2017

Crimmigration-Counterterrorism

Margaret Hu
Washington and Lee University School of Law, hum@wlu.edu

CRIMMIGRATION-COUNTERTERRORISM

MARGARET HU*

The discriminatory effects that may stem from biometric ID cybersurveillance and other algorithmically-driven screening technologies can be better understood through the analytical prism of "crimmigration-counterterrorism": the conflation of crime, immigration, and counterterrorism policy. The historical genesis for this phenomenon can be traced back to multiple migration law developments, including the Chinese Exclusion Act of 1882. To implement stricter immigration controls at the border and interior, both the federal and state governments developed immigration enforcement schemes that depended upon both biometric identification documents and immigration screening protocols. This Article uses contemporary attempts to implement an expanded regime of "extreme vetting" to better understand modern crimmigration-counterterrorism rationales and technologies. Like the implementation of the Chinese Exclusion Act, extreme vetting, or enhanced vetting, relies upon biometric data as an anchor point for identity databasing and security screening. Thus, emerging vetting systems provide a timely example of the conflation of crime, immigration, and counterterrorism policy. It concludes that Critical Theory and theories of discrimination that stem from litigation surrounding crimmigration-counterterrorism policies may suggest legal avenues to guard against the risk of cyber-registries and algorithmic screening systems dependent upon biometric databases that may promote discriminatory vetting.

---

* Margaret Hu, Associate Professor of Law, Washington and Lee University School of Law. I would like to extend my deep gratitude to those who graciously offered comments on this draft or who offered perspectives and expertise on this research through our thoughtful discussions: Sahar Aziz, Emily Berman, Jennifer Chacón, Guy Charles, Andrew Christensen, Adam Cox, Trina Jones, Michael Kagan, Stephen Lee, Peter Margulies, Steve Miskinis, Hiroshi Motomura, Bertrall Ross, Steve Vladeck, Shoba Wadhia, and Andrew Wright. Many thanks to the editorial care of Tomás Clasen, Editor-in-Chief, *Wisconsin Law Review*, and for the generous research assistance of Mark Dewyea, Alexandra Klein, Kirby Kreider, and Carroll Neale. In addition, this research benefited greatly from the discussions generated from the Discussion Group on the Travel Ban at the Southeastern Association of Law Schools Annual Meeting; Immigration Law Professors Workshop; and Duke Law School's Culp Colloquium. All errors and omissions are my own.

INTRODUCTION

This Article examines the potential discriminatory impact of efforts to expand biometric ID cybersurveillance[1] and algorithmically-driven cyber-registration,[2] in the context of the Travel Ban,[3] "extreme vetting,"[4]

1. *See, e.g.*, Margaret Hu, *Biometric ID Cybersurveillance*, 88 IND. L.J. 1475 (2013) [hereinafter Hu, *Biometric ID*]; Margaret Hu, *Biometric Cyberintelligence and the Posse Comitatus Act*, 66 EMORY L.J. 697 (2017) [hereinafter Hu, *Biometric Cyberintelligence*]; KELLY A. GATES, OUR BIOMETRIC FUTURE: FACIAL RECOGNITION TECHNOLOGY AND THE CULTURE OF SURVEILLANCE (2011); JENNIFER LYNCH, FROM FINGERPRINTS TO DNA: BIOMETRIC DATA COLLECTION IN U.S. IMMIGRANT COMMUNITIES AND BEYOND (2012); SHOSHANA AMIELLE MAGNET, WHEN BIOMETRICS FAIL: GENDER, RACE, AND THE TECHNOLOGY OF IDENTITY (2011); Christopher W. Clifton, Deirdre K. Mulligan & Raghu Ramakrishnan, *Data Mining and Privacy: An Overview*, *in* PRIVACY AND TECHNOLOGIES OF IDENTITY: A CROSS-DISCIPLINARY CONVERSATION 191, 203 (Katherine J. Strandburg & Daniela Stan Raicu eds., 2006); Laura K. Donohue, *Technological Leap, Statutory Gap, and Constitutional Abyss: Remote Biometric Identification Comes of Age*, 97 MINN. L. REV. 407 (2012).

2. *See infra* notes 173–175, 256–270 and accompanying text, and discussion in Part III.B. *See also* Margaret Hu, *Algorithmic Jim Crow*, 86 FORDHAM L. REV. 633 (2017).

3. *See infra* notes 22–31 and accompanying text, and discussion in Part II.B. Many immigration, constitutional law, and national security scholars have commented on the legality and constitutionality of the Travel Ban. *See, e.g.*, Josh Blackman, *Hawaii v. Trump: What would an "Objective Observer" Think of President Trump's Travel Ban?*, LAWFARE INSTITUTE (May 16, 2017, 11:03 AM), https://www.lawfareblog.com/hawaii-v-trump-what-would-objective-observer-think-president-trumps-travel-ban [https://perma.cc/HB27-6UXL]; Adam Cox, *Why a Muslim Ban is Likely to be Held*

and other contemporary immigration policy developments.[5] It suggests that Critical Theories[6]—such as "critical biometric consciousness,"[7]

Unconstitutional: The Myth of Unconstrained Immigration Power, JUSTSECURITY (Jan. 30, 2017, 10:21 AM), https://www.justsecurity.org/36988/muslim-ban-held-unconstitutional-myth-unconstrained-immigration-power/ [https://perma.cc/XJ8P-JAGM]; Marty Lederman, *Unlocking the Mysteries of the Supreme Court's Entry Ban Case*, JUSTSECURITY (June 27, 2017, 8:01 PM), https://www.justsecurity.org/42577/mysteries-trump-v-irap/ [https://perma.cc/9JBY-2YA7?type=image]; Leah Litman & Steve Vladeck, *How the President's "Clarifying" Memorandum Destroys the Case for the Entry Ban*, JUST SECURITY (June 15, 2017, 8:01 AM), https://www.justsecurity.org/42166/presidents-clarifying-memorandum-destroys-case-entry-ban/ [https://perma.cc/R7L3-E4VX]; Peter Margulies, *The Travel Ban in the Supreme Court: Crafting a Workable Remedy*, LAWFARE INSTITUTE (June 26, 2017, 3:24 PM), https://www.lawfareblog.com/travel-ban-supreme-court-crafting-workable-remedy [https://perma.cc/EED6-UT2S]; IIya Somin, *Trump's Revised Travel Ban is Still Cruel and Still Unconstitutional*, WASH. POST: THE VOLOKH CONSPIRACY (Mar. 6, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/06/trumps-revised-travel-ban-is-still-cruel-and-still-unconstitutional/?utm_term=.5ae82e025123 [https://perma.cc/E53G-XCDN]; Mark Tushnet, *Mootness and the Travel Ban*, BALKIN BLOGSPOT (June 2, 2017, 1:18 AM), https://balkin.blogspot.com/2017/06/mootness-and-travel-ban.html [https://perma.cc/8YPX-S2UM]; Benjamin Wittes, *Malevolence Tempered by Incompetence: Trump's Horrifying Executive Order on Refugees and Visas*, LAWFARE INSTITUTE (Jan. 28, 2017, 10:58 PM), https://lawfareblog.com/malevolence-tempered-incompetence-trumps-horrifying-executive-order-refugees-and-visas [https://perma.cc/VKU6-XEQK].

4. *See, e.g.*, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into United States by Terrorists or Other Public-Safety Threats, Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017) [hereinafter Proclamation, Sept. 24, Travel Ban III]; Resuming the United States Refugee Admissions Program with Enhanced Vetting Capabilities, Exec. Order No. 13,815, 82 Fed. Reg. 50,055 (Oct. 27, 2017) (stating that enhanced vetting procedures "will enhance the ability of our systems to check biometric and biographic information against a broad range of threat information contained in various Federal watchlists and databases") [hereinafter Exec. Order, Oct. 27, Enhanced Vetting]. *See also infra* discussion in Part I.B, notes 145–148, and Part II.C.

5. *See, e.g.*, Margaret Hu, *Big Data Blacklisting*, 67 FLA. L. REV. 1735 (2015) [hereinafter Hu, *Big Data Blacklisting*]; Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1 (2014); Mark Noferi & Robert Koulish, *The Immigration Detention Risk Assessment*, 29 GEO. IMMIGR. L.J. 45 (2014) (discussing DHS deployment of automated risk assessment algorithms to analyze noncitizen data to assess detention and release risks). *See also infra* notes 253–259 and accompanying text.

6. *See, e.g.*, CRITICAL THEORY & SOCIETY: A READER (Stephen Eric Bronner & Douglas MacKay Kellner eds., 1989); DAVID COUZENS HOY & THOMAS MCCARTHY, CRITICAL THEORY (1994); THOMAS MCCARTHY, IDEALS & ILLUSIONS: ON RECONSTRUCTION & DECONSTRUCTION IN CONTEMPORARY CRITICAL THEORY (1993); THOMAS MCCARTHY, THE CRITICAL THEORY OF JÜRGEN HABERMAS (1989); THE ESSENTIAL FRANKFURT READER 205 (Andrew Arato & Eike Gebhardt eds., 1985).

7. SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS 116 (2015). *See also* Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487 (2000).

Critical Race Theory,[8] Surveillance Studies,[9] Critical Terrorism Studies,[10] and other theories—are necessary to examine the increasing racialization and subordinating effects of biometric ID cybersurveillance and other technologies that may facilitate cyber-registration under national security justifications. Specifically, the Article contends that the expansion of biometric ID cybersurveillance and national security vetting is supported by crimmigration[11]-counterterrorism[12]: a conflation of crime, immigration, and counterterrorism policy.[13]

8. *See, e.g.*, DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 144–45 (1993); DOROTHY BROWN, CRITICAL RACE THEORY: CASES, MATERIALS, AND PROBLEMS (2014); DEVON W. CARBADO & MITU GULATI, ACTING WHITE?: RETHINKING RACE IN POST-RACIAL AMERICA (2013); JESSIE DANIELS, CYBER RACISM: WHITE SUPREMACY ONLINE AND THE NEW ATTACK ON CIVIL RIGHTS (2009); RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (2012); LANI GUINIER, LIFT EVERY VOICE: TURNING A CIVIL RIGHTS SETBACK INTO NEW VISION OF SOCIAL JUSTICE (1998); THE NEW BLACK: WHAT HAS CHANGED—AND WHAT HAS NOT—WITH RACE IN AMERICA (KENNETH W. MACK & GUY-URIEL E. CHARLES EDS.) (2013); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR (1992); Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593 (2011); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992); Guy-Uriel E. Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Crits?*, 93 GEO. L.J. 575 (2005); Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Neil Gotanda*, A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005).

9. *See generally* JOHN GILLIOM & TORIN MONAHAN, SUPERVISION: AN INTRODUCTION TO THE SURVEILLANCE SOCIETY (2013); DAVID LYON, SURVEILLANCE SOCIETY: MONITORING EVERYDAY LIFE (2001); DAVID LYON, SURVEILLANCE STUDIES: AN OVERVIEW 16 (2007); Julie E. Cohen, *Studying Law Studying Surveillance*, 13 SURVEILLANCE & SOC'Y 91, 91 (2015), https://ojs.library.queensu.ca/index.php/surveillance-and-society/article/view/law/5368 [https://perma.cc/AY56-CPRN]; Oscar H. Gandy, Jr., *Surveillance and the Formation of Public Policy*, 15 SURVEILLANCE & SOC'Y 158 (2017); Kevin D. Haggerty & Richard V. Ericson, *The Surveillant Assemblage*, 51 BRIT. J. SOC. 605 (2000); Sean P. Hier, *Probing the Surveillant Assemblage: On the Dialectics of Surveillance Practices as Processes of Social Control*, 1 SURVEILLANCE & SOC'Y 399 (2003); David Lyon, *Surveillance, Snowden, and Big Data: Capacities, Consequences, Critique*, BIG DATA & SOC'Y, July-Dec. 2014, at 1 http://journals.sagepub.com/doi/pdf/10.1177/2053951714541861 [https://perma.cc/4X4F-ZMY8].

10. *See, e.g.*, CRITICAL TERRORISM STUDIES: A NEW RESEARCH AGENDA 19, 140 (Richard Jackson, Marie Breen Smyth & Jeroen Gunning eds., 2009); Amna Akbar, *Policing "Radicalization",* 3 U.C. IRVINE L. REV. 809, 845–51 (2013); James Forman, Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible*, 33 N.Y.U. REV. L. & SOC. CHANGE 331, 332–41 (2009); Jeroen Gunning, *A Case for Critical Terrorism Studies?*, 42 GOV'T & OPPOSITION 363, 363–96 (2007).

11. The term "crimmigration" was coined by Juliet Stumpf. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006). A growing body of literature examines the increasing merger of criminal law and immigration law and policy. *See, e.g.*, SOCIAL CONTROL AND JUSTICE: CRIMMIGRATION IN

The historical genesis for this phenomenon can be traced back to multiple migration law developments, including the Chinese Exclusion Act of 1882.[14] The Chinese Exclusion Act facilitated stricter immigration controls at the border and interior.[15] These identification and vetting systems were extended as part of the Japanese-American internment effort during World War II and have become increasingly technologically advanced in the aftermath of the terrorist attacks of September 11th, 2001.[16]

Anti-immigrant rhetoric, or the view that immigrants are inherently suspicious and dangerous, is not a new phenomenon.[17] The United States, despite being comprised of immigrants, has a history of treating individuals as suspect based on their nationality, ethnicity, and immigration status: Chinese immigrants;[18] Irish and other European

THE AGE OF FEAR 8–9 (Maria João Guia et al. eds., 2013); Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 137–38 (2009); Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1139–41 (2013); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1467–68 [hereinafter Hernández, *Creating Crimigration*]; César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449, 1492–94 (2015); Yolanda Vazquez, *Advising Noncitizen Defendants on the Immigration Consequences of Criminal Convictions: The Ethical Answer for the Criminal Defense Lawyer, the Court, and the Sixth Amendment*, 20 BERKELEY LA RAZA L.J. 31, 43 (2010).

12. *See, e.g.*, PHILIP BOBBITT, TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY 138–41 (2009); MARY L. DUDZIAK, WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES 135–36 (2012); ERIK LUNA & WAYNE MCCORMACK, UNDERSTANDING THE LAW OF TERRORISM 141–44 (2d. ed. 2015).

13. *See* Shoba Sivaprasad Wadhia, *Is Immigration Law National Security Law?*, 66 EMORY L.J. 669, 676–77, 685–87 (2017); Hu, *Biometric ID*, *supra* note 1, at 1483–84; Hu, *Big Data Blacklisting*, *supra* note 5, at 1786; *Biometric Cyberintelligence*, *supra* note 1, at 701. *See generally* DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 26–27, 34–35 (2003); LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS 386 (Mary L. Dudziak & Leti Volpp eds., 2006); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996).

14. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943).

15. *See* Hernández, *Creating Crimmigration*, *supra* note 11, at 1486–87.

16. *See, e.g.*, KEVIN R. JOHNSON, THE "HUDDLED MASSES MYTH": IMMIGRATION AND CIVIL RIGHTS 15, 20–21 (2004). *See also* Cole, *supra* note 13.

