem. Without an acknowledgement of this troubling history, reform will remain elusive. And, ultimately, reform is the next critical step.

INTRODUCTION

*Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door!*¹

"The New Colossus," a sonnet affixed to the Statue of Liberty, is often viewed as a symbol of American values,² and yet the historical context of this poem is often overlooked.³ Written in 1883, Emma Lazarus's sonnet came at the pinnacle of

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1. Emma Lazarus, *The New Colossus*, POETRY FOUND., <https://www.poetryfoundation.org/poems/46550/the-new-colossus> [<https://perma.cc/V6G7-HTWZ>] (last visited May 11, 2022).

2. See, e.g., Walt Hunter, *The Story Behind the Poem on the Statue of Liberty*, THE ATLANTIC (Jan. 16, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/the-story-behind-the-poem-on-the-statue-of-liberty/550553/> [<https://perma.cc/65HP-V5JK>] (explaining that public officials, such as James Comey and Nancy Pelosi, have proclaimed that "The New Colossus" is about the value of diversity and that "the revitalization . . . of America comes from our immigrant population").

3. See Caitlin Dickerson, *America Never Wanted the Tired, Poor, Huddled Masses*, THE ATLANTIC (May 2021) ("[F]orgetting [the shameful origins of our immigration system] has allowed the racism woven into America's immigration policies to stay submerged beneath the more idealistic vision of the country as 'a nation of immigrants.'").

racially charged immigration controversies in the United States. Just one year before Lazarus wrote the sonnet, the Chinese Exclusion Act became federal law.⁴ Indeed, in the midst of the xenophobic development of the U.S. immigration system, Lazarus's words were an anomaly—although Lazarus herself was a refugee advocate, her words, both then and now, stand in stark contrast to the ethno-nationalist structure woven into the DNA of U.S. immigration laws and policies.⁵

Ethno-nationalism, a term used throughout this Essay, is the phrase the authors use to describe the ideological approach that shaped U.S. immigration law. For the purpose of this Essay, ethno-nationalism refers to the view that one's nation is "defined in terms of assumed blood ties and ethnicity."⁶ Indeed, "[t]here have always been . . . two strands of nationalism in the United States: one holds that the distinctiveness of America depends on conceptions of human rights and democracy; and the other strand of nationalism is a kind of *ethno-nationalism that is more hostile to immigration, more linked to race.*"⁷

While racism permeates the entire U.S. immigration system,⁸ this Essay primarily concerns the racism that plagues U.S. asylum laws and policies. Reforming the asylum system must begin with an acknowledgement of the system's racist origins.⁹ As detailed below, the U.S. asylum system was designed to disadvantage people of color, and the system continues to perpetuate discrimination, although the racism embedded in today's purportedly race-neutral processes is more insidious.¹⁰ Moreover, although former President Trump's reference to Haiti, El Salvador, and African nations as "shithole countries" while advocating for immigration from "countries like Norway"¹¹ exacerbated existing systemic challenges, racism has been deeply ingrained in the U.S. asylum system since its inception.

4. Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58 (1882).

5. See Dickerson, *supra* note 3 (citing historian David Dorado Romo).

6. René Lemarchand, *The Siren Song of Self-determination*, UNESCO COURIER (June 1993), <http://unesdoc.unesco.org/images/0009/000944/094420eo.pdf> [<https://perma.cc/T8Q4-9GAP>].

7. Niall Stange, *The Memo: Trump Remark Sparks Debate Over Nationalism*, THE HILL (Oct. 23, 2018) (emphasis added).

8. See Elie Mystal, *The Groundbreaking Decision That Just Struck a Blow to Our Racist Immigration Laws*, THE NATION (Aug. 20, 2021), <https://www.thenation.com/article/society/immigration-crime-law/> [<https://perma.cc/UFE9-BG6T>] ("Our country's bigotry is so ingrained in our immigration laws that decoupling the racism from the law would require holding even basic immigration restrictions unconstitutional and essentially starting over."); see also Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. REV. 307, 323-33 (2009) (describing racism in immigration law as institutionalized).

9. See Eliot Walker, *Asylees in Wonderland: A New Procedural Perspective on America's Asylum System*, 2 NW. J. L. & SOC. POL'Y 1, 46 (2007) (explaining that the biggest obstacle to reform of the asylum system "lies not in finding solutions, but rather in simply appreciating the problems").

10. See Kevin R. Johnson, *Bringing Racial Justice to Immigration Law*, 116 NW. U. L. REV. ONLINE 1, 6 (2021) ("Unlike yesterday's nativists, most policymakers today deny that the policies are racially motivated.").

11. See Ibram X. Kendi, *The Day Shithole Entered the Presidential Lexicon*, THE ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/shithole-countries/580054/> [<https://perma.cc/U9LR-RGU5>] (quoting Donald Trump's unsavory comments: "[Haitians] all have AIDS . . . Why do we need more Haitians? . . . Take them out.").

This Essay proceeds as follows: Part I delineates the ethno-nationalist roots of the U.S. asylum system.¹² Because asylum law is a subset of U.S. immigration law, this Part describes the history and formation of U.S. immigration law more generally (emphasizing some instances in which xenophobic and nationalist views have shaped the system),¹³ before turning to the origins of our U.S. asylum system. Part II discusses the adverse effects of the U.S. asylum system on Haitians—the Haitian case study is perhaps the most notable and blatant example of historic and lingering animus within our asylum system toward people of color.¹⁴ In its conclusion, this Essay explains that a necessary first step in reforming our asylum system is acknowledging the root cause of injustice.¹⁵

I. THE ETHNO-NATIONALIST ROOTS OF THE UNITED STATES ASYLUM SYSTEM

A. Pre-World War II: The Foundation

a. The Chinese Exclusion Era

“Our laws have failed to achieve racial justice because racism has shaped our law’s DNA.”¹⁶

The myth that immigration laws were once “more equitable and humanitarian” is belied by the reality of the U.S. immigration system’s origins.¹⁷ America’s immigration system began with laws that restricted naturalized citizenship to “a *free*

12. See *infra* Part I.

13. In Part I, and throughout this Essay, Critical Race Theory (CRT) is used as a framework. CRT contends that, within the United States, racism is systemic and institutional. Cynthia Grant Bowman et al., *Race and Gender in the Law Review*, 100 NW. U. L. REV. 27, 60 (2006). Several scholars have recognized the role that race plays in immigration and have made compelling calls to action for CRT to be considered more centrally in immigration scholarship. See George A. Martínez, *Race and Immigration Law: A Paradigm Shift?*, 2000 U. ILL. L. REV. 517, 524 (2000). Recently, a paradigm shift has begun, and race is considered more centrally in the development of asylum law. *Id.* Race and immigration are inextricably linked and thus CRT provides an invaluable lens through which to view the formation of U.S. asylum law. See Adrien Katherine Wing, *Reno v. American-Arab Anti-Discrimination Committee: A Critical Race Perspective*, 31 COLUM. HUM. RTS. L. REV. 561, 576 (2000) (“The discussion of nationality and its link to Blackness segues into the discussion of race, a central aspect of identity and the primary axis for CRT.”).

14. See *infra* Part II.

15. *Infra* Conclusion.

16. Charles R. Lawrence III, *The Fire This Time: Black Lives Matter, Abolitionist Pedagogy and the Law*, 65 J. LEGAL EDUC. 381, 388 (2015).

