Journal of Civil Rights and Economic Development

Volume 26, Fall 2011, Issue 1 Article 7

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COLONIAL RELICS: UNEARTHING THE LINGERING TYRANNY OF COLONIAL DISCOURSE IN U.S.-CARIBBEAN IMMIGRATION LAW AND POLICY

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INTRODUCTION

Immigration law is constantly evolving. It is one of the most dynamic and multi-faceted areas of law. Specifically, in the space of asylum and refugee law, practitioners, immigration judges and our appellate courts face a daunting task of reconciling the law with the plethora of human misery that flock to our shores. The laws are plagued with ambiguity and complexity, and the task of interpretation is a daunting one. As a result, legal interpretation by our immigration courts can leave immigrants to languish in "a field of pain and death."[1]

This article will examine the politics of location inherent in U.S. immigration policy. I will explore the disparate treatment of Caribbean nationals in our immigration courts and the systemic discrimination that constrains the discretion of our immigration judges. My analysis will draw upon historical narratives that are steeped in the European-derived epistemology that constructed the Caribbean identity. The Caribbean basin has been more thoroughly colonized than any other area in the world.[2] Over centuries of European colonialism, the Caribbean peoples were subject to the dehumanizing and emasculating effects of having transplanted values and laws imposed upon them, often through the most

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1 *See* BRIAN BIX, LAW, LANGUAGE, AND LEGAL DETERMINACY 3 (1993) ("'[L]egal interpretation takes place in a field of pain and death'. By its place and function, legal interpretation is inextricably linked to the signaling of or the justification for deprivations of a person's goods or the imposition of violence or forcible constraints upon a person.") (quoting Robert Cover, *Violence and the Word*, 95 YALE L. J. 1601, 1601 (1986)).

2 Giselle Reid, *The Legacy of Colonialism: A Hindrance to Self-Determination*, 10 TOURO INT'L L. REV. 277, 279 (2000).

horrific means. In this historical context, this paper will demonstrate that the language employed during that era to maintain the twin demons of slavery and colonialism in the region, still informs the social construction of identity that permeates the rhetoric of "otherness" in United States immigration jurisprudence.[3]

I will argue that our immigration jurisprudence towards Caribbean nationals rests upon the ideology of "*Acquired Racist Syndrome,*" where the region and its peoples are still viewed through the lenses of slavery and colonialism. These imperialist assumptions continue to inform the international socio-legal formation that persists in subjugating the Caribbean peoples. For these immigrants, their fate rests upon the relics of slavery and colonialism that are preserved in the discourse surrounding U.S.-Caribbean foreign policy. To analyze this phenomenon, this paper will examine the historical immigration policies affecting immigrants from countries in the region of the Caribbean basin. Central to my thesis, is the idea that the presentation and re-presentation of peoples of color as belonging to a "lesser" world, was centripetal to maintaining the twin demons of slavery and colonialism, and has been adopted into U.S. notions of imperialism towards the Caribbean and its peoples.[4]

Part I will examine the theories underlying deportation in the history of U.S. immigration to provide background for the treatment of Caribbean nationals in our immigration courts. This historical account will demonstrate the slow change in the idea of the "undesirable" immigrants to this country. Part II will describe the legal tenets of slavery and its aftermath, colonialism, under the praxis of a racialized philosophy that nurtured these projects. It will also comment on how these ideologies persist to the present day in policies affecting the peoples of the Caribbean. Part III will illustrate the impact of deportation on families and the Caribbean region as a whole. Finally, Part IV will conclude by offering a prescription to assure that this particular group of immigrants receives fair and impartial hearings in immigration proceedings.

[3] *See* EDWARD W. SAID, CULTURE AND IMPERIALISM 9 (Alfred A. Knopf 1993) ("Neither imperialism nor colonialism is a simple act of accumulation and acquisition. Both are supported and perhaps even impelled by impressive ideological formations that include notions that certain territories and people *require* and beseech domination, as well as forms of knowledge affiliated with domination.").

[4] *See id.* ("[T]he vocabulary of classic nineteenth-century imperial culture is plentiful with words and concepts like 'inferior' or 'subject races,' 'subordinate peoples,' 'dependency,' 'expansion,' and 'authority.' Out of the imperial experiences, notions about culture were clarified, reinforced, criticized, or rejected.").

I. AMERICAN HISTORY OF ANTI-IMMIGRATION POLICIES – IMMIGRANTS AS THE "OTHERS"

Anti-immigrant sentiment in the U.S. dates back as far as its earliest British settlers. The first English pioneers viewed subsequent arrivals as "a problem" because they worried that the new arrivals would become a burden.[5] The writings of that time capture the sentiments of the day and provide the bedrock for the discourse that still permeates the laws and the social response to immigration in the United States. Subsequent groups seeking entry to the budding U.S. were considered "Others" who were beyond the scope of concern for the white, English settlers. For example, one pre-revolutionary publication referred to new immigrants as "the dregs, the excrescence of England." Similarly, colonial writer Samuel Johnson referred to the new arrivals as "a race of convicts . . . who ought to be content with anything we allow them short of hanging."[6]

These sentiments echoed throughout the formation of the developing United States and still resonate today in legislation such as the Arizona SB 1070 anti-immigrant legislation.[7] The rationale behind the Arizona Bill shares the same anti-immigrant sentiments and foundations as those that prompted legislation during the colonial period of this country. U.S. immigration policies continue to perceive those seeking to immigrate to this country as a "problem" concerning groups of outsider "Others" without much concern for the humanity of those deported back to dangerous home countries.

In the colonies, naturalization was used selectively, both as an inducement to settle and as a tool of exclusion. During the eighteenth century, a grant of naturalization in the colonies was reserved exclusively for Englishmen and denied to aliens. This use of deportation as a tool of exclusion springs from a desire to alienate the "Other." Wielding deportation in this way menaces immigrants by threatening them with exclusion from their families, homes, and jobs for minor infractions. But, this form of weaponized deportation also acts as a Sword of Damocles for the United States. The absolute power to deport can corrupt through an ever-growing fear of immigrants. Ironically, the overuse of deportation to "solve" the immigrant "problem" can create the belief that reliance on deportation is necessary.

5 Richard Vedder, Lowell Gallaway & Stephen Moore, *The Immigration Problem Then and Now*, 5 BENDER'S IMMIGR. BULL. 341, 341 (2000).