17. *See, e.g.*, BILL ONG HING, DEFINING AMERICA THROUGH IMMIGRATION POLICY (2003); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); JOHNSON, *supra* note 16. *See generally* Linda Bosniak, *Member, Equality, and the Difference that Alienage Make*s, 69 N.Y.U. L. REV. 104 (1994); Jennifer M. Chacón, *Essay: Immigration and the Bully Pulpit*, 130 HARV. L. REV. FORUM 7 (2017); Karla M. McKanders, *Federal Preemption and Immigrants' Rights*, 3 WAKE FOREST J.L. & POL'Y 333 (2013). *See also supra* note 11.

18. *See, e.g.*, H. Res. 683, 112th Cong. (Expressing that "the House of Representatives regrets the passage of legislation that adversely affected people of

immigrants;[19] U.S. citizens of Japanese descent;[20] Latino immigrants;[21] and, with the recent Executive Orders,[22] immigrants, refugees, and travelers from countries with a Muslim-majority population.[23]

Recent technological developments permit increasing cybersurveillance of populations, particularly the immigrant demographic and related proxies. The expansion of biometric ID cybersurveillance, a subset of broader trends in cybersurveillance and

Chinese origin in the United States because of their ethnicity," including the Chinese Exclusion Act"); IRIS CHANG, THE CHINESE IN AMERICA 130 (2003); ERIKA LEE, AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882–1943 16–17 (2005); JEAN PFAELZER, DRIVEN OUT: THE FORGOTTEN WAR AGAINST CHINESE AMERICANS 253 (2008); FRANK WU, YELLOW: RACE IN AMERICA: BEYOND BLACK AND WHITE (2002); Mark Kanazawa, *Immigration, Exclusion, and Taxation: Anti-Chinese Legislation in Gold Rush California*, 65 J. ECON. HIST. 779, 779–83 (2005).

19. *See, e.g.*, National Origin Act, Pub. L. No. 68–139, Stat (1924); MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 17–21 (2004). *See also* MADISON GRANT, THE CONQUEST OF A CONTINENT 160 (1933); NOEL IGNATIEV, HOW THE IRISH BECAME WHITE 40–41(1995); THE ALIEN IN OUR MIDST (Madison Grant & Chas. Stewart Davison eds., 1930).

20. *See, e.g.*, ERIC K. YAMAMOTO, ET. AL, RACE, RIGHTS, AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 34–35, 181 (2nd ed. 2013); ERIC L. MULLER, AMERICAN INQUISITION: THE HUNT FOR JAPANESE AMERICAN DISLOYALTY IN WWII (2007); MARY MATSUDA GRUENEWALD, LOOKING LIKE THE ENEMY: MY STORY OF IMPRISONMENT IN JAPANESE-AMERICAN INTERNMENT CAMPS 3, 8–9 (2005); ONLY WHAT WE COULD CARRY: THE JAPANESE AMERICAN INTERNMENT EXPERIENCE (Lawson Fusao Inada ed., 2000); RICHARD REEVES, INFAMY: THE SHOCKING STORY OF THE JAPANESE AMERICAN INTERNMENT IN WORLD WAR II 98–100 (2015).

21. *See, e.g.*, HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW (2014); HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (2006); VICTOR C. ROMERO, ALIENATED: IMMIGRANT RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA (2004).

22. President Trump issued a pair of Executive Orders with the same title: *Protecting the Nation from Foreign Terrorist Entry into the United States*. The first was issued on January 27, 2017. *See* Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) [hereinafter Exec. Order, Jan. 27, Travel Ban I]. It was challenged in the United States District Court for the Western District of Washington, and a temporary restraining order was granted. *See Washington v. Trump*, 847 F.3d 1151, 1157–58 (9th Cir. 2017) (per curiam). The government sought an emergency stay, which the Ninth Circuit denied. *Id.* at 1169. Subsequently, the President issued a second Executive Order on March 6, 2017, with the same title, but certain modifications. *See* Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017) [hereinafter Exec. Order, Mar. 6, Travel Ban II]. The Ninth Circuit granted the government's unopposed motion to dismiss its appeal of the stay on the first Executive Order. *See Hawaii v. Trump*, 859 F.3d 741, 757 (9th Cir. 2017) (per curiam).

23. The first Executive Order barred nationals of Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen from entering the United States for ninety days, both as immigrants and non-immigrants. *See Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (4th Cir. 2017). The second Executive Order eliminated Iraq as one of the designated countries. *Id.* at 573. These countries have predominately Muslim populations. *See id.* at 572 n.2.

dataveillance (data surveillance within the umbrella of cybersurveillance), is supported by crimmigration-counterterrorism.[24] Both the federal and state governments have developed immigration enforcement schemes that depend upon biometric identification documents and immigration screening protocols.[25] Immigration controls under the Chinese Exclusion Act employed one of the earliest methods of bureaucratized biometric identification—the Bertillon System.[26]

The Travel Ban litigation offers an opportunity to examine why discrimination by way of extreme vetting is difficult to conceptualize under traditional legal frameworks when the discriminatory effect occurs in a facially neutral way and is also technologically assisted.[27] To date, the Travel Ban litigation has been most developed in a pair of cases: *International Refugee Assistance Project v. Trump*[28] and *Hawaii v. Trump*.[29] These cases addressed President Trump's Order titled, *Protecting the Nation from Foreign Terrorist Entry Into the United States*,[30] which prohibited travel to the United States by nationals of six Muslim-majority designated countries, capped refugee admissions, and identified a review period to implement what has been described as "extreme vetting."[31]

24. Hu, *Biometric ID*, *supra* note 1; *see also infra* notes 259–264 and note 304.

25. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943).

26. Kitty Calavita, *The Paradoxes of Race, Class, Identity, and "Passing": Enforcing the Chinese Exclusion Acts, 1882–1910*, 25 L. & SOC. INQUIRY 1, 22 (2000) ("[O]fficers at ports of entry were told not only to photograph all entering and departing Chinese laborers, but to conduct a complete 'physical examination of his person required by the Bertillon system of identifications'").

27. *See, e.g.*, Hu, *Algorithmic Jim Crow*. On June 26, 2017, the Supreme Court granted certiorari in the Travel Ban cases, consolidating an appeal of both *International Refugee Assistance Project v. Trump* from the Fourth Circuit U.S. Court of Appeals and *Hawaii v. See Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2085–86 (2017) (per curiam). However, on September 25, 2017, the Court removed both cases from the oral argument calendar. *See Trump v. Int'l Refugee Assistance Project*, No. 16–1436, 2017 WL 2405595 (Sept. 25, 2017); *Trump v. Hawaii*, No. 16–1540, 2017 WL 2734554 (Sept. 25, 2017). Then, on October 10, 2017, and October 24, 2017, the Court vacated the judgments and remanded with instructions to dismiss as moot. *Trump v. International Refugee Assistance Project* and *Hawaii v. Trump*, respectively. *See Trump v. Int'l Refugee Assistance Project*, No. 16–1436, 2017 WL 4518553 (Oct. 10, 2017); *Trump v. Hawaii*, No. 16–1540, 2017 WL 4782860 (Oct. 24, 2017).

28. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc), *cert. granted* 137 S. Ct. 2080 (2017), *vacating as moot* 2017 WL 4518553.

29. *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (per curiam), *cert. granted* 137 S. Ct. 2080 (2017), *vacating as moot* 2017 WL 4782860.

30. Exec. Order, Mar. 6, Travel Ban II.

31. *Id.* at 13209–12. *See also* Peter Margulies, *Bans, Borders, and Justice: Judicial Review of Immigration Law in the Trump Administration*, 35–48 (Roger Williams Univ. Sch. of Law, Working Paper No. 177, 2017), http://ssrn.com/abstract=3029655 [https://perma.cc/VDQ4-PUN6] (arguing for a more

Various incarnations of the Travel Ban, and the associated legal challenges, currently focus the public's attention on the entry ban aspects of the Executive Orders. Yet, the more significant impact of the Executive Orders is the implementation of a cybersurveillance policy through enhanced vetting. Extreme or enhanced vetting is a screening process that entails using forms of cybersurveillance to collect, store and analyze information concerning not only immigrants, but potentially all U.S. citizens. And for those who secure entrance, cybersurveillance technologies will play a role in their tracking and supervision, such as the creation of cyber-registration systems or cyber-registries.

Just as the Trump administration's Executive Orders rest upon legal precedent mired in controversial historical moments, so the attempt to register and track foreign persons in this country has itself an unfortunate genealogy. In both cases, understanding the past is crucial to contextualizing the present. In order to better understand the surveillance implications of "extreme vetting" and potential cyber-registration, Part I begins with a review of prior efforts in that regard, with a large focus on the Chinese Exclusion Acts of the nineteenth century as the framework for understanding current ambitions. Part II summarizes the Trump administration's current efforts in immigration policy to restrict entry from several Muslim-majority countries. These executive actions are referred to as the "Muslim Ban" or the "Travel Ban." Part II explains that the Travel Ban's proposal for "extreme vetting" adopts expansion of vetting and screening protocols that are dependent upon biometric identification systems. It suggests how these vetting and screening systems are likely to serve as proxies for race and other classifications that can facilitate cybersurveillance and dataveillance.

In Part III, the Article utilizes Critical Theory to better evaluate how crimmigration-counterterrorism policy, when combined with biometric ID cybersurveillance technologies and databasing, can lead to a phenomenon of cyber-registration. Without the tools of Critical Theory, it will be difficult to examine the racialization and discriminatory impact of crimmigration-counterterrorism. This is especially the case where the technological tools of cyber-registration may appear to be race-neutral and where the crimmigration-counterterrorism policy, such as the Travel Ban, purports to be facially neutral under the law. The Article concludes that Critical Theory, combined with collateral discrimination theories that have arisen from the litigation surrounding the Travel Ban, may suggest legal avenues to guard against cyber-registries and algorithmic-driven screening methods that may promote discrimination.

searching judicial review of "extreme vetting" and the need to recognize the significant long-term impact of "extreme vetting").

I. UNDERSTANDING THE FUTURE OF CRIMMIGRATION-COUNTERTERRORISM POLICY THROUGH THE TRAJECTORY OF IMMIGRATION LAW AND BIOMETRIC ID CYBERSURVEILLANCE

Technology and immigration policy began to intersect with the introduction of biometric-based technologies and data computing. In the 1870s and 1880s, advances in mass photography, fingerprinting methodologies, and data cataloguing began to emerge. Additionally, database-sorting technology was introduced through the invention of the Hollerith data-sorting machine in the 1880s.[32] The Hollerith machine was eventually acquired by IBM, which led to the development of the computer.[33] The Hollerith machine revolutionized the federal government's ability to count, track, and follow its population for metric purposes. However, there remained the question of how to appropriately implement internal and external migration control, particularly tracking of the Chinese who could lawfully remain in the United States after Chinese Exclusion became national policy.

In 1882, Congress passed "An Act to Execute Certain Treaty Stipulations Relating to Chinese,"[34] commonly referred to as "The Chinese Exclusion Act." This Act arose as part of an anti-Chinese movement that commenced in California and other western states.[35] It barred the entry of Chinese laborers into the United States for ten years and prohibited Chinese laborers who had entered after the Act's passage from remaining.[36] The Act specifically defined Chinese laborers as "both skilled and unskilled laborers and Chinese employed in mining."[37] The rationale for the Act included national security objectives, in that Congress reasoned that "the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof[.]"[38]

After passage of the Chinese Exclusion Act of 1882, in order to implement stricter immigration controls at the border, the federal government developed more elaborate immigration enforcement schemes

32. SIMON GARFINKEL, DATABASE NATION: THE DEATH OF PRIVACY IN THE 21ST CENTURY 17–18 (Deborah Russell ed., 2000).

33. *Id.* at 18.

34. Chinese Exclusion Act, 22 Stat. 58 (1882) (repealed 1943).

35. *See* Calavita, *supra* note 26, at 4.

36. Chinese Exclusion Act § 1. ("[U]ntil the expiration of ten years next after the passage of this act, the coming of Chinese laborers to the United States be . . . suspended; and during such suspension it shall not be lawful for any Chinese laborer to come, or having so come . . . to remain within the United States."); *see also* Calavita, *supra* note 26, at 1–2.

37. Chinese Exclusion Act § 15.

38. *Id.* at pmbl.

that depended upon identification documents. Thus, the federal government began relying more on identification and travel documents, such as visas and passports, to control who could be lawfully admitted in the United States. The federal government also developed a system of "gatekeepers": those tasked with distributing documents and inspecting documents to keep unwanted migrants out. One scholar refers to this as an "unprecedented system" of federal immigration policy through "remote control."[39]

In 1885, biometric technology was combined with the concept of immigration registration when it was recommended that all Chinese immigrants in San Francisco could be registered by the city through fingerprinting and biographic data cataloguing.[40] Soon thereafter, Congress adopted a national policy of identification documentation incorporating biometric technology through passage of the Geary Act of 1892.[41] The Geary Act extended the Chinese Exclusion Act, due to expire in 1882, by another ten years.[42] The Geary Act, along with an amendment titled the McCreary Amendment, required all Chinese in the United States to carry on their person certificates of residence and identity, which required the inclusion of a photograph.[43] The Geary Act required that the certificates "shall contain the name, age, local residence and occupation of the applicant[,]"[44] and required "two white witnesses to testify to a Chinese person's immigration status."[45]

By 1892, census data estimated that approximately 110,000 Chinese remained lawfully in the United States in the intervening decade after the Chinese Exclusion Act of 1882.[46] One historian notes that the Geary Act, also colloquially referred to as the "Dog Tag Law" at the time of its passage,[47] reflected a "suspicion Chinese were attempting to enter the country under fraudulent pretenses."[48] Falsifying identity documents or failing to carry the "certificate of residence" was "a federal crime punishable by a year's imprisonment with hard labor[,]"[49] and deportation at the expense of those sentenced, because the federal

39. Aristide R. Zolberg, *Matters of State: Theorizing Immigration Policy*, *in* THE HANDBOOK OF INTERNATIONAL MIGRATION: THE AMERICAN EXPERIENCE 71, 75 (Charles Hirschman et al. eds., 1999).

40. Garfinkel, *supra* note 32, at 42.

41. Geary Act, ch. 60, 27 Stat. 25 (1892) (amended 1893) (repealed 1943).

42. *Id.* § 1.

43. *Id.*

44. *Id.* § 7.

45. PFAELZER, *supra* note 18, at 296.

46. *Id.* at 291.

47. *Id.*

48. Lee, *supra* note 18, at 41.

49. PFAELZER, *supra* note 18, at 292.

government did not have adequate funding to deport those found guilty.[50] Although fifteen states and territories urged Congress and President Harrison to engage in full-scale deportation of the remaining 110,000 Chinese in the country,[51] this option was declined due to its impracticality in logistics and cost.[52] The implementation of an identification document and internal "gatekeeping" system under the Geary Act was the compromise solution.

Some members of Congress, however, protested the Geary Act. Illinois Representative Robert R. Hitt denounced the Geary Act, drawing comparisons between the "Dog Tag Law" with the type of social control mechanisms that had been implemented during the slave era.[53]

> It is proposed to have 100,000 . . . men in our country ticketed, tagged, almost branded—the old slavery days returned. Never before in a free country was there such a system of tagging a man like a dog to be caught by the police and examined, and if his tag or collar is not all right, taken to the pound or drowned or shot . . . Never before was it applied by a free people to a human being with the exception (which we can never refer to with pride) of the sad days of slavery.[54]

A. History of U.S. Immigration Policy and Biometric Vetting

Consequently, biometric identification played a significant role in immigration law at the earliest developments of what is now known as the modern federal immigration law scheme. The Chinese Exclusion Act required protocols to identify Chinese immigrants. Identification cards and immigration screening procedures arose as a method to track, inspect, and deport Chinese laborers present in the United States at the turn of the century.