17. Tanya Kateri Hernández, *The Construction of Race and Class Buffers in the Structure of Immigration Controls and Laws*, 76 OR. L. REV. 731, 731-32 (1997) (“In the midst of current anti-immigration sentiment, which is motivating dramatic changes in the United States’ immigration laws, there exists the myth that prior immigration laws were more equitable and humanitarian. Yet historical analysis reveals that immigration law has been put to uses far from idyllic and has always been concerned with the racial makeup of the nation. Specifically, national preoccupation with the maintenance of a ‘White country’ is reflected in immigration law.”); see also Reece Jones, *Facing Up to the Racist Legacy of America’s Immigration Laws*, N.Y. TIMES (Oct. 28, 2021), <https://www.nytimes.com/2021/10/28/opinion/race-immigration-racism.html?smid=em-share> [https://perma.cc/Q9NM-3W82] (contending that “the 75 percent of Americans who believe that the United States is a nation of immigrants need to grapple with the fact that for most of the country’s history its laws meant that only white immigrants could come”).

white person, who shall have resided within . . . the United States for . . . two years.”¹⁸ Indeed, from its inception, the U.S. immigration system was designed to exclude non-white people. This conclusion has been recognized by many scholars, including Professor Reece Jones.¹⁹ Jones recently asserted in a New York Times opinion piece that:

[M]ass deportation of nonwhite people and immigration bans based on nationality, religion or race are quintessentially American. From the beginning, the United States was built on the dual foundation of open immigration for whites from Northern Europe and racial subordination and exclusion of enslaved people from Africa, Native Americans and, eventually, immigrants from other parts of the world.²⁰

Early racism is exemplified by two 1849 Supreme Court decisions known as the *Passenger Cases*.²¹ In those cases, the constitutional authority to regulate immigration was at issue.²² In a concurring opinion, Justice Grier posited that, “[i]t is the cherished policy of the general government to encourage and invite Christian foreigners *of our own race* to seek an [sic] asylum within our borders.”²³

On this explicitly racist foundation, the first comprehensive U.S. immigration laws were forged. These laws were known as the Chinese Exclusion Laws, which excluded immigrants from China and, eventually, excluded immigration from most other Asian countries.²⁴ In the wake of the Chinese Exclusion Laws, the U.S. Supreme Court decided a series of cases known as the *Chinese Exclusion Cases*.²⁵

The *Chinese Exclusion Cases* collectively stand for the proposition that the U.S. government has the unfettered power to exclude groups of immigrants. In *Chae Chan Ping v. United States*, the most prominent of the *Chinese Exclusion Cases*, the Court held that Congress had the power to exclude “foreigners of a different race.”²⁶ Specifically, the Court explained that:

[i]f . . . the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, *to be dangerous to its peace and security*, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.²⁷

18. Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103 (repealed 1795) (emphasis added).

19. See, e.g., Jones, *supra* note 17.

20. *Id.*; see REECE JONES, WHITE BORDERS: THE HISTORY OF RACE AND IMMIGRATION IN THE UNITED STATES FROM CHINESE EXCLUSION TO THE BORDER WALL (2021).

21. See *Smith v. Turner*, 48 U.S. 283 (1849).

22. *Id.* More specifically, the Court considered whether foreign commerce could be regulated by a state passenger tax on ships. *Id.* The Court’s plurality opinion did not produce any workable doctrine. *Id.*

23. *Id.* at 461 (Grier, J., concurring) (emphasis added).

24. See generally Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58 (1882).

25. See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Wong Wing v. United States*, 163 U.S. 222 (1896).

26. *Chae Chan Ping*, 130 U.S. at 606.

27. *Id.* (emphasis added).

Based on these national security justifications, the Court held that Congress had the power to exclude immigrants simply based on their race.²⁸

Another case in the Chinese Exclusion triad, *Fong Yue Ting*, espoused similar rhetoric. In that case, the Court relied upon *Chae Chan Ping's* national security justifications to conclude that Congress has broad power to deport or expel non-naturalized Chinese immigrants.²⁹ The Court explained that the right of Congress to expel immigrants was vital to the “safety . . . independence, and . . . welfare” of the U.S.³⁰ In dissent, Justice Brewer expressed antipathy toward Chinese immigrants reflecting the broadly held attitudes toward Chinese people at that time.³¹ Brewer cautioned the Court noting that although Chinese migrants may be an “obnoxious . . . distasteful class,” the exclusionary methods evoked in that case were dangerous as they could be extended to other groups of people.³²

Notably, the national security concerns relied upon in the *Chinese Exclusion Cases* (which have never been explicitly overturned) continue to justify discriminatory laws impacting non-white immigrants.³³ For example, the same rhetoric evoked in the *Chinese Exclusion Cases* was used to exclude Jewish refugees during World War II—President Roosevelt argued that Jewish refugees “posed a serious threat to national security.”³⁴ More recently, despite Justice Sotomayor’s fervent dissent that former President Trump’s statements would lead a “reasonable observer [to] readily conclude that the [travel ban] was motivated by hostility and animus toward the Muslim faith,”³⁵ national security concerns led the majority of Supreme Court justices to uphold the “Muslim Travel Ban” in *Trump v. Hawaii*.³⁶

28. *Id.* at 609.

29. *Fong*, 149 U.S. at 707.

30. *Id.* at 711.

31. *Id.* (Brewer, J., dissenting). At the time that the *Chinese Exclusion Cases* were decided, “[t]he national climate of opinion, pervaded by racism and a burgeoning feeling of ethnic superiority . . . certainly contributed . . . to the virtual unanimity with which the white majority put its seal of approval on anti-Chinese ends if not means.” Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 IND. L.J. 1111, 1122 (1998) (internal citations omitted).

32. *Fong*, 149 U.S. at 743.

33. See Jayashri Srikantiah & Shirin Sinar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 204 (2019) (explaining that *Trump v. Hawaii*, a 2018 case, relied on a “purported national security rationale”); see also Faiza Patel, *Deference to Discrimination: Immigration and National Security in the Trump Era*, HUM. RTS. MAG., Apr. 27, 2020, at 1, 3 (“[T]he Trump administration has found that framing immigrants as threats to national security has permitted it to unlock a powerful legal vehicle for engineering social change—to align U.S. policy with a perspective that America is a white, Christian nation.”).

34. Kaila C. Randolph, *Executive Order 13769 and America’s Longstanding Practice of Institutionalized Racial Discrimination Towards Refugees and Asylum Seekers*, 47 STETSON L. REV. 1, 7, 43 n.113 (2017) (quoting Const. Rts. Found., *History Lesson 5: U.S. Immigration Policy and Hitler’s Holocaust*, EDUCATING ABOUT IMMIGR., http://crfimmigrationed.org/index.php?option=com_content&view=article&id=144:hl5&catid=50:lessonsforteachers [https://perma.cc/W53K-CS76] (last visited May 11, 2022); see also Johnson, *supra* note 31, at 1129 (explaining that “[d]uring World War II, anti-Semitism . . . unfortunately influenced the U.S. Government’s refusal to accept many Jewish refugees fleeing the Holocaust”).

35. *Trump v. Hawaii*, 138 S. Ct. 2392, 2435 (2018) (Sotomayor, J., dissenting).

36. *Id.* at 2423.

National security and foreign policy justifications are incompatible with the humanitarian aspirations of international refugee laws.³⁷ This has been recognized by several scholars, including Professor Deborah Anker (the Founder of the Harvard Law School Immigration and Refugee Clinical Program) who noted the grievous tension between a refugee policy “conceived as a means of safeguarding human rights” and a refugee policy “viewed as an instrument of foreign policy.”³⁸ Such has also been recognized by Professor E. Tendayi Achiume, the U.N. Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, who has explained that, “racist and xenophobic ideologies rooted in ethno-nationalism regularly combine with national security . . . to violate the human rights of non-citizens . . . on the basis of race, ethnicity, national origin and religion.”³⁹

b. National Origin Quotas and the Undesirable Aliens Act

The xenophobia evidenced in the Chinese exclusion era also permeated the 20th Century. Early 20th Century U.S. immigration laws were shaped by ideas of biological superiority and overt racism.⁴⁰ In fact, Dr. Harry N. Laughlin, a eugenics consultant to the House Judiciary Committee on Immigration and Naturalization in the early 1920s, stated:

We in this country have been so imbued with the idea of democracy, or the equality of all men, that we have left out of consideration the matter of blood or natural born hereditary mental and moral differences. No man who breeds pedigreed plants and animals can afford to neglect this thing . . .⁴¹

Overtly racist ideologies such as these played an outsized role in the implementation of 1920 immigration policies, including: (i) the national origin quota system, and (ii) the Undesirable Aliens Act. First, the national origin quota system, which remained in place until 1965, favored white immigrants.⁴² The system was established by the Immigration Act of 1924 (the Johnson-Reed Act), which perpetuated the exclusion of Chinese, Japanese, and other non-white migrants.⁴³ The quotas were equally devastating for thousands of Jewish refugees who sought

37. See FRANCES NICHOLSON & JUDITH KUMIN, A GUIDE TO INTERNATIONAL PROTECTION AND BUILDING STATE ASYLUM SYSTEMS 28 (Inter-Parliamentary Union & U.N. High Comm’r for Refugees eds., 2017) (explaining that the right to seek asylum involves “safeguarding the civilian, peaceful, and humanitarian nature of asylum”).