6 *Id.*

7 S. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

This phenomenon of exclusion was given new life in the aftermath of the Civil War when ex-slaves were catapulted to the status of "aliens." In 1798, the first anti-immigrant law, The Alien and Sedition Act of 1798, was given effect.[8] After this initial push of anti-immigrant legislation, the federal government softened its posture to create more immigrant-friendly legislation. However, the benefit of this newfound empathy was reserved for people emigrating from Western Europe. In a backlash towards Irish and later Chinese labor, American society began to employ a rationale for exclusion. The response to the political current led to legislation. Laws were passed on the platform that "Americans must rule America." From this clarion call, the rule that only native-born citizens should be selected for the office of the President of the United States was born. [9]

A. The Lincoln Project: Fugitive Slave Laws, Colonization, and the Epistemological Threads of Race-based Immigration Policy

Modern immigration laws as they relate to immigrants of color, spring directly from the bedrock of post-Civil War American politics. The ideology that permeated the debate in the early days of the colonies devolved into exclusion based on race. The Dred Scott case of 1857, confirmed that in the eyes of the judiciary and the new United States, ex-slaves were not citizens.[10] As the slave machinery began to falter with the pending Civil War, however, the slavery question was transformed into the "emigrant problem."[11] After the war, the pivotal question on the mind of the government was whether these slaves were Africans or Americans.

President Abraham Lincoln, the "father of emancipation," determined the solution would be: mass deportation back to Africa, Central America, and the West Indies.[12] With the federal government's blessing, the states began to enact legislation that would employ Lincoln's idea of a solution. Beginning in April 1860, the State of Arkansas decreed that all free

8 The act consisted of four acts, three of which were immigration related: (1) The Naturalization Act, 1 Stat. 566, 566 (1798); Increased residence period from 5 to 14 years. Later restored to 5 years by the Naturalization Act of 1802, 2 Stat. 153, 153 (1802); (2) The Alien Act, 1 Stat. 570, 571 (1798) authorized the President to expel dangerous aliens; and (3) the Alien Enemies Act, 1 Stat. 577 (1798), which provided that whenever there is a declared war with another country, male nationals of that country, age 14 and up, may be detained or removed by proclamation of the President. The provision restricting the law to males was eliminated in 1918. *See* 40 Stat. 531 (1918). This law still exists today and is codified at 50 U.S.C.S §§21–24 (2011).

9 *See* Vedder et al., *supra* note 5, at 350.

10 Scott v. Sandford, 60 U.S. 393, 406 (1857).

11 DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 83–90 (2007).

12 *See id.* at 90.

Africans were to leave the state or be forced back onto plantations. Notably in April 1862, a group of ex-slaves petitioned the Congress to prevent their deportation to Central America. In their petitions, the group articulated the fear of being transported to these lands and implored the United States to preclude their removal. These same lamentations echo in modern day asylum petitions, that often employ the same language of fear when faced with deportation to their country of origin.

Ironically, the countries where the former slaves were to be sent are the same countries that are the focus of this article. The aspirations of citizenship articulated by these former slaves bears an eerie parallel to the plight of many immigrants of color today. The swiftness by which U.S. immigration policy divests non-citizens of permanent residency can be traced directly to the treatment of these American-born children of former slaves.

Specifically, the group of former slaves stated that they were fearful of being sent to Liberia, Haiti, and Afro-West Indian Islands "where vice reigns supreme and where [their] very blood would be required if [they] oppose its indulgence."[13] Like modern day asylum seekers, these ex-slaves articulated credible fears of persecution if they were sent back to their homeland, or relocated to some other part of the world. The petition further stated that "though colored and debarred from rights of citizenship, our hearts none the less cling to the land of our birth."[14] The ex-slaves further pleaded their fervent need to remain and become productive citizens that would add value to the country.

Despite resistance from abolitionists, the social current in the country during this period was pro-deportation of the former slaves and their descendants. Some championed the removal based on the idea that the "republican system was meant for a homogenous people."[15] Others argued that their removal was justified on the premise that "as long as blacks continue to live with the whites they constitute a threat to the national life . . . . [T] he increase of mixed breed bastards may some day challenge the supremacy of the white man."[16]

Our modern immigration jurisprudence echoes these sentiments of removal and relocation of immigrants based on race, modern asylum laws echo the sounds of colonial discourse championed by President Lincoln.

13 *Id.* at 87.
14 KANSTROOM, *supra* note 11, at 87.
15 *Id.*
16 *Id.* at 87–88.

Lincoln justified his removal policies on the basis that removal was better for the ex-slave. One central tenet of U.S. asylum law is to relocate petitioners to different parts of the country or to grant them temporary asylum if conditions improve in the home country.[17] Lincoln introduced the idea that socially undesirable groups can be dealt with through deportation legislation, calling for the removal of blacks under the guise of returning foreign nationals to their countries of origin. The fact that freed slaves had not come to the United States of their own free will apparently had no bearing on the pressing national need to deport them.

B. Aftermath of the Lincoln Project: Expanding Exclusion from Slaves to Ethnic Immigrant "Others"

Once the post-Civil War anti-immigrant laws were enacted and enforced, precedent was set to forcibly deport racial groups under the guise of protecting American ideals. This institutionalized racism against the former slaves made further racially based anti-immigration legislation much more palatable to the American people.[18]

The Chinese Exclusion Act of 1882 was largely based on labor issues. Both major parties denounced the practice of hiring immigrant labor. The debate was couched in the language of denigration. Republicans designed their argument to denounce, "contract labor" while Democrats chose the more colorful terms of, "foreign labor" and "servile races."[19] The debate then took a racial turn; anti-immigrant advocates put forward arguments that American institutions were Teutonic (Anglo-Saxon or German) in origin, thus, the society must contain only those of the Teutonic race to sustain it. One Senator even proclaimed regarding the Teutonic peoples that God had made them "adept [] in government that [they] may administer government among savages and senile peoples."[20]

This worldview carried over to the 20th century where the enactment of legislation continues to respond to anti-immigrant fervor. The Refugee Act of 1980 created the Federal Refugee Resettlement Program to help refugees make effective and self-sustaining transitions into the United States.[21] This helpful legislation, however, was enforced six years later by, The Immigration Reform and Control Act of 1986, which requires employers to

17 Immigration and Nationality Act, 8 U.S.C. § 1101, et seq.
18 KANSTROOM, *supra* note 11, at 74.
19 GEORGE FRANCIS DAWSON, THE REPUBLICAN CAMPAIGN TEXT-BOOK FOR 1888 15 (1888).
20 33 CONG. REC. 711 (1900) (statement of Sen.Beveridge).
21 Refugee Act of 1980, 8 U.S.C. § 1521 (2011).

confirm the immigration status of employees.[22]

In 1996 responding to anti-immigrant sentiments, President Bill Clinton signed two significant Acts into law, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) and the Anti-terrorism and Effective Death Penalty Act (AEDPA).[23] These two acts passed as the next Congressional hurdle to legal immigration into the United States. Both IIRAIRA and AEDPA curtailed the much-needed judicial review of immigration decisions and cast a wide net, effectively causing more aliens to be detained and deported.[24] Specifically, IIRAIRA increased the number of criminal acts for which a non-citizen could be removed from the United States and eliminated most forms of relief for immigrants. In sum, both Acts greatly expanded the grounds for removal of non-citizens from the U.S. by cloaking the grounds for removal under the branch of aggravated felonies. This re-characterization changed the criteria for aggravated felonies of five years or more to those of one year or more.