The debates that led to the passage of the Chinese Exclusion Act emphasized the perceived threat of Chinese immigrants, with one Senator, John Franklin Miller of California, referring to the entry as a "Chinese invasion"[55] that was a "stealthy, strategic, but peaceful invasion

50. *Id.* at 305.

51. *Id.* at 296 (citation omitted).

52. *Id.* at 305 ("Democratic attorney general Richard Olney reported that it would cost $6 million to deport unregistered Chinese, and he had only $16,806 left in his fund.") (citation omitted).

53. *Id.* at 296 (citation omitted).

54. *Id.*

55. 13 Cong. Rec. 1481–85 (1882) (Remarks of Senator John Franklin Miller of California (arguing that a vote against the measure suggests that the United States "is

as destructive in its results and more potent for evil than an invasion by an army with banners."[56] Senator Miller argued that Chinese immigrants with their "peculiar civilization" could overwhelm "the American people and Anglo-Saxon civilization," suggesting that American civilization might not endure a wave of Chinese immigration.[57]

In the nineteenth century, hysteria about a civilizational threat meant that there must be an objective means for "properly identifying" Chinese laborers who were in the United States before the Act was passed.[58] It required the "collector of customs" to list Chinese laborers who were about to depart from the United States[59] in "registry-books."[60] This registration required customs officials to record the "name, age, occupation, last place of residence, physical marks of peculiarities, and all facts necessary for the identification of such Chinese laborers."[61]

The laborers were entitled to receive a certificate that contained "a statement of the name, age, occupation, last place of residence, personal description, and facts of identification of the Chinese laborer to whom the certificate is issued . . . ."[62] The certificate permitted the laborers to return to the United States.[63] The certificate system did not apply only to Chinese laborers who were entering and exiting the United States. Section 6 of the Act also required "every Chinese person other than a laborer who may be entitled by said treaty and this act to come within the United States" to receive a certificate issued by the Chinese government that identified them as an individual entitled to enter the United States.[64] That certificate also required identifying information, including "age, height, and all physical peculiarities."[65]

now in favor of the unrestricted importation of Chinese; that it looks with favor upon the Chinese invasion now in progress.")).

56. *Id.* at 1482.

57. *Id.* at 1483. ("If we continue to permit the introduction of this strange people, with their peculiar civilization, until they form a considerable part of our population, what is to be the effect upon the American people and Anglo-Saxon civilization? Can these two civilizations endure side by side as two distinct and hostile forces? Is American civilization as unimpressible as Chinese civilization? When the end comes for one or the other, which will be found to have survived?").

58. Chinese Exclusion Act § 4 (1882) (repealed 1943).

59. Per the Act, this was to "furnish [Chinese laborers] . . . with the proper evidence of their right to come to the United States of their free will and accord, as provided by the treaty between the United States and China." *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* § 6.

65. *Id.*

Chinese nationals who did not have a required certificate were barred entry to the United States, and any "Chinese person found unlawfully within the United States shall be caused to be removed from the country to whence he came . . . at the cost of the United States . . . ."[66] Section 14 of the Act highlighted what Congress perceived as the suspect nature of Chinese nationals by prohibiting state and federal courts from granting citizenship to Chinese individuals.[67]

This continuation of the Chinese Exclusion Act,[68] therefore, expanded the documentation requirements for Chinese individuals in the United States.[69] All Chinese had to carry a registration certificate, which showed that they were permitted to be in the United States.[70] Chinese individuals seeking to acquire U.S. citizenship were required to possess a birth certificate that proved that they had been born in the United States, and at that time that was "the only route open to the Chinese . . . to acquire U.S. citizenship . . . ."[71] The registration requirement was "highly controversial" because no other aliens had such registration requirements, and the State Department itself was concerned about foreign relations.[72]

The certificates mandated by the Geary Act contained the same information required by the Chinese Exclusion Act of 1882, including "physical peculiarities."[73] Detailed descriptions of physical traits of Chinese nationals were considered essential forms of identification.[74] The Acts also focused on social class, as entry restrictions were focused on Chinese laborers.[75] Individuals in exempt classes—merchants, students, teachers, or travelers—received a Section 6 certificate, distinguishing them from the laborers.[76]

In 1903, customs officers at ports of entry began utilizing the Bertillon system as part of a way to record and track Chinese nationals,

66. *Id.* § 12.

67. *Id.* §14 ("[H]ereafter no State court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed.").

68. Geary Act, ch. 60, 27 Stat. 25 (1892) (amended 1893) (repealed 1943).

69. *Id.*

70. Calavita, *supra* note 26, at 20–21.

71. *Id.* at 21

72. *Id.* at 21 n.15.

73. *Id.* at 21 ("Particularly in the early years before photographs were widely available, the designation of 'physical marks or peculiarities' was deemed critical.").

74. *Id.* at 21–22; Jonathan Weinberg, *Proving Identity*, 44 PEPP. L. REV. 731, 745–46 (2017).

75. Calavita, *supra* note 26, at 1–2.

76. *Id.* at 21 ("[S]ection 6 certificates issued by the Chinese government provided evidence that one belonged to an exempt status—merchant, student, teacher, or traveler for pleasure or curiosity.").

particularly laborers,[77] based upon French criminologist Alphonse Bertillon's system of measurements in tracking and identifying criminals in France.[78] Bertillon's work focused on "practical and administrative" aspects of identification.[79] Bertillon's system further relied on "anthropometric measurements of arrested persons[,]" "standardized photographs" and "verbal portrait[s]."[80] These details were listed on cards that were filed at police departments, permitting identification and tracking of individual arrests.[81] Bertillon's methods have been described as a "curious statistical mechanism: that of recording the body's markers, normally common to all, in sufficient detail as to render them specific to one."[82]

Bertillon developed a means of standardizing biometric identification, now referred to as "Bertillonage."[83] Bertillon's system required measuring parts of the offender's body, including the head, ears, feet, and limbs, as well as eye color, scars, and other physical identifying characteristics.[84] The system emphasized standardization of the way police viewed a suspect and recorded their information, and "archive[d] the file on each subject by 'individualising him in the midst of the multitude of human beings.'"[85] Bertillonage later added fingerprinting to the identification processes.[86] The Bertillon system, although relying on small data world measurements and observations, represented a means of expanding security data. One expert explains:

> By turning the body into code, it had the potential to allow security data to travel. . . . [I]t spread from Europe to the Americas and along the routes of empire, where fingerprinting was simultaneously on the rise . . . . If you were trading under a certain name in Bengal in say, 1898 but were an imposter or swindler, the Bertillon system promised your undoing. You

77. Calavita, *supra* note 26, at 22.

78. Weinberg, *supra* note 74, at 746.

79. Mark Maguire, *The Birth of Biometric Security*, ANTHROPOLOGY TODAY, Apr. 2009 at 9, 12.

80. *Id.*

81. *Id.*

82. *Id.*

83. BROWNE, *supra* note 7, at 112.

84. *Id.*

85. Maguire, *supra* note 79, at 12 (quoting ALPHONSE BERTILLON, IDENTIFICATION ANTHROPOMETRIQUE: INSTRUCTIONS SIGNALETIQUES 4 (1893)).

86. *Id.* at 13.

> had, even in the 19th century, a modern shadow—a so-called data double.[87]

Bertillon's work has been characterized as "less of a triumph in science and more of a triumph in filing[,]"[88] but the standardization of identification and characteristics, and emphasis on administrative governance is echoed in modern big data biometric cybersurveillance. The use of the Bertillon system in tracking and identifying Chinese nationals in the United States is of interest because it suggests that such immigrants were inherently suspect. The system was developed for use in identifying arrested individuals and criminals.[89] The Department of Commerce and Labor issued extensive guidelines for utilizing the Bertillon system in identifying Chinese laborers, specifying highly detailed measurements.[90] External identifiers, including class, were also important indicators for physical identification,[91] and customs officials could deny entry to individuals who held Section 6 certificates if the customs officials believed that their physical characteristics and appearances indicated they were truly laborers.[92]

The Geary Act also required Chinese laborers who were entitled to be in the United States to apply for a certificate of residence.[93] The laborer was required to prove his entitlement to remain in the United States.[94] The Secretary of the Treasury prescribed rules and regulations for proof sufficient to receive a certificate.[95] The regulations required that "the fact of residence shall be proved by 'at least one credible witness of good character,' or, in case of necessity, by other proof."[96] Failure to obtain or apply for a certificate within the year after the Geary Act was passed was evidence that the Chinese laborer was not lawfully present in the United States, and was not entitled to remain, thus subjecting him to deportation.[97] A laborer could not circumvent deportation unless he could establish a valid reason for his failure to obtain a certificate such as accident or illness, such evidence had to be "'to the satisfaction of the

87. *Id.*

88. *Id.* at 12.

89. Weinberg, *supra* note 74, at 746.

90. *See* Calavita, *supra* note 26, at 22–23 (quoting extensively from the 1903 guidelines that specified how to measure Chinese immigrants and laborers).

91. *Id.* at 24.

92. *Id.* at 24–25, 24 & n.19.

93. *See Fong Yue Ting v. United States*, 149 U.S. 698, 726 (1893).

94. *Id.* ("[B]y making it the duty of the Chinese laborer to apply to the collector of internal revenue of the district for a certificate, necessarily implies a correlative duty of the collector to grant him a certificate, upon due proof of the requisite facts.").

95. *Id.*

96. *Id.*

97. *Id.* at 727.

court, and [supported] by at least one credible white witness, [demonstrating] that he was a resident of the United States at the time of the passage of this act.'"[98]

Challenges to the Geary Act on substantive due process and other constitutional grounds failed. In *Fong Yue Ting v. United States*,[99] the Supreme Court concluded that "[t]he power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government[.]"[100] "The right of a nation to expel or deport foreigners," explained the Court, is "absolute and unqualified[,]"[101] and the plenary power doctrine, an idea that the federal immigration power flowed from "unlimited inherent sovereign powers[,]" was cemented.[102] Justice Brewer dissented: "This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced?"[103]

The Court further upheld the validity of requiring certificates of residence,[104] explaining that Congress had the right to "expel aliens of a particular class, or permit them to remain, has undoubtedly the right to provide a system of registration and identification of the members of that class within the country, and to take all proper means to carry out the system which it provides."[105] The Court acknowledged that the effect of the Geary Act was to create a presumption that any Chinese laborer without a residence certificate in the United States was presumed not to be entitled to be in the United States.[106] The Court found that the procedures afforded to Chinese nationals were sufficient—despite the fact that the burden of proof rested solely on the Chinese individual to prove that suspicion did not apply.[107] This burden, as well as the requirement of a "credible white witness," the Court explained "is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of

98. *Id.*

99. 149 U.S. 698 (1893).

100. *Id.* at 713.

101. *Id.* at 707.

102. Gabriel J. Chin, Chae Chan Ping *and* Fong Yue Ting*: The Origins of Plenary Power*, *in* IMMIGRATION LAW STORIES 7 (David A. Martin & Peter Schuck eds., 2005). *See also* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1 (2002).

103. *Fong Yue Ting*, 149 U.S. at 737.

104. *Id.* at 698.

105. *Id.* at 714.

106. *Id.* at 728.

107. *Id.* at 729.

its own government."[108] Witness competency—even a requirement of a witness's race, the Court stated, was a matter for Congress to decide.[109]

The Court's ruling suggested that Chinese individuals' testimony was less trustworthy. The Court deferred heavily to Congress.[110] Quoting Justice Field's opinion in *Chae Chan Ping v. United States*,[111] the Court explained that Congress may have required a white witness because in prior cases, "the testimony of Chinese persons admitted to prove similar facts 'was attended with great embarrassment, from the suspicious nature, in many instances, of the testimony offered to establish the residence of the parties, arising from the loose notions entertained by the witnesses of the obligation of an oath.'"[112]

Justice Brewer dissented, arguing that there is no "arbitrary and unrestrained power to banish residents, even resident aliens."[113] Under Justice Brewer's perspective, because the Fourteenth Amendment applied to "persons," then it applied to "all persons lawfully within the territory of the United States" and thus, residents of the United States—including Chinese nationals who were lawfully present—were entitled to its protections.[114] Justice Brewer argued that Section 6 of the Geary Act violated the Fourteenth Amendment because it "imposes punishment without a trial, and punishment cruel and severe. It places the liberty of one individual subject to the unrestrained control of another."[115] Justice Brewer's opinion was not written out of any feelings of racial inequality—he expressed anti-Chinese sentiments throughout, stating that Chinese nationals in the United States obtained constitutional protections "by sufferance and not of right."[116]

Yet, his concern was about broader democratic norms. If Congress exercised this power, he reasoned, "[W]ho shall say it will not be exercised to-morrow against other classes and other people? If the guaranties of these amendments can be thus ignored in order to get rid of a distasteful class what security have others that a like disregard of its

108. *Id.*

109. *Id.* ("The competency of all witnesses, without regard to their color, to testify in the courts of the United States, rests on acts of Congress, which Congress may, at its discretion, modify or repeal.").

110. *Id.* ("[R]equiring a Chinese alien, claiming the privilege of remaining in the United States, to prove the fact of his residence here at the time of the passage of the act 'by at least one credible white witness' may have been the experience of congress[.]"). *Id.*

111. 130 U.S. 581 (1889).

112. *Fong Yue Ting*, 149 U.S. at 730 (quoting *Chae Chan Ping*, 130 U.S. at 598).

113. *Id.* at 738 (Brewer, J., dissenting).

114. *Id.* at 739 (Brewer, J., dissenting).

115. *Id.* at 739–40 (Brewer, J., dissenting).

116. *Id.* at 743 (Brewer, J., dissenting).

provisions may not be resorted to?"[117] Justice Field also dissented, rejecting the majority's conclusion "that 'congress, under the power to exclude or expel aliens, might have directed any Chinese laborer found in the United States without a certificate of residence to be removed out of the country by executive officers, without judicial trial or examination, just as it might have authorized such officers absolutely to prevent his entrance into the country.'"[118] Justice Field argued that expelling residents of the United States (even foreign nationals) without constitutional compliance demonstrated "an unlimited and despotic power."[119] Justice Field dissented vehemently from the procedures set forth, particularly the shift in burden of proof, as well as the "credible white witness" requirement.[120]

Regardless of how the Chinese Exclusion Acts fared before the Court, mechanically, it entailed identifying one by national origin through an attempt at a systemic accumulation of data that was both biometric and biographical. The Bertillon system was, in short, an attempt to systematize identity management. While the acquisition of data about an individual serves to facilitate recognition, it also enables analysis. Biometric and biographical data on Chinese immigrants enabled the government to begin generalizing and classifying the kinds of characteristics that might be typical of the class subject to this surveillance. That, in turn, facilitated administrative decisionmaking; for example, distinguishing between skilled and unskilled laborers, and enabled inferences of criminality and national security concerns. Finally, that administrative decision making facilitated preferential immigration decisions.

Thus, one of the earliest manifestations of the conflation of crime, immigration, and national security policy could be seen through the development of an identity management system of Chinese immigrants in the United States. The crimmigration-counterrorism phenomena, now reflected in extreme vetting, is a contemporary example of this troubling

117. *Id.* (Brewer, J., dissenting).

