Enforcing Stereotypes: The Self-Fulfilling Prophecies of U.S. Immigration Enforcement

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ABSTRACT

U.S. immigration law was built on a foundation of systemic white supremacy. While a brief historical analysis of immigration laws in the United States illustrates a shift from explicitly racial to race-neutral language, the effects of the originally race-restrictive provisions in immigration law continue to be felt today. This Article illustrates this present-day impact of racialization through a critical analysis of Section 240A(b)(1) of the Immigration and Nationality Act, which governs relief from deportation for undocumented immigrants. Immigration scholars and jurists have discussed the amorphous, unworkable nature of this provision, but this Article delves a step further to consider the secondary cultural impacts resulting from that unworkability. This Article considers how even the seemingly humanitarian sections of current U.S. immigration laws effectively dehumanize Mexican and other Latinx immigrants, perpetuating harmful stereotypes of the very immigrants the subsection intends to serve. Building upon the call of critical race theorists throughout recent decades, the solution to cultural stereotyping perpetuated through immigration laws may lie in intentional awareness of the human impacts the law has on both immigrant communities and U.S. society at large.

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I pray that soon the good men and women in our Congress will ameliorate the plight of families like the [petitioner’s] and give us humane laws that will not cause the disintegration of such families.

–Judge Harry Pregerson, Ninth Circuit Court of Appeals

INTRODUCTION

Immigration policies in the United States are changing faster than news cycles can keep up. During his presidential campaign, Donald Trump promised stronger immigration enforcement, usually supported by vitriol aimed at Mexican immigrants. This vitriol painted Mexican immigrant women as drains on U.S. resources and Mexican immigrant men as dangerous criminals. Despite the heterogeneity of the immigrant population in the United States, in his talks of the need for stronger immigration enforcement, Donald Trump’s most common targets were Mexicans.

While millions of people found this brand of openly racialized rhetoric appalling, this stereotyped ideology regarding immigrants is nothing new. The United States is a country rooted in white supremacy, and that supremacy has

been woven into our immigration laws through the Immigration and Nationality Act (INA). This Article spotlights the white supremacy embedded in the INA through a critical analysis of one of its seemingly humanitarian subsections—Section 240A(b), which provides a mechanism to seek relief from deportation.

Illuminating the full contours of white supremacy exceeds the scope of this Article. However, this Article uses a critical race theory approach to consider the parameters of the INA. Critical race theorists generally assert that the procedures and substance of American law are structured to maintain white privilege—“the normative supremacy of whiteness in American law and society.” This paper tracks two tenets that critical race scholarship generally rejects: the idea that colorblindness will solve racism, and that racism is an individual, rather than systemic, ascription. When discussing white supremacy, this Article refers not to any individual intent to affect racist policies, but rather to the structures that maintain whiteness as the dominant baseline, which then places a burden on all others to adapt. Since 27 percent of the immigrant population in the United States is Mexico-born—by far the largest percentage of any country of origin—this Article applies this definition of white supremacy to focus on oppression faced by Mexican immigrants through the enforcement of the United States’ immigration laws.

Immigration law in the United States is largely enforced and carried out through the INA. This statute, serving as one organized body of regulatory law, dates back to 1952. In 2016, the INA spanned 526 pages, comprising hundreds of sections and subsections. While many of these sections are seemingly innocuous, providing administrative information like definitions and procedures, collectively these sections play a monumental role in the

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7. Francisco Valdes, Jerome McCristal Culp & Angela P. Harris, Battles Waged, Won, and Lost: Critical Race Theory at the Turn of the Millennium, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 1 (Francisco Valdes et al. eds., 2002).
8. Id. at 1–4. Critical race theorists also acknowledge that racism cannot be challenged without an intersectional interrogation of other forms of oppression and injustice. While many of the regulations promulgated by immigration laws implicate classed and gendered stereotypes, the in-depth discussion that these implications are owed fall beyond the scope of this Article. A fuller understanding of the subordination perpetuated by the INA requires an intersectional discussion, but this Article will focus its discussion mainly on race and national origin.
11. For a challenge to the innocuousness of these definition sections and others, see Emily C. Torstveit Ngara, Aliens, Aggravated Felons, and Worse: When Words Breed Fear and Fear Breeds Injustice, 12 STAN. J. C.R. & C.L. 389, 414–49 (2016).
enforcement of immigration policies in the United States. The INA prioritizes the kinds of immigrants granted entry to the United States, explains processes for applying for visas, and describes grounds for inadmissibility to and deportation from the country, among many other things. This Article cannot provide a sufficient overview of the Act in its entirety, but the statute’s importance cannot be understated. The INA is, in short, the gatekeeper to the country.

While the INA’s primary focus is on managing the flow and legal status of immigrants, the INA also does less visible work: It shapes the dominant cultural narrative about immigrants in the United States. As it provides the guidelines for who is allowed into the country and who must leave, the INA also helps to define what an American is. The statute draws a line in the sand between candidates worthy to be considered Americans and others not fit to reside in or claim this country as their own. This othering is often accomplished through classed, gendered, and racialized ideologies that both reflect and mold immigration laws in the United States.

From an immigrant’s point of view, most of the INA serves as the strong arm of immigration enforcement, providing a labyrinth through which every person seeking entry into, or authorization to stay in, the country must navigate. There are a few sections of the law that, at least at first glance, appear to provide a glimmer of hope to those with difficulty entering or legally staying in the country.