The IIRAIRA bars foreign nationals unlawfully present in the U.S. for less than a year from legal re-entry for at least three years. Those unlawfully present for over a year are barred from re-entry for ten years. In either case, a foreign national removed from the country under IIRAIRA, who returns to the U.S. before the re-entry period has expired, will be permanently barred from the U.S. This type of zero-tolerance anti-immigration legislation arose from post-emancipation American history. Once anti-immigrant legislation became the vehicle for racism against freed slaves, the accompanying dehumanization seemed part and parcel with controlling immigration problems.

II. UNIQUE IMPACT OF CARIBBEAN NEOCOLONIAL DISCOURSE IN U.S. IMMIGRATION COURTS

A. Colonial Discourse and Understanding Persecution as Historically Defined

In its broadest sense, post-colonial scholars seek to mete out the cultural,

22 Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324(a) (2011).

23 Illegal Immigration and Reform Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as 8 U.S.C. § 1101), and Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as 18 U.S.C. § 1).

24 *See* Zadvydas v. Davis, 533 U.S. 678, 697, 701 (2002) (holding that immigration authorities may not hold a noncitizen in detention indefinitely following a removal order when that person cannot be returned to his or her home country). *But see* Demore v. Kim, 538 U.S. 510, 533 (2003) (holding that due process does not entitle a non-citizen to release pending removal proceedings).

social, political, and economic legacy of colonization. Colonialism includes a form of paternalism on the part of the colonizing power. The colonizers presumptuously assume control over the culture, knowledge base, and social structure of another country. Part of the legacy of colonialism is intellectual and sociolinguistic. Colonizers imposed their laws and language upon the newly subjugated natives. As a result of this, the assumptions and arguments often made by the colonizing power, act as a heavy hand of paternalism. Its fingers run long and deep into the fabric of a colonized people, reaching far beyond the period of colonization itself. The history of a colonized people requires specialized attention and nuanced understanding to parse out the legacy of colonialism from the true needs and desires of a post-colonized people.

B. Colonial Discourse in the Caribbean Basin: Imported Persecution of Homosexuals, Blacks, and Women

The Caribbean basin was one of the largest centers of resistance to slavery and colonial projects. Additionally, the region has been under the hand of colonialism for over 500 years.[25] This is not surprising considering the region was home to one of the largest plantation societies during the era of slavery, and Caribbean slavery was one of the most brutally savage of these inhumane projects. Writers from this era chronicled the excessive brutality that was visited on the Caribbean peoples at the hands of the colonizing Europeans.

The unequal tension between dominance and subjection defines the history of the Caribbean. The English colonial policy was one of "beggar my neighbor", a theory of colonialism holding that the loss of one nation is the gain of another.[26] From its inception, the aim of Caribbean colonization was to capitalize on the oppression of the Caribbean peoples and exploit their resources.

The genesis of modern slavery and anti-black racism was employed to guide the European construction of blackness and whiteness. Caribbean natives not only had the concept of blackness and whiteness forced upon them by their European colonizers, but also a hierarchical system placing whites at the top and stratifying blacks based on European notions of law, ethics, and social order. The oppressed came to depend on their colonizers for their legal, economic, social, and educational systems.[27] In the modern-

25 Reid, *supra* note 2, at 279.
26 *Id.* at 281.
27 *Id.* at 279.

day Caribbean, the social order retains these linguistic markers of colonialism, which is articulated through neocolonial power. Sociolinguistic scholars define neocolonial power as the power that a former colonial ruler exercises over its former colonial subjects.[28] This power is often manifested in the laws and regulations that are promulgated to control the former colonial subjects.

During slavery and the colonial period, these laws were drafted as vagrancy acts. Much like the Australian aboriginal laws that were created to make the aboriginal Australians "illegal" because of their aboriginality, the vagrancy acts were enacted as a means of controlling the slaves and newly freed peoples of the Caribbean.[29] These laws prevented ex-slaves from making any economic or social progress in the post-plantation societies by functionally forcing them back onto the plantations as little more than indentured servants. Similar to serfs in feudal England, former slaves and their descendants were forced to continue their subhuman existence guided by post-colonial law. Today, immigration policies of developed nations perpetuate the inhumane treatment of Caribbean peoples by the enactment of draconian immigration laws that are designed to exclude persons from the Third World, and their former subjects. - The immigrations policies of European Countries and the United States are articulated in the language of colonialism, which bestows a subhuman status upon the colonized, and denies restitution to the victims of persecution. .[30]

U.S. deportation laws reflect these same tendencies. Today, Caribbean nations are reeling from the influx of deported persons. The punitive nature of our immigration laws towards peoples of the developing South, and specifically the Caribbean islands, is a legacy of the plantation punishment that was guided by strict political doctrines that were at once anti-feminist and anti-black. In plantation societies, punishment was meted out to attack the social psychology of the slave so as to make the individual a non-entity. These same ideologies still exist in immigration policies today. U.S. immigration policy towards Caribbean nationals preserves this Eurocentric discourse in the harsh punishment of deportation and incarceration that is afforded to Caribbean immigrants. Immigration law, then, maintains the

28 *See* Diana Eades, *Courtroom Talk and Neocolonial Power*, *in* SOCIOLINGUISTICS AND THE LEGAL PROCESS 115, (MM Textbooks 2010).

29 *See* ROSE-MARIE BELLE ANTOINE, COMMONWEALTH CARIBBEAN LAW AND LEGAL SYSTEMS 21 (2d ed. 2008) (stating that after the abolition of slavery, the law and legal systems continued to reflect the unequal structure of the ex-slave, colonial society, and were used to reinforce this structure).