118. *Id.* at 755 (Field, J., dissenting).

119. *Id.* at 756 (Field, J., dissenting).

120. *Id.* at 759–60 (Field, J., dissenting).

> Here the government undertakes to exact of the party arrested the testimony of a witness of a particular color, though conclusive and incontestable testimony from others may be adduced. The law might as well have said that unless the laborer should also present a particular person as a witness who could not be produced, from sickness, absence, or other cause, such as the archbishop of the State, to establish the fact of residence, he should be held to be unlawfully within the United States.

Id. (Field, J., dissenting).

policymaking evolution. Unlike past methods, such as the Bertillon system, modern iterations embrace biometric ID cybersurveillance.

B. Biometric Identification and Immigration Vetting after the Chinese Exclusion Act

At the turn of the century, there was a great national debate on immigration that went beyond the exclusion of the Chinese. Through publications of essays such as *The Control of Trends in the Racial Composition of the American People* and other academic discussions, immigration policy debates focused on "Old Stock" or "Native Stock" Americans—Western and Northern Europeans—and "New Stock" or "Immigrant Stock" Americans—Southern and Eastern Europeans.[121] The census statistics of 1910 and 1920 showed a dramatic rise in "New Stock" Americans.[122] "Between 1900 and 1910 the origin of the American people, as between old and new stock, passed below the fifty percent line."[123] The results of the 1910 census were published in 1913.[124] Congress responded with several immigration reform bills in the 1920s. The Quota Act of 1921[125] and National Origins Act of 1924[126] were designed to restrict the number of immigrants allowed from Central, Southern, and Eastern Europe, and set the quota for immigrants from East, South, Southeast, and Central Asia and all other "Oriental countries" at nearly zero.[127] The "quota" system of federal immigration policy was not lifted until 1965.[128]

In the 1920s and 1930s, the Chinese population of the United States plummeted.[129] There was a sharp rise, however, in immigrants from Eastern and Southern Europe. In 1939, Pennsylvania passed an "Alien Registration Act," which required that every immigrant in the state register with the state annually, "provide such information as is required by the statute," and pay an annual registration fee.[130] In addition, the

121. Harry H. Laughlin, *The Control of Trends in the Racial Composition of the American*, *in* THE ALIEN IN OUR MIDST 158 (Madison Grant & Chas. Stewart Davison eds., 1930).

122. *Id.* at 159–60.

123. *Id.* at 159.

124. U.S. DEP'T OF COMMERCE, THIRTEENTH CENSUS U.S. TAKEN IN YEAR 1910 (1913).

125. Emergency Quota Act of 1921, ch. 8, 42 Stat. 5 (1921).

126. Immigration Act of 1924, ch. 190, 43 Stat. 153 (also known as the Johnson–Reed Act, and including the National Origins Act and Asian Exclusion Act).

127. HING, *supra* note 17, at 68–69 (2004).

128. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911.

129. *See, e.g.*, HING, *supra* note 17, at 42.

130. *Hines v. Davidowitz*, 312 U.S. 52, 59 (1941) (citing 35 Pa. Stat. Ann. §§ 1801–06).

Pennsylvania law required that the immigrant "receive an alien identification card and carry it all times; show the card whenever it may be demanded by any police officer or any agent of the Department of Labor and Industry; and exhibit the card as a condition precedent to registering a motor vehicle in his name or obtaining a license to operate one."[131] Failure to register could result in "a fine of not more than $100 or imprisonment for not more than 60 days."[132] Failure to carry or show the card "upon proper demand" could result in "a fine of not more than $10, or imprisonment for not more than 10 days, or both."[133] Shortly thereafter, in *Hines v. Davidowitz*,[134] the Supreme Court struck down the Pennsylvania law on preemption grounds, finding that the state statute interfered with the exclusive power of the federal government to regulate "the rights, privileges, obligations or burdens of aliens[.]"[135]

Congress followed Pennsylvania in the enactment of the Alien Registration Act of 1940.[136] Congress utilized the most advanced biometric technology available at the time in developing a national registration program for immigrants. The national identity registry required the fingerprinting of nearly 5 million foreign nationals during World War II.[137] Database sorting technology made possible through the U.S. Census Bureau's usage of the Hollerith machine, combined with the alien registration protocol, allowed for the identification of Japanese-Americans for internment purposes.[138]

After the Pearl Harbor attack on December 7, 1941, state and local governments began enacting laws and ordinances targeting Japanese Americans and immigrants from Japan residing in the United States.[139] Subsequently, Executive Order 9,066, signed by President Roosevelt in 1942,[140] ordered the internment of approximately 112,000 Japanese Americans; a majority of them, an estimated 70,000, were U.S.

131. *Id.*

132. *Id.* at 59–60.

133. *Id.* at 60.

134. *Id.*

135. *Id.* at 63–64.

136. Alien Registration (Smith) Act of 1940, ch. 439, 54 Stat. 670 (1940).

137. Will Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 338 (1956) ("In 1940, the Alien Registration Act required every alien fourteen years of age or older to be fingerprinted and to disclose the essential facts about his immigration status. As a result, 4,800,000 aliens registered.").

138. *See, e.g.*, GARFINKEL *supra* note 32, at 17–18; Haya El Nasser, *Papers Show Census Role in WWII Camps*, USA TODAY (Mar. 30, 2007, 1:33 AM), http://usatoday30.usatoday.com/news/nation/2007-03-30-census-role_N.htm [https://perma.cc/SF93-CSCY].

139. *See, e.g.*, Yamamoto, *supra* note 139 at 100–01.

140. Executive Order 9,066, 7 Fed. Reg. 1407 (Feb. 25, 1942); *See also Hirabayashi v. United States*, 320 U.S. 81, 85 (1943); Yamamoto, *supra* note 139.

citizens.[141] This same database technology and protocol was used to identify Italian-Americans and German-Americans as well. During World War II, over 600,000 Italian-born and 300,000 German-born United States resident aliens and their families were mandated to carry Certificates of Identification.[142]

After World War II, there was a consensus that the United States needed a comprehensive and uniform immigration regulation policy.[143] On September 4, 1952, President Truman appointed the President's Commission on Immigration and Naturalization to make recommendations "designed to eliminate from our immigration laws the unfortunate provisions which apply discriminations based on national origin, race, creed and color; and to substitute provisions worthy of our people and our form of government."[144]

C. Biometric Identification under Extreme Vetting Protocols

Expanding upon past immigration and citizenship identification protocols, in the aftermath of the terrorist acts of September 11, 2001, the newly-created U.S. Department of Homeland Security (DHS) has been developing technologically advanced forms of screening and vetting. These new DHS vetting protocols are based on sources that include DHS-published materials describing current refugee vetting processes and interviews with experts familiar with the refugee vetting protocols established under the Obama Administration.[145] Extreme vetting will entail biometric database screening and other enhanced database screening protocols.[146] Currently, immigration-related vetting protocols

141. *Korematsu v. United States*, 323 U.S. 214, 241–42 (1944) (Murphy, J., dissenting). ("It seems incredible that under these circumstances it would have been impossible to hold loyalty hearing for the mere 112,000 persons involved—or at least for the 70,000 American citizens—especially when a large part of this number represented children and elderly men and women.").

142. Wartime Treatment Study Act, S. 621, 110th Cong. § 2 (2007).

143. U.S. IMMIGRATION IN THE 1980S: REAPPRAISAL AND REFORM 3 (David Simcox ed., 1988).

144. Special Message to the Congress Transmitting Report of the President's Commission on Immigration and Naturalization, 1952–1953 PUB. PAPERS 1169, 1170 (1953) http://www.presidency.ucsb.edu/ws/index.php?pid=14387&st=Special+Message+to+the+Congress+Transmitting+Report+of+the+President%5C%27s+Commission+on+Immigration+and+Naturalization&st1= [https://perma.cc/9TYS-56DH].

145. *See generally* Office of Biometric Identity Management, U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/obim [https://perma.cc/ZH3C-F8WZ].

146. *See, e.g.*, Exec. Order, Oct. 27, Enhanced Vetting; *see also* Ann M. Simmons, *We Don't Know Exactly What 'Extreme Vetting' Will Look Like, But Screening For Refugees Is Already Pretty Tough*, L.A. TIMES (Jan. 29, 2017), http://www.latimes.com/nation/la-fg-refugees-screening-20170129-story.html [https://perma.cc/46PY-NW2K].

often begin with biographic identification—for example, in-person interviews combined with screening paper documents such as birth certificates, travel and work visas, passports, and other government-issued documents;[147] as well as biometric identification—for example, the collection and database screening of scanned fingerprints and irises, digital photographs for facial recognition technology, and DNA.[148]

Biometric data collection occurs at the earliest stages of refugee vetting. The United Nations High Commissioner for Refugees (UNHCR) recommends qualified refugees to the United States and other cooperating countries for resettlement and is tasked with conducting the initial assessment of whether an applicant qualifies for refugee status under international laws.[149] UNHCR "collects identity documents [such as visas and passports, if available], biographical information, and biometric data, such as iris scans for Syrians."[150] DHS also reportedly collects DNA at specific refugee camps.[151]

Experts have explained that refugees are subjected to a "21-step screening process."[152] The vetting protocols for refugees are described by experts as already "extreme" and "among the most rigorous for anyone seeking to enter the United States."[153] Once referred by UNHCR for refugee resettlement in the United States, applicants are referred to support centers, contracted by the U.S. Department of State to compile and process refugee's personal data.[154] The U.S. Department of State

147. *See Refugee Processing and Security Screening*, U.S. CITIZENSHIP AND IMMIGRATION SERV., https://www.uscis.gov/refugeescreening [https://perma.cc/2BHS-P696].

148. Hu, *Biometric ID*, *supra* note 1.

149. Simmons, *supra* note 146.

150. *Id.*

151. Shane Bauer, *The FBI is Very Excited About This Machine That Can Scan Your DNA in 90 Minutes*, MOTHER JONES (Nov. 20, 2014, 11:30 AM), http://www.motherjones.com/politics/2014/11/rapid-dna-profiles-database-fbi-police [https://perma.cc/7ZTU-C63B] ("The US government will soon test the [Rapid-DNA] machine in refugee camps in Turkey and possibly Thailand on families seeking asylum in the United States, according to Chris Miles, manager of the Department of Homeland Security's biometrics program.").

152. Del Quentin Wilber & Brian Bennett, *Federal Agents are Reinvestigating Syrian Refugees in U.S. Who May Have Slipped through Vetting Lapse*, L.A. TIMES (Jan. 25, 2017, 9:55 AM), http://www.latimes.com/politics/la-na-syria-refugees-vetting-gap-20170125-story.html [https://perma.cc/9D4L-CERE].

153. *Id. See also* Simmons, *supra* note 146; Interview by John Burnett of Leon Rodriguez, Former Head of Dep't of Homeland Security's Immigration Serv., *in All Things Considered: Former Immigration Director Defends U.S. Record on Refugee Vetting* (NPR Feb. 3, 2017), http://www.npr.org/2017/02/03/513311323/former-immigration-director-defends-u-s-record-on-refugee-vetting [https://perma.cc/PG9K-XCL6].

154. Simmons, *supra* note 146.

checks the refugee's name against digital watchlisting systems operated by the military and the intelligence communities.[155] The National Counterterrorism Center conducts interagency checks, such as for

155. U.S. CITIZENSHIP AND IMMIGRATION SERV., *supra* note 147. DHS explains that the following State Department checks are involved in refugee vetting protocols:

> The Department of State's Consular Lookout and Support System (CLASS):
>
> - State initiates CLASS name checks for all refugee applicants when they are being prescreened by an RSC. Name checks are conducted on the applicant's primary names as well as any variations used by the applicant. Responses are received before the USCIS interview, and possible matches are reviewed and adjudicated by USCIS headquarters. Evidence of the response is included in the case file. If a new name or variation is identified at the interview, USCIS requests another CLASS name check on the new name and places the case on hold until that response is received.
> - CLASS is owned by State. The name-check database provides access to critical information for adjudicating immigration applications. The system contains records provided by numerous agencies and includes information on individuals who have been denied visas, immigration violations, criminal histories, and terrorism concerns, as well as intelligence information and child support enforcement data.
> - In addition to containing information from State sources, CLASS also includes information from:
>   - National Counterterrorism Center/Terrorist Screening Center (terrorist watch lists);
>   - TECS;
>   - Interpol;
>   - Drug Enforcement Administration;
>   - Health and Human Services; and
>   - FBI (extracts of the National Crime Information Center's Wanted Persons File, Immigration Violator File, Foreign Fugitive File, Violent Gang and Terrorist Organization File (and the Interstate Identification Index)).
>
> Security Advisory Opinion (SAO):
>
> State initiates SAO name checks for certain refugee applicants when they are being prescreened by an RSC. The SAO biographic check is conducted by the FBI and intelligence community partners. SAOs are conducted for an applicant who is a member of a group or nationality that the U.S. government has designated as requiring this higher level check. SAOs are processed, and a response must be received before finalizing the decision. If there is a new name or variation identified at the interview, USCIS requests another SAO for the new name and places the case on hold until that response is received.

The SAO process was implemented after September 11th, 2001, to provide an additional security mechanism to screen individuals in certain higher-risk categories who are seeking to enter the United States through a variety of means, including refugee applicants. *Id.*

military-age males, to determine if "derogatory information" disqualifies the applicant.[156]

The results of those checks are passed along to the DHS Office of U.S. Citizenship and Immigration Services, which assigns officers to travel to foreign countries to interview the refugees to assess the applicant's credibility.[157] The screening process includes background security clearance checks through an Interagency Check[158] and an in-person interview with the DHS Office of U.S. Citizenship and Immigration Services.[159]

In addition to extensive interviews, the applicant's fingerprints and digital photographs are screened. Fingerprints of the applicant, for example, are screened through intelligence and military databases operated by the FBI, the U.S. Department of Homeland Security, the Department of Defense, and other databases.[160] The applicant is also

156. *Id.*

157. Wilber & Bennett, *supra* note 152.

158. U.S. CITIZENSHIP AND IMMIGRATION SERV., *supra* note 147. DHS explains that the Interagency Check protocol involves prescreening by intelligence community partners:

> Interagency Check (IAC):
>
> > The IAC screens biographic data, including names, dates of birth, and other additional data of all refugee applicants within designated age ranges. This information is captured at the time the applicant is prescreened and is provided to intelligence community partners. This screening procedure began in 2008 and has expanded over time to include a broader range of applicants and records. These checks occur throughout the process.
>
> *Id.*

159. *Id.*

160. DHS explains that the following biometric database screening is involved in refugee vetting protocols:

> At the time of USCIS interview, USCIS staff collects fingerprints and begins biometric checks. These checks include:
>
> - FBI Fingerprint Check through Next Generation Identification (NGI);
>   - Recurring biometric record checks pertaining to criminal history and previous immigration data.
> - DHS Automated Biometric Identification System (IDENT - f/n/a US-VISIT);
>   - A biometric record check related to travel and immigration history as well as immigration violations, and law enforcement and national security concerns. Enrollment in IDENT also allows U.S. Customs and Border Protection (CBP) to confirm the applicant's identity at U.S. ports of entry; and
> - DOD Defense Forensics and Biometrics Agency (DFBA)'s Automated Biometric Identification System (ABIS).
>   - A biometric record check of the Department of Defense's (DOD) records collected in areas of conflict.

screened through various medical tests to ensure that he or she is free of any communicable diseases.[161] "Syrian refugees referred for resettlement in the United States face additional screening.[162] Only then is the applicant's status conditionally approved for resettlement and submitted to the U.S. State Department for final processing."[163]

If the applicant is able to pass security and medical screening, the refugee is approved for resettlement. According to U.S. State Department data, the entire screening process takes at least 18 months to two years.[164] John Sandweg, former DHS Acting General Counsel and former DHS Acting Director of Immigration and Customs Enforcement, explained that it was difficult for him to conceive of how the vetting protocols could be made more rigorous by the Trump administration, given the rigorousness of the present system.[165]

Importantly, Sandweg described the vetting procedures in place as involving the efforts of multiple intelligence agencies, U.S. Department of Defense, and other law enforcement databases at the federal and state level. He stated, "'There are individuals who are collecting information on the battlefield, from sources and electronic intercepts. That is all fed into the refugee screening process[.]'"[166] DHS specifies that vetting of refugees includes "[a] biometric record check of the [U.S.] Department of Defense's (DOD) records collected in areas of conflict (predominantly Iraq and Afghanistan). DOD screening began in 2007 for Iraqi applicants and has now been expanded to all nationalities."[167]

DHS explains that vetting uses both classified and unclassified databases for biometric and biographic screening, corroborating that vetting involves intelligence tools.[168] Specifically, according to one media report, "U.S. intelligence agents cross-check[] refugees' names and biographical information against CIA databases[.]"[169] Database screening systems "automatically inspect data contained in 'attachments' to the records, the officials said. Such attachments can include cellphone numbers, address books, social media postings, arrest reports and

Id.