One of these sections is 240A, which provides for cancellation of removal—that is, cancellation of a deportation after one has been ordered.\textsuperscript{16} An immigrant who has already gone through the immigration court process and has been deemed removable, or subject to deportation, can petition for this form of relief. There are a number of grounds upon which a person can invoke Section 240A.\textsuperscript{17} Section 240A(b)(1), the focus of this Article, provides the Attorney General with the discretion to cancel the removal of undocumented immigrants who (1) have been in the country for ten consecutive years, (2) have good moral character, (3) have a clean criminal record, and (4) can show an exceptional and extremely unusual hardship to their spouse, parent, or child, who is either a U.S. citizen or permanent resident.\textsuperscript{18} For undocumented immigrants who have been ordered to leave the United States, this section would appear to offer some hope that their families could remain intact or that they could maintain the financial security they have obtained while in the country. Undoubtedly, it serves that capacity for the small number of immigrants granted relief, and this Article in no way discounts that essential task. However, on a much larger scale, this section may not be as altruistic as it appears.

This Article considers the white supremacy perpetuated by the INA through a critical analysis of relief from removal under Section 240A(b)(1). Not only does this relief section show a disregard for immigrant families by normalizing their disposability, but it also shows how, even in its seemingly humanitarian efforts, the INA cannot escape its white supremacist roots and intentions. Drawing on the legislative history of this section, the national dialogue occurring during the amendments of the section, and its judicial implementation, this Article argues that the 240A hardship exception to deportation, like the more exclusion-focused sections of the INA,\textsuperscript{19} shapes the

\textsuperscript{17} Id. § 240A(a)–(b).
\textsuperscript{18} Id.
perception of Mexican immigrants in ways that perpetuate harmful cultural stereotypes within the United States at large.

Part I of this Article provides a brief history of the INA and the white supremacy embedded within it. Part II describes the historical context for the hardship exception itself, depicting how the exception plays out in courts. And finally, Part III provides a brief commentary about the future of immigration laws and the potential for deportation relief that would provide more than mere glimmers of hope.

I. THE CULTURAL CONTEXT OF AMERICAN IMMIGRATION LAW

Changes to immigration laws do not occur in a vacuum; they are propelled by political attitudes and ideology in the wider culture. Understanding this political climate is essential to grasping the driving force behind Section 240A. This Part briefly discusses the racialization of immigration and naturalization law in order to contextualize the overall intent behind the INA and its amendments.

A. Pre–1952 Immigration Law

Immigration law and policy in the United States centers on a common theme of assimilation and integration into American society. Assimilability has often been determined through explicit racial terms. Whether a given group could successfully assimilate into U.S. society depended on the group’s inherent racial character. Based on a 1791 federal statute, for example, only “free white persons” could become naturalized citizens in the United States; an exception was added in 1870 for persons of African descent. This racial qualification created an explicit dichotomy between persons who were white and others—often noted as, and later codified in the INA as, “aliens”—with the contours of who gets to be white ever shifting throughout history.
Racialization in immigration policy was evident with the Chinese Exclusion Act of 1882, which barred Chinese laborers from entering the country for a period of ten years and prevented Chinese immigrants from becoming naturalized citizens. In addition to racial bias, the law demonstrated class bias, a phenomenon prevalent throughout the history of immigration law, by exempting merchants, teachers, students, travelers, and diplomats from the ban. In 1888, the law was tightened to prohibit reentry of Chinese laborers after they voluntarily left the country. In the seminal 1889 Chinese exclusion case, *Chae Chan Ping v. United States*, the Supreme Court found the biases in the Chinese Exclusion Act unremarkable, instead limiting its discussion to Congress’s ability to pass such an immigration restriction law. Justice Field, writing for the majority, stated, “If . . . 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 . . . , its determination is conclusive upon the judiciary.” Thus, the still-present plenary power of Congress with regard to immigration legislation was established, laying a foundation for its nearly unfettered ability to regulate and enforce immigration law regardless of explicit race, gender, or class bias.

The wielding of this power is apparent in Congress’s early immigration legislation. The Immigration Act of 1917 was rife with exclusions for people considered unassimilable—poor people, people afflicted with mental deficits, immoral people, and prostitutes, to name a few of the many grounds for exclusion. The most well-known section of the 1917 law, however, created the

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28. 130 U.S. 581 (1889).
30. *Chae Chan Ping*, 130 U.S. at 606 (1889).
“Asiatic Barred Zone,” which prohibited anyone from eastern Asia and the Pacific Islands from immigrating to the United States. In passing the legislation, advocates of the law and Congress used explicitly race-based reasons for restricting immigration from Asia; while interpreting the law, the Supreme Court also used explicit racialized language. Thus, while the Asiatic Barred Zone was a geographic-specific restriction, it implicated racialized restrictions.

The 1924 Immigration Act saw the establishment of a quota system, which based the number of visas awarded to particular countries on the percentage of U.S. citizens who traced their ancestral lineage to that country. The system was stacked against people from southern and eastern Europe while completely barring those from Asia, manifesting a racially discriminatory intent in the quotas. As one historian concludes, “In all of its parts, the most basic purpose of the 1924 Immigration Act was to preserve the ideal of U.S. homogeneity.” However, in addition to the establishment of this quota system, which would later be codified in 1952, the 1924 Act, more importantly, established the deportation of any person who entered the United States without a valid visa or overstayed a granted visa. Prior to this sweeping new rule, deportation had been reserved only to those the country deemed criminal

34. Immigration Act of 1917 §3; see also Immigration Act of 1917—"Asiatic Barred Zone,” MUSEUM CHINESE AMERICA (2016), http://www.mocanyc.org/learn/timeline/immigration_act_of_1917 [https://perma.cc/M9CK-6GFS]. As discussed above, people from China were already prohibited from immigrating at that time.