38. Deborah Anker, *U.S. Immigration and Asylum Policy: A Brief Historical Perspective*, 13 IN DEF. OF THE ALIEN 74, 77 (1990).

39. E. Tendayi Achiume (Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance), Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance, Follow-Up to and Implementation of the Durban Declaration and Programme of Action, U.N. Doc. A/HRC/38/52 (Apr. 25, 2018) at 19.

40. JOYCE VIALET, CONG. RSCH. SERV., 80-223 EPW, A BRIEF HISTORY OF U.S. IMMIGRATION POLICY (1980).

41. *Id.* at 17 (internal citations omitted).

42. *See id.* at 3 (explaining that the national origin quota system was adopted to “protect and preserve what was then seen as [the country’s] national ethnic heritage”).

43. Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153, 159 (codified as amended at 8 U.S.C. §§ 1101-1778).

protection before and during World War II—these refugees were denied protection because “national quotas for German and Austrian immigrants had been set firmly at 27,000.”⁴⁴

The second policy discussed herein, the Undesirable Aliens Act, took effect in 1929.⁴⁵ This law criminalized border crossing at U.S. unofficial entry points.⁴⁶ Specifically, the law stated that:

(a) if any alien has been arrested and deported in pursuance of law, he shall be excluded from admission to the United States whether such deportation took place before or after the enactment of this Act, and if he enters or attempts to enter the United States after the expiration of sixty days after the enactment of this Act, he shall be guilty of a felony and upon conviction thereof shall, unless a different penalty is otherwise expressly provided by law, be punished by imprisonment for not more than two years or by a fine of not more than \$1,000 or by both such fine and imprisonment.⁴⁷

This was the first U.S. law to criminalize undocumented entry into the country, and it primarily targeted Mexican immigrants.⁴⁸ Indeed, the program led to the deportation of nearly 20% of the Mexican population living in the U.S. at the time.⁴⁹

Comments made by Representative Robert Green, a Democrat from Florida, during a radio address in January 1928 reflect the general mood toward Mexican immigration in the 1920s. He commented that an “influx of all types of undesirable aliens [specifically Mexicans who were mixed race] and their amalgamation with our people will cause a general weakening, physically and mentally, of our civilization.”⁵⁰ Despite these racist origins, the Undesirable Aliens Act’s punitive approach to undocumented migration remains U.S. law today.

Only recently are courts beginning to recognize the racial roots of these laws. For example, in August 2021, Judge Miranda M. Du, a Nevada District Court Judge, analyzed the Undesirable Aliens Act in *United States v. Carrillo-Lopez*.⁵¹ Judge Du determined that the Act violated the Equal Protection Clause because it was “motivated by racial animus.”⁵² In that case, the defendant, Mr. Carrillo-Lopez, had

44. Daniel A. Gross, *The U.S. Government Turned Away Thousands of Refugees, Fearing That They Were Nazi Spies*, SMITHSONIAN MAG. (Nov. 28, 2015), <https://www.smithsonianmag.com/history/us-government-turned-away-thousands-jewish-refugees-fearing-they-were-nazi-spies-180957324/> [https://perma.cc/34P5-3YJV].

45. Undesirable Aliens Act, Pub. L. No. 70-1018, 45 Stat. 1551 (1929).

46. *Id.*

47. *Id.* ch. 690(a).

48. Ingrid V. Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C. L. REV. 1967, 1981 (2020) (explaining that the Undesirable Aliens Act “was sponsored by Senator Coleman Livingston Blease, a white supremacist who sought to exclude Mexicans from the United States”).

49. Benjamin Gonzalez O’Brien, *The 1929 Law that Turned Undocumented Entry into a Crime*, ZÓCALO PUB. SQUARE (Nov. 27, 2018), <https://www.zocalopublicsquare.org/2018/11/27/1929-law-turned-undocumented-entry-crime/ideas/essay/> [https://perma.cc/JH3K-TNQW].

50. *Id.*

51. *United States v. Carrillo-Lopez*, No. 20-cr-00026-MMD, 2021 WL 3667330 (D. Nev. Aug. 18, 2021).

52. *Id.* at *24-25. Judge Du also noted that the fact that the Act was reauthorized in 1952 as “Section 1326” did not alter this conclusion. *Id.* at *23.

reentered the United States after being deported twice.⁵³ After reentry, he was arrested on felony charges and was charged under the Undesirable Aliens Act.⁵⁴ He argued that the law was unconstitutional and Judge Du agreed.⁵⁵

Judge Du relied on the Act's legislative history to reach her conclusion.⁵⁶ The legislative history of the Act demonstrated that its drafting was largely influenced by input from Dr. Laughlin, the aforementioned eugenics consultant to the House Judiciary Committee on Immigration and Naturalization.⁵⁷ During a House Committee hearing, Laughlin stated that "immigration control is the greatest instrument which the Federal Government can use in promoting race conservation of the Nation."⁵⁸ Congress relied on Laughlin's logic—indeed former Representative Albert Johnson advocated for Congress to apply "'the principle of applied eugenics' to reduce crime by 'debar[ri]ng and deport[ing] people.'"⁵⁹

Importantly, Judge Du was not persuaded by the government's argument that the Act was needed to "maintain national security."⁶⁰ Critiquing a government witness (Professor Lytle Hernández), Judge Du explained that the national security arguments "only offer[ed] an explanation in part . . . [The] more complete answer turned on the conclusion that 'racial animus [was] also at play.'"⁶¹ *Carrillo-Lopez* is yet another example of the government's invocation of national security to justify racism.

B. The Aftermath of World War II

In the aftermath of World War II, when millions of individuals were forcibly displaced from their homes, the international community assembled a set of legal standards designed to protect refugees.⁶² The 1951 Convention Relating to the Status

53. See Jesse Franzblau, *Landmark Decision Finds "Illegal Reentry" Charges Are Racist in Origin, Discriminatory in Practice*, NAT'L IMMIGRANT JUST. CTR. (Aug. 26, 2021), <https://immigrantjustice.org/staff/blog/landmark-decision-finds-illegal-reentry-charges-are-racist-origin-discriminatory> [https://perma.cc/9ZTV-DDFU].

54. *Carrillo-Lopez*, 2021 WL 3667330 at *1.

55. *Id.*

56. *Id.* at *8.

57. *Id.*

58. *Id.*

59. *Id.* (internal citation omitted).

60. *Id.* at *20.

61. *Id.* at *21.

62. The 1951 Convention Relating to the Status of Refugees was "limited in scope to persons fleeing events occurring before 1 January 1951 and within Europe." Convention and Protocol Relating to the Status of Refugees, United Nations High Comm'r for Refugees, <https://www.unhcr.org/en-us/3b66c2aa10> [https://perma.cc/F2WQ-2AXF]. In 1967, the Protocol Relating to the Status of Refugees broadened and solidified the Convention. See *Frequently Asked Questions About the 1951 Refugee Convention*, UNITED NATIONS HIGH COMM'N ON REFUGEES (June 1, 2001), <https://www.unhcr.org/en-us/news/stories/2001/6/3b4c06578/frequently-asked-questions-1951-refugee-convention.html> [https://perma.cc/24GQ-JHH6] ("[The Protocol] removes the geographical and time limitations written into the original Convention under which mainly Europeans involved in events occurring before 1 January 1951, could apply for refugee status."). The United States did not ratify the Convention, but it did ratify the Protocol and is thus obligated to abide by both international instruments. See States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, United Nations High Comm'r on Refugees, <https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf> [https://perma.cc/UA5Z-392D].