161. Simmons, *supra* note 146.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. U.S. CITIZENSHIP AND IMMIGRATION SERV., *supra* note 147.

168. *Id.* ("CBP's [DHS Customs and Border Patrol] National Targeting Center-Passenger (NTC-P) conducts biographic vetting of all ABIS biometric matches against various classified and unclassified U.S. government databases.")

169. Wilber & Bennett, *supra* note 152.

intelligence assessments[.]"[170] Thus, United States law enforcement and intelligence officials screen individuals through the classified databases of the CIA, FBI, and National Counterterrorism Center; the military databases of the U.S. Department of Defense; and the civilian databases of the U.S. Department of State and DHS.[171]

It is worth noting that the vetting protocols involve continuous monitoring, and tracking of the refugee even persists after the applicant is approved for entry. The refugee faces additional interviews and screening upon entry to the United States. "'The individuals are recurrently vetted even after they are in the United States,' Sandweg said. 'You are constantly running them through a database to see if any new information has come in to say that they are a threat.'"[172]

In this sense, a registry of sorts already exists insofar as, once a refugee enters the surveillance system, they get no exit. Nevertheless, the Trump administration envisions something more expansive. On November 15, 2016, an immigration adviser to then-President-Elect Donald Trump explained to Reuters News Service that the incoming administration was considering the development of a Muslim "database" or "registry" of Muslim immigrants residing in the United States.[173] According to the media report: "Kansas Secretary of State Kris Kobach, who helped write tough immigration laws in Arizona [Arizona's SB 1070] and elsewhere, said in an interview that Trump's policy advisers had also discussed drafting a proposal for his consideration to reinstate a registry for immigrants from Muslim countries."[174] The reinstatement of a Muslim registry or Muslim database screening system was a reference to a discontinued Bush Administration program named the "National Security Entry-Exit Registration System," a biometric database screening system that collected the scanned fingerprints and digital photographs of Muslim immigrants.[175]

170. *Id.*

171. *Id.*

172. Simmons, *supra* note 146.

173. Mica Rosenberg & Julia Edwards Ainsley, *Immigration Hardliner Says Trump Team Preparing Plans for Wall, Mulling Muslim Registry*, REUTERS (Nov. 15, 2016, 7:45 PM), http://www.reuters.com/article/us-usa-trump-immigration-idUSKBN13B05C?feedType=RSS&feedName=politicsNews&utm_source=Twitter&utm_medium=Social [https://perma.cc/4AWV-38SK].

174. *Id.*

175. *National Security Entry-Exit Registration System,* U.S. DEP'T OF JUSTICE (2002), https://www.justice.gov/archive/ag/speeches/2002/natlsecentryexittrackingsys.htm [https://perma.cc/3S5J-GXSU].

II. IMPLEMENTING CRIMMIGRATION-COUNTERTERRORISM THROUGH THE MUSLIM BAN, THE TRAVEL BAN, AND EXTREME VETTING

A. The Muslim Ban

Then-candidate Trump's original call for a "Muslim Ban" occurred on December 7, 2015, following terrorist attacks in Paris and San Bernardino, when he published a "Statement on Preventing Muslim Immigration" on his campaign website.[176] The statement explained that Trump was "calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."[177]

The Muslim Ban, as initially proposed during the campaign, was intended to prohibit any Muslim from entering the United States.[178] Trump subsequently explained that it would be a temporary ban, which would permit the government to execute an assessment of immigration procedures, and "suspend immigration from regions linked with terrorism . . . "[179] He also argued that surveillance of Muslims and mosques was necessary, linking domestic surveillance and foreign vetting as one integral policy.[180]

In response to challenges that banning individuals from entry to the United States based on religion was inconsistent with the Constitution, then-candidate Trump suggested that it would instead be based on territory.[181] In an interview with NBC's *Meet the Press*, Trump explained that, "We must immediately suspend immigration from any nation that has been compromised by terrorism until such time as proven vetting

176. *Int'l Refugee Assistance Project v. Trump,* 857 F.3d 554, 575 (4th Cir. 2017) (en banc); *see also* Fred Barbash, *Muslim Ban Language Suddenly Disappears from Trump Campaign Website After Spicer Questioned*, WASH. POST (May 9, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/05/09/trumps-preventing-muslim-immigration-vow-disappears-from-campaign-website-after-spicer-questioned/?utm_term=.2411d4837bec [https://perma.cc/7JHW-LFW8].

177. Barbash, *supra* note 176. (Statement of Donald J. Trump, on Preventing Muslim Immigration (Dec. 7, 2015)). The statement was available on the campaign website until shortly before oral argument before the Fourth Circuit in *International Refugee Assistance Project v. Trump*. *See Int'l Refugee Assistance Project*, 857 F.3d at 575 n.5.

178. *Id.*

179. Associated Press, *How Donald Trump's Plan to Ban Muslims Has Evolved*, FORTUNE (June 28, 2016), http://fortune.com/2016/06/28/donald-trump-muslim-ban/ [https://perma.cc/7VVE-QCKU].

180. *Int'l Refugee Assistance Project*, 857 F.3d at 576; *see also* David Mark & Jeremy Diamond, *Trump: 'I Want Surveillance of Certain Mosques'*, CNN (Nov. 21, 2015, 7:25 PM), http://www.cnn.com/2015/11/21/politics/trump-muslims-surveillance/ [https://perma.cc/Y5AS-UASF].

181. *Int'l Refugee Assistance Project*, 857 F.3d at 576.

mechanisms have been put in place."[182] Trump stated that the shift to nation-based exclusion was an "expansion" and that he was "talking territory instead of Muslim."[183] Thus, even as the proposed policy purportedly shifted to more defensible legal grounds—targeting specific countries rather than an entire religion based on a country-by-country risk assessment—rhetorically broadened the divide, encompassing not only Muslims, but also their associates residing in countries subject to Islamic influence. In this way, the proposed ban continued to be animated by—while also animating—cultural phobia of Muslims.

In a further expansion of his arguments for stricter scrutiny of immigrants, candidate Trump announced a proposal for "extreme vetting" during a campaign speech in August 2016.[184] He explained that, "In the Cold War, we had an ideological screening test. The time is overdue to develop a new screening test for the threats we face today. I call it extreme vetting."[185] As a candidate, Trump also endorsed a "biometric entry-exit system for tracking visa-holders."[186]

B. The Travel Ban

In his first week in office, President Trump signed three Executive Orders that implemented various aspects of immigration-related campaign promises that had been articulated prior to his election. On January 25, 2017, President Trump issued two Executive Orders titled, "Border Security and Immigration Enforcement Improvements, Executive Order 13,767,"[187] and "Enhancing Public Safety in the Interior of the United States, Executive Order 13,768."[188] The former stated that it was "the policy of the executive branch to . . . secure the southern

182. *Meet the Press - July 24, 2016*, NBC NEWS (July 24, 2016, 11:47 AM), http://www.nbcnews.com/meet-the-press/meet-press-july-24-2016-n615706 [https://perma.cc/DH2W-5UHJ].

183. *Id.*

184. Donald J. Trump, Remarks at Youngstown State University in Youngstown, Ohio (August 15, 2016) (transcript by Gerhard Peters & John T. Woolley, The American Presidency Project, http://www.presidency.ucsb.edu/ws/index.php?pid=119503 [https://perma.cc/8NBQ-8B9U].

185. *Id.*

186. Emily Schultheis, *Donald Trump Doubles Down in Immigration Speech: "Mexico Will Pay for the Wall"*, CBS NEWS (Aug. 31, 2016, 10:06 PM), http://www.cbsnews.com/news/donald-trump-delivers-immigration-speech-in-phoenix/ [https://perma.cc/ZF7E-X2FE].

187. Border Security and Immigration Enforcement Improvements, Exec. Order No. 13,767, 82 Fed. Reg. 18, 8793 (Jan. 30, 2017) [hereinafter Exec. Order, Jan. 30, Border Security].

188. Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13,768, 82 Fed. Reg. 18, 8799 (Jan. 30, 2017) [hereinafter Exec. Order, Jan. 30, Interior Public Safety].

border of the United States through the immediate construction of a physical wall" between the United States and Mexico.[189] The latter threatened the loss of federal funding for "sanctuary" jurisdictions, those state and local governments refusing to cooperate with the federal government in the detention and deportation of undocumented immigrants. [190]

Two days later, on January 27, 2017, President Trump issued a third Executive Order, Executive Order 13,769, promulgating immigration policy, titled, "Protecting the Nation from Foreign Terrorist Entry into the United States."[191] The January 27, 2017, Order barred the admission of all refugees to the United States for 120 days,[192] and excluded immigration from seven countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.[193] It indefinitely suspended refugees from Syria.[194] Further, it asserted that immigration from those countries was "detrimental to the interests of the United States" and suspended immigration from those countries for ninety days while visa protocols were scrutinized.[195]

Trump explained in a television interview on the Christian Broadcasting Network that the January 27, 2017, Order would afford greater protection to Christians.[196] Specifically, the Executive Order stated that prioritization would be granted to refugee applicants seeking relief from religious-based persecution if they demonstrated that they were among the religious minority in the Muslim-majority countries impacted by the Order.[197] The Order further lowered the refugee cap in 2017 to 50,000 refugees, down from the 85,000 refugee cap set by the Obama Administration for 2016.[198] State and local jurisdictions also enjoyed an expanded role in the process of refugee resettlement under the Order,[199] likely in response to multiple lawsuits brought by states seeking to prevent the resettlement of Syrian refugees in those states,

189. Exec. Order, Jan. 30, Border Security at 8793.

190. Exec. Order, Jan. 30, Interior Public Safety at 8801.

191. Exec. Order, Jan. 27, Travel Ban I.

192. *Id.* at 8979.

193. Exec. Order, Mar. 6, Travel Ban II.

194. Exec. Order, Jan. 27, Travel Ban I at 8979.

195. *Id.* at 8978.

196. *See, e.g.*, Daniel Burke, *Trump Says US Will Prioritize Christian Refugees*, CNN, (Jan. 30, 2017, 11:28 AM), http://www.cnn.com/2017/01/27/politics/trump-christian-refugees/ [https://perma.cc/MBB4-7S99].

197. Exec. Order, Jan. 27, Travel Ban I at 8979.

198. *Id.*

199. *Id.* at 8980

including a lawsuit involving then-Governor Mike Pence's efforts to bar Syrian refugees from the state of Indiana.[200]

In response to ongoing litigation that had temporarily suspended the January 27, 2017, Order,[201] on March 6, 2017, President Trump reissued this Executive Order, Executive Order 13,780, under the same title, "Protecting the Nation from Foreign Terrorist Entry into the United States" ("March 6, 2017, Order").[202] The March 6, 2017, Order was more limited, and significantly modified the provisions that had restricted travel and refugee relief. The revised Order no longer included Iraq,[203] thereby restricting travel by citizens from six countries: Iran, Libya, Somalia, Sudan, Syria, and Yemen.[204] The March 6, 2017, Order no longer indefinitely suspended refugee relief for Syrian refugees, and instead subjected Syrian refugees to the provision of the order that bars admission of all refugees to the United States for 120 days.[205] In addition, it did not offer refugee relief preferences on the basis of minority religious persecution.[206] The March 6, 2017, Order expressly identified those who would not face a "suspension of entry" pursuant to the order, including: lawful permanent residents,[207] dual nationals,[208] diplomats,[209] and those who had been granted valid visas,[210] and asylum or refugee status prior to implementation of the order.[211]

The revised March 6, 2017, Order, like the original, stated that temporarily suspending refugee relief and banning travel into the United States by nationals and citizens of the "countries of concern" would allow time to develop more stringent vetting procedures.[212] It explained that the "countries of concern" were previously identified in the Visa Waiver Program, enacted in 2015 through the Visa Waiver Program Improvement and Terrorist Travel Prevention Act.[213] The March 6, 2017, Order specified that "[u]niform [s]creening and [v]etting [s]tandards for

200. *See Exodus Refugee Immigration, Inc. v. Pence*, 838 F.3d 902, 902 (7th Cir. 2016).

201. *See supra* notes 27–31 and accompanying text.

202. Exec. Order, Mar. 6, Travel Ban II.

203. *Id.* at 13211–12

204. *Id.* at 13210–11

205. *Id.* at 13215.

206. *Id.* at 13210.

207. *Id.* at 13213.

208. *Id.* at 13213–14.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* 13209–11, 13215; *see also* Exec. Order, Jan. 27, Travel Ban I.

213. Exec. Order, Mar. 6, Travel Ban II at 13209 (citing Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, Pub. L. No. 114–13 § 203, 129 Stat. 2988–91 (codified at 8 U.S.C. § 1187(a)(12) (D)(ii)(Supp. III 2015))).

all [i]mmigration [p]rograms" would be developed by DHS, the U.S. Department of State, U.S. Department of Justice, and the Office of the Director of National Intelligence.[214] A revised screening process "could include holding more in-person interviews, searches of an expanded database of identity documents or longer application forms."[215] The March 6, 2017, Order further explained that expanded vetting and screening procedures would attempt to assess "malicious intent" and implement a "mechanism to assess whether [visa] applicants may commit, aid, or support any kind of violent, criminal, or terrorist acts."[216]

In contrast, the January 27, 2017, Order specifically stated that its purpose was to include an assessment of the ideological and constitutional posture of immigrants through extreme vetting:

> In order to protect Americans, the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles. The United States cannot, and should not, admit those who do not support the Constitution, or those who would place violent ideologies over American law.[217]

The March 6, 2017, Order did not include this language, however, the screening and vetting requirements set forth in Section 5 of the Order was more expansive and ambiguous. For instance, instead of focusing on constitutional ideology, Section 5 of the Order cast a wide pre-crime net, stating that the screening and vetting standards would analyze, amongst other concerns, a "risk of causing harm."[218]

The March 6, 2017, Order maintained several important provisions that were articulated in the January 27, 2017 version. Both asserted that restricting travel from the identified countries was "detrimental to the interests of the United States" and suspended immigration from those countries for ninety days while visa protocols were scrutinized.[219] Both lowered the refugee cap in 2017 to 50,000 refugees, down from 85,000 refugee cap set by the Obama Administration for 2016.[220] As in the original, the March 6, 2017, Order ensured that state and local

214. *Id.* at 13215.