38. See id. at 68–69. The Immigration Act of 1924 was passed with the strong urging and support of early twentieth century eugenicists, claiming that there was a biological imperative to such restrictions in order to protect the more “pure ‘Nordic race’” in the United States. Kenneth M. Ludmerer, Genetics, Eugenics, and the Immigration Restriction Act of 1924, 46 BULL. HIST. MED. 59, 62 (1972); see also Lynne M. Getz, Biological Determinism in the Making of Immigration Policy in the 1920s, 70 INT’L SOC. SCI. REV. 26 (1995); Randall Hansen & Desmond King, Eugenic Ideas, Political Interests, and Policy Variance: Immigration and Sterilization Policy in Britain and the U.S., 53 WORLD POL. 237 (2001).


40. Id.
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or morally corrupt. Thus, it is in the 1924 Act that we get the first glimpse of a system that has now come to broadly equate undocumented immigrants with criminals.

B. The Immigration and Nationality Act of 1952

Amid a debate between ridding immigration laws of their racial discrimination and the importance of national security, Congress passed the Immigration and Nationality Act of 1952. The original iteration of the INA codified the national quota system, lifting the exclusion of immigrants from Asia but maintaining extremely low quota allocations for those groups. The bill sought to eliminate the racial discrimination in existing immigration law, but in codifying the national quota system, Congress merely placed a mask over the continuing racial discrimination. In debates over passing the INA, Representative Emanuel Celler expressed to the Senate concerns about the “startling discrimination” in the quota system in the United States, calling for an end to the hypocrisy of the system: “On the one hand we publicly pronounce the equality of all peoples . . . ; on the other hand, in our immigration laws, we embrace in practice these very theories we abhor and verbally condemn.” President Truman vetoed the bill, regarding it as un-American and discriminatory, but Congress passed the bill over the president’s veto.

Largely, the bill was concerned with communist infiltration. As such, while eliminating the express racial language, the bill focused on the assimilability of immigrants. The 1952 INA preferred individuals with special skills or those who had families already present in the United States.

41. Id.
42. See infra Part I.E.
43. It is generally believed that one reason the United States sought to eliminate racial discrimination in its immigration laws was to improve its international democratic image during the Cold War. See generally MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2011).
45. Id.
46. See Wasserman, supra note 33, at 78–79.
49. See Immigration and Nationality Act of 1952, supra note 44.
50. See id.
51. See id.
Communists, however, were considered unassimilable, and concern over their infiltration compelled Congress to list “communists” or “communism” twenty-nine times in the bill. It seems odd in present-day United States to consider the fact that current immigration law has been built upon Cold War–era legislation passed in response to the threat of communism. Nevertheless, this was the first iteration of the current INA.

C. The Amended INA of 1965

The civil rights movement of the 1960s ushered in changes to the 1952 INA. The primary purpose of the 1965 INA was to eliminate the explicit discrimination President Truman railed against with his veto in 1952. Accordingly, in the 1965 amendments of the INA, the national quota system was dismantled in favor of race neutrality among countries of origin, though the Western Hemisphere (which would be the sender of primarily Latinx immigrants) was afforded a smaller immigration cap than the Eastern Hemisphere; the Western Hemisphere was capped at 120,000 visas, while the Eastern was capped at 170,000. Given the geographic proximity of countries in the Western Hemisphere and the historic migration of Mexican workers to the United States, this immigration cap and country allocation denied Latinx immigrants equal treatment under the law.

In lieu of quotas, the 1965 INA adopted a visa preference system based on family relations and labor force needs. Included in the increased consideration of labor force needs were stricter labor certification requirements.

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54. A gender-neutral alternative to Latino/a. This phrase includes all people deriving from Latin America, regardless of their gender identity. For more regarding this phrase, see Tanisha Love Ramirez & Zeba Blay, Why People Are Using the Term ‘Latinx,’ HUFFPOST (Oct. 17, 2017), https://www.huffingtonpost.com/entry/why-people-are-using-the-term-latinx_us_57753328e4b0cc0fa136a159 [https://perma.cc/6SEQ-MSYM].
57. See id.
requirements. Before being granted an employment visa, an applicant was now required to secure a certification from the U.S. Department of Labor, certifying the unavailability of American workers to do desired work. While this restriction was aimed at protecting U.S. jobs for U.S. citizens, the requirements disproportionately affected Mexican workers given their migration history and the United States’ demand for workers. The combination of capped immigration from Mexico with the increased strain on legitimate employment after the 1965 INA served as a catalyst for anti-Mexican sentiment in the United States.

Importantly, in signing the 1965 amendment, President Johnson anticipated relatively minor changes to immigration, stating, “This bill that we will sign today is not a revolutionary bill. It does not affect the lives of millions…. It will not reshape the structure of our daily lives or add importantly to either our wealth or our power.” This sentiment, widely shared by Congress as well, indicates that the consequences of the 1965 amendments were unintended. The common belief was that, since the amended bill emphasized family reunification for people already present in the United States, and since the vast majority of immigrants prior to 1965 had been white, that the status quo of an overwhelmingly majority-white immigrant population would be maintained.