of Refugees (the Convention) and the 1967 Protocol Relating to the Status of Refugees (the Protocol), obligate signatory countries to protect refugees and provide them with basic human rights.⁶³ The Convention and Protocol fundamentally obligate countries “to recognize, offer protection to, and ensure nonrefoulement of refugees.”⁶⁴ As a party to the Protocol, the United States is bound by the principle of nonrefoulement—“[n]o Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁶⁵ Additionally, the United States is obligated, pursuant to its ratification of the Protocol, to “facilitate the assimilation and naturalization of refugees.”⁶⁶

a. From 1967 to 1980, the United States Failed its Signatory Obligations

Pursuant to the Convention’s nonrefoulement provision, the United States must respect the human right to asylum regardless of an asylum seeker’s country of origin.⁶⁷ However, the first refugee laws—the Refugee Relief Act and the Refugee Escapee Act—were highly politicized and not shaped by humanitarian goals.⁶⁸ Rather, as Professor Deborah Anker explains, “anticommunism has been a dominant informant of our refugee and asylum policy.”⁶⁹ This is demonstrated by the disparate number of asylum grants to those fleeing communist-dominated countries as compared to those fleeing other countries.⁷⁰ From 1965 to 1980, “United States refugee law had expressly given preference within the established quota system to aliens from communist countries.”⁷¹ Moreover, from 1980 to 1985, at least ninety-

63. See Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

64. Eunice Lee, *Non-Discrimination in Refugee and Asylum Law (Against Travel Ban 1.0 and 2.0)*, 31 GEO. IMMIGR. L.J. 459, 477 (2017).

65. Convention Relating to the Status of Refugees, art. XXXIII, § 2, July 28, 1951, 189 U.N.T.S. 150.

66. *Id.* art. XXXIV.

67. See *id.* art. XXXIII (espousing that “[n]o Contracting State shall . . . expel or return (‘refouler’) a refugee in any manner.”); see also James R. Zink, *Race and Foreign Policy in Refugee Law: A Historical Perspective of the Haitian Refugee Crises*, 48 DEPAUL L. REV. 559, 569 (1998) (“Under the Convention’s non-refoulement clause in Article 33, refugees have a near absolute right to seek asylum, which necessarily entails the right to a hearing in order to determine refugee status. The United States, in acceding to the Protocol, agreed to the obligation of non-refoulement.”).

68. See, e.g., VIALET, *supra* note 40, at 23 (explaining that “the inclusion of the category of ‘escapees’ from Communist domination in this and subsequent refugee legislation reflected the preoccupations of this Cold War period”).

69. Deborah Anker, *U.S. Immigration and Asylum Policy: A Brief Historical Perspective*, 13 IN DEF. OF THE ALIEN 74, 75 (1990).

70. See Barry Sautman, *The Meaning of “Well-Founded Fear of Persecution” in United States Asylum Law and in International Law*, 9 FORDHAM INT’L L.J. 483, 483-86 (1986) (“Large groups of Cubans, Soviet Jews, and Indochinese . . . are officially regarded as having been the victims of persecution . . . [Immigrants] from non-Communist countries have usually been held to a significantly higher standard of proof than those from Communist countries in showing that they are refugees and not ‘economic migrants.’”); see also Charles J. Ogletree, Jr., *America’s Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755, 765 (2000) (“[A]liens who were fleeing from Communist governments and other countries unfriendly to the U.S. were disproportionately granted asylum or refugee status.”).

71. *Political Legitimacy in the Law of Political Asylum*, 99 HARV. L. REV. 450, 458 (1985).

five percent of asylum grants were from communist-dominated countries.⁷² Indeed, the disproportionate grants of asylum to those fleeing governments viewed as unfriendly to the United States indicate a case of “discrimination based on national origin.”⁷³

The U.S. government’s preference to provide protection to those fleeing communist regimes was recognized in *American Baptist Churches v. Thornburgh*, a case before the Northern District of California.⁷⁴ In that case, plaintiffs brought suit because the government “systematically and discriminatorily denied [Guatemalan and Salvadoran] individuals protection.”⁷⁵ In settling the case, the U.S. government acknowledged that decisions had been based on foreign policy concerns and nationality—the settlement stated that, “the fact that an individual is from a country whose government the United States supports or with which it has favorable relations is not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution” and that “the same standard for determining whether or not an applicant has a well-founded fear of persecution applies to Salvadorans and Guatemalans as applies to all other nationalities.”⁷⁶ After that settlement, the Immigration and Naturalization Service was widely criticized for its “adherence to foreign policy positions of the Department of State” and “insensitivity to asylum applicants.”⁷⁷

b. 1980: Incorporation of the Refugee Definition into United States Law

Although the United States is a party to the Convention and the Protocol,⁷⁸ it did not enact domestic law in compliance with its signatory obligations until 1980.⁷⁹ The Refugee Act of 1980 incorporated the Protocol’s definition of refugee—the Act codified asylum law and refugee law as subsets of U.S. immigration law.⁸⁰ Under the Refugee Act, asylees (those who are granted asylum)⁸¹ and refugees are people

72. *Id.* at 459.

73. Zink, *supra* note 67, at 571.

74. See *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991).

75. Lee, *supra* note 64, at 483 (“When they did manage to apply for asylum, fewer than 3% of Salvadorans and 1% of Guatemalans received protection, compared to an average 30% grant rate overall.”).

76. *Am. Baptist Churches*, 760 F. Supp. at 799; see also *Am. Baptist Churches v. Thornburgh Settlement Agreement*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 3, 2009), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/american-baptist-churches-v-thornburgh-abc-settlement-agreement> [<https://perma.cc/Z955-DCP3>].

77. Mary Waltermire, *An Analysis of the Clinton Administration’s Proposed Asylum Reform Regulations*, 1 U.C. DAVIS J. INT’L L. & POL’Y 1, 8 n.15 (1995) (noting that in response to these failures, the Asylum Officer Corps was created in 1991 to replace the Immigration and Naturalization Service examiners).

78. See FRANCES NICHOLSON & JUDITH KUMIN, A GUIDE TO INTERNATIONAL PROTECTION AND BUILDING STATE ASYLUM SYSTEMS 28 (Inter-Parliamentary Union & United Nations High Comm’r for Refugees eds., 2017) (explaining that the right to seek asylum involves “safeguarding the civilian, peaceful, and humanitarian nature of asylum”).

79. Lee, *supra* note 64, at 481.

80. *Id.*

81. Asylum seekers come to the United States in a variety of ways and the adjudicative process may vary depending on the method of entry. *How Refugees Get to the U.S.*, UNITED NATIONS HIGH COMM’R

who are “unable or unwilling to return to, and [are] unable or unwilling to avail [themselves] of the protection of, [their country of origin] because of persecution or a well-founded fear of persecution on account of” race, religion, nationality, membership in a particular social group, or political opinion.⁸² Individuals who are already within the United States or present themselves at a border apply for asylum while individuals who seek protection while outside of the United States enter as refugees.⁸³

When the Refugee Act of 1980 came to pass, Senator Edward Kennedy acknowledged the discrimination which permeated the system—Senator Kennedy noted that there was a need for a new policy to treat all refugees “fairly and equally,” something that was “clearly lacking” at that point.⁸⁴ It was further noted that the Refugee Act of 1980 would reform the “discriminatory and outdated refugee provisions in the Immigration and Nationality Act of 1952.”⁸⁵

However, despite the hopes of Senator Kennedy and others, the asylum system remains highly politicized⁸⁶ and discriminatory.⁸⁷ As one 1994 study demonstrated, “ideological preferences and unreasoned and uninvestigated political judgments . . . continue to influence the decision-making process.”⁸⁸ This study, principally investigated by Professor Deborah Anker, was “the first intensive empirical study of the United States’ asylum determination process.”⁸⁹ The “ideological preferences

ON REFUGEES, <https://www.unhcr.org/58a211664.pdf> [<https://perma.cc/EW9T-XMNE>] (last visited May 11, 2022).

82. 8 U.S.C. § 1101(a)(42) (2021).

83. See Zsea Bowmani, *Queer Refuge: The Impacts of Homoantagonism and Racism in U.S. Asylum Law*, 18 GEO. J. GENDER & L. 1, 17 (2017).