215. Reuters, *Here's What Trump's Order on Extreme Vetting Includes*, BUSINESS INSIDER (Jan. 28, 2017, 12:19 PM), http://www.businessinsider.com/heres-what-trumps-order-on-extreme-vetting-includes-2017-1 [https://perma.cc/W74H-S24U].

216. Exec. Order, Mar. 6, Travel Ban II at 13215.

217. Exec. Order, Jan. 27, Travel Ban I at 8977.

218. Exec. Order, Mar. 6, Travel Ban II at 13215.

219. *Id.* at 13213; *see* Exec. Order, Jan. 27, Travel Ban I at 82.

220. Exec. Order, Jan. 27, Travel Ban I at 8978; Exec. Order, Mar. 6, Travel Ban II at 13216.

jurisdictions enjoy an expanded role in the process of refugee resettlement.[221] This is likely in response to multiple lawsuits attempting to overturn state bans on the resettlement of Syrian refugees in those states.[222]

A full legal analysis of the Travel Ban cases extends beyond the scope of this Article. At the time of publication, the litigation remains ongoing and executive actions surrounding the Travel Ban and extreme vetting are dynamic; however, a cursory overview of recent developments is as follows. On September 24, 2017, the ninety-day entry suspension in Section 2(c) of the March 6, 2017, Order expired. In response, the President issued a Proclamation, pursuant to Section 2(e) of the March 6, 2017 Order. Consequently, on September 24, 2017, the travel restrictions and the vetting requirements were expanded in a third iteration of the Travel Ban, titled, "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats."[223] President Trump signed this new Proclamation (the "September 24, 2017, Proclamation")[224] before oral arguments were scheduled for the U.S. Supreme Court in the consolidated Travel Ban cases of *Trump v. Hawaii* and *Trump v. International Refugee Assistance Project*.[225]

Solicitor General Noel Francisco claimed that the executive action "was issued after the completion of a worldwide review conducted under Section 2(a) of the [March 6, 2017] Order to determine what additional information (if any) is needed from each foreign country to assess whether that country's nationals who seek to enter the United States pose a security or safety threat."[226] Furthermore, Solicitor General Francisco characterized the September 24, 2017, Proclamation as "impos[ing] certain conditional restrictions on entry into the United States of nationals of a small number of countries"[227] due to "the President's findings regarding those countries' information-sharing capabilities and practices and other serious terrorism-related risks the countries present."[228] The September 24, 2017, Proclamation was set to go into effect on October 18, 2018. On October 17, 2017, significant parts of the

221. Exec. Order, Jan. 27, Travel Ban I at 8980; Exec. Order, Mar. 6, Travel Ban II.

222. *See, e.g.*, *Exodus Refugee Immigration, Inc. v. Pence*, 838 F.3d 902, 903–04 (7th Cir. 2016).

223. Proclamation, Sept. 24, Travel Ban III.

224. Proclamation, Sept. 24, Travel Ban III.

225. 137 S. Ct. 2080 (2017).

226. Letter from U.S. Solicitor Noel General Francisco to the Clerk of the Supreme Court, dated September 24, 2017.

227. *Id.*

228. *Id.*

September 24, 2017, Proclamation were enjoined by the Districts of Hawaii and Maryland in *Hawaii v. Trump*[229] and *International Refugee Assistance Project v. Trump*,[230] respectively.

The September 24, 2017, Proclamation differs from the prior Orders. The March 6, 2017, Order fully replaced the January 27, 2017, Order. The September 24, 2017, Proclamation, however, supplements the March 6, 2017, Order. Importantly, the September 24, 2017, Proclamation shifts the focus away from an Entry Ban or a Travel Ban and emphasizes more clearly the vetting and screening provisions set forth by the prior Orders. The Proclamation and other executive action now makes clear that extreme vetting must be understood as part of a web of biometric and biographic tracking technologies that DHS has termed "identity management."[231]

The March 6, 2017, Order left the extreme vetting provisions of the January 27, 2017, Order in place.[232] The vetting requirements were expanded in several respects,[233] and most fully articulated in Section 5, titled "Implementing Uniform Screening and Vetting Standards for All Immigration Programs."[234] Sections 1(a) through (h) of the September 24, 2017, Proclamation expands extreme vetting even further. The September 24, 2017, Proclamation focuses its attention on "identity-management and information-sharing capabilities, protocols, and practices" related to immigration screening and vetting.[235]

Additionally, the September 24, 2017, Proclamation instituted a number of changes to the requirements that had been previously imposed by the March 6, 2017, Order. Under the September 24, 2017,

229. *Hawaii v. Trump*, 2017 U.S. Dist. LEXIS 171242 (D. Haw., Oct. 17, 2017).

230. *Int'l Refugee Assistance Project v. Trump*, 2017 U.S. Dist. LEXIS 171879 (D. Md., Oct. 17, 2017).

231. *See* Proclamation, Sept. 24, Travel Ban III; Exec. Order, Oct. 27, Enhanced Vetting. DHS offers this definition of identity management:

> Identity Management (IdM) deals with identifying and managing individuals within a government, state, local, public, or private sector network or enterprise. In addition, authentication and authorization to access resources such as facilities or, sensitive data within that system are managed by associating user rights, entitlements, and privileges with the established identity.

Cyber Security Division Identity Management Program Video, U.S. DEP'T HOMELAND SEC., https://www.dhs.gov/science-and-technology/cyber-security-division-identity-management-program-video [https://perma.cc/F9KK-XVRE].

232. Exec. Order, Mar. 6, Travel Ban II §§ 1–2; *see also id.* § 5 ("Implementing Uniform Screening and Vetting Standards for All Immigration Programs").

233. *Compare id.*, *with* Exec. Order, Jan. 27, Travel Ban I § 4.

234. Exec. Order, Mar. 6, Travel Ban II § 5.

235. *Id.*; *see also supra* note 231 and accompanying text (discussing U.S. Department of Homeland Security definition of "identity management").

Proclamation, for example, Sudan nationals are no longer restricted from entry.[236] Immigrants who are nationals from seven nations are suspended from entering indefinitely: Iran, Libya, Somalia, Syria, Yemen, Chad, and North Korea.[237] Of that group, only nationals from Chad and North Korea were not subject to March 6, 2017, Order.[238] However, nonimmigrant entry of nationals from those seven countries is suspended in varying degrees.[239] Nonimmigrant nationals from North Korea and Syria are suspended from entry.[240] Nonimmigrant nationals from Iran can enter in general, but not on business (B-1), tourist (B-2), or business/tourist (B-1/B-2) visas.[241]

Some nationals from Venezuela are subject to this same suspension: a number of officials, and their immediate family members, of Venezuelan agencies that work in screening and vetting procedures, such as the Ministry of the Popular Power for Interior, Justice and Peace; the Administrative Service of Identification, Migration and Immigration; the Scientific, Penal and Criminal Investigation Service Corps; the Bolivarian National Intelligence Service; and the Ministry of the Popular Power for Foreign Relations.[242] Other nationals from Venezuela who have visas have to comply with additional measures to maintain their traveler information.[243]

Nationals from Somalia are subject to "additional scrutiny" regarding issuance of visas and permission to enter "to determine if applicants are connected to terrorist organizations or otherwise pose a threat to the national security or public safety of the United States."[244] The September 24, 2017, Proclamation defines "immigrant" as someone who enters subject to an immigrant visa who becomes a lawful permanent resident once in the United States.[245] Furthermore, before it was enjoined, the Proclamation was to take effect on October 18, 2017, except for those who were already subject to Section 2(c) of the March 6, 2017, Order—namely, nationals from Iran, Libya, Somalia, Syria, and Yemen—for whom the September 24, 2017, Proclamation had an immediate effect.[246]

236. *See* Proclamation, Sept. 24, Travel Ban III.
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*

The January 27, 2017, and March 6, 2017, Orders mandated immediate completion of the "Biometric Entry-Exit Tracking System" by DHS,[247] a system with the stated aim of tracking foreign visitors' arrival and departure from United States airports, borders, and other ports of entry by screening biometric data through government databases.[248] The Obama Administration had previously announced that it would aim to implement biometric exit checks at the largest airports in the nation by 2018.[249] Some experts have explained that system risks limited efficacy unless it is extended to all land, air, and sea ports of entry,[250] and unless it includes biometric data on all those residing in the United States, both citizens and noncitizens.[251] "According to a 2014 report from the Bipartisan Policy Center the system would be expensive to implement and would 'offer mixed value for enforcement objectives.'"[252]

Section 5 of the March 6, 2017, Order suggested pre-crime objectives, stating that the screening and vetting standards will analyze, for example, the "risk of causing harm."[253] The September 24, 2017, Proclamation expands the ambiguity of the objectives of the screening and vetting protocols. In section 1(a) of the September 24, 2017, Proclamation, it states that the purpose is "to protect its citizens from terrorist attacks and other public-safety threats. Screening and vetting protocols and procedures associated with visa adjudications and other immigration processes play a critical role in implementing that policy."[254] Repeatedly, the September 24, 2017, Proclamation refers to

247. Exec. Order, Mar. 6, Travel Ban II, at 13216; *see also* Exec. Order, Jan. 27, Travel Ban I, at 8980.

248. *See, e.g.*, *Why is the Biometric Exit Tracking System Still Not in Place?: Hearing Before the S. Subcomm. on Immigration and Nat'l Interest*, Comm. on the Judiciary, 114th Cong. 1 (2016) (Anh Duong, Director, Borders and Maritime Security Division, U.S. Dept. of Homeland Security, Craig Healy, Assistant Director, National Security Investiations Division, U.S. Dept. of Homeland Security and John Wagner, Deputy Asst. Comm'r, Office of Field Operations, U.S. Dept. of Homeland Security), https://www.hsdl.org/?abstract&did=789646 [https://perma.cc/7MWE-DWP5] (written testimony).

249. CUSTOMS AND BORDER PROT., U.S. DEP'T HOMELAND SEC., COMPREHENSIVE BIOMETRIC ENTRY/EXIT PLAN, FISCAL YEAR 2016 REPORT TO CONGRESS, at 18 (2016), https://www.dhs.gov/sites/default/files/publications/Customs%20and%20Border%20Protection%20-%20Comprehensive%20Biometric%20Entry%20and%20Exit%20Plan.pdf [https://perma.cc/YS7Y-WPEM].

250. *See Implementation of an Entry-Exit System: Still Waiting After All These Years: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. (2013), https://www.gpo.gov/fdsys/pkg/CHRG-113hhrg85565/pdf/CHRG-113hhrg85565.pdf [https://perma.cc/7KT7-URZA].

251. *See, e.g.*, Hu, *Biometric ID*, *supra* note 1, at 1541.

252. Reuters, *supra* note 215.

253. Exec. Order, Mar. 6, Travel Ban II § 5(a).

254. Proclamation, Sept. 24, Travel Ban III.

"identity management" systems and protocols. Multiple additional challenges to the September 24, 2017, Proclamation have ensued, and a new Executive Order addressing enhanced vetting was announced on October 24, 2017.[255]

C. Biometric ID Cybersurveillance and Algorithmic Screening Tools as Big Data Proxies for Race and Other Classifications Under the Travel Ban and Extreme Vetting Protocols

On a practical programmatic level, identity management systems are coterminous with biometric identification systems.[256] "Extreme vetting" or "enhanced vetting" will likely entail biometric database screening and other enhanced database screening protocols that rely upon biometric data as an identifying data anchor point[257] or data backbone for multiple screening and vetting systems.[258] Clarifying how biometric technology may be used for surveillance is therefore essential to understand the role of biometric cybersurveillance and algorithmic tools in extreme vetting programs, as well as their possible abuse as proxies in big data surveillance and screening.

255. At the time of publication, multiple complaints have been filed to challenge the Proclamation. *See, e.g.*, Complaint for Declaratory and Injunctive Relief at 26–27, *Iranian Alliances Across Borders, Univ. of Md. Coll. Park Chapter v. Trump*, No. 8:17-cv-02921-GJH (D. Md. Oct. 2, 2017) (seeking declaratory and injunctive relief from the Sept. 24, 2017, Proclamation, and alleging that the Proclamation violates the antidiscrimination provision of the Immigration and Nationality Act, 8 U.S.C. § 1152(a)(1)(A) (2012)); Letter from ACLU to Hon. Theodore D. Chuang, U.S. Dist. Ct. for the Dist. of Md. (Sept. 29, 2017), https://www.aclu.org/letter/irap-v-trump-pmc-letter [https://perma.cc/8PR7-ZUCF] (seeking to amend the complaint in *International Refugee Assistance Project* in light of the September 24, 2017, Proclamation); s*ee also* Complaint for Declaratory and Injunctive Relief at 1, *Brennan Ctr. for Justice N.Y. Univ. Sch. of Law v. U.S. Dep't. of State*, No. 1:17-cv-07520 (S.D.N.Y. Oct. 2, 2017) (seeking disclosure of reports referred to in sections 1(c) and 1(h) of the September 24, 2017, Proclamation, pursuant to the disclosure requirements of the Freedom of Information Act, 5 U.S.C. § 552 (2012)). On October 24, 2017, the White House issued a press release announcing an Executive Order that implemented enhanced vetting procedures for refugees. *See* Press Release, White House, Presidential Executive Order on Resuming the United States Refugee Admissions Program with Enhanced Vetting Capabilities (Oct. 24, 2017), https://www.whitehouse.gov/the-press-office/2017/10/24/presidential-executive-order-resuming-united-states-refugee-admissions [https://perma.cc/JKD9-JJ9W]; *see also* Exec. Order, Oct. 27, Enhanced Vetting.

256. DHS Office of Biometric Identity Management, *supra* note 145; *see also* Hu, *Biometric Cyberintelligence*, *supra* note 1; Hu, *Biometric ID*, *supra* note 1.

257. *See, e.g.*, Exec. Order, Oct. 27, Enhanced Vetting.

258. *See generally* Hu, *Biometric ID*, *supra* note 1 (discussing how biometrics will increasingly be used by government programs to combat terrorism); *see infra* notes 259–66.