30 *See generally* ALBERT MEMMI, THE COLONIZER AND THE COLONIZED (Beacon Press 2d ed. 1991)

status quo of control and containment, disguised as laws to preserve national security.[31]

The mandatory deportation scheme currently in place has effectively wiped out most forms of relief for those immigrants caught in the criminal justice system. Historically, deportation laws for those committing crimes had some semblance of humaneness. Since 1988, however, Congress has passed a series of reform acts with dire consequences for non-citizen, legal permanent residents. The wide net cast by these provisions and the formalistic interpretation employed by immigration judges have a disparate impact on Caribbean immigrants. The Anti-Drug Abuse Act (ADAA) of 1988 defined an aggravated felony as "murder, any drug trafficking crime . . . or any illicit trafficking in any firearms or destructive devices . . . or any attempt or conspiracy to commit any such act committed within the United States."[32] This broad provision has disproportionately impacted Caribbean nationals. Not only are Caribbean nationals subject to the same dangers from drug abuse as the rest of the United States, but certain drugs are affiliated with cultural or religious practices from the region that make Caribbean nationals disproportionately susceptible to the ADAA.

In 1988, a discretionary waiver from deportability became available to many of these immigrants who could apply under Section 212(c) of the Immigration and Nationality Act (INA). Under Section 212(c), a legal permanent resident who can demonstrate seven years of consecutive residency in the United States and show family ties can petition the court for a waiver of deportation. Under that scheme, the immigration judge may consider the humanitarian concerns of familial relationship to avert deportation. Although not a panacea for the ills of deportation, Section 212(c) offered a stopgap measure to stem the tide of broken families caused by deportation for less severe crimes.

Unfortunately, much of the protective power of Section 212(c) has been reigned in. As a response to the "War on Drugs," Congress has since passed more draconian laws and in the same stroke effectively eradicated Section 212(c) relief. Beginning in 1990, relief under Section 212(c) waned with the passage of the Immigration Act. This Act broadened the ADAA by expanding the definition of aggravated felony to include any "illicit trafficking in any controlled substance" and any crime of violence or

31 *See generally* DUNCAN KENNEDY, THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 5 (David Kairys ed., Pantheon Books 1982) ("The law is a major vehicle for the maintenance of existing social and power relations . . .").

32 Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469 (1988) (repealed 1997).

money laundering for which the term of imprisonment imposed exceeded five years. In addition, the ADAA provision that criminalized only acts relating to trafficking "within the United States" was broadened to be more universal, encompassing state, federal, or foreign law.

With all these revisions to the ADAA, Section 212(c) relief was unavailable to a large class of immigrants who, more often than not, could not satisfy the new requirement that the imprisonment be less than five years since our sentencing guidelines for drug crimes are inherently biased towards persons of color. With the dilution of Section 212(c), the deportation regime has spiraled out of control, often with disproportionate consequences on Caribbean nationals and their families.

C. Impact of Colonial Discourse in Immigration Courts: Misguided Deportation of Caribbean Nationals

Legal Caribbean immigrants who have adopted this country as their own continue to be deported often without due process of law that affords constitutional protections to permanent residents as well as United States citizens. Newly enacted rules such as AEDPA and IIRARIA effectively foreclose the route of immigration remedies to Caribbean immigrants who are convicted of certain crimes in the United States. Foremost among these, are crimes involving narcotics to which these groups are highly susceptible.[33]

In *United States v. Copeland*, a Jamaican national was denied relief from deportation due to the immigration judge's erroneous interpretation of Section 212(c).[34] In this case, Copeland had been a resident of the United States since the age of 12. He had emigrated with his maternal grandmother, a U.S. Citizen and his closest living relative. Copeland married a United States citizen and had two children who were also U.S. citizens. For all purposes of belonging, kinship and identity, Copeland was an American. Yet, he was deported through a draconian interpretation of the law and denied the relief to re-enter and be reunited with his family. The harshness inherent in this case is that the burden is placed on the defendant to demonstrate that he likely would have been granted relief under Section 212(c) if his hearing had been granted.[35] A denial of due process, which occurred here, should never have been imposed on the

33 Dawn Marie Johnson, *The AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes*, 27 J. LEGIS. 477, 485 (2001).

34 United States v. Copeland, 376 F.3d 61 (2d Cir. 2004).

35 *Id.* at 66.

petitioner since the petitioner was denied a fundamental right based on alienage classification. Thus, these types of claims mandate a strict scrutiny standard where the burden is on the government.[36]

III. IMMIGRATION POLICY AS A TOOL OF U.S. HEGEMONY IN THE CARIBBEAN BASIN: TURNING A BLIND EYE TO CARIBBEAN PERSECUTION AND PLEAS FOR ASYLUM

U.S. immigration laws are cloaked in a mantle of political power.[37] The law is feeble in the face of the political machinery and does nothing to prevent its improper exercise. For Caribbean immigrants, the law is an instrument that entrenches white supremacy.[38] In the field of immigration, racial identity is often a pivotal factor in the decision to confer immigration benefits. While I reject the argument that judges are innately racist, the legal culture in which they operate is grounded in racist beliefs. Often, the decision of who gets deported and who gets to immigrate is guided by the racist ideology that people of color are inferior and, therefore, less desirable than their white counterparts.[39]

Immigration policies maintain the ideology of colonialism through the threat of deportation and exclusion. The power of the slave master evolved into that of the colonial master with the attendant ability to dehumanize the colonial subject. This tendency to dehumanize "otherness" is inscribed in U.S. immigration policies towards immigrants from the Caribbean Basin, and the Third World in general. The tendency to denigrate this group of immigrants are manifested not only in our courts, but in American society as well. In that vein, even the legal permanent resident (LPR), and those who have been naturalized live in a constant state of flux – feeling only an artificial sense of "belonging." This insecure status on the part of the green card holder led one Supreme Court Justice to opine that the LPR could remain in U.S. only as a "matter of permission and tolerance" and that deportation "deprive[s] a man and his family of all that makes life

36 *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1281-85 (2007); *see also* Graham v. Richardson, 403 U.S. 365, 371-72 (1971).

37 Vedder, *supra* note 5, at 341 ("By long established custom whoever speaks of immigration must refer to it as a 'problem.'") (quoting Marcus Lee Hansen, *The Problem of the Third Generation Immigrant*, AUGUSTANA HISTORICAL SOC'Y PUBL'NS, 1938).

38 *See* DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 5-7 (Aspen 5th ed. 2004).

39 *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection Reckoning with Unconscious Racism*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, 235, 238 (Kimberlé Chrenshaw et al. eds., 1995) (discussing unconscious racism and the inadequacies of equal protection analysis to account for unconscious racism).

worthwhile."[40] In sum, a legal permanent resident's constitutional rights are tenuous - a simple misdemeanor can snatch those rights away by the stroke of the immigration judge's pen. Even naturalized citizens are not immune from this damning act. A naturalized citizen can also be transformed into a "foreigner."[41] At the heart of the deportation power is the dehumanization of the "Other." Ostracism and banishment are the tried and true methods employed to reinforce "otherness."