84. Lee, *supra* note 64, at 478 (quoting Senator Edward Kennedy, the Chairman of the 1979 Senate Judiciary Committee’s Subcommittee on Refugees).

85. *Id.* at 475; see also *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 434-37 (1987) (discussing the legislative history of the Refugee Act, which implicitly acknowledged that the United States had been non-compliant with the United Nations Protocol Relating to the Status of Refugees).

86. Indeed, asylum adjudicators reflect U.S. political objectives. One example of this is the importance placed on the U.S. Department of State’s annual country reports on asylum adjudications. Asylum officers and immigration judges rely heavily on the U.S. Department of State’s country reports when assessing country conditions and an asylum applicant’s credibility relevant to each asylum claim. These annual country reports are highly politicized documents, which are often manipulated to address U.S. foreign policy objectives. Additionally, the reports often “[downplay] human rights violations in certain countries” and mislead adjudicators. ANDREW I. SCHOENHOLTZ ET AL., *THE END OF ASYLUM* 45, 46 (GEORGETOWN UNIV. PRESS 2021).

87. See Johnson, *supra* note 31, at 1134 (explaining that the 1980 Act was “motivated in part to limit the number of Vietnamese refugees accepted by the United States”). Discrimination against Vietnamese asylum seekers persisted and culminated in a suit accusing the U.S. government of nationality-based discrimination. See *Legal Assistance for Vietnamese Asylum Seekers v. Dep’t of State, Bureau of Consular Affs.*, 104 F.3d 1349, 1351 (D.C. Cir. 1997) (finding that there was no violation of equal protection or of the Immigration and Nationality Act’s antidiscrimination provision when the U.S. Department of State enacted a policy inhibiting the ability of “screened out” Vietnamese asylum seekers to obtain a visa).

88. Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 446-47 (1993). The study also noted that the issues identified (many of which persist today) are systemic and that the system had not achieved the nationality-neutral determination process mandated by Congress. *Id.* at 447.

89. *Id.* at 436.

and unreasoned and uninvestigated political judgments” demonstrated in that study are perhaps most obvious in U.S. treatment of Haitian asylum seekers.

II. ADVERSE EFFECTS OF THE ASYLUM SYSTEM ON HAITIAN ASYLUM SEEKERS

Given the ethno-nationalism that has shaped asylum law, it is unsurprising that U.S. asylum laws continue to have adverse effects on people of color. While there are innumerable examples of discrimination against asylum seekers,⁹⁰ discrimination against Haitian refugees is perhaps the most blatant. This Part analyzes how the structure of the system has disadvantaged those from Haiti because of their blackness.

A. A History Fraught with Racial Tension

The adverse treatment of Haitian asylum seekers by the United States is rooted in a history “fraught with racial tension[.]”⁹¹ An important backdrop to this racial tension is that during the Haitian Revolution, by which Haiti, a former slave colony, won its independence from France, the United States “contributed at least \$750,000 and some troops to aid the French” in their continued oppression.⁹² Additionally, the United States helped enforce “reparations” to former French slave holders for their lost Haitian slaves, which crippled Haiti’s economy for decades,⁹³ and “withheld recognition of the new republic for almost sixty years.”⁹⁴

Furthermore, in 1971, the United States supported the election of the “most oppressive regime in the hemisphere,”⁹⁵ President Jean-Claude Duvalier.⁹⁶ Jean-Claude Duvalier and his father Francois Duvalier (who Jean-Claude succeeded) were violent dictators known for committing torture and extrajudicial killings along political lines.⁹⁷ Human Rights Watch reported in 2014 that, under Jean-Claude

90. See, e.g., Bowmani, *supra* note 83, at 32 (explaining that the REAL ID Act, a law governing credibility in asylum determinations, “creates the expectation that refugees should perform their identities in such a way as to seem credible to the judging official, usually based on stereotypes”); Basileus Zeno, *Trump May be Gone, But the U.S. Asylum System is Still Broken*, WASH. POST (Aug. 12, 2021), <https://www.washingtonpost.com/opinions/2021/08/12/trump-may-be-gone-us-asylum-system-is-still-broken/> [<https://perma.cc/CV4W-ATP8>] (describing a lack of transparency and a low approval rate at the Boston Asylum Office).

91. Zink, *supra* note 67, at 562.

92. *Id.* at 593.

93. Dan Sperling, *In 1825, Haiti Paid France \$21 Billion To Preserve Its Independence — Time For France To Pay It Back*, FORBES (Dec. 6, 2017), <https://www.forbes.com/sites/realspin/2017/12/06/in-1825-haiti-gained-independence-from-france-for-21-billion-its-time-for-france-to-pay-it-back/?sh=2f8e4464312b> [<https://perma.cc/5PZ2-YMM9>].

94. Zink, *supra* note 67, at 599.

95. Jean-Pierre Benoit & Lewis A. Kornhauser, *Unsafe Havens*, 59 U. CHI. L. REV. 1421, 1444 (1992) (quoting *Haitian Refugee Ctr., v. Civiletti*, 503 F. Supp. 442, 475 (S.D. Fla. 1980)).

96. *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 451 (S.D. Fla. 1980).

97. Brief for Haitian Bridge Alliance et al. as Amici Curiae Supporting Plaintiffs, *Al Otro Lado, Inc. v. Wolf*, No. 17-CV-02366-BAS-KSC, 2020 WL 6384357, at *5 (S.D. Cal. Oct. 30, 2020) [hereinafter Brief for Haitian Bridge Alliance].

Duvalier, Haitians were subject to numerous “systematic human rights violations.”⁹⁸ For example:

Hundreds of political prisoners held in a network of prisons known as the “triangle of death” died from their extraordinarily cruel treatment. Others were victims of extrajudicial killings. Duvalier’s government repeatedly closed independent newspapers and radio stations. Journalists were beaten, and in some cases tortured, jailed, or forced into exile.⁹⁹

Although Haitians clearly faced political persecution by their government, the United States has long characterized Haitian tribulations as “economic,” rendering most Haitians ineligible for asylum.¹⁰⁰ Notwithstanding the fact that Haitian poverty is a political condition in and of itself,¹⁰¹ the economic misfortunes of Haitians cannot preclude their right to asylum.

B. The Haitian Program

The United States further foreclosed relief for Haitians with the implementation of the “Haitian Program” in 1978.¹⁰² The program has been characterized as “accelerated processing,” to “expel Haitian asylum applicants as rapidly as possible.”¹⁰³ The program sought to deter Haitians from entering the United States and detained Haitian asylum seekers who were already in the United States—“basically denying them carte blanche their asylum claims and just sending them back.”¹⁰⁴

In 1981, President Reagan modified the Haitian Program and authorized the Coast Guard to intercept and return boats transporting Haitian asylum seekers.¹⁰⁵ Pursuant to Executive Order 12324, Reagan entered into “cooperative arrangements with appropriate foreign governments [including Haiti] for the purpose of preventing illegal migration to the United States by sea.”¹⁰⁶ Under this order, despite the ongoing political turmoil and oppressive ruling regime in Haiti, the United States

98. *Haiti: Justice Denied by Duvalier’s Death*, HUM. RTS. WATCH (Oct. 4, 2014), <https://www.hrw.org/news/2014/10/04/haiti-justice-denied-duvaliers-death> [<https://perma.cc/BK7L-8PV7>].

99. *Id.*

100. See Sautman, *supra* note 70, at 484 (explaining that, perhaps because of the role that the United States played in the persecution of Haitians, Haitians have long been held to a higher standard of proof than those from communist countries); see also Josué López, *CRT and Immigration: Settler Colonialism, Foreign Indigeneity, and the Education of Racial Perception*, 19 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 134, 141 (2019) (arguing that asylum law “serves as a method of racialization” that does not consider colonialism or “account for a history of racial violence, U.S. interventions . . . [or] dehumanization of marginalized and Indigenous peoples”).

101. Note, *Political Legitimacy in the Law of Political Asylum*, 99 HARV. L. REV. 450, 459-60 (1985).

102. See Zink, *supra* note 67, at 569-72.

103. *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 451, 523 (S.D. Fla. 1980), *modified sub nom. Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023 (Former 5th Cir. Unit B 1982).