Biometrics is "[t]he science of automatic identification or identity verification of individuals using physiological or behavioral characteristics."[259] Because such characteristics are unique to an individual, they are often considered a "gold standard" method of identity verification.[260] Biometric identification and verification systems can involve "hard" or "soft" biometrics.[261] The difference between hard and soft biometrics is "perceived reliability for automated identification matching technologies."[262] Hard biometrics are traditional biometric identifiers that serve "secure identification and personal verification solutions."[263] Examples of hard biometrics include fingerprints, facial recognition, iris scans, and DNA. Soft biometrics are "anatomical or behavioral characteristic[s] that provide[] some information about the identity of a person, but does not provide sufficient evidence to precisely determine the identity."[264] Examples of soft biometric identifiers include a digital analysis or automatic determination of age, height, weight, race or ethnicity, skin and hair color, scars, birthmarks, and tattoos.[265]

Publicly available information, including information available through the Freedom of Information Act, demonstrates that DHS is using data technologies such as data fusion and algorithm-driven predictive analytics.[266] Although at this point in time, determining how extreme vetting will be implemented is still speculative, publicly available information suggests that extreme vetting will involve big data

259. JOHN R. VACCA, BIOMETRIC TECHNOLOGIES AND VERIFICATION SYSTEMS 589 (2007); *see also* Margaret Hu, *Biometric Surveillance and Big Data Governance* in CAMBRIDGE HANDBOOK ON SURVEILLANCE LAW 125–26 (David Gray and Stephen Henderson, eds.) (2017) [hereinafter Hu, *Biometric Surveillance*].

260. Hu, *Biometric ID*, *supra* note 1, at 1537 n. 258 (citing Alan Gomez, *Immigrant Tracking May Impede Bill; Partisan Split Developing over Biometric Data on Foreigners Leaving U.S.*, USA TODAY, May 9, 2013, at A5 ("[Former U.S. Secretary of Homeland Security Michael] Chertoff calls [biometrics] the 'gold standard.'").

261. Hu, *Algorithmic Jim Crow*, *supra* note 2, at 661 n.287; Hu, *Biometric Surveillance*, *supra* note 259.

262. *Id.*

263. *See* VACCA, *supra* note 259, at 57.

264. *See* Hu, *Biometric Surveillance*, *supra* note 259 (citing Karthik Nandakumar & Anil K. Jain, *Soft Biometrics*, *in* ENCYCLOPEDIA OF BIOMETRICS 1235, 1235 (Stan Z. Li & Anil Kumar Jain eds., 2009)).

265. *Id. See also* Hu, *Algorithmic Jim Crow*, *supra* note 2, at 125–26; Hu, *Biometric Surveillance*, *supra* note 259.

266. *See, e.g.*, U.S. DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT UPDATE FOR THE FUTURE ATTRIBUTE SCREENING TECHNOLOGY (FAST)/PASSIVE METHODS FOR PRECISION BEHAVIORAL SCREENING 5 (2011), https://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_st_fast-a.pdf [https://perma.cc/NVP4-HFN5]; U.S. DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE FUTURE ATTRIBUTE SCREENING TECHNOLOGY (FAST) PROJECT 4 (2008), https://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_st_fast.pdf [https://perma.cc/33M7-HLKH].

technologies, analytics, database screening, monitoring social media, and other cybersurveillance techniques.[267]

DHS has expanded its identity management initiatives, such as biometric ID credentials and background checks, which includes mass biometric data collection and analysis.[268] Identity management as a policy rationale is intended to facilitate governance decisions by tethering risk to rights and privileges.[269] Essentially, analytic technologies can permit risk assessments based on data, which are then linked to the individual's digital and physical identity through biometrics. This information then can be used to make determinations for governance and security purposes.[270] This effort to seize upon the body via biometrics—and make it the locus for an ostensibly neutral and objective analysis—has a history that should not be forgotten, no matter how different biometric cybersurveillance is from its past variants.

III. UTILIZING CRITICAL THEORY TO INTERROGATE THE DISCRIMINATORY IMPACT OF CRIMMIGRATION-COUNTERTERRORISM

Part I explored the historical genesis of "extreme vetting": attempts to enforce border security and interior enforcement of unwanted migration through an increasing emphasis on biometric identification and screening protocols. It described how, following the terrorist attacks of September 11th, 2001, multiple advances in database screening and algorithmic-driven screening now depend upon biometric data as a data backbone for contemporary security vetting systems.

Part II discussed how the Muslim Ban morphed into a Travel Ban before more firmly settling into an extreme vetting or enhanced vetting policy mandate. Given the legal hurdles the Travel Ban has faced thus far, it will likely morph again to target new groups further removed from the traditional protected categories recognized under constitutional law, such as race, national origin, ethnicity, gender, and religion. In addition, as stated above, the federal courts have not yet had an opportunity to assess the legal implications of extreme vetting.[271] In this way, the long-term constitutional impact of the Travel Ban, namely, the impact of the extreme vetting protocols and its progeny, is yet to be determined. Thus,

267. Interview by John Burnett, *supra* note 153. *See, e.g.*, Hu, *Algorithmic Jim Crow*, *supra* note 2; *See also* Notice of Modified Privacy Act System of Records, 82 Fed. Reg. 179 (Sept. 18, 2017); 60-Day Notice of Proposed Information Collection: Supplemental Questions for Visa Applicants, 82 Fed. Reg. 148 (Aug. 3, 2017).

268. Hu, *Biometric ID*, *supra* note 1, at 1547–48.

269. *Id.* at 1489–90 (discussing identity management); Hu, *Biometric Cyberintelligence*, *supra* note 1, at 737.

270. Hu, *Biometric Cyberintelligence*, *supra* note 1, at 737–38.

271. *See, e.g.*, Margulies, *supra* note 31, at 36–37.

any federal court decision, to the extent that it focuses only on the Travel Ban and excludes the vetting and screening protocols that may flow from it, may be limited in its usefulness in an analysis of the discriminatory reach of the Executive Orders and Proclamation.[272]

A. Parallels Between Travel Ban and Past Discrimination Under Rule of Law: Chinese Exclusion Act and WWII Japanese-American Internment

Facially neutral terms and categories must be analyzed in the context of their history and genealogy. The legal precedent that underlies the Travel Ban has a genealogy that descends from the Chinese Exclusion Act cases and Japanese internment cases of World War II. The Chinese Exclusion Act cases are particularly instructive in demonstrating phobias of foreign culture that the Court found threatened what the Court appeared to suggest were ineffable "American" qualities of our society.

Both before and after President Trump issued the Executive Orders intended to suspend travel from nationals of designated Muslim-majority countries, commentators drew comparisons between the Travel Ban and the Chinese Exclusion Act.[273] Executive Orders 13,769 and 13,780 have also drawn comparisons to the Japanese Internment Order, Executive Order 9,066,[274] particularly because as a candidate, Trump and other advisors had cited President Roosevelt's actions and *Korematsu v. United States*[275] as justification for both the Muslim Ban and a Muslim database registry.[276] Then-candidate Trump explained that, "What I'm doing is no different than FDR," to ABC News during the campaign.[277]

272. *Id. See also* Noferi & Koulish, *supra* note 5.

273. *See, e.g.*, Michael Kagan, *Is the Chinese Exclusion Case Still Good Law? (The President is Trying to Find Out)*, 1 NEV. L.J. FORUM 80, 80–81 (2017) (pointing out the parallels between the Chinese Exclusion Case and the Travel Ban litigation); *see also* Kat Chow, *As Chinese Exclusion Act Turns 135, Experts Point To Parallels Today*, NPR (May 5, 2017, 6:06 PM), http://www.npr.org/sections/codeswitch/2017/05/05/527091890/the-135-year-bridge-between-the-chinese-exclusion-act-and-a-proposed-travel-ban [https://perma.cc/A2SF-QUR6]; David W. Dunlap, *135 Years Ago, Another Travel Ban Was in the News*, N.Y. TIMES (Mar. 17, 2017), https://www.nytimes.com/2017/03/17/insider/chinese-exclusion-act-travel-ban.html?mcubz=1 [https://perma.cc/WM3V-ZD3J]; Chris Fuchs, *The Parallel Between Trump's Immigration Ban and Past U.S. Anti-Asian Policies*, NBC NEWS (Jan. 30, 2017, 10:25 AM), http://www.nbcnews.com/news/asian-america/some-trump-s-immigration-ban-parallels-past-anti-asian-policies-n714091 [https://perma.cc/6KZA-FULG]; Massoud Hayoun, *A Chinese American Lesson for Trump*, AL JAZEERA NEWS (Jan. 31, 2017), http://www.aljazeera.com/indepth/features/2017/01/chinese-american-lesson-trump-170130123606142.html [https://perma.cc/6V2W-MDLC].

274. Executive Order 9,066, 3 C.F.R.§ 1092 (1942).

275. 323 U.S. 214 (1944).

276. *See, e.g.*, Derek Hawkins, *Japanese American Internment Is 'Precedent' for National Muslim Registry, Prominent Trump Backer Says*, WASH. POST (Nov. 17, 2016),

A former spokesman for the Great America Political Action Committee, Carl Higbie, explained during an interview that a Muslim database registry would be legal and "hold constitutional muster" based on *Korematsu*.[278] Like both the Chinese Exclusion Act, and Executive Order 9,066 and the orders related to WWII Japanese-American Internment, the Travel Ban Executive Orders were based on rationales relating to national security.[279] The Chinese Exclusion Acts relied on congressional conclusions that Chinese laborers posed a threat to communities.[280] Executive Order 9,066 justified its decision to detain individuals based on "every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national defense utilities,"[281] flowing from the President's Executive Branch authority as Commander in Chief.[282] Executive Orders 13,769 and 13,780 were issued to "protect its citizens from terrorist attacks, including those committed by foreign nationals. . . . [and] to improve the screening and vetting protocols and procedures associated with the visa-issuance process and the USRAP."[283]

The Court upheld the Chinese Exclusion Acts and the Japanese-American Internment Order, Executive Order 9,066, on national security grounds.[284] The Court's decision to vacate the case and remand it with instructions to dismiss as moot means that the constitutionality of the Travel Ban has yet to be determined; however, the Courts of Appeals have expressed skepticism regarding the broad national security

https://www.washingtonpost.com/news/morning-mix/wp/2016/11/17/japanese-internment-is-precedent-for-national-muslim-registry-prominent-trump-backer-says/?utm_term=.76ecd8dcec4a [https://perma.cc/2APA-87VU].

277. Meghan Keneally, *Donald Trump Cites These FDR Policies to Defend Muslim Ban*, ABC NEWS (Dec. 8, 2015, 1:01 PM), http://abcnews.go.com/Politics/donald-trump-cites-fdr-policies-defend-muslim-ban/story?id=35648128 [https://perma.cc/VP79-7LTB].

278. Hawkins, *supra* note 276.

279. *See* Exec. Order, Jan. 27, Travel Ban I (stating that the President was issuing the Executive Order to "protect the American people from terrorist attacks by foreign nationals admitted to the United Sates"); Exec. Order, Mar. 6, Travel Ban II (explaining that the President was disseminating the new Order to "protect the Nation from terrorist activities by foreign nationals admitted to the United States").

280. *See* Chinese Exclusion Act, 22 Stat. 58 (1882) (repealed 1943) ("Whereas in the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof."); *see also supra* notes 34–120 (discussing the enactment of the Chinese Exclusion Act).

281. Executive Order 9,066, 3 C.F.R. 1092, 1093 (1942).

282. *Id.*

283. Exec. Order, Mar. 6, Travel Ban II, at 13209. The first Executive Order, on January 27, 2017, also used the quoted language. *See* Exec. Order, Jan. 27, Travel Ban I, at 8977.

284. *See supra* notes 99–103.

justifications suggested by the government to support the ban.[285] National security aims, as one of the governmental interests claimed to be among the most important,[286] typically enjoy generous deference by the judicial branch. That reviewing courts have been skeptical despite a tradition of national security deference to the executive is likely attributable to the fraught precedent that appears to support such deference.[287]

Experts explain that the debates, which included racial arguments, leading to the passage of the Chinese Exclusion Act stemmed from an "assumption that the Chinese were a distinct race with a biologically determined nature that was reflected in moral behavior, cultural preferences, and physiological traits."[288] The parallels with contemporary rhetoric about the danger posed by Muslims and the inevitable clash with Western values are obvious. None of this is to deny the threat of terrorism, but at the same time distinguishing that threat to the overblown rhetoric it has engendered in the public sphere is essential.

Pulitzer Prize-winning columnist, Eugene Robinson of the *Washington Post*, warns that the Muslim Ban and extreme vetting can lead to what he refers to as a "special version of Jim Crow" for Muslims.[289] Then-Attorney General Sally Yates, in fact, explained in media reports that her refusal to defend the January 27, 2017, Order stemmed in part because she "thought back to Jim Crow laws."[290] All U.S. citizens could logically be subjected to extreme vetting protocols, as any citizen or noncitizen may pose a terroristic threat risk.[291] In fact, significantly, the original announcement of Trump's Muslim Ban indicated that the proposal was inclusive of U.S. citizens. In February 2016, retired General Lieutenant Michael Flynn, Trump's former campaign adviser on national security and former White House National Security Adviser, stated on Twitter: "Fear of Muslims is

285. *See Trump v. Hawaii*, No. 16–1540, 2017 WL 4782860 (Oct. 24, 2017), *supra* note 27; *see generally Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017); *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017).

286. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 36 (2010).

287. *See, e.g.*, *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Korematsu v. United States*, 323 U.S. 214 (1994).

288. Calavita, *supra* note 26, at 11.

289. Eugene Robinson, *Trump's Special Version of Jim Crow – for Muslims*, WASH. POST (June 20, 2016), https://www.washingtonpost.com/opinions/trumps-special-version-of-jim-crow-for-muslims/2016/06/20/70fc1bd2-3721-11e6-8f7c-d4c723a2becb_story.html [https://perma.cc/MB8F-UPCY]. *See also* Hu, *Algorithmic Jim Crow*, *supra* note 2.

290. *See* also Hu, *Algorithmic Jim Crow*, *supra* note 2 at 14 n.55 (citing Ryan Lizza, *Why Sally Yates Stood Up to Trump*, NEW YORKER (May 29, 2017), http://www.newyorker.com/magazine/2017/05/29/why-sally-yates-stood-up-to-trump [https://perma.cc/JHF9-73DM]).

291. *Id.*

RATIONAL."[292] During a speech in August 2016, Flynn characterized Islamism as a "'vicious cancer inside the body of 1.7 billion people' that has to be 'excised[.]'"[293] Although experts argue that a small minority of Muslims have adopted radicalized Islamist views,[294] according to Robinson, "[i]n Trump's eyes, however, all Muslims are suspect."[295]

The original statement released by then-candidate Trump on the Muslim Ban characterized "Shariah [sic]" as "authoriz[ing] such atrocities as murder against non-believers who won't convert, beheadings and more unthinkable acts that pose great harm to Americans, especially women."[296] The rhetoric was inflammatory, magnifying the threat posed by international terrorism to encompass an entire religion apparently inherently predisposed to attack Western values. Similar to the rhetoric that led to the Chinese Exclusion Act and the Japanese Internment, the rhetoric of the Muslim Ban separated "them"—characterized as persons seeking to infiltrate and then terrorize our society—from "us," translating a real national security concern into an authority to target uncomfortable cultural otherness.[297]

Consequently, the federal courts have been invited in the litigation surrounding the Travel Ban to assess the government's arguments that the ban is facially neutral and non-discriminatory. As with the claims raised in defense of the Chinese Exclusion Act and Japanese Internment, the facially-neutral crimmigration-counterterrorism policy rationales advanced by the administration in support of the Travel Ban are similar to the national security policy rationales of the past.

292. Dana Priest & Greg Miller, *He Was One of the Most Respected Intel Officers of His Generation. Now He's Leading 'Lock Her Up' Chants.*, WASH. POST (Aug. 15, 2016), https://www.washingtonpost.com/world/national-security/nearly-the-entire-national-security-establishment-has-rejected-trumpexcept-for-this-man/2016/08/15/d5072d96-5e4b-11e6-8e45-477372e89d78_story.html?utm_term=.49b904ac60ba [https://perma.cc/7LB5-BT2R].