Historically, Caribbean nationals facing deportation are more likely to be denied immigration benefits than immigrants from other countries. The difficult hurdles faced by this group of immigrants beg the question of whether race is a factor in the disposition of these cases. The answer lies in the relationship between the United States and the countries of the Caribbean in the aftermath of the decolonization of these island nations from the former colonizing powers of Europe.

United States immigration policy as it relates to Caribbean nationals has historically been a relationship based on geopolitical convenience. Since the decolonization process began in the late 1960s, countries in the region became pawns in the United States goal for hegemony. Today, these island-nations, former colonies of Britain, France, Spain, and The Netherlands still continue to flounder within their own space, and on the international stage.[42]

To illustrate this premise, the cases of Cuba and Haiti are instructive. Since European encounter with the inhabitants of these two nations, these two countries have been embroiled in conflict with the major world powers that colonized them. In modern times, the United States was the last major world power to become involved in an embattled relationship with these two nations. A glimpse into the workings of U.S. immigration policy towards asylum seekers and other immigrants from these two nations provoke a glaring curiosity. In the immigration context, Cubans are preferred over Haitians. The preference for Cuban immigrants stems from the geopolitical climate of the Cold War. Since the Cold War began, U.S. immigration policy towards the region has been a tool of foreign policy often used as a double-edged sword to the peoples of the region.[43] Although the citizens of both countries share similar histories of brutal and

40 Harisiades v. Shaughnessy, 342 U.S. 580, 586-87, 600 (1952).

41 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004) (noting that a naturalized citizen can be held has an enemy combatant if they associate with the military of an enemy government).

42 See generally, Newton, Velma, Commonwealth Caribbean Legal Systems at 13 (1989).

43 *See* EVA ESZTER SZABO, U.S. FOREIGN AND IMMIGRATION POLICIES IN THE CARIBBEAN BASIN, 188 (Horváthné Dr. Katalin Molnár ed., 2007).

repressive governments, the treatment of immigrants and asylum seekers from both countries are starkly discriminatory.[44]This preferential treatment of Cubans over Haitians has its genesis in the racist ideology of slavery and colonialism. The historical discrimination policies towards Haiti since that Nation's defeat of the French in 1804 speak volumes of the racist undertones that characterize its relationship with the United States today.[45] The 1966 Cuban Adjustment Act (CAA) guaranteed that Cubans living in the United States for at least one year after January 1, 1959 were eligible to adjust their immigration status to that of lawful permanent resident. This legislation set in place a preferential treatment for all Cuban migrants. As a result, Cuba ranks as the country sending the fifth largest number of immigrants to the United States.

A. Coup and Earthquake Syndrome – Periodic Popular Interest in Caribbean Basin

When the United States takes notice, it is in the aftermath of a great tragedy as occurred in the 2010 earthquake in Haiti. On January 12, 2010, Haiti suffered a 7.0 earthquake that killed over 222,000 Haitians and left countless others devastated. Among the victims of the Haitian earthquake were hundreds of thousands of Haitian children orphaned by the tragedy. In response, Congress passed H.R. 5283 – the Help Haiti Act of 2010 - ,which allowed the Secretary of Homeland Security to change these Haitian orphans status to permanent resident status in order to expedite the immigration of these children to the United States.

The generosity and care directed towards the Caribbean basin during these types of mass tragedies are appreciated and needed. However, immigration policy cannot be designed around periodic tragedies and should not reserve its sense of decency and humanitarianism for globally publicized events alone.

B. Seeking Asylum in United States

Citizens of the developing South seeking asylum in the United States have three options. The broadest protection is the granting of asylum. Under the Immigration and Nationality Act, foreign nationals may be

[44] See Alice Barrett and Kelsey Cary, Commentary: Disparities in U.S. Immigration Policy Toward Haiti and Cuba: A Legacy to be Continued?, Reprinted from Caribbean Net News, available at www.caribbeannetnews.com, visited on 9/4/2010.

[45] See Randall Robinson, Haiti, From Revolution to the Kidnapping of a President: An Unbroken Agony, (Basic Civitas Books, 2007).

granted asylum into the United States if they can demonstrate a well-founded fear of persecution based on race, religion, nationality, political opinion, or membership in a particular social group.[46] Even a ten percent chance of persecution upon return to the applicant's country of origin can establish a well-founded fear.[47] Despite impediments such as language barriers and a developed mistrust of government authorities, asylum seekers are returned to their countries of persecution, regardless of the merits of their cases, if they fail to apply for asylum within one year of their arrival to the United States.[48]

Alternatively, these refugees may also seek a withholding of removal[49] from the United States to their country of origin, but only by meeting a higher "more likely than not" standard.[50] Lastly, these refugees may also seek a withholding of removal under the Convention Against Torture Act, which requires refugees to demonstrate that it is "more likely than not" that they will be tortured if returned to their country of origin.[51]

In recent years, U.S. immigration courts have been presented with asylum claims from the Caribbean region ranging from domestic violence to homosexuality to ethnic cleansing. Most of these asylum cases are unsuccessful because of the insurmountable hurdles applicants need to overcome to avoid deportation back to the place of persecution. One particular area of contention is the burden on applicants to demonstrate "persecution." In the immigration context, this word is subject to varying interpretations, which produces nightmarish results for asylum petitioners. This is an especially significant problem for asylum seekers whose countries are not located in the so-called "axis of evil" zones. These claims are often met with skepticism and allegations of fraud, derailing the application process.

More often than not, these cases are dismissed based on deficient findings of "persecution." Some immigration advocates assert that these cases languish because of patriarchal severity and myopic judges who are culturally blind and ignorant to issues that are unique to countries in the developing South plague our immigration jurisprudence. For example, to qualify for asylum, victims must first demonstrate persecution. A refugee

46 Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (2011).

47 I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987).

48 Elizabeth Brundige, *Too Late for Refuge: An International Law Analysis of IIRAIRA's One-Year Filing Deadline for Asylum Applications*, 7 BENDER'S IMMIGR. BULL. 778 (2002).

49 Unlike asylum, withholding of removal does not extend to the recipient's family and is not a step towards ultimately obtaining U.S. citizenship. *See id.*

50 8 U.S.C. § 1231(b)(3) (2011).

51 8 C.F.R. § 208.16(c)(2) (2011).

is someone who "is unable or unwilling to avail himself or herself of the protection of that country 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."[52]

In *I.N.S. v. Elias-Zacarias*, the court held that a generalized fear of persecution because of political opinion was insufficient to offer asylum to a petitioner.[53] In *Ford v. I.C.E.*, the Third Circuit upheld a denial of asylum based on homosexual persecution to a Jamaican petitioner. The court held that although some evidence showed that homosexuals were tortured in Jamaica, no evidence was provided that this was visited upon a majority of homosexuals. This decision was handed down to a Jamaican immigrant in the face of binding Board of Immigration Appeals (BIA) precedents, holding that homosexuals were a protected group for asylum purposes and under the Convention Against Torture (CAT). A year later, the 3rd circuit articulated these same reasons in *Parker v. Ashcroft*, another Jamaican Petitioner seeking asylum based on homosexuality.