104. Fabiola Cineas, *Why America Keeps Turning its Back on Haitian Migrants*, VOX (Sept. 24, 2021), <https://www.vox.com/22689472/haitian-migrants-asylum-history-violence> [<https://perma.cc/T3U4-YG65>].

105. See Zink, *supra* note 67, at 572.

106. *Haitian Refugee Ctr., Inc. v. Baker*, 789 F. Supp. 1552, 1555 (S.D. Fla. 1991) (internal citations omitted).

interdicted about 25,000 Haitians at sea between 1981 and 1991.¹⁰⁷ Although the order purportedly addressed the unique needs of refugees, the U.S. District Court for the Southern District of Florida found that the program refoiled Haitians without providing proper procedure to determine their eligibility for asylum or to determine any other legal means for them to remain in the United States.¹⁰⁸

Subsequently, in 1992, President Bush expanded the Haitian Program despite the U.S. Department of State's recognition that "there [was] violence and persecution in Haiti."¹⁰⁹ At that time, there was a coup d'état of "Haiti's first democratically elected president, Jean-Bertrand Aristide."¹¹⁰ The coup resulted in widespread violence, including:

"1,500 to 2,000 deaths and the forced exile of 10,000 political refugees" . . . [The army opened] fire in rallies and in public, "especially in poor areas where ousted President Jean-Bertrand Aristide has widespread support" . . . A number of massacres in an extremely poor area known as an Aristide stronghold [leaving] close to 200 dead between 29 September and 2 October 1991.¹¹¹

Although there was "no shortage of individuals with a legitimate fear of persecution," the U.S. government continued to expel Haitian asylum seekers in violation of their right to claim asylum required under U.S. domestic and international law.¹¹²

The Haitian Program came to a crossroads in *Sale v. Haitian Centers Council, Inc.*¹¹³ The plaintiffs in that case argued that there was a conflict between the international legal obligations of the United States and the interdiction program.¹¹⁴ Specifically, they argued that U.S. international and domestic obligations require that the U.S. government not return refugees to places where they face possible persecution.¹¹⁵

107. Brief for Haitian Bridge Alliance, *supra* note 97, at 10.

108. *Id.* at 1569-71, 1578 (explaining that the Convention's non-refoulement provisions extend to Haitians interdicted through the Haitian Program and, also, explaining that the U.S. government was required to implement procedures "to ensure that Haitians with bona fide political asylum claims [were] not forced to return to Haiti in violation of Article 33"); *see also* CONG. RSCH. SERV., U.S. IMMIGRATION POLICY ON HAITIAN MIGRANTS (2011) ("The court also found inadequate the screening procedures employed by the Immigration and Naturalization Service (INS) to determine which Haitians have plausible claims of asylum.").

109. Benoit & Kornhauser, *supra* note 95, at 1444-45.

110. Cineas, *supra* note 104 (explaining that George H. W. Bush "paid lip service to the illegitimate military government"); *see also* Jeffrey D. Sachs, *From His First Day in Office, Bush Was Ousting Aristide*, L.A. TIMES (Mar. 4, 2004), <https://www.latimes.com/archives/la-xpm-2004-mar-04-oe-sachs4-story.html> [<https://perma.cc/8PJC-7QLR>] (alluding to potential U.S. involvement in the coup d'état).

111. Immigration and Refugee Board of Canada, *Impact of the September 1991 Coup*, REFWORLD (June 1, 1992), <https://www.refworld.org/docid/3ae6a81018.html> [<https://perma.cc/33YA-9XTM>] (internal citation omitted).

112. Benoit & Kornhauser, *supra* note 95, at 1447.

113. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993).

114. *Id.* at 159.

115. *Id.* at 178 (plaintiffs argued that "the Protocol's broad remedial goals require that a nation be prevented from repatriating refugees to their potential oppressors whether or not the refugees are within that nation's borders").

Ultimately, subject to much critique,¹¹⁶ the U.S. Supreme Court upheld the program on national security grounds.¹¹⁷ The Court resurrected the ghost of *Chae Chan Ping* and used “xenophobic ideologies rooted in ethno-nationalism . . . to violate the human rights of non-citizens.”¹¹⁸ Professor E. Tendayi Achiume called this program “a clear example of racial targeting” and noted that the program exemplifies ideologies that “implicitly manifested in legal and policy frameworks that systematically exclude specific racial, ethnic or national minorities.”¹¹⁹ The Court’s disregard of the racial underpinnings of the Haitian Program is especially troublesome considering the history of United States/Haiti relations discussed above.¹²⁰

C. Differential Treatment of Haitian Asylum Seekers

a. The Comparative Treatment of Cuban and Haitian Asylum Seekers

The ongoing differential treatment of Haitian asylum seekers is evidenced by the comparative treatment of Cubans.¹²¹ Overall, Cubans fare far better within the U.S. immigration system than Haitians despite their similar paths to entry and the political persecution that nationals of both countries face—for example, in the summer of 1980, “100,000 Cubans came by boat seeking asylum, and so did approximately 15,000 Haitians.”¹²² Although Haitian and Cuban migrants both fled persecution, and although these migrants literally traveled the same route to the United States, Cubans were welcomed and “officially regarded as having been the victims of persecution” while Haitians were “held to a significantly higher standard of proof . . . in showing that they [were] refugees and not ‘economic migrants.’”¹²³

The disparate treatment of Haitian asylum seekers is further evidenced by the Nicaraguan Adjustment and Central American Relief Act (NACARA), which “enabled Nicaraguans and Cubans to become legal permanent residents.”¹²⁴ Congress deliberately opted to exclude Haitian asylum seekers in NACARA relief,

116. See Zink, *supra* note 67, at 579-80 (explaining the controversial nature of the *Sale* decision and the Haitian Program generally).

117. *Sale*, 509 U.S. at 179 (noting that those who claim to be a refugee but pose a danger to national security may be refouled; see also Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 6276 (“[T]he benefit [of refugee status] may not . . . be claimed by a refugee whom there are reasonable grounds for regarding as a danger to . . . security.”)).

118. Achiume, *supra* note 39, at 19.

119. *Id.* at 15.

120. Zink, *supra* note 67, at 613 (“By ignoring the effects of the Haitian Program and the historical context in which it took place, the Court narrowed the scope of its inquiry. In doing so, it passed on the opportunity to at least draw attention to the long-time discrimination against Haitian refugees, a practice that fits nicely into an overall pattern of abuse and subordination of the Caribbean nation at the hands of the United States.”).

121. See CONG. RSCH. SERV., RS 21349, U.S. IMMIGRATION POLICY ON HAITIAN MIGRANTS (2011).

122. Cineas, *supra* note 104.

123. Sautman, *supra* note 70, at 483-86; see also Brief for Haitian Bridge Alliance, *supra* note 97, at 7 (noting that the Cuban Adjustment Act allowed Cubans to apply for permanent residency after one year).

124. Brief for Haitian Bridge Alliance, *supra* note 97, at 10-11.

concerned that including Haitians would “kill the bill.”¹²⁵ Part of the rationale for the U.S. government’s exclusion of Haitian migrants was prevention of HIV. However, the rationale proved unsound—even the then-director of the Centers for Disease Control explained that “Haitians were the only risk group that were identified because of who they were rather than what they did.”¹²⁶

b. Statistics Show Disparate Treatment

The perpetual discrimination and exclusion of Haitian asylum seekers is evidenced by statistics illustrating their disparate treatment. Asylum seekers of African descent, “are detained and deported at higher rates, have higher percentages of family detention, and have among the highest asylum denial rates.”¹²⁷ Haitians were granted asylum at a mere 4.62% between 2018 and 2021, the lowest rate of any nationality.¹²⁸ Moreover, Haitians are disproportionately detained—at the Karnes County Residential Center in Karnes City, Texas, for example, Haitian families comprised 44% of all detained immigrants in 2020.¹²⁹ This is especially alarming considering immigrants from Africa and the Caribbean comprised merely 4% of people in detention (nationally) from 2012 to 2017.¹³⁰ More astonishing still, during the same period, immigrants from Africa and the Caribbean, who are predominantly black, comprised 24% of all immigrants in solitary confinement.¹³¹

Haitians have long faced heightened risk of immigrant detention in the United States. In 1982, Judge Spellman of the U.S. District Court for the Southern District of Florida noted:

[M]ore Haitians are being detained and for longer periods of time than non-Haitians. The evidence also demonstrates that a larger percentage of non-Haitians are granted parole or deferred inspection than the percentage of Haitians Haitians are being impacted by the detention policy to a greater degree than aliens of any other nationality at the present time.¹³²

125. See Elizabeth M. Iglesias, *Identity, Democracy, Communicative Power, Inter/National Labor Rights and the Evolution of LatCrit Theory and Community*, 53 U. MIAMI L. REV. 575, 601, n.58 (1999) (“NACARA’s architects maintained that if the Haitians were included the bill would die, and supporters of the Haitians in Congress agreed to permit the Central American refugee relief legislation to move forward without including them.”).