The unexpected consequence was a surge of nonwhite immigrants. “[T]he U.S. population in 1960 was eighty-five percent non-Hispanic white and eleven percent the descendants of enslaved Africans.” By “the 1980s, more than three-fourths of all immigrants to the United States were either Asian or

58. Immigration and Nationality Act of 1965 § 10; at 137–38.
59. Id.
60. Id. The history of this migration and labor demand can be observed as early as 1942, when President Roosevelt established the Bracero Program, which provided temporary admission to the United States for Mexican agriculture workers. Concerns of rising levels of illegal immigration that accompanied the program may have led to its demise (and the more stringent labor certificate requirements that followed) in 1964. See Adam B. Cox & Cristina M. Rodriguez, The President and Immigration Law, 119 Yale L.J. 458, 485–91 (2009).
61. Id.
63. See Chin, supra note 37, at 303–306 (summarizing scholarly opinions concluding that results of 1965 Act were unintended).
Because of the per-country caps, however, a disproportionate number of Mexican and Latinx immigrants were undocumented. In the decades following this surge of nonwhite immigrants, Congress worked to counter this unexpected diversity.

D. The Post-1965 INA

In the aftermath of the increase in nonwhite immigration, Congress passed several legislative actions that seemed to try to roll back the racial progress provided by the 1965 INA. These actions began in 1986, when a vast majority of immigrants were nonwhite—a turnabout from earlier immigration patterns. One program provided visas to immigrants from “underrepresented countries,” which were in fact countries with predominantly white populations. Another program provided visas for “countries whose nationals had been ‘adversely affected’ by the abolition of the national origins quota system . . . .” The 1990 Immigration Act saw the first permanent immigration program of this sort, authorizing the admission of fifty-five thousand immigrants each year from underrepresented countries. Europe stood to benefit most under that program.

Immigration enforcement efforts saw an uptick as well. In 1986, President Ronald Reagan amended the INA with the Immigration Reform and Control Act (IRCA). The law sought to control “illegal immigration,” making it unlawful for employers to knowingly hire, recruit, or continue the employment of an undocumented immigrant. Out of fear of criminal prosecution, employers discriminated against people they perceived to be foreign, most often Mexican or Latinx workers.

67. See Johnson, supra note 56.
68. See Legomsky, supra note 66, at 328–29.
69. Id. at 329.
70. Id.
71. 8 U.S.C. §§ 1151(a)(3), 1151(e), 1153(c); see also id. at 329–30.
72. See id.
74. Id.
75. See generally B. Lindsay Lowell et al., Unintended Consequences of Immigration Reform: Discrimination and Hispanic Employment, 32 Demography 617 (1995).
E. The IIRIRA of 1996

Most recently, in 1996, the INA was amended with the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). The early 1990s saw an increase in fear and public concern about Latinx immigrants. For example, this time period saw the U.S.-Mexico border militarized, with aims at sealing the border from undocumented immigrants, or “illegal aliens,” which was the phrase more often used at the time. As one immigration scholar notes, “Public concern with undocumented Mexican immigration heightened at the same time that the population of persons of Mexican ancestry grew in the United States.”

The 1996 Act amended the INA in a way that largely increased immigration enforcement, which included measures to keep undocumented immigrants out of the United States and deport those unlawfully present. Among the various sections of the 1996 Act, the law heightened border security, with more border enforcement agents and a new fence along the southern U.S. border, as well as expanded criminal grounds on which immigrants could be found inadmissible or deportable.

By expanding criminal immigration enforcement, the IIRIRA firmly equated those deemed illegal immigrants with criminals. Despite the fact that in 1993 Mexico contributed the highest number of legal immigrants than any other country, the national dialogue nevertheless framed Mexican immigrants as criminals and a drain on national resources, and hence illegal immigrants came to be synonymous with Mexican immigrants.

77. Id. at 1138.
79. See generally id.
Throughout the twentieth century, immigration laws have transitioned from promoting overt white supremacy to a more facially neutral brand of white supremacy. This colorblind approach stems from the 1965 INA, which instigated the growing animus against Mexican immigrants that, as evidenced by Donald Trump’s successful presidential campaign, is still politically and socially prevalent in the United States today. In considering the whole of the INA, the discrimination within the law is clear. Building on this background, this Article asks whether any part of the INA can escape its white supremacist roots. As a starting point into this inquiry, the next Part delves into the “exceptional and extremely unusual hardship” exception to deportation for undocumented immigrants.

II. THE HARDSHIP EXCEPTION

Deportation is the formal removal of a person born outside the United States for violating an immigration law. A person can face deportation whether or not they originally entered the country with a valid visa, so long as the person has been deemed to have violated an immigration law. Before being ordered to be deported, an immigrant has a right to be heard in front of an immigration judge regarding the grounds for deportation, although there is no right to representation during the hearing. After the immigration judge’s ruling, the immigrant is either ordered to be removed or not, and the immigrant can appeal the decision to the Board of Immigration of Appeals. Pending the result of the appeal or the completion of the removal, immigrants can be detained, though not indefinitely.

Section 240A of the INA provides for discretionary relief from deportation for an array of individuals: permanent residents, nonpermanent

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83. In all practicality, the terms “deportation” and “removal” are interchangeable, though the INA uses the word “removal.”


85. See id.


88. Deportation, supra note 84.

residents with a showing of hardship, and those who have suffered, or the children of those who have suffered, from domestic violence. Section 240A(b)(1), the focus of this Article, provides the Attorney General with discretion to cancel the removal of undocumented immigrants who (A) have been in the United States for ten consecutive years, (B) have good moral character, (C) have a clean criminal record, and (D) can show an exceptional and extremely unusual hardship to their spouse, parent, or child, who is either a U.S. citizen or permanent resident. This exception can be invoked after an undocumented immigrant’s case has been adjudicated and the immigrant has been ordered to be deported. The hardship exception has gone through several pivotal changes since its inception, some of which track the changes of the INA as a whole, as discussed above. This Part briefly outlines the major revisions this exception to deportation has seen, discusses where the law stands today, and illustrates how it is applied by U.S. immigration courts.