Persecution of homosexuals is pervasive throughout post-colonial and modern Caribbean nations. Jamaican homosexuals can expect police harassment, mob attacks, arbitrary detention, and protective custody in poorly operated prisons.[54] Haitian homosexuals also suffer at the hands of repressive regimes, suffering expulsion from public schools, arrests without reason, and physical attacks by both mobs and police forces.[55]

C. Persecution Based on Homosexuality in the Post-Colonial Caribbean Basin

The Matter of Toboso-Alfonso, a precedent case, establishes homosexuality as a ground for asylum.[56] As required by Cuban law, Toboso-Alfonso's last thirteen years in his home country of Cuba were spent as a registered homosexual.[57] He was summoned by the Cuban government every two or three months for a physical examination that included questions about his sexual activities and partners. These summons were triggered by his status as a homosexual, rather than

52 8 U.S.C. § 1101(a)(42)(A).

53 I.N.S. v. Elias-Zacarias, 502 U.S. 478, 482 (1992); *accord* Amanfi v. Ashcroft, 328 F.3d 719, 727 (3d Cir. 2003).

54 2003 U.S. Dep't of State, COUNTRY REP. ON HUM. RTS. PRACTICES: JAMAICA, *available at* http://www.state.gov/g/drl/rls/hrrpt/2003/27904.htm

55 2010 U.S. Dep't of State, COUNTRY REP. ON HUM. RTS. PRACTICES: DOMINICAN REPUBLIC, *available at* http://www.state.gov/documents/organization/160162.pdf

56 In re Toboso-Alfonso, 20 I. & N. Dec. 819, 822-23 (B.I.A. 1990).

57 *Id.* at 820.

particular homosexual acts.[58] Further, he "simply took [it] as a matter of course" that police would jail him without charges.[59] Due to his status as a homosexual, he spent sixty days in a forced labor camp for missing work on one occasion.[60]

Toboso-Alfonso was initially paroled into the United States during the 1980 Mariel boatlift. Shortly before Toboso-Alfonso left Cuba, a communist youth group held an approved anti-homosexual demonstration at his workplace during which participants climbed atop tables screaming that all homosexuals should leave Cuba.[61] That same day, the Chief of Police gave him a week to decide between a four-year prison sentence for being a homosexual, or leaving Cuba for the United States.[62]

The Board of Immigration Appeals found these circumstances sufficient to consider Toboso-Alfonso's homosexuality a particular social group for the purposes of establishing persecution for his asylum claim.[63] In 1994, the Attorney General ordered the decision designated as precedent.[64]

Despite *Toboso-Alfonso*, our immigration courts have been slow to find a pattern or practice of persecution of homosexuals in Jamaica and other Caribbean nations.[65] Until very recently, homosexual applicants claiming persecution in Jamaica based on their homosexual status were denied asylum. As late as 2004, the Third Circuit ruled that there was no evidence of torture against homosexuals in Jamaica because "a substantial portion of homosexuals in the country did not fall prey to [that] fate."[66] It is noteworthy that Jamaica prohibits homosexuality in its Constitution.

For Jamaican asylum seekers, the carrot, rather than the stick, is now extended because the Jamaican government is asserting itself against the imperialist policies of the U.S. Historically, the global response to this resistance has been one of economic reprisals, which were sometimes demonstrated by immigration policies that were, and still are, at once both carrots and sticks. These responses stem from colonial discourse steeped in racist and anti-feminist ideologies. A study of the policies geared towards

58 *Id.* at 821.
59 *Id.* at 823.
60 *Id.* at 821.
61 *Id.*
62 *Id.* at 821.
63 *Id.* at 823.
64 In re Matter of Toboso-Alfonso, 1994 Op. Off. Legal Counsel 73 (June 16, 1994).
65 *See* Bromfield v. Mukasey, 543 F.3d 1071, 1080 (9th Cir. 2008) (holding the immigration judge erred in concluding that there was not an established practice of persecution of homosexuals in Jamaica).
66 Ford v. I.C.E., 294 F. Supp. 2d 655 (M.D. Pa. 2003); *see* Parker v. Ashcroft, 112 F. App'x 860, 862-63 (3d Cir. 2004).

the Caribbean slave populations and its colonized peoples will provide a window into the rhetoric that plagues the immigration discourse today.

In *Bromfield v. Mukasey*, Bromfield was an openly gay Jamaican national who feared for his life if deported to Jamaica.[67] Relying heavily on a Country Report from the U.S. State Department, the Court determined that anti-homosexual violence in Jamaica is both widespread and, at least in part, perpetuated by the police and other government officials.[68] The Court found the situation in Jamaica so dire that it went beyond persecution and further found the Jamaican government sufficiently complicit in persecution of homosexuals to consider it torture.[69]

The powerful and systemic homophobia still prevalent in these Caribbean societies has its genesis in slavery and the postcolonial societies that developed on the model of the plantation society. Homophobia continues to be a pervasive social ill throughout the Caribbean basin and is one finger from the dead hand of colonialism reaching from the past to persecute in the present.

D. Racial Persecution in Post-Colonial Caribbean Basin

Beginning in the 1620's and extending into the 1770's, the Spanish were heavily colonizing and enslaving the Caribbean peoples, launching the "sugar revolution."[70] One of the sugar revolution's key defining features was the transition from free labor to slavery in the Caribbean islands.[71] The French and English also colonized and enslaved the Caribbean peoples during the sugar revolution.[72] Even after the reign of colonialism had ended, it was quickly replaced with a regime that offered little corrective equality, only codifying the colonial division of 'white capital' and 'coloured labour.'[73]

In a first-hand account James Williams, a Jamaican slave-turned-apprentice after colonialism, described how his treatment and station in life had decreased under laws abolishing slavery. Williams described life under the new laws, "[w] hen I was a slave, I was never flogged, —I sometimes was switched, but not badly; but since the new law begin, I have

67 *Bromfield*, 543 F.3d at 1074.
68 *Id.* at 1074.
69 *Id.* at 1079.
70 B.W. HIGMAN, A CONCISE HISTORY OF THE CARIBBEAN 98 (2011).
71 *Id.* at 98.
72 *Id.* at 112.
73 MALCOLM CROSS, URBANIZATION AND URBAN GROWTH IN THE CARIBBEAN: AN ESSAY ON SOCIAL CHANGE IN DEPENDENT SOCIETIES 23 (1979).

been flogged seven times, and put in the house of correction four times."[74]

In the Caribbean, the social construction of identity is dictated by race. Post-colonial writers, such as Aime Cesaire and Frantz Fanon, articulated the impact of slavery and colonization both in the conception of the Caribbean self and the perception of Caribbean peoples by neocolonialists. Today, modern Caribbean scholars still engage in research on the philosophy and praxis of modern racism. The racist ideology engendered by slavery and colonialism is a bitter legacy that left Caribbean societies fragmented.

