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Written Reflections on Racial Discrimination and Related Intolerance Resulting from the use of Digital Technologies in Border Enforcement and Administration.

The Center on Race, Inequality, and the Law (“the Center”) was created to confront the laws, policies, and practices that lead to the oppression and marginalization of people of color. Among the Center’s priorities is work at the intersection of race, law, and technology in the United States. Accordingly, the Center’s work includes the exploration of the use of automated decision systems and algorithmic tools in the immigration system. A forthcoming report entitled “*Automating the Golden Door: A Racial Justice Approach to Immigration and Automated Decision Systems in the United States*” explores these challenges through a racial justice lens.

It is difficult to measure the full racial impact of digital technologies in immigration due to the lack of statistical data on the race and ethnicity of immigrants entering the United States.¹ However, the Center’s research and review of the intersection of race, technology, and immigration reveals the high likelihood that digital technologies used in border enforcement administration carry the vast potential to exacerbate and reify the racial bias that already infects the immigration system. The following reflections will summarize the digital technologies used that are derived from a history of racist tools; the racialized principles derived from these technologies; and current and proposed approaches to address these challenges through a racial justice lens.

- 1. Digital technologies used in the United States’ border enforcement practices are informed by racially biased data and derived from a history of racist tools used to oppress people of color.***

Digital technologies that rely on data, algorithms and machine learning are grounded in historical data and by extension are embedded with the relics of the United States’ racist history. Thus, digital technologies will replicate and reproduce socially constructed patterns of race and

¹ The United States immigration federal agencies do not publish racial or ethnic data on immigrants entering the United States. As a result, national origin is often used as a proxy to discuss the racial impact of immigration policies.

racism. As racism is engrained in the history of immigration law and policy in the United States, all digital technologies used at the border will invariably replicate these patterns.

In addition, many of the digital technologies used at the border are in themselves digitized versions of historical tools, systems and processes used to monitor, track and oppress communities of color. The examples below identify the parallels of these digitized tools:

Biometric Technologies: Biometric technology has been described as “[a] technology of measuring the living body. The application of this technology is in the verification, identification, and automation practices that enable the body to function as evidence.”² This dynamic is described as “the digitized, biometric body” in which people of color’s bodies become forms of identification for the state.

Historical Tools: Branding of enslaved Black individuals; dental examination of enslaved Black children and youth to determine age; 19th century facial analysis, based on physiognomy to determine the “essence” of the criminal face.

Digitized Tools: Facial recognition scans; fingerprint scanning; iris scanning; DNA collection; tattoo recognition technology; Child Exploitation Image Analytics, and dental and bone X-rays used for age assessment for unaccompanied children.

Big Data Collection and Database Sharing: People of color are heavily monitored and policed by federal and state authorities and by extension are disproportionately represented on both secretive and open databases. Databases are shared across social systems, states and with other countries. The data is then used to inform algorithmic systems employed for immigration purposes.

Historical Tools: Manual registries of enslaved Black individuals; the *Book of Negroes* that recorded the identity of Black loyalists who crossed the US-Canada border; electric tabulating machines established in 1870 to collect and share information about immigrants; the sharing of census data with the military to facilitate the internment of Japanese Americans during World War II; the Federal Bureau of Investigation’s COINTELPRO program.

Digitized Tools: National Security Entry Exit System “NSEERS” (now discontinued); Gang Databases; The Apex Border Situational Awareness program; Investigative Case Management; FALCON system; Detention Call Analysis Technologies (Talton); The Automated Targeting System (“ATS”); “Extreme Vetting Initiatives” for Muslim immigrants including social media surveillance and racialized, discriminatory questions used to determine admissibility.

2. Racialized principles drive the discriminatory use of digital information technologies in border enforcement and administration

² SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS, Duke University Press, (2015).

Digital Technologies Used at the Border Serve an Explicitly Racist and Xenophobic Government Agenda.

Immigrants of color have been described as carrying visible “racial baggage” as they cross borders.³ Accordingly, “[t]he border, then, is also about claiming citizenship rights...and about the institutional practices that align to weigh down particular passport holders with racial baggage when they try to claim those rights.”⁴ The immigration system is highly politicized and lies entirely within the realm of the federal government, with limited judicial oversight.⁵ As such, it is replete with examples of long-standing, and recent institutional legal practices that “weigh down” immigrants of color at the borders of the United States.⁶ Buoyed by a Commander-in-chief who openly embraces racist and anti-immigrant discourse and societal fears of the so-called “genocide of the White race,”⁷ these institutional practices reflect xenophobic, nativist, and racist ideologies that align to primarily weigh down Latinx and Black immigrants, and immigrants of color who identify as Muslim.