A. A Brief History of Deportation Relief

Prior to 1940, the Attorney General had no discretion to cancel any deportation orders. Instead, immigrants had to petition Congress through private bills to appeal their deportation. Needless to say, this was not a very efficient system. Due to the high number of private bills filed, in 1940 Congress granted the Attorney General discretionary power to cancel deportation orders based on proof of economic detriment to a lawful resident immigrant or to an immediate relative. However, this exception was placed in the Alien Registration Act, a broader, stringent set of immigration regulations borne out of the United States’ fear of government overthrow by political subversives. The humanitarian efforts of the relief from deportation were likely overshadowed by the content of the broader Act within which it was adopted.

Hardship was not a consideration for cancelling deportation until 1952, when Congress provided that the Attorney General could suspend deportation if the deportation would “result in exceptional and extremely unusual hardship.

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90. Immigration and Nationality Act § 240A(a)–(b); 8 U.S.C. § 1229b(a)–(b) (2012).
91. Id. § 240A(b)(1).
93. Id.
to the [immigrant] or to his spouse, parent or child, who is a citizen or an [immigrant] lawfully admitted for permanent residence," regardless of whether the immigrant was documented or not.96 The exception applied to immigrants who had continuously been in the United States for seven years, who had good moral character, and whose deportation would result in the hardship.97

By providing this discretionary relief, “Congress... wanted to ensure that meritorious [immigrants] would get the protection they deserved,” and it was generally understood that, with this exception, no immigrant “would be deported if it would be unconscionable to do so.”98 The 1952 “exceptional and extremely unusual hardship” exception was merely one section of the original INA, spurred by growing fears of Communist invasion—the result of which was more restrictive regulations, an expansion in the criteria for deportation, and decreasing executive discretionary powers.99

Deeming the 1952 exception both too restrictive and burdensome as Congress was overloaded with private bill petitions by immigrants who believed they did not qualify for the hardship exception, Congress passed the 1962 reforms to the hardship exception.100 With the 1962 revisions, the narrow and high bar of exceptional and extremely unusual hardship was reserved for immigrants deportable on criminal grounds, while those facing deportation for any other reason would have to show only an “extreme hardship”—a much lower standard—to either the immigrant or the immigrant’s spouse, parent, or child.101 Essentially, Congress expanded the “exceptional and extremely unusual hardship” exception to a mere “extreme hardship” requirement while maintaining the seven-year presence and good moral requirements, opting to reserve the narrower “exceptional and extremely unusual hardship” exception to immigrants ordered to be deported for criminal reasons.102 With these changes, immigrants deported for criminal reasons would have to show ten consecutive years of presence in the United States, as opposed to seven for noncriminal immigrants, and the same requirement of good moral character.103 These subcategories of relief operated until Congress amended the INA in 1996.

97. See id.
98. Griffith, supra note 92, at 1018–19.
99. Griffith, supra note 94, at 280; see supra Part I.B.
100. Id. at 284.
102. Id.
103. Id.
B. The 1996 Revisions

As discussed in Part I, the IIRIRA cemented the conflation of undocumented immigrants and criminals.104 This conflation can also be seen in the amendment to the unusual hardship exception from deportation. The 1996 Act expanded the “exceptional and extremely unusual hardship” standard to apply to all undocumented immigrants facing deportation, rather than only those convicted of crimes.105 Additionally, the presence requirement for the hardship exception for undocumented immigrants shifted to ten years—the same length immigrants convicted of crimes had previously been required to show.106 With this change, Congress now holds all undocumented immigrants to the previous hardship standards of immigrants convicted of crimes.107 This change greatly restricted discretionary relief for immigrants who may have needed it just the same prior to the enactment of IIRIRA.108

Another important change to note is that the hardship required could now only be that of the immigrant’s immediate relative who is either a permanent resident or U.S. citizen; gone were the considerations of any hardships that a deportation might inflict on the immigrant directly.109 This change shows a diminishing regard for the personal safety and wellbeing of undocumented immigrants facing deportation. Just as the body of the INA depersonalizes immigrants, the unusual hardship exception now fails to recognize the humanity in the immigrants upon which the law is being enforced.

This is the standard used today. Undocumented immigrants must show that their deportation would cause an “exceptional and extremely unusual hardship” on a spouse, parent, or child who is either a permanent resident or a U.S. citizen.110 They must meet the ten-year presence requirement, have a clean criminal record, and be able to show good moral character, despite how vague this standard may be.111 Lastly, it should be noted that the grant of this exception, along with all other exceptions included in Section 240A (five bases

104. Supra Part I.E.
106. Id.
107. See supra Part II.A.
109. Illegal Immigration Reform and Immigrant Responsibility Act § 240A(b)(1)(D) (stating that the petitioner must “establish[] that removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence”).
111. Id.
of appeal in total), is capped at four thousand approvals per year—a meager number for the thousands of immigrants who may need this type of relief.112

C. The Unusual Hardship Exception Applied

As discussed above, the unusual hardship exception was greatly narrowed in 1996 with the passage of the IIRIRA.113 With little guidance from Congress for applying this heightened standard and a very limited number of available approvals, immigration courts have had difficulty determining which immigrants facing deportation qualify for the hardship exception. The result, ironically, has often been that families deemed too normal—those incapable of showing exceptional and extremely unusual hardship—are ripped apart. In addition to the personal devastation of each dismantled family, the narratives resulting from the remaining broken families contribute to the broader anti-Mexican sentiment, rooted in the INA, which has become prevalent across the United States today.