Afro-Trinidadians are still disproportionately favored across many social and governmental entities compared to Indo-Trinidadians.[75] Afro-Cubans still suffer segregation-like levels of housing and employment stratification compared to light-skinned Cubans.[76] Haitians and dark-skinned others in the Dominican Republic are still denied services in public places, including restaurants, stores, banks, and nightclubs.[77] Thus, racism and ethnic-cleansing projects are very real in some Caribbean societies.[78] Notwithstanding, these types of claims are often dismissed in U.S. immigration courts.

The cognitive dissonance on the part of immigration judges towards these petitioners is grounded in the ideology of slavery and colonialism. The practice of ignoring human suffering by people of color is guided by a belief system that peoples of color are subhuman, and as a result do not experience physical pain as their white counterparts. This belief was cultivated not as an ideology, but as a justification to maintain the status quo of slavery and the atrocities that follow in the wake of its abolition and the post-colonial societies that grew out of the untenable slave system. In short, the racism that maintained the twin machinery of slavery and colonialism still survives in the law making processes of the very institutions that are designed to protect the victimized.[79]

74 JAMES WILLIAMS, A NARRATIVE OF EVENTS, SINCE THE FIRST OF AUGUST, 1834, BY JAMES WILLIAMS, AN APPRENTICED LABOURER IN JAMAICA 5 (Diana Paton ed., 2001).

75 2003 U.S. Dep't of State, COUNTRY REP. ON HUM. RTS. PRACTICES: TRINIDAD AND TOBAGO, *available at* http://www.state.gov/g/drl/rls/hrrpt/2003/27921.htm.

76 2009 U.S. Dep't of State, COUNTRY REP. ON HUM. RTS. PRACTICES: CUBA, available at http://www.state.gov/g/drl/rls/hrrpt/2009/wha/136108.htm.

77 U.S. Dep't of State (DOMINICAN REPUBLIC), *supra* note 55.

78 Franz Fanon, *Introduction* to *The Wretched of the Earth*, *in* JEAN-PAUL SARTRE, COLONIALISM AND NEOCOLONIALISM 153, 156 (Azzedine Haddour et al. trans., Routledge 2006) (1964) ("The mother country contented itself with paying a few feudal landowners: there, by dividing and ruling, it has artificially created a bourgeoisie of the colonized . . . . Europe has multiplied divisions and oppositions, forged classes and sometimes racisms . . . to cause and to increase the stratification of the colonized societies.").

79 *See, e.g.* Albert Memmi, *The Colonizer and the Colonized*, *in* JEAN-PAUL SARTRE,

The social construction of race has its genesis in Europe even before Columbus set sail across the Atlantic. In fact, historians of ancient Greek societies posit that race theory began to surface during the time of Hippocrates in the 4th century B.C. One historian asserts that the theory of racial determinism began to take hold in the days of Greco-Roman slavery. Even then, Afro features bore negative values in those times.[80] In 1520, Paracelsus, a Swiss physician and philosopher posited that Africans, Indians, and other non-Christian peoples of color were not descendants of Adam and Eve.[81]

The concept of race, then, developed strong fervor in Europe and by the time of encounter with native peoples, the philosophy of racial superiority was deeply entrenched in the minds of European explorers like Columbus. Natural law became praxis for racial superiority. Early European explorers were guided by the natural law philosophy of Aristotle and St. Thomas de Aquinas. Indeed, Aristotle in his treatise, "Politico", argues, "Some men are by nature slaves, others by nature, free." Thus for the Greek system of slavery, Aristotle's writings provided a ready alibi to Europeans for slavery, imperialism and colonialism in the New World. For the inhabitants of the Americas, the propaganda from the early explorers, that they were "truly wild men", creatures of idleness, viciousness, and depravity became a belief system that justified their extermination.

Today, in the context of immigration, the rapid deportation of Caribbean nationals back to their native countries is grounded in these historical constructs. There are significant parallels between U.S. immigration policy and the descendants of slaves and native peoples. Like their forefathers, Caribbean immigrants are deemed as undesirable and every attempt is made to dispossess them of American citizenship and freedom. The detention rates for Caribbean immigrants compared to other immigrants from Europe attest to this fact.

E. Persecution Based on Sex: (Mis) Treatment of Women in Post-Colonial Caribbean Basin

Violence against women also runs rampant throughout post-colonial Caribbean cultures. Domestic violence in the Dominican Republic has

COLONIALISM AND NEOCOLONIALISM 59 (Racism is inscribed in the . . . institutions . . . . Since the natives are subhuman, The Declaration of Human Rights does not apply to them.)

80 DAVID E. STANNARD, AMERICAN HOLOCAUST: COLUMBUS AND THE CONQUEST OF THE NEW WORLD 165 (1992).

81 *Id.* at 209.

reached such epidemic levels that, even with significant under-reporting, approximately 20% of women between the ages of 15 and 49 have been the victims of physical abuse at the hands of a man.[82] Cuban law does not recognize domestic violence as a crime, and Cuban police often fail to respond to domestic violence calls at all.[83] Trinidad and Tobago also has a significant problem with physical abuse of women that is exacerbated by lack of police responsiveness.[84] Jamaica, too, has seen a spike in violence against women that continues to grow and go under-reported.[85]

Under U.S. Asylum and Refugee law, women fleeing domestic violence in their countries of origin are often denied refuge on the basis that domestic violence does not constitute persecution. Although our immigration laws make provisions for women under the Violence Against Women Act (VAWA), the same remedy is not available for women who suffer abuse in their home country. These types of cases are often brought by women from the developing south; in those countries, wife beating is a legacy of colonialism and slavery.

Plantation societies in the Caribbean were guided by anti-black and anti-feminist ideology. Europeans subjugated the female identity so as to define their own masculinity. In slavery and colonial discourse, black women are presented and re-presented as dual subjects. First, they are subjects to the male. Europeans used this ideology to contain women and later transferred this idea to legitimize the enslavement of the African male. From the earliest tribal wars, besting one's opponent required first taking his property, then his women, then lording over his broken spirit.