Against this backdrop, digital technologies in immigration are literally tailor-made to deliver racist and xenophobic outcomes. Digital technologies are embedded with institutional bias and therefore serve as tools to facilitate, enhance and even create new ways to racially discriminate against immigrants of color.

For example, immigration advocates have explored the racialization of immigrants through the prism of mass detention and deportation – an effect of the increasing criminalization of immigrants. Digital technologies used at the border have enhanced the detention and deportation of primarily Latinx, Black, and Muslim immigrants of color, an approach referred to as “algorithmic Jim Crow.”⁸

One such algorithmic tool known as the Risk Classification Assessment (“RCA”) was established to streamline the decision-making process to determine bond for detainees. In 2017, Immigration Customs and Enforcement (“ICE”) eliminated the release option from the tool altogether. Almost immediately, the number of immigrants detained by ICE (with no criminal history) tripled to more than 43,000 when compared to the previous year.⁹

³ *Id.*

⁴ *Id.*

⁵ The Plenary Powers Doctrine is “absolute” See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

⁶ Long standing examples include severe restrictions on the constitutional right to due process; lawful racial profiling; and the detention of vulnerable groups such as children. Recent institutional legal practices include the separation of children from their families; a series of travel bans exclusive to Muslim-majority countries; and a mass ban on the entry of immigrants seeking asylum at the US-Southern border.

⁷ See e.g., ANTI-DEFAMATION LEAGUE, “*White Genocide*,” <https://www.adl.org/resources/glossary-terms/white-genocide>

⁸ Margaret Hu, *Algorithmic Jim Crow*, 86 FORDHAM L. REV. 633 (2017).

⁹ See Mica Rosenberg and Reade Levinson, *Trump’s Catch-and-Detain Policy Snares Many who Have Long Called U.S. Home*, REUTERS (June 20, 2018) <https://www.reuters.com/investigates/special-report/usa-immigration-court/>

Digital Technologies Used in Immigration Facilitate “Efficient Racist” Responses to National Emergencies

National emergencies relating to national security continue to justify “efficient racism” - the use of digital technologies that are known to have an effect on race and inequality.¹⁰ Following 9/11, the Bush administration initiated the controversial tool known as NSEERS, requiring the mandatory registration of noncitizen males from twenty-four Muslim majority countries – predominantly Middle Eastern, Arab, South Asian and Black individuals. In addition, the ATS was vastly expanded after 9/11 and continues to collect personal racial data from all individuals crossing the borders of the United States. The system uses algorithmic predictive technology to determine potential terrorists and has been identified as a prime example of digital technologies that racially target immigrants of color.

Other examples of efficient racism include measures introduced by the Trump administration purportedly designed to “control” the US-Southern border,¹¹ and unprecedented immigration surveillance technologies and restrictive policies in response to the COVID-19 global pandemic.

3. Policy and advocacy responses rooted in racial justice that could inform reform and accountability proposals.

Many current responses focus on the disproportionate use of surveillance technologies on Latinx and Black immigrants of color in the interior of the United States. Responses also include capturing and exposing technology actors who have contributed to racialized border enforcement practices such as Palantir Technologies. These responses are critical considering the increase of surveillance and “bio-surveillance” technologies in response to the COVID-19 global pandemic. The Center recognizes the absence of racial justice-oriented policy and advocacy responses to automated decision systems in immigration. In a forthcoming report, the Center recommends that automated decision systems are reframed to center on decarceration and reduced deportations; greater multidisciplinary collaboration among racial justice, technology, and legal actors; and the collection of racial data to assess the impact of digital technologies on immigrants of color.

See also Robert Koulish and Ernesto F. Calvo, *The Human Factor: Algorithms, Dissenters and Detention in Immigration Enforcement*. Ilcsw WORKING PAPER No 1 (2019). *See also* ACLU, *NYCLU Lawsuit: ICE in NYC Has Secret No-Release Policy*, (March 2, 2020) <https://www.aclu.org/press-releases/nyclu-lawsuit-ice-office-nyc-has-secret-no-release-policy>;

¹⁰ RUHA BENJAMIN, RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CODE, Medford, MA Polity (2019).

¹¹ This includes policies previously enacted between 2017 – 2019 and policies introduced in March 2020 in response to the COVID-19 pandemic.

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