In the United States, 56 percent of undocumented immigrants were born in Mexico,114 but Mexicans comprise nearly 63 percent of people removed from the country.115 About 58 percent of all unusual hardship appeals are filed by Mexican immigrants. Given these numbers, it is no secret that the unusual hardship exception, much like the country immigration ceilings116 and increased enforcement efforts,117 overwhelmingly affects Mexican immigrants more than any other group of immigrants.

The following narratives serve to illustrate the difficulties Mexican immigrants face from the more stringent hardship exception standard. Furthermore, they elucidate how the fractured families resulting from this

112. Id. The government publicly maintains only data on Section 240A approvals. As such, it is difficult to ascertain the exact number of applications submitted in any given year; however, in 2016, 340,056 immigrants were ordered to be removed. Any number of these immigrants, believing they qualified for relief, could have petitioned for relief under Section 240A. 2016 Yearbook of Immigration Statistics, Table 39: Aliens Removed or Returned: Fiscal Years 1892 To 2016, U.S. DEP’T HOMELAND SEC. (Nov. 30, 2017), https://www.dhs.gov/immigration-statistics/yearbook/2016/table39 [https://perma.cc/M9SF-8YVK].
113. See supra Part II.B.
116. See supra Part I.C.
117. See supra Part I.E.
heightened standard reinforce many of the racist and gendered stereotypes attributed to Mexican immigrants in the United States today.

1. Oscar Martinez

In 1955, Oscar Martinez was born in a small, poor town in Mexico. While he actively sought educational opportunities, he was compelled to prioritize working in order to help feed his family. After diligently working and failing to achieve the kind of financial stability he desired, Oscar moved to Oakland, CA in 1985. He did not have authorization to enter or work in the United States, but he soon found work making less than minimum wage. Undeterred, he found a better job six months later and stayed with that company until his deportation order in 2007. In addition to his full-time job with benefits, Oscar worked a part-time job to supplement his income and help take care of his family.

In 1996, Oscar met Zoila, whom he later married. Oscar had always been keen on being a father, and Zoila had two young children. Eager to start their life together, Oscar and Zoila, with their two children, settled into their community and became active members at church and community events. He was an active union member and involved in PTA meetings, school activities, and community athletic and cultural programs. By all accounts, he worked his hardest to contribute fully to the community he had made his home.

Oscar was arrested by U.S. Immigration and Customs Enforcement (ICE) in August 2007, and removal proceedings were initiated. A lawyer working on Oscar’s behalf argued for cancellation of the removal based on Section 240A(b)(1). Undoubtedly, this was a solid argument in Oscar’s case. By the time his proceedings were initiated, he had been in the country and in the employ of the same company for twenty-three years. He was a contributing member of his community, had no criminal record, and the hardship on his then ten- and thirteen-year-old U.S.-citizen children resulting from his removal would be severe.

The immigration judge hearing the case agreed that Oscar was a strong candidate for the § 240A(b)(1) exception, particularly noting the difficulty Oscar’s ten-year-old son would have with the adjustment of losing and growing up without the only father he had known. Consequently, the judge cancelled

118. Oscar’s narrative is gleaned from Bill Ong Hing, The Failure of Prosecutorial Discretion and the Deportation of Oscar Martinez, 15 SCHOLAR: ST. MARY’S L. REV. ON RACE & SOC. JUST. 437 (2013). Hing served as Oscar’s counsel during his appeal to apply the hardship exception.
Oscar’s removal. With this result, Oscar could remain a valuable member of his community, allowing him to further contribute his efforts at work, church, school, and home. His Mexican American children would continue to have an active father as part of their everyday lives. His Mexican immigrant wife could grow old in the same house with the man she married, and they could keep the home they had built together. This nuclear, quintessentially American family is not the typical image that the words “undocumented immigrant” conjure for most U.S. citizens.

Unfortunately, attorneys for ICE sought an appeal of Oscar’s cancellation, claiming that he failed to show sufficient hardship on his children to qualify for the exception. ICE brought the case to the Board of Immigration Appeals (BIA), and the BIA agreed. In their holding, they noted that the possibility of Oscar’s daughter being unable to attend college, due to the financial upheaval of Oscar’s removal, was not an exceptional and extremely unusual hardship. They also noted that Oscar’s son had no medical issues, so there would be no extremely unusual hardship to the son either.

With that, the BIA denied the hardship exception and ordered Oscar removed. In September 2011, Oscar peacefully exited the country in compliance with his removal orders. His family could not maintain the payments on their house, and they were forced to move to a less safe, low-income neighborhood. While he remained a part of his family’s life as much as he could via telephone calls, by all appearances to those unknowing, the Martinezes were now a low-income, single-mother Mexican family. This image falls more in line with the white supremacist stereotypes that many U.S. citizens have towards Mexicans, despite the fact that Oscar’s two children were, and had always been, U.S. citizens. Through implementing regulations of the INA, including the hardship exception, the immigration court not only left two American children fatherless, but it also perpetuated the racist and erroneous perception that Mexican women travel to the United States in order to have children and take advantage of social systems—an image invoked by Donald Trump during his campaign.119

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2. **Martha Andazola-Rivas**

Martha was a thirty-year-old Mexican immigrant who entered the United States without authorization in August 1985 at roughly the age of fourteen. She lived with her two U.S. citizen children, aged eleven and six, and her Mexican immigrant boyfriend, the father of her children. Prior to her deportation order, Martha worked for the same company for four years. She had health insurance for herself and her two children, and she had amassed some assets during her time in the United States. Fourteen years after her arrival, she was able to buy her own home. She had two vehicles and had managed to accumulate savings of $7000 from her income. Like Oscar, Martha was an active member of her community. She attended church with her family every week and volunteered at her child’s Head Start program.