The creation of Caribbean slave society rested in part on anti-feminist theory.[86] In order to maintain colonialism, the rest of the subjected world had to be transformed into women. The emasculation of the male subject rested on the premise that if black men were deprived access to the means of production, then they like women would be rendered powerless. Today, we see this ideology manifested in the number of Caribbean immigrants who are deported back to their country of origin for the pettiest crimes. The weapon of deportation has been replaced in the narrative as a means of control over the black male to reinforce the idea of powerlessness. For Caribbean nationals already emasculated by post-colonialism, denial of

82 U.S. Dep't of State (DOMINICAN REPUBLIC), *supra* note 55.

83 U.S. Dep't of State (CUBA), *supra* note 76.

84 U.S. Dep't of State (TRINIDAD AND TOBAGO), *supra* note 77.

85 U.S. Dep't of State (JAMAICA), *supra* note 54.

86 *See generally* ENGENDERING HISTORY: CARIBBEAN WOMEN IN HISTORICAL PERSPECTIVE (Verene Shepherd, Bridget Brereton & Barbara Bailey eds.,1995).

asylum for trivial offenses or without due process only further strips them of their dignity and sense of justice.

In *Rodriguez v. Holder*, a Cuban national was denied asylum in the United States due to his criminal history for possession of marijuana and in light of a prior possession of cocaine conviction.[87] The National Immigration and Nationality Act makes conviction of an aggravated felony a deportable offense[88], but its broad language allows for the further emasculation of Caribbean men by stripping them of asylum to the United States for petty offenses.

The justification given for the disparity in the deportation of these groups rests on the idea of national security. However, the pitiless policies of deportation of Caribbean immigrants are not solely based on the need for homeland security. If national security was the sole reason, then only those who have committed heinous crimes against their neighbors or against the country through terrorist activities would be deported. This would result in a low number of deportees.

However, the statistics show that these immigrants are often deported for minor infractions. This practice begs several questions. Among them are, whether they are deported for fear of an increase in the voting demographic, particularly among republican lawmakers who fear a numerical majority of democratic voters, and whether there is a fear that the more immigrants that are allowed to assimilate and gain citizenship status can diminish the strength of United States exports to countries in the region.[89]

Caribbean men are not the only immigrants to suffer from the emasculization of post-colonialism. Post-colonial Caribbean women have found themselves at the bottom of a foreign and imposed hierarchical system. The rates of domestic violence and misogyny throughout the Caribbean basin during and after the colonial era have continued to grow in frequency and severity. *In the Matter of Pierre*, a Haitian woman was deported back to an abusive husband who had already threatened her life and attempted to kill her by burning down their home.[90] The Court held that this type of "personal problem" did not amount to persecution, even if her fear of her husband was well founded. Failing to recognize domestic violence in the Caribbean as a form of persecution lingering from its post-

87 Rodriguez v. Holder, 619 F.3d 1077, 1080 (9th Cir. 2010).
88 8 U.S.C. § 1101(a)(43).
89 *See generally* ALBERT MEMMI, THE COLONIZER AND THE COLONIZED.
90 In re Pierre, 15 I. & N. Dec. 461, 462 (B.I.A. 1975).

colonial history denies similar asylum-seekers from the protections afforded to immigrants to the United States. These cases only skim the surface of the unique problems facing Caribbean asylum-seekers designated for deportation that makes them "the object of intense scorn throughout the Caribbean."[91]

IV. RECOMMENDATIONS AND CONCLUSIONS

The Caribbean basin has a unique history as post-colonial nations, which must be recognized and taken into account when its citizens engage the U.S. immigration system. The lingering effects of post-colonialism in the Caribbean, including violence based on sexual orientation, race, or gender, are only further entrenched by failing to address these issues when Caribbean nationals come before immigration courts.

A. Judicial Appointments and Training

The Obama Administration's promise of comprehensive immigration reform must pay attention to judicial appointments and provide an overhaul of the training and education process. The major premise is that immigration judges must be compelled to attend training based on the history and culture of the countries and areas represented by these petitioners. The one size fits all approach that is still embraced in our immigration courts serves to dehumanize asylum seekers from the Caribbean and gives rise to the perception that immigration benefits are only conferred on those from favored nations.

Moreover, immigration judges ought to give special consideration to the post-colonial history of Caribbean nationals in assessing whether persecution claims meet muster. Immigration courts must design and implement an improved training process to educate immigration judges on the history of the Caribbean basin with regards to the postcolonial impacts on modern culture within the region. Such training will spread awareness among immigration judges as to the unique form persecution can take in a post-colonial society.

B. Non-Refoulment and International Policy

The Obama Administration also must make good its promise of

91 Bryan Lonegan, *American Diaspora: The Deportation of Lawful Residents from the United States and the Destruction of Their Families*, 13 BENDER'S IMMIGR. BULL. 1, 6 (2008).

immigration reform because U.S. immigration practices may contravene the country's duty of non-refoulement under several international treaties on the humane treatment of refugees.[92] The United States is under an international duty against refoulment, or sending asylum-seekers back to home countries where they may be subject to persecution. The current state of American anti-immigration laws places the United States in direct contravention of this duty. Moreover, if immigration laws' primary goal is to promote national security, the deportation of immigrants to these islands will derail this goal in the long run. Deportation will only serve to drain the blood of already anemic economies. These deportees are met only with apathy from their government and fellow countrymen who view them as outcasts. The result is a new group of sophisticated criminals who continue their criminal activities as a means of survival, wreaking havoc on their nation, which will ultimately lead to the insecurity of the region, and inevitably, the United States.

92 *See* Brundige, *supra* note 48, at 778.

TABLE 1:

COMPARATIVE HISTORY OF U.S. IMMIGRATION POLICIES AND COLONIAL CARIBBEAN NATIONS

Time	Events & Sentiments
1492	Beginning of Spanish colonization of Caribbean islands
1518	Spanish sugarcane plantations firmly established throughout Caribbean basin
1570's – 1670's	European colonization of the Caribbean islands, establishing sugar plantations and enslaving natives throughout the region
1760's – 1800's	U.S. immigration policy extends only to Englishmen moving to states
1789	Alien Sedition Acts
1800's – 1860's	Lincoln Project: states throughout the union passed laws requiring free slaves to leave state or face deportation
1857	Dred Scott decision
1880's	U.S. era of anti-immigration policy directed at particular groups of foreign nationals
1882	Chinese Exclusion Act
1958-1962	Most British-controlled Caribbean islands gain independence from colonial rule, forming independent nations
1980	Refugee Act
1986	Immigration Reform and Control Act
1988	Anti-Drug Abuse Act Immigration and Nationality Act
1994	Immigration and Nationality Technical Corrections Act
1996	Illegal Immigration Reform and Immigrant Responsibility Act