126. *Haitians Removed from Aids Risk List*, N.Y. TIMES (Apr. 10, 1985), <https://www.nytimes.com/1985/04/10/us/haitians-removed-from-aids-risk-list.html> [<https://perma.cc/C23V-X7MU>].

127. Brief for Haitian Bridge Alliance, *supra* note 97, at 18.

128. Aaron Morrison et al., *Haitians See History of Racist Policies in Migrant Treatment*, THE ASSOCIATED PRESS (Sept. 24, 2021), <https://apnews.com/article/immigration-race-and-ethnicity-mexico-haiti-asylum-seekers-a81ac1148118db38824d2d8f62139b87> [<https://perma.cc/5D2M-XDAZ>].

129. *Black Immigrant Lives Are Under Attack*, THE REFUGEE & IMMIGRANT CTR. FOR EDUC. & LEGAL SERVS., <https://www.raicetexas.org/2020/07/22/black-immigrant-lives-are-under-attack/> [<https://perma.cc/DC3D-243R>] (last visited May 11, 2022).

130. *Id.*

131. Spencer Woodman, *U.S. Isolates Detained Immigrants from Majority-Black Countries at High Rate, Study Finds*, INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Apr. 21, 2020), <https://www.icij.org/investigations/solitary-voices/u-s-isolates-detained-immigrants-from-majority-black-countries-at-high-rate-study-finds/> [<https://perma.cc/MP7S-7SVB>].

132. *Louis v. Nelson*, 544 F. Supp. 973, 982-83 (S.D. Fla. 1982).

Further, Judge King (also of the Southern District of Florida) acknowledged that Haitians' blackness was a "possible underlying reason" for their treatment as compared to others who sought protection from persecution.¹³³

c. Differential Treatment Under the Trump Administration

In response to a devastating earthquake in Haiti in 2010, the Department of Homeland Security began providing Temporary Protected Status (TPS) for Haitians.¹³⁴ However, in November 2017, under the Trump Administration, the United States announced that it planned to terminate the program and repatriate all of its beneficiaries, an impossible burden for Haiti given the existing political and economic turbulence.¹³⁵

Notably, the United States again invoked a national security justification to defend the revocation of TPS for Haiti. As one scholar recently noted, the executive branch "found that framing immigrants as threats to national security . . . permitted it to unlock a powerful legal vehicle for engineering social change—to align U.S. policy with a perspective that America is a white, Christian nation."¹³⁶ Fortunately, in October 2018, a court enjoined the termination of TPS for Haitians.¹³⁷ The Trump Administration was "guided by racism—not a sober consideration of the facts on the ground—when it canceled Temporary Protected Status designations for El Salvadoran, Haitian, Sudanese, and Nicaraguan escapees from political and natural disaster."¹³⁸

Other Trump-era policies disadvantaged Haitian asylum seekers who entered through the southern border, including a practice called "metering," which restricted the number of people that it allowed to apply for asylum each day.¹³⁹ This "turnback" policy, purportedly instituted in response to a large number of Haitians in Tijuana in 2016, forced asylum seekers to "wait in Mexico until some future—and often unspecified—date."¹⁴⁰ As Professor Kevin Johnson notes, "[t]he increasingly

133. *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 451 (S.D. Fla. 1980).

134. TPS is a status given to migrants from countries that the United States designates as unsafe based on temporary conditions like armed conflict or environmental disaster. *See Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/temporary-protected-status> [<https://perma.cc/4FTA-GL6L>] (last visited May 11, 2022).

135. Raymond Audain, *Not Yet Forgiven for Being Black: Haiti's TPS, LDF, and the Protean Struggle for Racial Justice*, 52 LOY. L.A. L. REV. 409, 412, 416 (2019) (describing the Trump Administration's action as an "obvious racial decision" and noting that Haiti could not safely repatriate 58,000 Haitians).

136. Faiza Patel, *Deference to Discrimination: Immigration and National Security in the Trump Era*, HUM. RTS. MAG. (Apr. 27, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/immigration/deference-to-discrimination/ [<https://perma.cc/PE77-737Q>].

137. *Ramos v. Nielsen*, 321 F. Supp. 3d 1075, 1108 (N.D. Cal. 2018) (enjoining the Trump Administration's termination and challenging the President's motives in terminating TPS).

138. Karla McKanders, *Immigration and Blackness: What's Race Got to Do with It*, 44 HUM. RTS. 20, 21 (2019).

139. *See Policies Affecting Asylum Seekers at the Border*, AM. IMMIGR. COUNCIL (Jan. 29, 2020), <https://www.americanimmigrationcouncil.org/research/policies-affecting-asylum-seekers-border> [<https://perma.cc/SDL8-LV66>].

140. *See* Karolina Walters, *Discriminatory Treatment of Haitians Throughout History Informs Current Policy at the US-Mexico Border*, AM. IMMIGR. COUNCIL: IMMIGR. IMPACT (Nov. 19, 2020), <https://immigrationimpact.com/2020/11/19/haitian-immigrants-asylum-border/> [<https://perma.cc/P6JW->

rigorous enforcement of the nation's southern border with Mexico, in comparison to the relatively lax enforcement of the northern border with Canada, is . . . nothing less than evidence of racism at work."¹⁴¹

The "turnback" policy was challenged in *Al Otro Lado, Inc. v. Wolf*, when the plaintiffs contended that U.S. Customs and Border Protection used tactics to "to deny bona fide asylum seekers the opportunity to pursue their claims."¹⁴² The plaintiffs further argued that the motivation for the turnbacks was to discourage asylum seekers from pursuing a claim.¹⁴³ An amicus brief filed by the Haitian Bridge Alliance, the Institute for Justice & Democracy in Haiti, and several immigration scholars articulates how the policy is rooted in racial hostility.¹⁴⁴ The brief contends that:

The indisputable common denominator for this disparate treatment of Haitians and Africans is the color of their skin . . . [Trump's] policies are not based on capacity constraints, or even on the legitimacy of migrants' asylum claims . . . [H]is administration has based its immigration policies on race and exclusionism, perpetuating racist and xenophobic opposition to Haitian and Black migrants.¹⁴⁵

Yet, this disparate treatment of Haitian asylum seekers is not limited to the Trump Administration.

d. Contemporary Treatment of Haitian Asylum Seekers

The history and structure of the U.S. asylum system, riddled with ethno-nationalist foreign policy concerns, continues to perpetuate discrimination and exclusion of Haitian asylum seekers. America has recently borne witness to images of U.S. Customs and Border Protection officers on horseback attacking Haitian migrants attempting to enter the United States.¹⁴⁶ As Alison Parker, the U.S. managing director at Human Rights Watch, articulated, "[t]he US government showed a total disregard for the right to seek asylum when it sent agents on horseback with reins flailing to control and deter this largely Black migrant population."¹⁴⁷ The justification behind this discriminatory exclusion is United States Public Health

PDP5]; *see also* *Munyua v. United States*, No. C-03-04538, 2005 WL 43960, at *6 (N.D. Cal. Jan. 10, 2005) (noting that the inspection and processing provisions of the Immigration and Nationality Act are not discretionary and that there is a duty to refer an individual to an asylum officer if they express a fear of return).

141. Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 L. & CONTEMP. PROBS. 1, 17-18 (2009).

142. *Challenging Customs and Border Protection's Unlawful Practice of Turning Away Asylum Seekers*, AM. IMMIGR. COUNCIL, <https://www.americanimmigrationcouncil.org/litigation/challenging-customs-and-border-protections-unlawful-practice-turning-away-asylum-seekers> [<https://perma.cc/Z8H9-D9HA>] (last visited May 11, 2022).

143. *Id.*

144. *See* Brief for Haitian Bridge Alliance, *supra* note 97, at 14; *see also* Walters, *supra* note 140 ("[T]he historically discriminatory treatment of Haitian and Black migrants informs current policy choices, including the treatment of asylum seekers, who are largely Black, Indigenous, and other people of color.").

145. Brief for Haitian Bridge Alliance, *supra* note 97, at 14.

¹⁴⁶ *US: Treatment of Haitian Migrants Discriminatory*, HUM. RTS. WATCH (Sept. 21, 2021), <https://www.hrw.org/news/2021/09/21/us-treatment-haitian-migrants-discriminatory> [<https://perma.cc/7LQD-V5U2>].

147. *Id.*

Code Title 42.¹⁴⁸ This law, which was reinvigorated under the Trump Administration, expels individuals without giving them the opportunity to seek asylum on the grounds that it will prevent the spread of COVID-19—a justification eerily similar to historical Haitian exclusion based on HIV prevention.¹⁴⁹ The Director of Immigration at the International Rescue Committee, Olga Byrne, has described Title 42 as “the most efficient tool at the government’s disposal for quick expulsions to quickly get people out of the U.S. without due process.”¹⁵⁰

Although the Biden White House recently espoused that “[p]eople are not coming into the country through legal methods,”¹⁵¹ it is legal under U.S. domestic and international law to seek asylum at the border. This was recognized by Judge Sullivan of the U.S. District Court for the District of Columbia.¹⁵² Judge Sullivan granted an injunction, requiring the Biden Administration to cease enforcement of Title 42.¹⁵³ Judge Sullivan explained, “Plaintiffs have provided ample un rebutted evidence demonstrating that they are collectively deprived of certain statutory procedures to seek protection under the Title 42 Process, and they face real threats of violence and persecution if they were to be removed from the United States.”¹⁵⁴ Notably, Haitian refoulement to unsafe conditions has been condemned by the United Nations High Commissioner for Refugees:

In expediting the collective expulsion of Haitian migrants, the United States is subjecting a group of predominantly Black migrants to impermissible risks of refoulement and human rights abuse without any individualized evaluation International law prohibits arbitrary or collective expulsions. States cannot label all migrants of a certain nationality per se threats to national security, and all migrants, no matter their nationality, race or migration status, must be guaranteed the protections called for under international law.¹⁵⁵

In an effort to continue expulsion, the Biden Administration appealed the order.¹⁵⁶ However, at the same time, the Biden Administration reinstated TPS for

148. See Armando Garcia et al., *What is Title 42? Amid Backlash, Biden Administration Defends Use of Trump-Era Order to Expel Migrants*, ABC NEWS (Sept. 26, 2021), <https://abcnews.go.com/US/title-42-amid-backlash-biden-administration-defends-trump/story?id=80149086> [https://perma.cc/9L6M-8TDB]; see also 42 U.S.C. § 201.

149. *Haitians Removed from Aids Risk List*, *supra* note 126.

150. Garcia et al., *supra* note 148.

151. *Press Briefing by Press Secretary Jen Psaki, September 23, 2021*, THE WHITE HOUSE (Sept. 23, 2021), <https://www.whitehouse.gov/briefing-room/press-briefings/2021/09/23/press-briefing-by-press-secretary-jen-psaki-september-23-2021/> [https://perma.cc/KHK2-2Q5J].

152. *Huisha-Huisha v. Mayorkas*, No. CV 21-100, 2021 WL 4206688, at *1 (D.D.C. Sept. 16, 2021).

153. *Id.* at *18.

154. *Id.* at *15.

155. Press Release, Refugee Agency, Statement Attributable to UN High Commissioner for Refugees Filippo Grandi on the Need to End US COVID-19 Asylum Restrictions, (May 20, 2021), <https://www.unhcr.org/news/press/2021/5/60a687764/statement-attributable-un-high-commissioner-refugees-filippo-grandi-need.html> [https://perma.cc/Z8EH-JCH3].

156. On appeal, the D.C. Circuit held that the Biden Administration “can expel the Plaintiffs from the country. But it cannot expel them to places where they will be persecuted or tortured.” *Huisha-Huisha*, 2021 WL 4206688, at *4; see also Kevin Breuninger, *Judge Orders Biden Administration to Stop Expelling Migrants Under Trump-era Health Law*, CNBC (Sept. 16, 2021), <https://www.cnbc.com/2021/09/16/judge-orders-us-to-stop-expelling-migrants-under-title-42-health-law.html> [https://perma.cc/FU73-D6D9].

Haitians currently in the United States, recognizing that Haiti is unsafe as a result of “security concerns, social unrest, an increase in human rights abuses, staggering poverty, and lack of basic resources, which are exacerbated by the COVID-19 pandemic.”¹⁵⁷ In light of the United States’ recent treatment of Haitian asylum seekers, the U.S. Special Envoy to Haiti, Daniel Foote, resigned his post, arguing against the United States’ “inhumane, counterproductive decision to deport thousands of Haitian refugees . . . to Haiti, a country where American officials are confined to secure compounds because of danger posed by armed gangs in control of daily life.”¹⁵⁸ Moreover, this “inhumane” treatment has led to a class action suit by which eleven Haitian asylum seekers are accusing the Biden Administration of “physical and verbal abuse, racial discrimination, denial of due process, and other severe rights violations.”¹⁵⁹

In sum, the historical and lingering animus toward Haitian asylum seekers is well established. From Haiti’s independence to Title 42 refolement, the United States has sought to block Haitians from immigrating to the United States.

CONCLUSION

The first step in reforming our asylum system requires recognition that racial animus motivates much of U.S. immigration laws and policies. Indeed, not only do U.S. laws and policies have a disparate impact on black asylum seekers as discussed above, but when placed in their historical context, one would be hard pressed to argue that these laws are neutral. The pervasive foreign policy and national security concerns continually invoked by the U.S. government to justify this discrimination ring hollow in light of this injustice. Without an acknowledgement of this troubling history, reform will remain elusive. And, ultimately, reform is the next critical step.¹⁶⁰ Judges must follow U.S. District Court Judge Du’s lead in examining the historical evidence of racial animus deeply embedded in our immigration laws and find that these laws are simply too racist to remain in place. Teasing out the racism embedded within many of our immigration laws would, as one journalist recently put it, “require holding even basic immigration restrictions unconstitutional and essentially starting over.”¹⁶¹

157. See Bicameral Letter Urging Biden Admin. to End Disparate Treatment of Black Migrants from Cori Bush, Member of Cong., to President Joseph R. Biden (Dec. 20, 2021) (on file with author) [hereinafter Bicameral Letter] (internal citation omitted).

158. *Resignation Letter from U.S. Special Envoy for Haiti, Daniel Foote*, WASHINGTON POST (Sep. 21, 2021), <https://www.washingtonpost.com/context/read-resignation-letter-from-u-s-special-envoy-for-haiti-daniel-foote/3136ae0e-96e5-448e-9d12-0e0cabfb3c0b/> [https://perma.cc/3E46-5RMS].

159. Amy Goodman & Juan González, *Haitian Asylum Seekers Sue US Government for Racial Discrimination*, TRUTH OUT (Dec. 22, 2021), <https://truthout.org/video/haitian-asylum-seekers-sue-us-government-for-racial-discrimination/> [https://perma.cc/4P3Q-HMDH].

160. See Bicameral Letter, *supra* note 156 (explaining that, to begin with, reform may include the following: “halt the use of Title 42 expulsions, conduct a holistic review of the disparate treatment of Black migrants throughout our immigration system, make available to the public the results of this review and take steps to remedy disparities at each step of the immigration enforcement process”).

161. Mystal, *supra* note 8.