293. Andrew Kaczynski, *Michael Flynn in August: Islamism a 'Vicious Cancer' in Body of All Muslims that 'Has to be Excised'*, CNN (Nov. 22, 2016, 8:36 PM), http://www.cnn.com/2016/11/22/politics/kfile-michael-flynn-august-speech/ [https://perma.cc/T4VJ-AGJ3].

294. *See, e.g.*, Michael Lipka, *Muslims and Islam: Key Findings in the U.S. and Around the World*, PEW RES. CTR. (Aug. 9, 2017), http://www.pewresearch.org/fact-tank/2016/07/22/muslims-and-islam-key-findings-in-the-u-s-and-around-the-world/ [https://perma.cc/5S66-TQYW] ("[P]eople in countries with large Muslim populations are as concerned as Western nations about the threat of Islamic extremism, and have become increasingly concerned in recent years.").

295. Robinson, *supra* note 289.

296. *See* Barbash, *supra* note 176.

297. *See, e.g.*, EDWARD W. SAID, ORIENTALISM 7, 295 (1994).

B. *Critical Theory as a Method to Unmask Cyber-Registration Under Crimmigration-Counterterrorism Policy*

Both the Chinese Exclusion Act and Japanese Internment were dressed in a national security rationale that the Court embraced.[298] With the perspective of history, experts note that racism and xenophobia, rather than national security, was the driving force.[299] We do not have the benefit of history in the present context, even if there is significant evidence that current xenophobic trends are seizing upon and gaining expression through policies attempting to address the real security threat posed by terrorism.[300] Thus, prevention of invidious discrimination depends heavily on the robustness of any judicial review available in due process and other challenges to government efforts to ban, restrict, or target surveillance on various social groups.[301]

Even biometrics, which in some sense purport to stand outside history, rooted in the signs of the body, have a history and have been a means for constructing and enforcing racial and cultural divisions. Databases and their sorting algorithms, in short, cannot be taken on their own terms because their effects on society will be real and so there must be vigilance to ensure they are not also pernicious.

In this context, judicial challenge currently provides an unlikely avenue to protect rights in large part because there is very little understanding of how biometric datafication of the body and biometric surveillance affect rights. This is a topic of interest to surveillance study scholars and sociologists and should be one of equal interest to legal scholars who should join in the project of developing what Simone Browne aptly characterizes as "critical biometric consciousness."[302] By this, she means a Critical Theory project to educate ourselves and others on how biometrics work and how they rely upon, and can reinforce, social racialization and potentially discrimination.

To advance this conversation, legal scholars can engage a wide range of critical tools[303]—including Critical Theory, Critical Race Theory, Surveillance Studies, Critical Terrorism Studies, and other critical theoretical approaches—to better understand the discriminatory

298. *See supra* notes 278–284 and accompanying text.

299. *See, e.g.,* Calavita, *supra* note 26, at 11.

300. *See* AARTI KOHLI, PETER L. MARKOWITZ & LISA CHAVEZ, CHIEF JUSTICE EARL WARREN INST. ON LAW & SOC. POLICY, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 1, 1–2 (2011), http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf https://perma.cc/TB4J-UGVP].

301. Hu, *Algorithmic Jim Crow*, *supra* note 2.

302. BROWNE, *supra* note 7, at 116.

303. *See, e.g.*, Cohen*, supra* note 9.

aspects of modern vetting and screening systems promulgated by crimmigration-counterterrorism policies that are heavily cyber- and big data-reliant. The formulation of an informed and protective social policy in relation to biometric surveillance and the use of biometric data is a crucial first step to ensuring individual rights such as due process, equal protection, and First Amendment rights—among the claims raised in the Travel Ban litigation—are cognizable in rapidly evolving cyber policy contexts.

The Travel Ban, while the most prominent part of the Executive Orders, is not the only part. In the long run, it is likely to be overshadowed by the long-term consequences of "extreme vetting" and biometric cybersurveillance of foreigners, and potentially citizens, deemed to present enough of a risk to warrant surveillance. An outright legal challenge to these aspects of the Executive Order faces difficulties in that their impact on individuals will neither be as immediate and dramatic as banning entrance or return to the country, and indeed with regard to surveillance, may not be felt at all, at least immediately. Assessing and even understanding such impacts requires legal scholars to join the ongoing conversation about biometrics and their use in the administrative state.[304]

Scholars like Browne note that biometrics have a veneer of scientific objectivity and technologic infallibility.[305] But in the end they involve classifying traits of the body such that persons may be identified as authentically who they say they are. Surveillance technology designed to identify facial and other features means placing such features within classificatory frameworks and typologies and that in turn requires mobilizing racial, ethnic, and gendered categories.[306] Indeed Browne reviewed research on biometrics and finds within that discourse a "racial nomenclature" that in other contexts would be regarded as "seemingly archaic" but is alive and well in this cutting edge science.[307] In short, biometrics relies upon, rather than transcends, gendering and racializing categories.

This in itself, of course, does not make biometrics inherently discriminatory but a biometric critical consciousness is one that, at a minimum, seeks to understand how racial and other categories are mobilized by biometric systems to make the body "readable" and identifiable. Browne is alert to norms implicit in the very technology.

304. *See, e.g.*, Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L.R. 1, 25 (2008); Margaret Hu, *From the National Surveillance State to the Cybersurveillance State*, 13 ANN. REV. L. & SOC. SCI. 161 (2017).

305. BROWNE, *supra* note 7, at 108.

306. *Id.* at 111.

307. *Id.*

Certain bodies—elderly and Asian/Pacific Islander, for instance—have fingerprints that are difficult or impossible to measure, a trait also in common with laborers in jobs requiring frequent use of caustic chemicals.[308]

If biometric researchers are discovering gendered, racial, and even social class distinctions in the kind of data the body offers up, how much more so will be the case when such distinctions are actively sought? Under crimmigration-counterterrorism policies, such amassed data is being analyzed for purposes of assessing a terror risk. Amassing a Muslim registry, thus, could create a database and then yield data patterns that perhaps will be determined to characterize typical "Muslim" classifications. Other categories could be registered to assist national security or other policy objectives. Those isolated as fitting those patterns, but who may not necessarily self-identify with the cyber-registry classification, can be targeted for surveillance, detention, and other consequences.[309]

A critical biometric consciousness means we make an effort to understand how biometrics work and how they employ such categories, and how, in more subtle ways than imposing outright bans, they create, or create the potential for, traditional forms of discrimination imposed in perhaps untraditional ways. And, above all, it means remembering that humans create the classifications biometrics use; humans create the algorithms which operate biometric databases, and humans make the decisions how to act upon the results of biometric matching efforts and biometric database analyses. As Browne notes, the trigger for acting on suspicious data may differ depending on race and the type of actions may, in turn, differ depending on race and other variables.[310]

Browne calls for approaching data rights through Critical Theory.[311] And moreover, a critical biometric consciousness should explore how we protect due process in the face of decisions to grant or deny rights and benefits on the basis of purportedly "objective" and "infallible" biometric matching and analysis.

Scholars in other fields are already turning a critical lens upon this technology. Browne's call for a critical biometric consciousness is invoking the tradition of Critical Theory, a tradition which already holds a prominent influence in legal scholarship, as seen most prominently in Critical Race Theory. This kind of scholarship provides a necessary

308. *Id.* at 113.

309. *See, e.g.*, Margaret Hu, *Metadeath: How Does Metadata Surveillance Inform Lethal Consequences*, *in* PRIVACY AND POWER: A TRANSATLANTIC DIALOGUE IN THE SHADOW OF THE NSA AFFAIR (Russell Miller ed., 2017).

310. BROWNE, *supra* note 7, at 114–15.

311. *Id.* at 117–18.

starting point for an analysis of biometric identification under crimmigration-counterterrorism policy, especially since, as Browne points out, racial categories are likely to be prominent in the project of turning the body into nodes of capturable, classifiable, and then analyzable data.[312]

C. Collateral Discrimination Under Crimmigration-Counterterrorism Policy

In the Fourth Circuit's en banc decision in *International Refugee Assistant Project*, Judge Wynn concluded his concurrence by noting that President Trump "seemed to suggest during the campaign" that statistically, Muslims are more likely to engage in terrorism, which "giv[es] rise to a *factual* inference" that admission would be harmful to the United States.[313] And yet, regardless of the accuracy of such an inference, it is "impermissible as a matter of *constitutional law*" to place burdens on individuals on the basis of their membership in a protected class because they lack any moral responsibility for whatever traits one seeks to attribute to the overall class.[314] Doing so cuts against "core democratic principles" and is "destabilizing to our Republic."[315] As this administration and future administrations promulgate big data vetting and cyber-registration, the statistical inference of big data methods of terroristic screening will likely increase the discrimination that may attach to correlative threat risk assessments or predictive assessments.[316]

Judge Wynn's concurrence, therefore, may prove to be even more valuable than the Fourth Circuit's majority opinion in this end. Judge Wynn broadens an understanding of the crimmigration-counterterrorism rationales presented by the Administration as a form of national security pretext for what he views as its underlying invidious discriminatory impetus. Addressing the national security justifications on their own terms, he finds them both constitutionally problematic and irrational

312. *Id.* at 128–29.

313. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 629 (4th Cir. 2017) (Wynn, J., concurring).

314. *Id.* (Wynn, J., concurring).

315. *Id.* (Wynn, J., concurring).

> In particular, classifying individuals based solely on their race, nationality, or religion—and then relying on those classifications to discriminate against certain races, nationalities, or religions—necessarily results in placing special burdens on individuals who lack any moral responsibility, a result the Framers deemed antithetical to core democratic principles and destabilizing to our Republic.

Id. (Wynn, J., concurring).

316. *See, e.g.*, Hu, *Big Data Blacklisting*, *supra* note 5, at 1798–99.

because they do not account for the individual's intent.[317] Instead, they impute a risk to entire class of individuals who are then targeted by the Travel Ban. He makes clear that national security risks cannot be determined by race, religion, or country of national origin.[318] Judge Wynn presses this position to its full extent, urging that it is both illogical and contrary to core democratic values, and asserting that in stigmatizing these classes with regard to foreigner status, damage is inevitably done to U.S. citizens similarly belonging to these classes.[319] This last point is particularly significant, since the stigmatic association with groups and classes deemed to post terroristic threat risks is not a legal harm that is easily recognized. Yet, the possibility exists that discrimination against foreigners on the basis of race, nationality, or religion will redound to U.S. citizens who belong to those same classes.

When and if the Court will have an opportunity to resolve the Travel Ban litigation remains unclear at the time of publication. Regardless of the final disposition of the case, it seems unlikely at this point that the treatment of the Travel Ban will embrace Judge Wynn's recognition of a general stigmatic harm to U.S. citizens who fall within classes targeted by a ban on foreigners. In part that is because it seems unlikely, at the merits, that the Court will address the reasoning of a concurrence.[320] Prior to dismissing the case as moot, the Court had narrowed the lower court's injunction, finding that a ban on entry of foreign nationals with insufficient ties to the United States "does not burden any American party by reason of that party's relationship with the foreign national."[321]

With a focus back on the issue of biometric cybersurveillance, Judge Wynn's concurrence is of keen interest because it is not rooted in immigration law. Rather, Judge Wynn relies on free-floating statutory interpretation canons that apply to all statutes, not just the INA (Immigration and Nationality Act), and require courts to interpret statutes in ways to avoid constitutional issues. In his reasoning, he acknowledges the stigmatizing effect of discrimination against protected classes, even where an individual is not the direct target of such discrimination. It is likely that cybersurveillance will use such protected classifications in determining surveillance priorities and in creating algorithms for threat

317. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d at 629 (Wynn, J., concurring).

318. *Id.* (Wynn, J., concurring).

319. *Id.* (Wynn, J., concurring).

320. *Trump v. Int'l Refugee Assistant Project*, 137 S. Ct. 2080, 2087 (narrowing the injunction in part because the Court concluded that allowing the injunction to prevent the denial of entry to foreign nationals with no relation to American citizens was not warranted).

321. *Id.*

assessments.[322] And in this context, the stigmatizing effects will be real. Race, nationality, and religion may subject an individual to various forms of cybersurveillance profiling that one might otherwise escape but for one's association with those classes.

This analytical approach to the discriminatory impact of the Travel Ban, if and when combined with Critical Theory tools, can assist in the project of unmasking the emerging problem of cyber-registration. Cyber-registration can and should be likened to the paper-based registration systems structured to track and monitor Chinese immigrants and Chinese-Americans under the Chinese Exclusion Act[323] and the paper-based registration of those of Japanese ancestry and Japanese-Americans under the Japanese Internment program.[324] Without proper legal and theoretical tools, the risk is a failure to recognize how crimmigration-counterterrorism cybersurveillance technologies may allow for cyber-registration structures that the government may argue are facially neutral and justified by compelling national security objectives.

Thus, however unlikely to be embraced by the Court in the future, Judge Wynn's concurrence articulates a valuable legal principle that has the potential of establish limits on cybersurveillance in general, as well as cyber-registries and digital watchlisting systems, such as terrorist watchlists and database screening systems that purportedly screen for terrorism, such as the No Fly List, extreme vetting, and its progeny. More pragmatically speaking, it may be worth exploring how his judicial reasoning can be statutorily codified as legal limits on government action. The lesson to be drawn from this litigation more broadly is that the INA's limitations on executive action may be a good model for legislation seeking to restrain executive authority in the context of crimmigration-counterrorism cybersurveillance such as extreme vetting protocols that may eventually extend to screening all citizens and noncitizens for national security purposes.

CONCLUSION

This Article discussed the manner in which immigration-related identification and vetting systems can facilitate invidious discrimination. The types of analyses that can occur with modern biometric identification systems and algorithmic vetting systems can move beyond the level of overt and invidious discrimination, the sort that forms the basis of a legally cognizable claim under the present legal frameworks that guard against discrimination. Race, national origin, or religion are

322. *See, e.g.*, Hu, *Algorithmic Jim Crow*, *supra* note 2.

323. *See supra* Parts I.A–I.B; notes 273–277 and accompanying text.

324. *See id.*

arguably the legally problematic basis for requiring the surrender of biometric information in the current Proclamation and Executive Order; but, once that information is in a database, it consists of individualizing data designed for recognition. Such data is then analyzed to enable risk determinations, which means risk will have generalizing characteristics. The question is then two-fold. One question is whether those generalizing characteristics will act to reinforce prejudicial dispositions against vulnerable classes of people. The second question is whether they will serve to obscure any disproportionate impacts of administrative decisionmaking on such protected classes.

The litigation surrounding the implementation of the Chinese Exclusion Act and its progeny, and *Korematsu* and other WWII Japanese-American Internment cases, teach that in retrospect, national security justifications can be driven by or give expression to broader cultural phobias and prejudices that current events help bring to a boiling point. Interfering with the Executive's efforts to address national security is of course a perilous venture. However, history teaches that discrimination that seems necessary and protective today will often, in hindsight, seem overbroad, unnecessary, and motivated on some level by prejudicial social currents. Fully digesting the implications of this unfolding new immigration policy under crimmigration-counterterrorism rationales requires placing it in the proper historical context.