Martha’s entire family had immigrated to the United States. Martha’s mother watched the children while she worked. In her appeal for a cancellation of deportation due to unusual hardship on her two U.S. citizen children, Martha emphasized her close family ties. The immigration judge agreed. In granting Martha the exception for exceptional and extremely unusual hardship, the judge emphasized the difficulty of uprooting the children from their family environment and support system. He expressed a concern that her children would likely fail in Mexican schools if they were forced to relocate, noting their limited Spanish-speaking abilities. Finally, the judge was concerned that, without the financial stability Martha was able to secure in the United States, the children would have to work in Mexico in lieu of going to school. The judge concluded that the hardship inflicted on the children would be unconscionable and granted the cancellation of removal.

Unfortunately, as in Oscar’s case, the Immigration and Naturalization Service appealed the grant of the exception. The Board of Immigration Appeals relied heavily on recent precedent to overturn the grant of the exception. *Matter of Monreal* attempted to clarify the requisite amount of hardship required to grant the exception. There, the BIA looked to Congress’s intent in tightening the hardship exception, tracing the language back to the original 1952 INA. The court stated that unconscionability—the ultimate standard used in 1952—was likely too high a burden for the present-day hardship exception to apply; at the same time, however, the court discussed cases that applied the 1952 standard, concluding that the same cases would come

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120. All facts are taken from *In Re Andazola*, 23 I. & N. Dec. 319 (B.I.A. 2002).
122. *Id. at 60; see supra Part II.A.*
nowhere near an exceptional or extremely unusual hardship by present standards.\(^\text{123}\) It appears contrary to the American ideals of a progressive society that a humanitarian relief section would be applied more stringently today than it was in 1952. Nevertheless, without providing more specific guidance, the court in Monreal stated that the hardship faced by the relative must be “substantially different from…that which would normally be expected from the deportation of an alien with close family members here.”\(^\text{124}\)

Just before reversing Martha’s grant of the hardship exception, the BIA noted, “We are sympathetic to the respondent’s case and to her situation. We have no doubt that she and her children will suffer some hardship upon moving to Mexico.”\(^\text{125}\) Therefore, the BIA indeed considered that Martha would likely not be financially stable in Mexico, that her children likely would not get a good education in Mexico, and that Martha and her children would be without any family in Mexico. But while the immigration judge believed these factors to be unconscionable, the BIA deemed them neither exceptional nor unusual enough.

Martha’s boyfriend had a temporary worker’s permit, so he was permitted to stay in the country. The BIA even indicated that he could send money to Mexico for Martha and the children, should they need it. Here, as in Oscar’s story, the family was split apart, with Martha being ordered to return to Mexico with her two U.S.–citizen children after contributing to U.S. society for seventeen years.

Aside from fracturing Martha’s family, the BIA’s decision left a single father working in the United States to send money to Mexico to support his family. This is yet another stereotypical narrative often lodged against Mexicans, painting a picture that Mexican men come to the United States to steal jobs and send U.S. money out of the country—a stereotypical image further invoked and reinforced by Donald Trump during his campaign.\(^\text{126}\)

Martha’s case is one of only three that the BIA has published as guidance on applying the current “exceptional and extremely unusual hardship” exception. The BIA considered and understood the hardships Martha’s children would suffer moving to a place they had never known, but ordered those hardships implemented despite that knowledge. The BIA’s analysis

\(^{123}\) Id. at 60–61.

\(^{124}\) Id. at 65.

\(^{125}\) Andazola, 23 I. & N. at 322.

shows that, even where there is extreme hardship, the stringent hardship exception likely will not apply, leaving lower courts with a dearth of uniform standards with which to apply the exception.

Martha and Oscar’s stories are just two of the thousands of examples of how the seemingly humanitarian sections of the INA not only operate to tear apart families, but also contribute to and perpetuate racist and gendered stereotypes of Mexican immigrants in the United States. The law shows a disregard for the wellbeing of immigrants without an immediate family member who is a U.S. citizen or permanent resident; if an immigrant has no immediate family member holding citizenship or permanent residency, the exception simply does not apply, regardless of the immigrant’s plight. Further, by providing only four thousand cancellation approvals each year and enforcing an amorphous “exceptional and extremely unusual” bar, Congress has tied the hands of immigration courts, rendering them incapable of delivering justice. At minimum, the enforcement of the INA sends the broad message that Mexican families are disposable. This ramification alone should warrant another look at the INA in its entirety, including the sections we might think already serve a positive, humanitarian purpose.

III. POSSIBLE RESOLUTION

Given the sordid history of U.S. immigration laws, resolving the racial disparity impacting Mexican immigrants and Mexicans in the wider American culture will not be easy. Nearly all immigration scholars shout, “Comprehensive immigration reform!” This Article sees no cause to break that mold. Indeed, comprehensive immigration reform is long overdue. The current INA is based on a Cold War–era, anticommunist protection law, yet concerns about communism would unlikely be considered in any immigration


128. See supra Part I.B.
laws written today. The INA is outdated and fails to provide necessary mechanisms to address the plight of the eleven million undocumented immigrants living in the country today.\textsuperscript{129}

This Article, however, cannot provide sufficient answers to specific immigration reform policies. Comprehensive immigration reform that addresses the white supremacy within immigration law will require hundreds of minor, individual decisions that collectively and slowly change the face of the law. Instead, this Article argues for more cultural understanding in passing new legislation. Understanding the racialized, gendered, and classed effects of immigration laws is not only morally imperative to our national consciousness, but perhaps constitutionally compelled as well.

Prior to the implementation of formal race neutrality, the INA had a century-long history of explicit race discrimination. As we saw in Part I, merely converting racialized language to neutral language can never solve the systematic oppression etched into the laws and culture during the many decades prior.

A more apt solution is cultural consciousness. The idea is not new—it invokes and builds on Charles Lawrence’s seminal critical race theory work, \textit{The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism}\textsuperscript{130}. In his work Lawrence urges that the “‘cultural meaning’ of an allegedly racially discriminatory act is the best available analogue for, and evidence of, a collective unconscious that we cannot observe directly.”\textsuperscript{131} Lawrence goes on to argue for judicial review that determines whether government action “conveys a symbolic message to which the culture attaches racial significance.”\textsuperscript{132} For instance, if the court finds that the broader culture considers an allegedly discriminatory governmental action to be racial, this informs the court’s determination of the motivations behind the action, since government actors are part of the broader culture. While Lawrence argues for this approach within the context of litigation challenging racially discriminatory legislation, I would argue for an extension of this approach to be applied when Congress considers and passes immigration reform.


\textsuperscript{131} \textit{Id}.

\textsuperscript{132} \textit{Id}.
White supremacy was built into the founding laws of the United States, including its immigration laws, as this Article has shown. In eliminating race-specific language in the laws, Congress did not eradicate the foundational white supremacy but rather silenced the discourse around its eradication. Present silence, however, will never remedy the systemic oppression that is being and has been inflicted upon people of color and other marginalized populations since centuries prior.

As such, I would urge Congress to consider and expand Lawrence’s approach to find cultural meaning in its immigration law actions. Prior to passing any additional immigration legislation, Congress should work to understand the current cultural harms being done by the INA, including the historical white supremacy upon which it was built. Ideally, Congress would understand how each provision of the INA impacts the raced, gendered, and classed cultural understandings of the groups the law is intending to reach. Then, by looking at current and past effects of the law, Congress would have better foresight to consider the potential harms of any proposed immigration legislation and how each proposed reform would work to ameliorate or sharpen those impacts. With knowledge, understanding, and acceptance of the pervasiveness of the white supremacy operating in U.S. immigration law, Congress has a moral and ethical obligation to consider these greater cultural harms when passing any kind of immigration reform into law. A country that bills itself as the land of opportunity and prides itself on being a melting pot of cultures demands nothing less.

Beyond a moral imperative, if the harmful cultural effects of the INA were known and accepted by the legislature, the Constitution may compel Congress to remedy those effects while passing new immigration laws. The Fifth Amendment provides immigrants with the right of due process, regardless of immigration status. Further, the amendment prohibits Congress from passing discriminatory legislation that amounts to a denial of due process. Thus, equal protection claims may be brought under the Fifth Amendment. If Congress were to heed Lawrence’s call for cultural understanding and come to understand the discriminatory nature of the INA, it likely would have a constitutional responsibility to resolve that discrimination through new legislation.

133. See supra Part I.
To provide an analogy, recent challenges to Donald Trump’s immigration policies reflect these protections as applied to the executive branch. Preliminary injunctions have been granted to curb the implementation of executive orders limiting immigrant entry into the United States from predominantly Muslim countries and rescinding the Deferred Action for Childhood Arrivals (DACA) program. Courts in these cases acknowledged plaintiffs’ claims of due process violations based on impermissible discrimination by the Executive, without dismissing the claims for lack of standing or validity. These preliminary decisions mention Trump’s biased rhetoric surrounding Muslim and Mexican immigrants as potentially probative to Fifth Amendment inquiries.

Arguably, these same principles should extend to Congress’s immigration legislation. If Congress has a moral obligation to understand the racialized, gendered, and classed effects of its own immigration legislation, it has a constitutional duty to ameliorate those effects upon understanding them. This duty, however, would necessarily depend on Congress’s own initiative first to learn the cultural impacts of the INA. Without understanding the broad cultural impacts of immigration laws prior to reforming them, policies that separate families and perpetuate racialized stereotypes will likely continue to hide behind the neutral language in the INA. This type of cultural awareness would require a conscious effort on the part of the legislature to understand these impacts; once the veil is lifted on the white supremacy controlling U.S. immigration laws, the Constitution compels Congress to better implement fairer policies for both immigrants in the United States and those aspiring to immigrate.

CONCLUSION

White supremacy is woven throughout U.S. immigration laws—even in its seemingly humanitarian relief sections. The critical race theory lens employed in this Article illuminates how structural white supremacy is reinforced through the INA. The law’s transition from explicitly racial to racially neutral language, while building a foundation of the anti-Mexican
animus seen in the United States today, affirms critical race theorists’ ascription that inequalities perpetuated by white privilege built into U.S. laws cannot be cured with a colorblind approach. A close analysis of one of the relief sections of the INA demonstrates that, indeed, no part of the INA can escape its white supremacist origins, while case narratives applying the specific relief section illustrate how the section not only harms Mexican families but the nation as a whole, as its broken application contributes to harmful stereotypes of Mexican immigrants. Should Congress develop a cultural awareness of the systemic harms perpetuated by the INA, it would be compelled to pass comprehensive immigration reform that addresses the white supremacy still affecting U.S. immigration laws today.

By taking a critical look at just a subsection of a subsection of the INA, this Article provides a small snapshot of the problems inherent therein; the issues span much further than the confines that this Article could possibly allow. Addressing such deeply rooted problems can be daunting and seemingly hopeless at times, but complacency is not an option. With a continued national dialogue, now augmented by the divisive rhetoric of the current, I am confident that, apart from the INA and governmental structures, we, as a nation, can begin to change the harmful narratives that are regularly foisted upon Mexican immigrants in the United States.